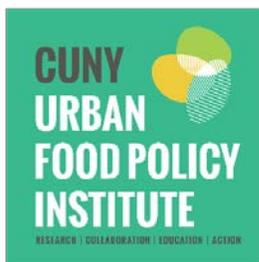


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Q AND A ON THE USE OF  
FOOD POLICY LITIGATION  
TO ADVANCE MORE  
EQUITABLE FOOD SYSTEMS

COMMENTARY

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## Q and A on the Use of Food Policy Litigation to Advance More Equitable Food Systems

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## SUMMARY

Using the legal system to remedy unjust food policies has a long history. Throughout the twentieth century, social reformers and lawyers have gone to court to make food safer, protect consumers, improve the pay and conditions of food workers, fight agricultural pollution, and help the hungry to gain access to food benefits.

Beginning in the 1960s, social justice activists, inspired by social movements and hoping to take advantage of a more liberal federal court system, found new ways to use the law to protect public health, improve access to food, housing and education and challenge policies that exacerbated inequality and injustice.

Since the 1980s, however, some food and health advocates have questioned the usefulness and efficacy of litigation as a strategy for change. They have pointed to its expense, the necessity of playing by rules set by the wealthy and powerful, and to the increasingly corporate-friendly federal court system.

This commentary seeks to encourage food policy advocates and the food justice movement to consider an appropriate role for litigation in reforming food systems in this era. Its aim is not to make a case for more or less attention to litigation, but rather to set the stage for a thoughtful discussion within the food policy community on how best to use this strategy.

The following Q and As summarize some of what we need to know to engage in that conversation. As a non-lawyer, I have no special expertise in food law; my observations are those of a researcher and participant in the food justice movement. I do believe that lawyers, advocates and academics need to talk to each other about how best to apply the law to achieve their goals. On September 14, the CUNY Urban Food Policy Institute will hold a forum on Litigation as a Strategy for Defending and Advancing Food Policy. Three experienced lawyers will describe some of the ways they use the law and litigation for improving food policy. Interested readers should [attend](#), watch the session on [livestream](#) and consult the resources listed at the end of this commentary.

## Q. How has litigation been used to advance food policy?

**A.** Going to court to redress wrongs is as American as apple pie. Early uses of litigation to reform food policy emphasized public health, with a focus on food safety and consumer protection against misleading claims.<sup>1</sup> Later uses included challenging false advertising,<sup>2</sup> protecting children against marketing of unhealthy foods,<sup>3</sup> improving school food,<sup>4</sup> and expanding access to SNAP and other food benefits.<sup>5</sup> Among the targets of food lawsuits were food corporations and government agencies.

## Q. Why is now an important time to consider the role of litigation in advancing food policy?

**A.** Several recent developments suggest that now may be a good time for a re-examination of the role of litigation in food policy. First, over the last decade, local and national food movements have emerged, sometimes divided about policy priorities, but increasingly capable of framing food as a social justice issue. Second, our food system has become increasingly concentrated, with a handful of giant transnational corporations controlling ever larger portions of food production, distribution and consumption. As these entities demonstrate their capacity to use the political system to achieve their business objectives, might courts play a more important role in restoring more democratic processes for shaping food policy? Finally, with a President and Congress determined to roll back health, safety and environmental regulations, cut food benefits and limit scrutiny of monopolies,<sup>6</sup> legislative routes for federal food policy change may be blocked, raising the questions as to whether courts can be used to protect the food policy accomplishments of the last decade. Current use of litigation by defenders of immigrants' rights suggests its potential value.

## Q. What are some of the advantages of litigation as a strategy for advancing food policy?

**A.** As a policy change strategy, litigation offers several advantages. It enables advocates to frame issues as questions of social justice and morality, perhaps avoiding the lengthy procedural debates and compromises involved in legislative strategies. Court cases can provide a platform for public and policy maker education and mobilization, attracting media and citizen

attention. Successful court cases can win damages for plaintiffs and the public, set precedents that can benefit others, deter companies or government agencies from future harmful practices, and, as the tobacco lawsuits illustrate, provide the public with information that can be used to undermine credibility and motives of the defendants, setting the stage for victories in other arenas. In some cases, even the threat of a lawsuit can persuade a company or government agency to change its practices.

Some of the rationale for using litigation is based on a comparison with other strategies. As the litigation director at the Center for Science in the Public Interest, a leading national food advocacy organization, once said, “Lawsuits are not the best way to resolve a dispute, but sometimes they are the only way.”<sup>7</sup>



Center for Science in the Public Interest is a leading national food advocacy organization.

