

How Commonsense Consumption Acts Are Preventing “Big Food” Litigation

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INTRODUCTION

America needs a health transformation. The data and statistics seem irreversible and continue to accelerate in the wrong direction. Obesity plagues 36.5% of adults in the U.S. and 17% of the youth.¹ Obesity in children has more than tripled over the last thirty years.² An even larger proportion of Americans—around 64.5%—are considered overweight based on a Body Mass Index calculation.³ The United States Surgeon General predicted this weight epidemic back in 2003.⁴ He went so far as declaring terrorism less of a threat to our health than the obesity epidemic.⁵ Indeed, it is undeniable that serious health risks are associated with obesity. Obesity has been linked to high blood pressure, coronary heart disease, several cancers, type 2 diabetes, osteoarthritis, sleep apnea, low quality of life, and even mental illnesses such as clinical depression and anxiety.⁶

The problem goes beyond health; it affects many aspects of our economy as well. Approximately \$147–210 billion per year is spent on medical costs related to adult obesity alone (increased from the \$93 billion estimated in 2003).⁷ Health care costs comprise approximately 9.1% of

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1. CYNTHIA L. OGDEN ET AL., U.S. DEP'T HEALTH & HUMAN SERVS., PREVALENCE OF OBESITY AMONG ADULTS AND YOUTH: UNITED STATES 2011–2014 (2015), <https://www.cdc.gov/nchs/data/databriefs/db219.pdf> [<https://perma.cc/434K-ELCT>].

2. Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1649 (2004) [hereinafter *Broken Scales*].

3. *Id.* at 1648.

4. *Id.* at 1649.

5. *Id.*

6. *The Health Effects of Overweight and Obesity*, CDC.GOV (June 5, 2015), <http://www.cdc.gov/healthyweight/effects/> [<https://perma.cc/2WFW-9WJ2>].

7. *Broken Scales*, *supra* note 2, at 1651.

our total national costs, paid for primarily by the government programs Medicaid and Medicare.⁸ Moreover, Americans suffering from diseases and other health concerns are more likely to miss work and eventually decrease contributions to commerce—especially those with physically demanding jobs.

One thing is certain: something must change in order to start moving the statistics in the right direction. While the increasing scale of obesity and other diet-related health issues in the U.S. demands reform, the legal avenues for reform are slim. Among these legal impediments, and arguably presenting the most challenging to health reform progress, are Commonsense Consumption Acts (CCAs). Twenty-four states have enacted various forms of CCAs.⁹ In large part, these laws prohibit individuals from seeking civil liability for injury or death when the liability is based on the individual's health condition related to weight gain or obesity, or from the individual's long-term, excessive consumption of food.¹⁰ CCAs aim to protect food corporations, manufacturers, sellers, trade associations, livestock producers, and retailers of food products from liability related to consumer lawsuits.¹¹

Only two lawsuits have been filed against food corporations on the theory that the corporation was civilly liable for health-related conditions arising from the consumption of its food products. The plaintiffs lost in both instances. One set of plaintiffs filed suit in the United States District Court in the South District of New York (“*Pelman*”). In this suit, two obese teenagers attempted to sue McDonald's fast food chain in a class action litigation asserting that consumption of McDonald's food was the proximate cause of the plaintiffs' obesity and related health problems.¹² The judge denied class certification on the grounds that the plaintiffs failed to satisfy the elements required by the Federal Rules of Civil Procedure.¹³ The plaintiffs attempted to file an amended complaint, but the suit was dismissed, this time with prejudice.¹⁴

The second, less well-known case was filed in the United States District Court in the Western District of New York (“*S.F.*”). The plaintiffs claimed several producers negligently designed High Fructose Corn Syrup and failed to warn consumers about the presence of High Fructose Corn

8. *Id.*

9. See CHARLES J. NAGY, JR., AMERICAN LAW OF PRODUCTS LIABILITY § 81:7 (3rd ed. Feb. 2017) [hereinafter AMERICAN LAW OF PRODUCTS LIABILITY].

10. *Id.*

11. *Id.*

12. *Pelman v. McDonald's Corp.*, 272 F.R.D. 82, 88 (S.D.N.Y. 2010).

13. *Id.* at 100.

14. *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 533, 543 (S.D.N.Y. Sept. 3, 2003).

Syrup in their products.¹⁵ The judge dismissed the case in part because the plaintiff failed to “connect her disease to the actions of any one defendant.”¹⁶ The scarcity of cases filed against food corporations on this theory of liability, and the dismissive results in these cases, demonstrates the uphill battle that tort reform has in shaping health reform.

This Note takes a critical look at Commonsense Consumption Acts and how they are detrimental to the possibility of “Big Food” litigation. The tobacco industry was held accountable through the effective use of tort litigation (commonly referred to as “Big Tobacco” litigation), and the food industry could theoretically be held similarly accountable, but CCAs are preventing the possibility of similar reform. Therefore, in order for health reform to be as effective as tobacco reform, CCAs must be repealed in the states where they exist. Part I of this Note discusses why the food industry needs tort reform. Specifically, it argues that the food industry has engaged in deceitful practices that are directly harming the health of American consumers, just as the tobacco industry did. Class action lawsuits played a vital role in holding the tobacco industry liable for tobacco-related illnesses. If CCAs were removed, class action lawsuits could also make an impact on obesity-related illnesses by holding the food industry accountable. Part II gives an overview of the different CCAs, including the legislative impetus behind their enactment and how they prevent health reform. Part III dives into a variety of foreseeable problems tort reform faces when taking on the powerful food industry, including how litigation against the food industry would differ from the—largely successful litigation against the tobacco industry. Lastly, the Note concludes with the argument that CCAs must be repealed, in order to move toward a healthier, more prosperous America.

