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The Battle of the Bulge: Evaluating Law as a Weapon Against Obesity

by

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THE BATTLE OF THE BULGE: EVALUATING LAW AS A WEAPON AGAINST OBESITY

*Margaret Sova McCabe**

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I. INTRODUCTION: LAW, FOOD CHOICES, AND OBESITY

“Silly rabbit, Trix are for kids.”¹ Since the 1970s, kids have gotten to know the silly rabbit created to promote sugary, fruit-flavored cereal in television ads. Today, “i’m lovin’ it” is the McDonald’s slogan,² but to millions of children the more recognizable symbol is Ronald McDonald. Ronald McDonald is so recognizable that one study pegged recognition of Ronald among American children at 96% and another at 80% by children in nine other countries.³ Given the “obesity crisis,” many question whether these ads should be permitted, with some questioning whether such products are even safe for children’s consumption. The Trix Rabbit and Ronald McDonald are just two pop culture examples of how pervasive the marketing of highly processed foods is, and has been, in America.

1. This is one of the more famous sugar cereal advertising tag lines. Trix is a sugar cereal manufactured by General Mills, which also manufactures Cheerios, Wheaties, and Lucky Charms. General Mills, *Our History*, <http://www.generalmills.com/corporate/company/history.aspx> (last visited Feb. 25, 2008). A one cup serving of the cereal has 120 calories, 1.5 grams of fat (no trans), 13 grams of sugar, and 1 gram of fiber. General Mills, *Trix*, <http://www.generalmills.com> (follow “Brands” hyperlink, “Cereals” hyperlink, then “Trix” hyperlink) (last visited Feb. 25, 2008). By contrast, Cheerios, also a popular children’s cereal (but one without its own character), is marketed as “the only ready-to-eat cereal clinically proven to lower cholesterol when eaten as part of diet low in saturated fat and cholesterol.” General Mills, *Cheerios*, <http://www.generalmills.com/corporate/brands/brand.aspx?catID=53&groupID=19412> (last visited Feb. 25, 2008). It contains 110 calories per one cup serving, 2 grams of fat (naturally occurring, not added), 1g of sugar, and 3 grams of fiber. The box also provides nutritional information for children under four. Cheerios, <http://www.cheerios.com> (last visited Feb. 25, 2008).

2. McDonald’s, <http://www.mcdonalds.com> (last visited Feb. 25, 2008).

3. ERIC SCHLOSSER, *FAST FOOD NATION* 4 (2002). “A survey of American schoolchildren found that 96 percent could identify Ronald McDonald. The only fictional character with a higher degree of recognition was Santa Claus.” *Id.* It should be noted that Schlosser acknowledges in the notes that the results of the study have been criticized but he concluded that the study was credible and supported by the character’s notoriety in foreign countries. *Id.* at 294 n.4.

Americans are fat.⁴ We eat too much and exercise too little. Modern children are no exception. Obesity is more than an individual health problem—it is a public health crisis. As a matter of public health, law and policy makers have an obligation to examine the reasons for obesity in America. What they will find is an agricultural policy that supports production of products like partially hydrogenated vegetable oils and high fructose corn syrup that are added to processed foods in part because they are cheap.⁵ These cheaper foods are heavily marketed to the American consumer. This marketing in turn fills many pantries and stomachs with foods that contribute to obesity. At the same time, agencies tasked with making it easier for Americans to understand food choices either have no power to regulate or are afraid to use power they have.

When America has a pervasive problem, it often turns to the power of law to motivate social change. Perhaps the most common example in America is the tax code. Recent government efforts to boost energy conservation were made through tax rebates on hybrid vehicles and energy efficient home construction and remodeling.⁶ Applying similar ideas to food marketing and availability may be one of the best ways to change our eating habits. Taxes are generally viewed as punitive, yet creating financial incentives that change be-

4. However, today the medical field has established that childhood obesity, diabetes, and heart disease are epidemic. NAT'L CTR. FOR HEALTH STATISTICS, CENTER FOR DISEASE CONTROL & PREVENTION (CDC), NATIONAL HEALTH & NUTRITION EXAMINATION STUDY (NHANES), PREVALENCE OF OVERWEIGHT AND OBESITY AMONG ADULTS: UNITED STATES, 2003-2004, *available at* http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght_adult_03.htm. This study found "an estimated 66 percent of U.S. adults are either overweight or obese." Adults were defined as those twenty years and over. "Overweight" is defined as a body mass index (BMI) greater than or equal to twenty-five, and "obese" is a BMI greater than or equal to thirty. These numbers reflect people born in 1983 or earlier. *Id.* The NHANES children's study shows steady increases between the first study in 1976-1980 and the 2003-2004 study: overweight increased from 5.0% to 13.9%; for those aged 6-11 there was an increase from 6.5% to 18.8%, and from 12-19 prevalence increased 5% to 17.4%. CDC, NHANES, PREVALENCE OF OVERWEIGHT AMONG CHILDREN AND ADOLESCENTS: UNITED STATES, 2003-2004, *available at* http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght_child_03.htm. For an explanation of BMI calculations and BMI calculators, see CDC, *Body Mass Index*, <http://www.cdc.gov/nccdphp/dnpa/bmi> (last visited Feb. 25, 2008).