## Q. What are some of its disadvantages?

**A.** America has the best courts money can buy, argue critics of the use of legal strategies to achieve social justice. They observe that advocates can rarely afford to match the resources that government agencies and corporations can spend to defend themselves. In addition, these critics note, the law is not a neutral arena. For the most part, the rules have been set by the rich and powerful. Compared to community mobilization strategies or movement building, where activists themselves can set the rules, litigation requires playing by rules not always designed to promote justice. Court cases can drag on for years, depleting advocacy organizations of limited resources and diverting their attention from other, perhaps more productive strategies. The current US Supreme Court is as corporate friendly as any in modern history,<sup>8</sup> making it unlikely to decide in favor of those challenging corporate prerogatives. And even winning a court case may not fix the problem. Implementing a court’s rulings and allocating the resources needed can require additional lengthy battles.

In considering the role of litigation in food policy, the right question is not “Is litigation a good strategy?” Rather, it is to assess its potential to advance policy to solve a specific problem in a specific time and place—and always in comparison to (or in conjunction with) other possible strategies. The box below lists some questions advocates can consider in determining whether litigation has a place on their strategy menu.

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### Does litigation have a place in your food advocacy campaign?

- How important is winning in court?
  - How likely is winning in court?
  - Can you frame the issue as one of social justice rather than only as a narrow legal dispute?
  - What resources are needed to compete effectively? Does your organization or coalition have the needed resources?
  - What are the opportunities to use the case for public education?
  - How much will you or your allies control the legal process?
  - How likely is victory to lead to policy change?
  - What other strategies are available and how do they compare in effectiveness, time and cost?
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### Q. What legal approaches have advocates used in litigating for improved food policies?

**A.** As Jennifer Pomeranz explains in a useful chapter on litigation in her recent book *Food Law for Public Health*, “litigation has played a starring role in legal disputes against, among and by the food industry.” Litigation can begin after a plaintiff identifies a law that the defendant has violated and makes the case that he/she/they have been harmed by that violation. Those violations can be the acts of food corporations or public agencies. As discussed below, food lawsuits use consumer protection, food safety, worker protection and other laws. The plaintiff can be individuals or consumer groups or Attorneys General, who seek to force companies or government agencies to end practices that harm the public or to obtain financial penalties for deceptive practices or to restore losses to individuals or the government. In choosing who to take legal action against and for what, plaintiffs often consider multiple, sometimes competing goals: ending harmful practices, winning damages, deterring other companies or government agencies, educating the public, or creating pressure for negotiations. Identifying clearly the relative priority of these sometime competing goals can help organizations considering food litigation to choose the most effective strategies and tactics.

Q. What are some food policy issues where litigation has been used?

A. Policy makers, advocates and social justice activists have used litigation to achieve various food policy goals.

### FOOD SAFETY:

Litigation to protect the safety of food first flourished after the passage of the 1906 Food and Drug Act as the FDA and others sought to force food manufactures to remove harmful ingredients from their products. In 1993, Bill Marler, now a leading food safety lawyer, represented Brienne Kiner, the most seriously injured survivor of the Jack in the Box E. coli O157:H7 outbreak. The case was settled for \$15.6 million, creating a record for an individual personal injury action. Even government officials recognize the value of food safety litigation. The FDA director of food safety in the Bush Administration observed that Marler and other litigators had figured out a way to use lawsuits to make changes in food industry practices that consumer groups, the industry and government had been unable to achieve. The cost of settlements that lawyers extract from food makers "can be a stronger incentive or disincentive than the passing of any particular regulation." An Obama era FDA official called food safety litigation "a central element of accountability."<sup>9</sup> While most analysts agree that a robust regulatory system is the best protection of food safety, criminal prosecution of violators provides the teeth for that system<sup>10</sup> and class action lawsuits by consumers and consumer groups act as an important albeit imperfect safety net when regulators fail.



The case brought against Jack in the Box after its E.coli O157:H7 outbreak on behalf of Brienne Kiner settled for a record \$15.6 million.