I. WHY THE FOOD INDUSTRY WARRANTS TORT REFORM

Before we can identify solutions to this obesity epidemic, we must first understand how we ended up here. Today, the food industry produces \$1 trillion per year in gross profits.¹⁷ The Federal Government spends roughly \$2.7 trillion per year on healthcare.¹⁸ Approximately 75% of the money the government spends on healthcare costs goes toward treating

15. *S.F. v. Archer–Daniels–Midland Co.*, No. 13-CV-634S, 2014 WL 1600414, at *1 (W.D.N.Y. Apr. 21, 2014).

16. *Id.* at *9.

17. Dr. Robert Lustig, *TED Radio Hour: The Food We Eat – How Worried Should We Be About Sugar?*, NAT'L PUB. RADIO (Nov. 18, 2016), <http://www.npr.org/programs/ted-radio-hour/493930098>.

18. *Id.*

chronic metabolic diseases, which, according to Dr. Robert Lustig, could be prevented if we did something about our diet.¹⁹ He reveals the government must spend roughly \$3 for every \$1 the food industry profits to clean up the mess the big food corporations leave in their wake.²⁰ Instead of focusing our time and energy on treating these diseases, perhaps we should take a more practical approach by shifting our focus towards educating the American public and transforming the type of food available to it.

A. *The Big Players*

The food industry is incredibly powerful, with that power concentrated in only a handful of high-stakes players calling the shots. According to a report conducted by Oxfam International, ten corporations “are so powerful that their policies can have a major impact on the diets and working conditions of people worldwide, as well as on the environment.”²¹ Most—if not all—of the ten companies are household names: Associated British Foods, Coca-Cola Company, Groupe Danone, General Mills, Kellogg Company, Mars Incorporated, Mondelez International, Nestle, PepsiCo, and Unilever Group.²² These companies control the world’s food industry. In 2013, they generated tens of billions of dollars of revenue, boasting at least \$50 billion in assets, and employing over 1.5 million people.²³ They also dominate advertising. In 2012, nine of the ten companies were among the 100 largest media spenders in the world.²⁴ For example, that same year, Coca-Cola spent over \$3 billion on advertising, making it the world’s sixth largest advertiser.²⁵

These companies essentially write the food advertising narrative and control much of the food available, yet they shirk the responsibility to push for a positive health transformation. This is not surprising—the change that is needed would negatively impact their sales, profits, and domination over the industry. In fact, some of these companies are actively and willfully contributing to the negative impact of their food products on the health of Americans. Take Coca-Cola, for example. In 2015, the New

19. *Id.*

20. *Id.*

21. Alexander E.M. Hess, *These 10 Companies Control The World’s Food*, HUFFINGTON POST (Aug. 18, 2014), http://www.huffingtonpost.com/2014/08/17/companies-control-food_n_5684782.html [<https://perma.cc/TP8D-E967>] (scroll below the article and click “See Gallery” to view the photo gallery associated with the cited article).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

York Times exposed Coca-Cola for sponsoring scientific studies that specifically aimed to shift blame away from sugary beverages and downplay the link between sugar and obesity.²⁶ These health scientists were not only publishing studies in peer-reviewed scientific journals, they were also “advancing this message in medical journals, at conferences, and through social media.”²⁷ As a result, their message spread, reaching the general public at large.

Companies continue to push their products regardless of health warnings from prominent organizations. In 2009, the American Heart Association recommended limiting the amount of added sugars in an individual’s diet to “no more than half of [the individual’s] daily discretionary calories allowed.”²⁸ For most American women, this equals roughly 6 teaspoons, 24 grams, or 100 calories.²⁹ For men, the recommendation totaled approximately 9 teaspoons, 36 grams, or 150 calories.³⁰ Similarly, in its 2015–2016 recommendations, the Office of Disease Prevention and Health Promotion (ODPHP) pushed for a significant limitation in daily intake of added sugars.³¹ Without distinguishing between demographics, ODPHP recommended individuals limit their daily intake of added sugars to less than 10% of total caloric intake.³² It also recommended limiting saturated fats to less than 10% of caloric intake per day and sodium intake to less than 2,300 milligrams per day.³³ The ODPHP indicated these specific substances must be limited because they are “of particular public health concern in the United States.”³⁴ Despite these health warnings, companies continue to market, sell, and distribute their sugary products in mass quantities across the United States.

26. Anahad O’Connor, *Coca-Cola Funds Scientists Who Shift Blame for Obesity Away from Bad Diets*, N.Y. TIMES: WELL (Aug. 9, 2015), http://well.blogs.nytimes.com/2015/08/09/coca-cola-funds-scientists-who-shift-blame-for-obesity-away-from-bad-diets/?_r=0.

27. *Id.*

28. *Added Sugars*, AM. HEART ASS’N (Feb. 1, 2017), http://www.heart.org/HEARTORG/HealthyLiving/HealthyEating/Nutrition/Added-Sugars_UCM_305858_Article.jsp#.WO-O61LMzBI [<https://perma.cc/3GWP-7CMP>].