5. GREG CRISTER, *FAT LAND: HOW AMERICANS BECAME THE FATTEST PEOPLE IN THE WORLD* 18 (2003).

6. Energy Policy Act of 2005, 42 U.S.C. § 15801 (2006); *see, e.g.*, Energy Star, *Federal Tax Credits for Energy Efficiency*, http://www.energystar.gov/index.cfm?c=Products.pr_tax_credits (last visited Feb. 25, 2008).

havioral structures and support consumer choices of healthier eating habits can be successful.⁷ Subsidies have long sustained big agribusiness in the over-production of corn, soy, wheat, sugar, and rice.⁸ What if the right foods were not only incentivized on the farm, but also in schools, and at the grocery store? This might be the most positive use of law to improve our nation's health and most importantly, to curb the obesity epidemic before financial and societal consequences rob our children of long, healthy productive lives.

This article addresses the role that law has played in the obesity crisis by examining several examples from three areas: litigation, federal legislation, and state and local regulation. Litigation, while an undesirable substitute for public health policy-making, has actually made the greatest strides in bringing change to food choices in America. Federal legislation has done little when specifically targeted at foods. For example, the initial federal response to food liability suits was an attempt to ban them while efforts at curbing marketing to children are slow to materialize.⁹ State legislation and local regulation show greater promise with public health programs addressing obesity through education, more nutritious food access for children, and banning harmful food additives as examples.¹⁰ Yet these programs are often successful on a small scale; without including them in a national vision for sound agriculture and nutrition policy, they offer little hope to curb obesity rates overall.

Obesity, adult or adolescent, is not simply an issue of personal choice and parental control. Society pays the cost of these diseases in higher health care costs, as well as other economic effects.¹¹ Controlling obesity is one of the nation's foremost public health problems.¹² The solution to the problem is undoubtedly complex, but

7. CTR. FOR WEIGHT & HEALTH, UNIV. OF CAL., BERKELY, SECTOR: GOVERNMENT/LEGISLATION 2 (2007), *available at* http://www.cnr.berkeley.edu/cwh/PDFs/Summit_3e-Sector.Govt_9-08-051web2.pdf.

8. DANIEL IMHOFF, *FOOD FIGHT: THE CITIZEN'S GUIDE TO A FOOD & FARM BILL* 33-36 (2007).

9. *Debate on Child Nutrition Reauthorization Begins in Washington*, PUB. POLICY LEGIS. & REG. BULL. (Soc'y for Nutrition Educ., Indianapolis, Ind.), Mar. 2003, at 3.

10. CDC, *Overweight and Obesity, State-based Programs* (2007), http://www.cdc.gov/nccdphp/dnpa/obesity/state_programs/index.htm (last visited Feb. 26, 2008).

11. *See, e.g.*, CDC, *Economic Consequences*, http://www.cdc.gov/nccdphp/dnpa/obesity/economic_consequences.htm (last visited Feb. 25, 2008). Studies have shown the healthcare costs related to obesity to be in the billions. For example, this CDC study estimates the 2002 cost at \$92.6 billion. *Id.*

12. The CDC, the National Institutes of Health (NIH), and even the Food and Drug Administration (FDA) have prominent programs and campaigns to address

must begin with a good understanding of the nation's equally complex food and agriculture policy. It must also strike the proper balance between individual, corporate, and public health interests.

The goal of this article is to show that law-based solutions to obesity must consider the various sectors of society and the economy that relate to the crisis. While food choices are clearly personal, as noted, there is a heavy societal toll when poor choices are made. Has the balance tipped so far that the costs to society mandate intervention in food choices? What will turn the tide in favor of healthy children and a healthier society? Finally, can any of these initiatives be successful without major reform to the US agricultural industry?