### CONSUMER PROTECTION AND LIMITS ON MARKETING

States and some municipalities including New York City have consumer protection statutes that prohibit acts or practices which courts can then use to prohibit a wide array of conduct that is deemed "unfair," "immoral," or "unconscionable." <sup>11</sup> In 2015, for example, Whole Foods and New York City's Department of Consumer Affairs (DCA) announced that the company had

agreed to pay a \$500,000 fine for mislabeling and over charging for pre-packaged foods and to modify its audits and training to avoid these problems in the future.<sup>12</sup>

## FOOD LABELING

Between 2011 and 2014, consumer groups and other plaintiffs filed more than 150 food labeling class action lawsuits against food and beverage companies.<sup>13</sup> While these cases are still working their ways through the courts, they show that consumers and their lawyers are seeking to change the labeling practices of food companies and are unsatisfied with current FDA efforts.

## PROTECTING FOOD WORKERS

Worker organizations and attorneys general have used the law to protect food workers against wage theft, sub-minimum wages, unsafe working conditions, and immigration abuses.<sup>14</sup> How emerging labor organizations can use the law to improve pay and working conditions for low wage food workers and how the food movement can support these efforts warrant further attention.<sup>15</sup>

## PROTECTING PUBLIC BENEFITS

In the 1970s, the Food Research and Action Center pioneered the use of litigation to expand access to food benefits for the poor. In 1970, the year FRAC was founded in New York City, it launched lawsuits in 26 states that ultimately led to a requirement that every state must operate in all counties either a food stamp or a commodity distribution program to feed the poor. In 1973, litigation by FRAC led to the release of funds impounded from the WIC program, catalyzing the rapid national growth of WIC. That same year, FRAC won two lawsuits in the United States Supreme Court that prevented exclusion of thousands of participants from the Food Stamp Program. In 1975, a U.S. District Court found that the Food Stamps Economy Food Plan did not adequately address the needs of individuals of different sexes and ages. The court ruled that “substantially all recipients” should have access to a healthy diet and directed the Secretary of Agriculture to issue regulations that would either individualize allotments or “increase the ‘average’ allotment so that virtually all recipients are swept within it.”<sup>16</sup> And in 1976, FRAC won a court order to release \$35 million in funds impounded from the Elderly Feeding Program. The released funds were used to increase the number of people served.<sup>17</sup>

## DEFENDING PUBLIC HEALTH INITIATIVES

In some cases, public health organizations defend themselves against lawsuits brought by industry groups. In the last 10 years, the New York City Department of Health has had its food regulations challenged by the American Beverage Association, the National Restaurant Association, the New York State Restaurant Association, The National Association of Convenience Stores and others. These organizations have gone to court to seek to reverse calorie and sodium labeling laws, restrictions on portion size of sugary beverages and other measures. In some cases, the city has prevailed in court; in others, the industry groups succeeded in overturning city rules or laws.

This brief review of some of the domains in which litigation has shaped food policy in the last several decades shows the important role it has played in New York City and the nation.



The NYC Department of Health and Mental Hygiene's sodium warning label.

## Q. Who can bring lawsuits on food issues?

**A.** Among those who have used litigation to advance food policies are consumer groups and state attorneys general. Center for Science in the Public Interest created CSPI Litigation in 2004 and has used the power of litigation, negotiation, and partnership to tackle some of the toughest issues in food and nutrition. Among the organizations they have taken to court are Coca-Cola Company and the American Beverage Association for launching an unlawful campaign of deception to mislead and confuse the public about the health harms related to sugary drinks; Naked Juice and PepsiCo for false and misleading marketing and labeling of their

beverages, and Cheerios Protein, made by General Mills, for falsely and misleadingly marketing Cheerios Protein as a high-protein and healthful alternative to original Cheerios.<sup>18</sup> NY AG Eric T. Schneiderman took four major retailers, GNC, Walmart, Target and Walgreen, to court for fraudulently selling potentially dangerous herbal supplements and demanded that they remove these products from their shelves.<sup>19</sup>



Center for Science in the Public Interest sued Naked Juice for false and misleading marketing and labeling of their beverages. [Photo credit](#)

## Q. What has been the food industry's response to litigation?

**A.** Food businesses have developed a variety of arguments to attack the motives for lawsuits that challenge them. These include:

- *Blame the parents.* Parents, not food companies, are responsible for what children eat. If parents were more responsible, no lawsuits against industry predatory marketing practices, misleading health claims, or risky product formulation would be necessary.
- *Blame the lawyers.* The main reason lawsuits get filed against food companies is greedy plaintiffs' lawyers, who take the lion's share of awards, leaving allegedly injured consumers with no or minimal compensation. In this view, every lawsuit against a food company is frivolous and ought to be dismissed. In the 2000s, 23 states enacted so-called "Cheeseburger Bills" designed to prevent consumer groups and their lawyers from filing "frivolous" suits against fast food chains for their role in contributing to obesity.