29. *Id.*

30. *Id.*

31. See *Key Elements of Healthy Eating Patterns*, HEALTH.GOV, <https://health.gov/dietaryguidelines/2015/guidelines/chapter-1/key-recommendations/#footnote-3> [<https://perma.cc/FE2X-RCBB>].

32. *Id.*

33. *Id.*

34. *Id.*

B. *The Illusion that is “Choice”*

One of the toughest challenges facing effective tort reform in the food industry is that of personal autonomy—the idea that we are rational actors who choose when and what we consume. McDonald’s does not force its customers to eat fries. General Mills does not require grocery shoppers to purchase sugary cereal. The idea that we are free actors making independent, uninfluenced choices is a keystone of the American identity.³⁵ However, what if “choice,” when it comes to the food we eat, is merely an illusion? Put differently, if food companies have been pushing a profit-over-people agenda for decades, then is it possible that most consumers lost the ability to choose what they eat and when they eat it?

The authors of *Broken Scales: Obesity and Justice in America* argue that society is too willing to attribute responsibility for, and causation of, health problems to the personal choices of consumers.³⁶ Before discussing influences that lead to obesity, the article gives an extensive overview of social psychology.³⁷ It emphasizes the “fundamental attribution error,” or the tendency to overestimate the influence of personal dispositions and choice while underestimating situational behavior.³⁸ In other words, social psychology research, such as Stanley Milgram’s 1963 famous shock study, indicate that people are heavily influenced by perception, context, and environment, rather than just by free will.³⁹ This conclusion contradicts the assertion that human action is driven primarily by autonomy and choice.

Shifting the conversation to the health epidemic in our country, the authors discuss multiple ways in which humans, when viewed as “situational actors,” do not have much of a choice when it comes to the food that they eat.⁴⁰ First, we are bombarded with advertisements and convenient ways to obtain food, both of which are meant to manipulate our biological disposition to seek “high-energy foods” (*i.e.*, sugar).⁴¹ Second, we are the unwitting victims of psychological tactics employed by food companies that target consumers in order to get us to eat more food (resulting in increased profits for the vendors and a larger waistline

35. See Art Markman, *The Dark Side of Choice in America*, HUFFINGTON POST: THE BLOG (July 4, 2011), http://www.huffingtonpost.com/art-markman-phd/dark-side-of-choice_b_888751.html [https://perma.cc/32PH-U3LF].

36. *Broken Scales*, *supra* note 2, at 1645.

37. *See id.* at 1654–88.

38. *Id.* at 1657.

39. *Id.* at 1656–57.

40. *Id.* at 1659.

41. *Id.* at 1678.

for the consumers).⁴² For example, many restaurant chains use overhead speakers to waft music inside the restaurant because it has been shown “to increase overall spending.”⁴³ Moreover, fast food companies have turned to chemistry in order to identify the perfect flavors that will “induce [a] pleasurable response in consumers and sell more burgers and french fries.”⁴⁴ Thanks to our psychological disposition toward fundamental attribution error—a propensity understood and purposefully exploited by food companies—we are prone to mindlessly engage in overconsumption of unhealthy products. This begs the question: do we even have a choice in the matter?

Furthermore, empirical research suggests we are not truly rational actors.⁴⁵ Many food corporations, such as Dr Pepper, Snapple Group, General Mills, and Kraft, have invested an exorbitant amount of money and resources in food science research in order to sell more product by taking advantage of our inability to act rationally.⁴⁶ While we may not be cognizant of their influence over our inability to make rational decisions when it comes to the food we eat, these food companies have shamelessly exploited this inability for decades.

Corporate influence on our food choices (or lack thereof) is most notable when it comes to overconsumption. Researchers Brian Wansink and Koert Van Ittersum discuss the problem of overconsumption, placing the blame primarily on portion sizes.⁴⁷ They argue that “portion distortion”⁴⁸ started in the late 1970s in restaurants and has been exacerbated by the popularity of fast food and, importantly, by portion increases in packaged foods sold in grocery stores.⁴⁹ After examining studies that confirmed overconsumption is a problem, the authors decline to hold the consumer themselves responsible for bad habits.⁵⁰ In fact, they acknowledge the difficulty of controlling overconsumption through willpower alone, noting, “[i]t is much easier for a person to change his or

42. *Id.* at 1678–81.

43. *Id.* at 1695.

44. *Id.*

45. Kelli K. Garcia, *The Fat Fight: The Risks and Consequences of the Federal Government's Failing Public Health Campaign*, 112 PENN. ST. L. REV. 529, 542 (2007) (“More recent studies have recognized that people are not always rational actors and have thus applied research from cognitive psychology to illuminate how people behave in the real world.”).

46. *See generally* MICHAEL MOSS, SALT SUGAR FAT: HOW THE FOOD GIANTS HOOKED US (2014) [hereinafter MICHAEL MOSS, SALT SUGAR FAT].

47. *See* Brian Wansink & Koert Van Ittersum, *Portion Size Me: Downsizing our Consumption Norms*, 107 J. AM. DIETETIC ASS'N 1103, 1103 (2007), https://foodpsychology.cornell.edu/sites/default/files/unmanaged_files/portion_size_me_JADA_2007.pdf [<https://perma.cc/8GSQ-5BZC>].

48. *Id.* at 1105.