Part II reviews how litigation, first over sugar cereal in the 1970s and more recently against McDonald's as well as other settled cases, influenced food manufacturing and marketing.¹³ Part III reviews some of the federal legislative responses to issues raised by food liability litigation.¹⁴ It also addresses how any federal response to obesity must be integrated into agriculture policies embodied in the Farm Bill. Part IV highlights three smaller-scale responses to the obesity crisis: the Farm to School Program, Body Mass Index (BMI) "Report Cards" used in six states, and New York City's ban on artificial trans fat.¹⁵ These initiatives are offered as examples of how larger laws, such as the Farm Bill, could more effectively shape healthy national agriculture and nutrition practices.

Without a comprehensive legal strategy to use law to fight obesity we are destined to lose the battle of the bulge. But, we haven't lost yet.

II. WHO MADE US FAT? THE LITIGATION BLAME GAME

Contemporary media's portrayal of the childhood obesity epidemic makes it seem as if America's nutritional nightmare is somehow new. It is not. Similarly, negative public reaction to plaintiffs suing McDonald's for making them fat gives the impression that the McDonald's case is a novel use of the law. It is not. This section analyzes how two food liability cases brought under consumer pro-

obesity. See, e.g., CDC, *Coordinated Approach to Child Health: From Research to Practice, Public Health Grand Rounds* (Jun. 15, 2007), <http://www.cdc.gov/osi/goals/people/peopleGrandRounds.html> (last visited Feb. 25, 2008); FDA, *FDA Proposes Action Plan to Confront Nation's Obesity Problem*, <http://www.fda.gov/oc/initiatives/obesity/> (last visited Feb. 25, 2008).

13. See *infra* notes 16-107 and accompanying text.

14. See *infra* notes 108-155 and accompanying text.

15. See *infra* notes 156-222 and accompanying text.

tection laws thirty years apart attempted to impose corporate liability for marketing unhealthy foods to children (but not for the content of the food). While individually the cases had little effect on corporate practices, the mere fact that they were brought has caused increased scrutiny of marketing to children—and rightly so.

When Americans are wronged they often sue, even when cereal or hamburgers are blamed for the wrong. However, activist lawsuits are often vehicles for social reform when other means of shaping public policy fail.¹⁶ Responsibility for processed or prepared foods is no exception, yet the propriety of lawsuits in this area is hotly debated.¹⁷ In fact, it not only brings disdain from the general public,¹⁸ but has also provoked Congressional action to ban such litigation.¹⁹ Should food companies be exempt from responsibility for the marketing of unhealthy products?²⁰

16. See, e.g., Arthur B. LaFrance, *Tobacco Litigation: Smoke, Mirrors and Public Policy*, 26 AM. J. L. & MED. 187 (2000). In his article, LaFrance shows how law is often used to “solve” societal problems involving personal choices or habits. Solutions in our history include curbing smoking with cigarette taxes, warning labels, and monumental tobacco litigation settlements. *Id.*

17. See John F. Banzhaf III, *Using Legal Action to Help Fight Obesity*, <http://banzhaf.net/obesitylinks.html> (last visited Feb. 25, 2008) (touting the positives of suing food manufacturers over obesity with links to other similarly minded websites and blogs); but see Ctr. for Consumer Freedom, *Cabal of Activists and Lawyers Plot to Sue Food Companies* (June 19, 2003), http://www.consumerfreedom.com/news_detail.cfm/headline/1975 (last visited Feb. 25, 2008) (advocating an end to attempts to sue for obesity and heralding personal choice instead).

18. See, e.g., Ctr. for Consumer Freedom, *Government Mandated Guilt*, http://www.consumerfreedom.com/news_detail.cfm/headline/3440 (last visited Feb. 25, 2008).

19. Personal Responsibility in Food Consumption Act of 2005, H.R. 554, 109th Cong. (2005) (also known as “the Cheeseburger Bill”).

20. There is great debate as to whether food is indeed addictive. See Forrest Lee Andrews, *Small Bites: Obesity Lawsuits Prepare to Take on the Fast Food Industry*, 15 ALB. L.J. SCI. & TECH. 153 (2004) (discussing the broad question of why the fast food industry is a target of these suits). Compare Joseph P. McMenamin & Andrea D. Tiglio, *Not the Next Tobacco: Defenses to Obesity Claims*, 61 FOOD & DRUG L.J. 445, 453-86 (2006); Daniel Fisher, *Food on the Brain*, FORBES, Jan. 10, 2005, at 63. See generally S.P. Kalra & P.S. Kalra, *Overlapping and interactive pathways regulating appetite and craving*, 23 J. ADDICTIVE DISEASES 5, 5-21 (2004). For an excellent overview of food addiction and related research, see RUDD CTR. FOR FOOD POL’Y & OBESITY, YALE UNIVERSITY, FOOD AND ADDICTION, CONFERENCE ON EATING AND DEPENDENCE (July 2007), available at <http://yaleruddcenter.org/news/pdf/RuddCenterAddictionMeeting.pdf> (last visited Mar. 13, 2008).