- *Blame the government.* If local, state and federal regulations were more rational, less burdensome, and more reasonably enforced, lawsuits would be unnecessary. Lawsuits are collateral damage from out-of-control regulation.

By analyzing the merits and evidence for these claims, food policy advocates may be able to contribute to an informed public discussion on the role of lawsuits in improving our food system.

## Q. What other ways have food policy advocates used the law?

**A.** In an assessment of the state of food law and policy, Emily Leib, the director of the Food Law and Policy Clinic at Harvard Law School and a leader of new uses of food law, summarized four contributions food lawyers could make: litigation, education of citizens and policy makers, assisting aspiring food entrepreneurs and social enterprises to negotiate the complex legal and regulatory transactions needed to establish and sustain their businesses, and policy advocacy.<sup>20</sup> Of litigation, she notes that “without adequate laws that reflect goals for healthier and more sustainable food production, advocates using litigation as an avenue for change are struggling to succeed in court. Thus, many of the other tools of lawyers are in high demand to foster systemic change and support new alternatives within the food system” (p. 1182).

## Q. How can I learn more about food policy litigation?

**A.** A variety of resources are available for those who want to understand more about the potential and limits of litigation as a strategy for advancing fair and equitable food policy. Here are a few suggestions:

Gardner S. [Litigation as a tool in food advertising: A consumer advocacy viewpoint](#). *Loy. LAL Rev.* 2006; 39:291. A lawyer for the Center for Science in the Public Interest explains how litigation can be used to protect consumers.

Gostin, LO. [“Big Food” Is Making America Sick](#). *The Milbank Quarterly*. 2016;94(3):480-4. A leading public health lawyer makes the case against the food industry.

Institute for Legal Reform. [The Food Court--Trends in Food and Beverage Class Action Litigation](#). U.S. Chamber of Commerce, 2017. This summary of current class action litigation against

food corporations presents the industry's perspectives on lawsuits that challenge its marketing, labeling, product development and other practices.

Leib EB, Condra A. [Food Law and Policy Career Guide](#). Harvard Food Law and Policy Clinic, 2014. This guide presents those interested in an internship or a career in food law and policy with a sampling of the diverse array of choices, from traditional legal jobs to research, advocacy, or policymaking positions within the food system.

Pomeranz JL. [Food Law for Public Health](#). New York: Oxford University Press, 2015. A primer in food law for audiences in public health, nutrition, and food studies. Discusses many current food law controversies, including GMO labeling, new dietary guidelines, caffeine safety, and regulations of food safety and food-borne disease.

Readers are also referred to the references at the end of the commentary.

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<sup>5</sup> McWilliams V. Retroactive Relief in Food Stamp Litigation: Why the Eleventh Amendment Is Not a Bar. *Clearinghouse Rev.*1988; 22:113.

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<http://www.cunyurbanfoodpolicy.org/news/2016/12/12/food-justice-in-the-trump-age-priorities-for-nyc-advocates>.

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<sup>7</sup> Simon M. Appetite for Profit How the Food Industry Undermines our Health and How to Fight Back. Nation Books, 2006, p. 260.

<sup>8</sup> Epstein L, Landes WM, Posner RA. How business fares in the Supreme Court. *Minn. L. Rev.* 2012; 97:1431. [http://www.minnesotalawreview.org/wp-content/uploads/2013/04/EpsteinLanderPosner\\_MLR.pdf](http://www.minnesotalawreview.org/wp-content/uploads/2013/04/EpsteinLanderPosner_MLR.pdf).

<sup>9</sup> Hylton W. A Bug in the System: Why last night's chicken made you sick. *The New Yorker*. February 2, 2015 <http://www.newyorker.com/magazine/2015/02/02/bug-system>.

<sup>10</sup> Hardee K. Increased Criminal Prosecutions: An additional Cost of Doing Business. *Food Safety Magazine*. Mar. 15, 2016.

<http://www.foodsafetymagazine.com/enewsletter/increased-criminal-prosecutions-an-additional-cost-of-doing-business/>.

<sup>11</sup> Price J, Bond R. Litigation as a tool in food advertising: consumer protection statutes. *Loy. L.A. L. Rev.* 2006; 39:277.

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