49. *Id.*

50. *Id.*

her environment than to change his or her thinking.”⁵¹ While eating a larger portion over a smaller portion is—in theory—a “choice,” Wansink and Van Ittersum’s research suggests it is incredibly difficult for consumers to exercise routine portion control when living in a capitalist society that eagerly takes advantage of the revenue potential provided by overconsumption.⁵²

On top of this illusion of choice, we also like to think we are not susceptible to advertising, when in fact, we are. Most people tend to believe that advertisements on the Internet, television, billboards, or elsewhere do not influence their choices whatsoever.⁵³ However, as evidenced by the fortunes spent by corporations to study consumer behavior and how we respond to advertisements, they do, in fact, influence our choices. Michael Moss writes in his popular book “Sugar, Fat, Salt: How the Food Giants Hooked Us,” that food manufactures are “well aware” of our addiction to sugar “along with a whole lot more about why we crave sweets.”⁵⁴ According to Moore, companies like Kraft have employees who have had to “tread very carefully” in balancing their desire to increase sales by creating better products with the knowledge that their salty, sugary, and fatty foods were causing obesity.⁵⁵

Perhaps we as a society should follow food corporations’ lead in investing time, money, and energy in how we think about food rather than shaming individuals for what and how much they eat. If we can embrace what food corporations have known for years—that we are not rational actors when it comes to the food we eat because of our susceptibility to environment, advertising, and addictive ingredients—then maybe we can stop blaming poor choices of individuals for the obesity epidemic and other diet-related health issues and begin to shift blame to the proper party.

II. COMMONSENSE CONSUMPTION ACTS: PAST AND FUTURE

The debate over whether America needs a health transformation is no longer a debate, as diet-related epidemics become a sad but undeniable reality. The question is not do we need health reform, but rather, what method of reform will be the most effective.⁵⁶ As discussed above, the

51. *Id.*

52. *Id.*

53. See JEAN KILBOURNE, CAN’T BUY MY LOVE: HOW ADVERTISING CHANGES THE WAY WE THINK AND FEEL 27 (1999) (“[J]ust about everyone in America still feels personally exempt from advertising’s influence.”).

54. MICHAEL MOSS, SALT SUGAR FAT, *supra* note 46, at 4.

55. *Id.* at 241.

56. See generally Rogan Kersh, *The Politics of Obesity: A Current Assessment and Look Ahead*, 87 MILBANK Q. 295 (2009).

food industry, as well as the general public, too easily places the blame for food-related health issues on the choices of individuals.⁵⁷ This is a rampant societal issue that will not be easy to solve. Assuming, however, that enough Americans agree that the food industry is responsible for this dire health crisis, we must next determine which avenue of remedy, justice, and reform to pursue.

A. Legislative History

Before politicians and American consumers were aware of this diet-related health epidemic, creating the need for reform, the food industry was already pursuing legislative measures to safeguard their goldmine.⁵⁸ The American Legislative Exchange Council (ALEC) finalized the model CCA on January 1, 2004.⁵⁹ The United States House of Representatives successfully passed what was commonly referred to as the “cheeseburger bill”⁶⁰ in the same legislative year, but the bill did not pass in the Senate.⁶¹

While the Senate rejected a federal CCA after passing in the House, food industry lobbyists succeeded in passing many state-level “cheeseburger bills.” This series of enactments started with Florida⁶² and Colorado⁶³ in May of 2004, followed by Washington in June,⁶⁴ then Tennessee in July,⁶⁵ and Michigan in October of that same year.⁶⁶ South Dakota⁶⁷ and Arizona⁶⁸ ensued shortly after. In 2005, eleven additional states followed suit, enacting what are now referred to as “Baby McBills.”⁶⁹ Utah’s legislature acknowledged it had not yet embraced a law

57. See generally Markman, *supra* note 35.

58. The food industry was ahead of us when the “Big Food” players collectively drafted legislation that effectively shielded themselves from class action lawsuits.

59. AM. LEGISLATIVE EXCH. COUNCIL, *Commonsense Consumption Act*, ALEC.ORG (Jan. 28, 2013), <https://www.alec.org/model-policy/commonsense-consumption-act/> [<https://perma.cc/KM4F-WUQF>].

60. CCAs have been referred to as a “cheeseburger bills” or “Baby McBills.”

61. DAVID G. OWEN & MARY J. DAVIS, 2 OWEN & DAVIS ON PRODUCTS LIABILITY § 10:10 (4th ed., May 2016) [hereinafter Owen & Davis].

62. FLA. STAT. § 768.37 (2004).

63. COLO. REV. STAT. § 13-21-1102 (2004).

64. WASH. REV. CODE § 7.72.070 (2004).

65. TENN. CODE ANN. § 29-34-205 (2004).

66. MICH. COMP. LAWS § 600.2974 (2004).

67. S.D. CODIFIED LAWS § 21-61-2 (2004).

68. ARIZ. REV. STAT. ANN. § 12-682 (2004).

69. The states that enacted CCAs in 2005 include Illinois, Indiana, Kansas, Kentucky, Maine, Missouri, North Dakota, Ohio, Oregon, Texas, and Wyoming. See generally 745 ILL. COMP. STAT. 43 § 10 (2005); IND. CODE § 34-30-23-1 (2005); KAN. STAT. ANN. § 60-4801 (2005); KY. REV. STAT. ANN. § 411.610 (West 2005); ME. STAT. 14, § 170 (2005); MO. REV. STAT. § 537.595 (2005); N.D. CENT. CODE § 19-23-01 (2005); OHIO REV. CODE ANN. § 2305.36 (West 2005); OR. REV. STAT.

limiting the liability of food providers, but ultimately justified enacting the CCA because “[t]he passage of the Act follows the trend of a majority of states in the nation that have considered this type of legislation.”⁷⁰ Today, a total of twenty-three states have enacted some version of a CCA.⁷¹ In one quick sweep, the food industry used state legislatures to shield itself from reform.