A. 1977: Committee on Children's Television, Inc. v. General Foods

Over thirty years ago, consumers put food manufacturers on notice that their products were harmful in the sense that they contributed to obesity and related illness.²¹ Further, the targeting of advertising at children was identified as a major cause of childhood obesity.²² *Children's TV*²³ was the first reported case to attribute marketing practices as a corrosive influence on sound nutritional choices and connect it to a legal claim of unfair competition under consumer protection acts.²⁴ Given that *Children's TV* was filed in the 1970s, it is incredible that the plaintiff groups identified that sugar cereal contributed to diabetes, obesity, and heart disease in children and connected the phenomenon to marketing.²⁵ Interestingly, the defendants did not challenge this health claim in their motion to dismiss.²⁶

It is hard to believe that liability for marketing unhealthy foods to children was raised in the courts thirty years ago.²⁷ *Children's TV*

21. RICHARD NOYES & PAUL F. STIFFLEMIRE, JR., MEDIA RES. CTR., SUPERSIZED BIAS 5 (2004), available at http://www.freemarketproject.org/specialreports/2004/obesity_study/obesity_study.pdf.

22. Marian Burros, *Federal Advisory Group Calls for Change in Food Marketing to Children*, N.Y. TIMES, Dec. 7, 2005, at C4.

23. Comm. on Children's Television, Inc. v. Gen. Foods Corp., 673 P.2d 660, 663 (Cal. 1983) (en banc) [hereinafter *Children's TV*]. The fourth amended complaint reviewed by the court contained seven causes of action: two under consumer protection statutes, four for fraud, and one for breach of warranty. This article addresses the consumer protection claims for unfair competition and fraud claims.

24. Randolph Kline et al., *Beyond Advertising Controls: Influencing Junk-Food Marketing and Consumption with Policy Innovations Developed in Tobacco Control*, 39 LOY. L.A. L. REV. 603, 631 (2006), available at <http://llr.lls.edu/volumes/v39-issue1/docs/kline.pdf>.

25. Incredibly, it was not until 2006 that the U.S. government finally issued a report showing a clear connection between marketing and poor nutritional choices. The same report also illustrates how marketing to children is generally harmful to them. INST. OF MED., COMM. ON FOOD MKTG. & THE DIETS OF CHILDREN AND YOUTH, FOOD MARKETING TO CHILDREN & YOUTH: THREAT OR OPPORTUNITY? 133-225 (J. Michael McGinnis et al. eds., 2006) [hereinafter FOOD MARKETING]; see generally FEDERAL TRADE COMMISSION & DEP'T OF HEALTH & HUMAN SERVS., PERSPECTIVES ON MARKETING, SELF-REGULATION, & CHILDHOOD OBESITY (April 2006), available at <http://www.ftc.gov/os/2006/05/PerspectivesonMarketingSelfRegulation&ChildhoodobesityFTCandHHSReportonJointWorkshop.pdf>.

26. See generally *Children's TV*, 673 P.2d at 670 (failing to challenge the health claim may have been a strategic choice since the focus was on the legal sufficiency of the pleading).

27. *Id.* at 663 (noting that the original complaint was filed on June 30, 1977). The case survived the motion to dismiss but it is unknown whether it ever went to trial. The court record was unavailable for review and the plaintiff's attorney who was contacted could not recall the final outcome of the case. There are other food

foreshadowed the downward spiral of American children's health, because it linked the nation's children's increased consumption of highly processed foods with obesity and its related medical diseases.²⁸ The case is important to understanding modern food liability litigation for three reasons: 1) it shows that marketing to children has been acceptable to government regulators since the 1970s, 2) it reveals that the industry was aware of consumer health concerns about sugar and fat since the 1970s, and 3) it demonstrates that despite the litigation, corporations did not curb the amount of highly processed foods developed and marketed to children (perhaps because the court dismissed the notion of corporations having superior bargaining power over child consumers).²⁹ If nothing else, the case illustrates that private plaintiffs have little power to change corporate behavior—no matter how potentially harmful³⁰—without government intervention or the threat of it.

In *Children's TV*, the plaintiffs' core theory of liability was deceptive marketing under California's Consumer Protection Act.³¹ The Committee on Children's Television, along with other organizational plaintiffs³² and individual parents and children, sued General Foods and their marketing firms³³ because sugar cereals were mar-

liability cases, but most have been dismissed and none contain the specific types of health claims made about obesity, diabetes, and heart disease. See Theodore Frank, *A Taxonomy of Obesity Litigation*, 28 U. ARK. LITTLE ROCK L. REV. 427, 430-33 (2006) (summarizing various lawsuits brought against food manufacturers for food content and marketing); CSPI, *Litigation Project, Current Docket*, <http://www.cspinet.org/litigation/index.html> (last visited Feb. 25, 2008) (listing ongoing, settled, and withdrawn litigation against food products).

28. CRISTER, *supra* note 5, at 18, 33-39 (noting how U.S. agricultural policy in the 1970s under Commissioner Earl Butz paved the way for more affordable processed foods with increased availability of soybean oil and the corn product high fructose corn syrup. This economic shift in the late 1970s, combined with busier families in the 1980s and 1990s, is hypothesized to have led to increased snacking and consumption of highly processed, packaged, or pre-prepared meals (including frozen meals and take-out)).

29. Kline, *supra* note 24, at 631.

30. The issue of potential harm is indeed an interesting one but beyond the scope of the article. It usually requires proof of actual harm with scientific evidence to trigger a federal ban. See *generally Children's TV*, 673 P.2d at 660. However, it is obvious that in large populations, the negative effects of food additives could take decades to emerge—and even more time to confirm with scientific data.

31. See *id.* at 667-71.

32. *Id.* at 664 (listing other plaintiffs: the California Society of Dentistry for Children, the American G.I. Forum of California, the Mexican-American Political Association, and the League of United Latin American Citizens).

33. *Id.* (listing other defendants: Benton and Bowles, Inc. and Ogilvy & Mather. Safeway Foods was also named as a defendant).

keted towards children to make them seem nutritious, beneficial, and healthful. Calling the defendant General Foods' children's cereals "candy breakfast" because the cereals were from 38-50% sugar by weight,³⁴ the plaintiffs sought to end marketing aimed at children while also proposing educational and labeling requirements.³⁵

Five cereals—AlphaBits, Honeycomb, Fruity Pebbles, Sugar Crisp, and Cocoa Pebbles³⁶—were targeted because they were almost half sugar and chemicals, yet marketing enticed children to believe that they were nutritious and healthful.³⁷ Relying on the California consumer protection statute, plaintiffs alleged that because this message was contrary to sound nutritional guidelines, General Foods should be responsible for any harm that the cereal and its marketing caused.³⁸ Specifically, the complaint claimed unfair competition, fraud, and breach of fiduciary duty.³⁹

The California consumer protection statutes allowed the plaintiffs to craft a complaint for unfair competition by alleging that "[the] defendants engaged in a sophisticated advertising and marketing program which is designed to capitalize on the unique susceptibilities of children and preschoolers in order to induce them to consume products, which, although promoted and labeled as 'cereals,' are in fact more accurately described as sugar products or candies."⁴⁰ This tactic represents one of the most common complaints against

34. *Id.*

35. *Children's TV*, 673 P.2d at 666. More specifically, plaintiffs requested unique remedies, such as "warning labels in stores and on packages, creation of funds for research on the health effects of sugar consumption by young children, public interest representatives on defendants' board of directors, and public access to defendants' research on the health effects of their products." *Id.* Interestingly, these are all ideas that have now been implemented or are under consideration to address obesity.

36. Today, four of the cereals remain on the market under the Post brand, owned by Kraft Foods, which merged with General Foods in 1989. Kraft Foods, *History*, <http://kraft.com/About/history/> (last visited Feb. 25, 2008). AlphaBits, first introduced in 1958, was reformulated in 2005 to have zero grams of sugar per serving; HoneyComb now has ten grams; Fruity Pebbles and Cocoa Pebbles, on the market since 1971, have eleven grams; and Sugar Crisp is no longer on the market under that name, but a similar product Golden Crisp has fourteen grams per serving. Kraft Foods, *Post*, <http://www.kraftfoods.com/Postcereals/posthome.htm> (last visited Feb. 25, 2008).

37. *Children's TV*, 673 P.2d at 664.

38. *Id.* at 667-70.

39. *Id.* at 660.

40. *Id.* at 664.

food manufacturers—that they specifically target foods to children who are susceptible to certain types of advertising.⁴¹

In fact, the court specifically rejected the defendants' position that the complaint was faulty as to the children, since they did not purchase the cereal:

Defendants' argument is inconsistent with the strategy of their own advertising. They are aware that the parents purchase the cereals, but they are also aware that parents do not exercise a totally independent judgment, but are influenced by the desires of their children. If such were not the case, defendants would not spend millions to advertise cereals on children's programs watched by very few adult purchasers.⁴²

The court was fully cognizant that the defendants specifically targeted the unhealthy cereals to children to influence the parents' purchasing. This raises an interesting point—if parents are held to a standard of monitoring their children's exposure to advertisements and educating them to be smart consumers from a young age, why are our corporate citizens not restricted more effectively from such tactics?