The Louisiana State Legislature was the only legislature that enacted its CCA before ALEC’s model, passing its law in June of 2003.⁷² The language of Louisiana’s law is typical of a majority of the statutes, providing:

Any manufacturer, distributor, or seller of a food or nonalcoholic beverage intended for human consumption shall not be subject to civil liability for personal injury or wrongful death based on an individual’s consumption of food or nonalcoholic beverages in cases where liability is premised upon the individual’s weight gain, obesity, or a health condition related to weight gain or obesity and resulting from his long-term consumption of a food or nonalcoholic beverage.⁷³

Some states’ legislative history have been a bit more controversial. In Oklahoma, for example, the Supreme Court of Oklahoma rendered the original CCA void in its entirety.⁷⁴ In *Douglas v. Cox*, the court held the bill violated the single-subject rule⁷⁵ required by the state’s constitution.⁷⁶ Albeit a small victory, it was short-lived after the court conceded, “[w]e do not doubt that tort reform is an important issue for the Legislature.” After the opinion was issued in June of 2013, the legislature quickly responded by implementing a new tort protection in September of the same year.⁷⁷ Utah and Wisconsin resisted initially, but ultimately enacted their

§ 30.961 (2005); TEX. CIV. PRAC. & REM. CODE ANN. § 138.002 (West 2005); and WYO. STAT. ANN. § 11-47-103 (West 2005); Owen & Davis, *supra* note 61.

70. Darci Alter, *Tort Law: Prohibition Against Obesity Lawsuits*, 2005 UTAH L. REV. 395, 395 (2005).

71. *See generally* Owen & Davis, *supra* note 61, app J7.

72. LA. STAT. ANN. § 9:2799.6 (2012).

73. *Id.*

74. *Douglas v. Cox Ret. Prop., Inc.*, 302 P.3d 789, 794 (“This is not the first time we have invalidated a bill in its entirety . . .”).

75. *Id.* at 792. Oklahoma’s single-subject rule requires the legislature to embrace one subject only and to address this subject in its title. One purpose for the rule is to adequately inform citizens of Oklahoma of the potential effect of the law.

76. *Id.*

77. OKLA. STAT. tit. 76 § 38 (2013).

versions of a “Baby McBill” in February and March of 2008, respectively.⁷⁸

Notably, half of the states have not joined the trend in enacting CCAs.⁷⁹ However, enough states have enacted CCAs to render some form of tort litigation moot. Unless the CCAs are significantly changed or repealed all together, the possibility of a tobacco-like litigation reform is unlikely.

B. *The Legislative Purpose Behind the Enactments*

Some state legislatures were clear as to why they were enacting CCAs, while others were less transparent. Among those less transparent is the Louisiana State Legislature, the first to enact a CCA.⁸⁰ Members of the legislature provided nothing more than a bare legislative procedure of sessions in which the law was proposed, amended, and eventually enacted.⁸¹ Other state legislatures—such as Alaska, Arizona, and Georgia—were also mechanical in their enactments, following ALEC’s format while providing little purpose or substantive incentive behind passing the law.⁸² Likewise, an Illinois Senator introduced the bill, gave a brief description of how it functions, and simply mentioning that other states have considered similar legislation, of which six actually passed into law.⁸³ The Senator wrapped up the bill’s introduction noting “[t]his is an initiative of the Illinois Restaurant Association. The trial Lawyers are neutral on it.”⁸⁴ The bill passed with a sweeping fifty-eight ayes and not a single nay vote.⁸⁵

On the other hand, Colorado’s lawmakers testified in favor of its enactment, declaring it necessary to prevent alleged frivolous lawsuits.⁸⁶ The prime sponsor of the bill, Representative Dr. Lynn Hefley,⁸⁷ cited

78. UTAH CODE ANN. § 78B-4-303 (2012); WIS. STAT. § 895.506 (2008).

79. See AMERICAN LAW OF PRODUCTS LIABILITY, *supra* note 9. We know twenty-five states have enacted the law, leaving the rest of the twenty-five states without a CCA on the books.

80. See LA. REV. STAT. ANN. § 9:2799.6 (2012).

81. Louisiana’s State Legislature mentioned its Limitation of Liability for Damages from Long-term Consumption of Food and Nonalcoholic Beverages statute in twelve legislative sessions and three official reports. See, e.g., H.B. 518, 2003 Original, Reg. Sess. (La. 2003).

82. See generally H.B. 2220, 46th Leg., 2nd Reg. Sess. (Az. 2004); H.B. 1519, 2004 Gen. Assemb., Reg. Sess. (Ga. 2004).

83. S. 93-3981, 105th Sess., at 28 (Il. 2004).

84. *Id.* at 29.