The plaintiffs in *Children's TV* also attempted to address the issue of corporate restraint and responsibility when marketing to children in the fraud count.⁴³ California law defined fraud by deception as:

1. (t)he suggestion, as a fact, of that which is not true, by one who does not believe it to be true; 2. (t)he assertion, as a fact, of that which is not true, by one who has no reasonable grounds to believe it to be true; 3. (t)he suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact⁴⁴

Rather than arguing that the advertisements contained a truthful message, the defendants attempted to dismiss the fraud claims because the pleading did not give exact times, dates, and transcripts of the ads.⁴⁵ However, because California law waived the specific pleading rule when the defendant had specific knowledge of the facts and

41. See FOOD MARKETING, *supra* note 25, at 133-225 (providing a comprehensive overview of the tactics and methods used to target children).

42. *Children's TV*, 673 P.2d at 674.

43. *Id.* at 671-75.

44. *Id.* at 671.

45. *Id.* at 673-74. I acknowledge that a defense challenge to the sufficiency of the pleading is a better legal strategy than responding to its substance; however, this strategy also points to an implied argument—"we all know marketing is meant to create appeal"—the problem with this thought is that children do not know this. See generally FOOD MARKETING, *supra* note 25, at 294-95.

the plaintiff did not easily know the facts, the fraud claim was not dismissed.⁴⁶

Finally, the plaintiffs asserted that corporations that engage in marketing to children breach a fiduciary duty to children and their parents.⁴⁷ The claim of breach of fiduciary duty in the consumer context was termed “unique” by the court⁴⁸—and indeed it was. The claim represents the crux of the larger issue of who bears responsibility for consumption of unhealthy products marketed to children. The plaintiffs argued that because General Foods characterized itself as an “expert” source of information on diet and nutrition,⁴⁹ that children were exploited when General Foods targeted ads that made its “candy breakfast” seem nutritious, beneficial, and uplifting.⁵⁰ This view puts the corporation in a position of superior bargaining power over children and parents. However, the court rejected the notion that General Foods was a fiduciary to the consumer, and children in particular, based on any theory of superior bargaining power.⁵¹ Further, the court ruled that other causes of action were more suitable in the consumer context, and that fiduciary law was ill-suited to the case.⁵²

It is unfortunate that the court could not find a way to fashion some fiduciary responsibility by a corporation engaged in marketing to consumers. It is precisely “superior bargaining power” that is the root of many poor food choices made by American parents and children. Corporations hold superior bargaining power not only in

46. *Children’s TV*, 673 P.2d at 670-71.

47. *Id.* at 675.

48. *Id.*

49. *Id.*; see generally LAURA SHAPIRO, *SOMETHING FROM THE OVEN* (Viking Penguin 2004); LAURA SHAPIRO, *PERFECTION SALAD* (Collins Publishers 1986). Both books provide a historical perspective (from turn of 20th Century through the 1960s) on how Americans, and women in particular, came to trust the food industry as “experts” for nutrition information and safe food.

50. *Children’s TV*, 673 P.2d at 675.

51. *Id.*; see, e.g., SHAPIRO, *SOMETHING FROM THE OVEN*, *supra* note 49, at 189 (analyzing the use of Betty Crocker radio spots to influence women’s attitudes about foods, Shapiro notes “[t]hese shows, which were developed before broadcasting enforced any important distinction between editorial content and advertising, conveyed a remarkably fluid version of reality.”).

52. *Children’s TV*, 673 P.2d at 675 (noting that “the efforts of commercial sellers—even those with superior bargaining power—to profit from the trust of consumers is not enough to create a fiduciary duty. If it were, the law of fiduciary relations would largely displace both the tort of fraud and much of the Commercial Code.”). The court implied that the entire subject was probably best suited to administrative investigation and regulation, yet the California legislature had not yet acted to put such a process in place. *Id.*

the marketing context, but likely in the regulatory process as well where large food manufacturers spend millions to lobby for permissive marketing and food content standards.⁵³ Consumers hold the power to purchase, which can be very powerful, but is much less so when the consumer does not have accurate information about the product or it is marketed in a deceptive way. This power imbalance is most likely the reason that although *Children's TV* alluded to the physical damage done by sugar cereals, it took another twenty-five years for the issue of content liability to emerge.