85. *Id.*

86. See generally COLORADO COMMITTEE SUMMARY H.B. 04-1150 BEFORE COLORADO HOUSE COMMISSION ON THE JUDICIARY, 64th Gen. Assemb. (Co. 2004).

87. Dr. Lynn Hefley is the wife of Joel Hefley, a conservative Republican who also served as member of United States House of Representatives. WIKIPEDIA (Sept. 1, 2017, 8:30 PM), https://en.wikipedia.org/wiki/Joel_Hefley [<https://perma.cc/93BU-FZFJ>].

obesity statistics in Colorado and discussed related anecdotes about “other frivolous lawsuits.”⁸⁸ Additionally, a representative on behalf of the Colorado Restaurant Association (CRA) spoke in favor of the bill.⁸⁹ He also cited these “frivolous lawsuits” related to obesity and answered the members’ questions about the differences between “a one-time experience resulting in a valid injury” and “a pattern of unhealthy eating that is attributed to the individual’s choice”⁹⁰ Similarly, Florida’s lawmakers asserted it was necessary in wake of the lawsuits filed against fast food corporations where plaintiff’s alleged “health-related injuries due to weight gain”⁹¹ However, lawmakers could only cite to *Pelman* to support this assertion.⁹² More significantly, the legislature explicitly referenced the successful tobacco litigation as a motivating factor behind enacting its CCA.⁹³

The titles of the statutes also provide insight into the purpose behind their enactments. Ironically, Idaho’s CCA is located in the “Health and Safety” section of its state legislature, with the inflammatory title: “Prevention of frivolous lawsuits.”⁹⁴ On the other hand, South Dakota’s statute title is unambiguous as to its purpose and structure: “Prohibition on recovery based on claims of weight gain, obesity, or health condition resulting from long-term consumption of qualified product.”⁹⁵ Likewise, Kansas’ reads: “Immunity from liability for claims arising out of weight gain or obesity.”⁹⁶ In other words, the goal of these statutes is clear: to prevent class action lawsuits related to the excessive consumption of unhealthy food manufactured by “Big Food” companies.

C. The Future of CCAs

Even though there was a flurry of legislation in the early 2000s, it appears the Baby Mc Bills have lost steam. Currently, nothing is pending in the state legislatures, which have abstained from enacting CCAs up until

88. See generally COLORADO COMMITTEE SUMMARY H.B. 04-1150 BEFORE COLORADO HOUSE COMMISSION ON THE JUDICIARY, 64th Gen. Assemb. (Co. 2004) (statement of Pete Meersman, representative, Colorado Restaurant Association).

89. *Id.*

90. *Id.*

91. H.B. 333, 2004 Staff Analysis, Reg. Sess. (Fl. 2004).

92. *Id.*

93. *Id.*

94. IDAHO CODE § 39-8702 (2004).

95. S.D. CODIFIED LAWS § 21-61-2 (2004).

96. KAN. STAT. ANN. § 60-4801 (2005).

this point.⁹⁷ Furthermore, no federal legislation has been enacted (although it was attempted in 2005).⁹⁸ It is unclear what the future holds for CCAs. For now, twenty-three states are blocking the potential for tort reform against the food industry, but this has proven to be enough to prevent the progression of tort litigation in this context.

III. FORESEEABLE OBSTACLES

While tort reform should be a viable option for reforming the food industry, it has foreseeable obstacles. For example, the plaintiffs in the potential lawsuits against “Big Food” are likely to face similar challenges to those faced by the plaintiffs in the “Big Tobacco” litigations. Moreover, defense lawyers will have the ability to be cleverer, more cunning, and more knowledgeable in their arguments against this “Big Food” litigation.

A. *Issues with Tort Reform in the Big Food Litigation Context*

As evidenced by the court’s ruling in *Pelman*, the biggest issue plaintiffs have in bringing a tort action (class action or otherwise) against the food industry is causation.⁹⁹ Although obesity’s exact cause remains highly debated, scientists and doctors alike have suggested ways to combat the disease,¹⁰⁰ which indicates that we have an idea of its cause. What we do know is that Americans eat at least 10% of their total caloric intake in added sugars (primarily found in processed foods produced in large part by the ten companies discussed above).¹⁰¹ In a study published in *JAMA Internal Medicine*, “participants who took in 25% or more of their daily calories as sugar were more than twice as likely to die from heart disease as those whose diets included less than 10% of added sugar.”¹⁰² Foods like cookies, cakes, pastries, fruit drinks, ice cream, frozen yogurt, and candy, and beverages such as sodas, energy drinks, and sports drinks account for

97. See Posts Tagged ‘common sense consumption acts,’ PHAI (Aug. 26, 2013), <http://www.phaionline.org/tag/common-sense-consumption-acts/> [<https://perma.cc/BF8L-3QG7>].

98. See generally Personal Responsibility in Food Consumption Act, H.R. 544, 109th Cong. (1st Sess. 2005).

99. *Pelman v. McDonald’s Corp.*, 237 F. Supp. 2d 512, 523 (S.D.N.Y. Sept. 3, 2003) (“However, plaintiffs must allege that they have eaten primarily, if not wholly, at McDonalds of New York outlets. In other words, a plaintiff who has lived for merely a year in New York State—and thus eaten at outlets run by McDonalds of New York only for one year—may have a difficult time in showing causation.”).

100. Jeremy H. Rogers, *Living on the Fat of the Land: How to Have Your Burger and Sue It Too*, 81 WASH. U.L.Q. 859, 865 (2003).

101. Julie Corliss, *Eating too much added sugar increases the risk of dying with heart disease*, HARV. HEALTH PUBLICATIONS (Nov. 30, 2016), <http://www.health.harvard.edu/blog/eating-too-much-added-sugar-increases-the-risk-of-dying-with-heart-disease-201402067021> [<https://perma.cc/4AVT-SZS7>].

102. *Id.*

much of the overconsumption of added sugar.¹⁰³ Although it is “well-known” that the intake of added sugar is linked to weight gain,¹⁰⁴ it will remain difficult to prove the legal theory that the defendant’s specific product was the direct cause of the plaintiff’s obesity.

Another obstacle facing tort reform in this context is the existence of state consumer protection laws. Most states enacted these laws after being prompted by a speech by President Kennedy in 1962, entitled, “The Regulation of Advertising.”¹⁰⁵ In this speech, President Kennedy intended to promote 1) the right to safety, 2) the right to be informed, 3) the right to choose among products, and 4) the right to be heard as a consumer.¹⁰⁶ The purpose behind consumer protection laws is to empower consumers; however, the existence of these laws allows Big Food to argue that it was in compliance with the applicable state consumer protection laws, it did not abuse its advertising rights, and it did not prohibit the consumers’ right to choose whether or not to purchase their product.

Finally, as discussed in Part I. B., the plaintiffs in these cases have a scientifically supported argument that choosing to eat food that negatively impacts their health is, for the most part, an illusion and not entirely the plaintiffs’ fault. Regardless, the defense of personal responsibility and autonomy will almost certainly be raised.¹⁰⁷ Although both sides have seemingly persuasive arguments, it is highly possible that a court would find, as it did in *Pelman*, that “[n]obody is forced to eat at McDonalds.”¹⁰⁸ However, the argument is not that these cases are airtight; rather, it is that these plaintiffs should have their day in court. As long as CCAs are on the books, this is not a possibility. Just as it took time, money, and social acceptance to have successful tobacco litigation (discussed further in Part III. B.), the same would apply to Big Food litigation.¹⁰⁹

B. How Tort Law Reformed the Tobacco Industry

The impetus behind the tobacco litigation was the widespread information in the national press about the health risks involved in

103. *Id.*

104. *Id.*

105. See Robert M. Langer, *State Consumer Protection Laws*, in THE AMERICAN LAW INSTITUTE – AMERICAN BAR ASSOCIATION CONTINUING LEGAL EDUCATION, C612 ALI-ABA 355, 358 (Feb. 28, 1991).

106. *Id.*

107. See Rogers, *supra* note 100, at 864.

108. *Pelman v. McDonald’s Corp.*, 237 F. Supp. 2d 512, 533 (S.D.N.Y. Sept. 3, 2003).

109. See *infra* Part III. B.

smoking.¹¹⁰ As a result of this information, lawsuits began to flourish as people tried to sue tobacco companies “for injuries they believed were caused by smoking.”¹¹¹ Taking down “Big Tobacco” was no small feat. Forty years and 1,800 lawsuits later, lawyers and plaintiffs were finally awarded a victory over Big Tobacco for smoking related illness.¹¹²

In 1954, the case *Lowe v. R.J. Reynolds* initiated the “first wave” of the tobacco litigation.¹¹³ The first wave was largely unsuccessful because the tobacco companies refused to settle and employed familiar delay tactics via discovery requests and procedural motions.¹¹⁴ However, a new doctrinal development occurred in the 1960s–70s, which enabled the “second wave” to be more successful.¹¹⁵ Namely, comparative fault liability breathed new life into these plaintiffs’ claims, as well as “an increased scientific knowledge about the health effects of cigarettes” and the continued public commentary of the dangers of tobacco use.¹¹⁶ The third and final wave, which began in 1994, engaged the public even further by emphasizing public, rather than private, goals.¹¹⁷ Specifically, the success can be attributed to the idea that “[o]nce smoking is recognized as an addiction that usually begins while the smoker is a minor, it can more readily be perceived as a public health matter, rather than a question of individual choice.”¹¹⁸ Moreover, the plaintiffs’ attorneys were able to reveal information in discovery that finally drove the tobacco defendants to start settling cases.¹¹⁹ Discovery shed new light “on the industry’s knowledge of the addictiveness of tobacco, as well as its intentional manipulation of nicotine levels and marketing to minors.”¹²⁰

C. Comparing “Big Tobacco” Litigation with “Big Food” Litigation

Several parallels between the potential for Big Food litigation and what transpired during the Big Tobacco litigation exist. First, the litigation would target a pressing public health concern: obesity. Second, the litigation would face the same set of legal obstacles that the plaintiffs’ attorneys in the tobacco litigation had to overcome (assumption of risk,

110. Wendy E. Parmet, *Tobacco, HIV, and the Courtroom: The Role of Affirmative Litigation in the Formation of Public Health Policy*, 36 HOUS. L. REV. 1663, 1672 (1999).

111. *Id.*

112. Rogers, *supra* note 100, at 861.

113. Parmet, *supra* note 110, at 1673.

114. *Id.* at 1674.

115. *Id.*

116. *Id.* at 1675.

117. *Id.* at 1676.

118. *Id.* at 1677.