B. 2002: Pelman v. McDonald's Corp.

Fast forward a quarter century and enter *Pelman v. McDonald's Corporation*.⁵⁴ This highly controversial suit⁵⁵ filed in New York seeks to hold the world's largest fast food restaurant⁵⁶ responsible for the unhealthful content of its foods under New York's Consumer Protection Act. Similar to *Children's TV*, this action is *not* based on the actual content of the food but on marketing techniques and failure

53. *Id.*; see also MARION NESTLE, FOOD POLITICS 51-66 (Univ. of Cal. 2002) (commenting on the 1991 controversy over changes to the food pyramid, Nestle writes that USDA Secretary Madigan's decision to scuttle changes to the food pyramid because it would confuse children "seemed so patently absurd that it immediately suggested an alternative interpretation: pressure from the meat industry."); see also *Marketplace: FDA Pays to Compete with Private Sector* (Nat'l Pub. Radio Broadcast, July 17, 2007) available at http://marketplace.publicradio.org/display/web/2007/07/17/fda_pays_to_compete_with_private_sector/. In the broadcast, Congressman Bart Stupak (D. Mich.), noting that a \$10 million appropriation for food safety that was diverted to pay bonuses for drug approval work indicated "the bonus bonanza is part of a larger ineptitude on the part of the FDA." *Id.* Another commenter, Chris Waldrop of the Food Policy Institute at the Consumer Federation of America noted that "[i]t's an agency that's broken, that doesn't have the money it needs to be able to do its job. And the agency is having to just put out fires." *Id.*

54. *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003) [hereinafter *Pelman I*]; *Pelman v. McDonald's Corp.*, No. 02 Civ. 7821(RWS), 2003 WL 22052778 (S.D.N.Y. Sept. 3, 2003) [hereinafter *Pelman II*]; *Pelman v. McDonald's Corp.*, 396 F.3d 508 (2d Cir. 2005) [hereinafter *Pelman III*]; *Pelman v. McDonald's Corp.*, 396 F. Supp. 2d 439 (S.D.N.Y. 2005) [hereinafter *Pelman IV*]; *Pelman v. McDonald's Corp.*, 452 F. Supp. 2d 320 (S.D.N.Y. 2006) [hereinafter *Pelman V*]. The procedural history of this case, while interesting, is beyond the scope of this article. Readers are encouraged to read this line of cases and observe how difficult it has been for the parties and the courts to shape this case.

55. Frank, *supra* note 27, at 428; see also John Freeman, *Ethics Watch: McDonald's and Lawyer Advertising*, 16-MAR. S.C. LAW. 9 (2005) (discussing how *Pelman* created more reason to lawyer-bash).

56. McDonald's, 2006 Annual Report, available at http://www.mcdonalds.com/corp/invest/pub/2006_Annual_Report.html.

to disclose certain nutritional information.⁵⁷ In particular, the plaintiffs address marketing that occurred following a consent decree between McDonald's and the New York Attorney General's office in which McDonald's agreed to provide better nutritional information to consumers, particularly in its inner city outlets.⁵⁸

Like *Children's TV*, this case is about marketing unhealthy food to children and the resulting health damage.⁵⁹ In 2002 when suit was filed, the lead plaintiffs were minors (represented by their parents).⁶⁰ The suit claims that the infant consumers purchased and consumed McDonald's food "and, as result thereof, have become overweight and have developed diabetes, coronary heath disease, high blood pressure, elevated cholesterol intake, and/or other detrimental and adverse health effects as a result of the defendants' conduct and business practices."⁶¹

Linking these health claims to McDonald's ads, the plaintiffs in *Pelman* claimed three violations of the New York Consumer Protection Act in counts I and II of their complaint: 1) McDonald's misled the plaintiffs through its ad campaigns and publicity by representing that its products were nutritious; 2) McDonald's failed to disclose in its ads the fact that some of its foods were substantially less healthful than others because of processing and additives; and 3) McDonald's engaged in unfair and deceptive acts by representing to the New York Attorney General that it did provide nutritional brochures and information at *all* of its stores.⁶²

The *Pelman* outcome hinges on causation and reliance⁶³—illustrating how difficult food content liability is to prove. Specifically, the plaintiffs must show both that McDonald's food caused their medical problems *and* that they relied on the McDonald's ad-

57. *Pelman III*, 396 F.3d at 510.

58. *Id.* at 510 n. 3 ("According to the amended complaint, McDonald's had entered into an agreement with the New York State Attorney General to provide [nutritional] information in easily understood pamphlets or brochures which will be free to all customers so they could take them with them for further study [and] to place signs, including in-store advertising to inform customers who walk in, and drive through information and notice would be placed where drive-through customers could see them").

59. *Pelman I*, 237 F. Supp. 2d at 520.

60. *Id.* at 512, 519.

61. *Id.* at 519.

62. *Id.* at 524-30.