119. *Id.*

120. *Id.*

causation, individual choice, etc.). Third, similar to the deep-pocketed tobacco industry, the food industry, with its ten powerful members, has to the means to combat litigation. Finally, the products that are causing concern (tobacco as well as sugar, fat, and salt) are documented as highly addictive and cause negative impacts on the health of Americans. Because of these similarities, the possibility of reforming the food industry with the same method of mass litigation is not only possible—it was predicted as probable.

In 2003, the general counsel for the American Tort Reform Association (ATRA), along with seasoned lawyers from both the plaintiff and defense side, said the years ahead hold serious tobacco-like litigation against the food industry.¹²¹ Not coincidentally, this prediction was documented one year before CCAs were enacted. Similarly, in fall of 2003, the Washington University Law Quarterly published a Note predicting more lawsuits like *Pelman* and *S.F.* would be initiated for two reasons: “(1) there are nearly 100 million overweight people in America, and Big Food serves them products that contribute to their weight problems; and (2) caring for overweight and obese people costs approximately \$157 billion per year, and Big Food can afford to subsidize these costs.”¹²² Unbeknownst to the lawyers, the ATRA, and the author of *Living on the Fat of the Land: How to Have Your Burger and Sue It Too*, the food industry also saw the writing on the wall and effectively blocked tobacco-like litigation by turning to the legislature and lobbying for a tort shield. Unfortunately, these predictions no longer had the legal avenue to come to fruition.

While the type of tort reform that successfully took down the tobacco industry has the potential to do the same to the food industry, reforming the food industry using this method would face unique obstacles. For one, the food industry can learn from the mistakes of the tobacco industry before litigating against potential plaintiffs. In other words, the food industry can take notes about what did not work for the Big Tobacco defendants in order to avoid the same litigation pitfalls fighting the Big Food plaintiffs.

121. Roger Parloff, *Is Fat the Next Tobacco? For Big Food, the Supersizing of America is Becoming a Big Headache*, FORTUNE MAG. (Feb. 3, 2003), http://archive.fortune.com/magazines/fortune/fortune_archive/2003/02/03/336442/index.htm [https://perma.cc/5ABT-ZQQZ] (“The precedents, the ammo, the missiles are already there and waiting in a silo marked ‘tobacco,’ says Victor Schwartz, general counsel of the American Tort Reform Association.” (internal citations omitted)).

122. See Rogers *supra* note 100, at 861 (proposing that Big Food litigation was a feasible way for states to regain money incurred from Medicaid expenses associated with treating overweight and obese people). This proposition still rings true if CCAs are repealed.

Moreover, eventually, smokers became somewhat like social pariahs. It was no longer “cool” to smoke, but rather seen as a disgusting and repulsive habit. Thus, what was once a status custom became a nemesis to society. Not only did the general public disapprove of smoking, but the press, politicians, and state attorneys general got involved in spreading the “must quit” message.¹²³ According to Roger Parloff, author of the editorial piece “Is Fat the Next Tobacco?,” the public attack on tobacco was “very powerful,” and tort reform only works if society has been persuaded that the “object of attack is some kind of pariah.”¹²⁴ While doctors, dentists, and kale-eaters may frown upon eating a cheeseburger, is still largely an accepted and often celebrated pastime. It certainly helps that eating healthily, exercising, and living a healthy lifestyle have become increasingly popular, but we are still far from considering soda drinkers societal pariahs. Unless eating unhealthily becomes as socially unacceptable as smoking, successful tort reform will be difficult to pursue without the same degree of awareness and public support.

In order to move health reform forward, one way to distinguish the fight against unhealthy food from tobacco is the long list of long-term health affects as a result of eating junk food. The health problems associated with tobacco use, while also incredibly serious and disconsolate, are limited. On the other hand, the negative health effects of eating an excessive amount of sugar, fat, and sodium are virtually endless. Furthermore, as Parloff noted in his article, once weight is gained, it is “notoriously hard to lose.”¹²⁵ This is especially bothersome when it comes to childhood obesity. For the most part, the general public is aware of the dire need for a health transformation. Thus, the message must be that change can occur by influencing the products distributed by the food industry. But the food industry is not going to change on its own. It must be pushed, like the tobacco industry, to make a substantial change that will benefit nearly every consumer in America.

Eventually, the tobacco industry agreed to settle the disputes by paying \$246 billion to the states themselves (some juries required the tobacco companies to pay individuals, too).¹²⁶ Successfully holding the food companies legally accountable for the obesity epidemic could lead to many positive outcomes, but perhaps the most politically and socially enticing would be distributing the damages to states to recover healthcare funding. Rather than fork out individual payouts to individual plaintiffs,

123. Parloff, *supra* note 121.

124. *Id.*

125. *Id.*

126. *Id.*

the public might have an easier time supporting putting money back into government programs to provide for better healthcare.

CONCLUSION

CCAs should be repealed to make room for tobacco-like litigation that many experts expected to plague the food industry. As long as CCAs block the possibility of tort reform, food companies will continue to deceive consumers and Americans' health will continue to decline. Because the companies that dominate the food industry have demonstrated their profit-driven agenda in providing products that are highly detrimental to the health of their consumers (a majority of Americans), they should be held accountable for their actions. Similar to the success of "Big Tobacco" litigation, tort reform has the potential to play a significant role in launching "Big Food" litigation. Although foreseeable legal and societal obstacles exist, the dire necessity of creating a healthier generation of Americans alone should, at the very least, move the conversation forward.