63. *Pelman II*, No. 02 Civ. 7821(RWS), at *9 (quoting *Smith v. Chase Manhattan Bank USA, N.A.*, 741 N.Y.S. 2d 100, 102 (N.Y. App. Div. 2002): "[t]he most formidable hurdle for plaintiffs is to demonstrate that they 'suffered injury as a result of the deceptive act.'").

vertising in making their dietary choices.⁶⁴ From the start of the case, the court stated that “legal consequences should not attach to the consumption of hamburgers and other fast food fare unless consumers are unaware of the dangers of eating such food.”⁶⁵ While the standard is somewhat relaxed in consumer fraud cases in an effort to protect consumers, the plaintiffs must still prove that McDonald’s materially deceptive act caused the injury.⁶⁶

In the initial stages of the case, the plaintiffs made one large step forward with the ruling that they adequately showed that at least one plaintiff’s consumption of McDonald’s food during her minority and in particular “during school lunch breaks and before and after school, approximately five times per week, ordering two meals per day”⁶⁷ sufficiently raised the factual issue of whether McDonald’s products “played a significant role in the plaintiff’s health problems.”⁶⁸ However, the higher hurdle, which remains an open question, is whether the plaintiff can ever “isolate the particular effect of McDonald’s foods on their obesity and other injuries.”⁶⁹ Setting this issue aside, the court initially dismissed the complaint because plaintiffs failed to include facts about their exercise habits, what other foods they ate, and what their genetic history would reveal about their diseases.⁷⁰ However, in *Pelman III* the Second Circuit ruled that the answers to such questions, along with the effect of McDonald’s food, were appropriate for discovery.⁷¹

On September 16, 2006, despite looming proof issues for the plaintiffs, McDonald’s was ordered to answer the second amended complaint.⁷² Even without a final ruling, *Pelman* illustrates the limitations of litigation to redress the ills of food that is of poor nutritional quality.⁷³ With five reported decisions already and plentiful procedural wrangling, *Pelman* also indicates how costly food litigation can be in terms of judicial resources, attorneys fees, and media

64. *Id.* at *9-*11.

65. *Pelman I*, 237 F. Supp. 2d at 517.

66. *Pelman II*, No. 02 Civ. 7821(RWS), at *9 (citing *Petitt v. Celebrity Cruises, Inc.*, 153 F. Supp. 2d 240, 266 (S.D.N.Y. 2001)).

67. *Id.* at 11.

68. *Id.*

69. *Id.*

70. *Id.* at 15.

71. *Pelman III*, 396 F.3d at 512.

72. *Pelman II*, No. 02 Civ. 7821(RWS).

73. See generally Caleb E. Mason, *Doctrinal Considerations for Fast-Food Obesity*, 40 TORT TRIAL & INS. PRAC. L.J. 75 (2004) (giving an overview of the various theories and their limitations).

attention. McDonald's will defend against allegations including that: at least forty of its ads were deceptive;⁷⁴ it failed to adequately disclose how the use of additives and the company's food processing made certain of McDonald's foods less healthy than represented;⁷⁵ and finally, it deceptively represented the provision of nutritional information in its outlets in New York.⁷⁶ Then, of course, the question will turn to causation and reliance.

While it is a case about advertising, *Pelman* raises much larger questions. Some have pondered whether Ronald McDonald is the next Joe Camel,⁷⁷ particularly given the progress of science focused on whether certain combinations of food ingredients can be addictive.⁷⁸ Whatever may be on the horizon for food liability suits, one thing is for certain—manufacturers are likely scared by the potential for liability as illustrated by the number of corporations settling cases or preemptively changing their products.

C. Looming Litigation Prompts Change

Pelman undoubtedly brought increased scrutiny of food content; American consumers are paying more attention—and so are regulators. As a result, it is considered smart business for food companies to address marketing methods and product content. In this way, companies remain free from regulation, free from scrutiny that might require more expensive manufacturing practices,⁷⁹ and free to advertise to children. Following are three examples of ways that litigation has contributed to positive changes in marketing food

74. See *Pelman V*, 452 F. Supp. 2d at 326 (noting that plaintiffs raised the number of advertisements to forty in the second amended complaint, but the court gave them leave to amend this for good cause shown).

75. See *id.* at 327.

76. *Id.*

77. David G. Yosifon, *Resisting Deep Capture: The Commercial Speech Doctrine and Junk-Food Advertising to Children*, 39 LOY. L.A. L. REV. 507, 539 (2006) (discussing whether cartoon characters could be banned in children's advertising for junk food); Brooke Courtney, *Is Obesity Really the Next Tobacco? Lessons Learned from Tobacco for Obesity Litigation*, 15 ANNALS HEALTH L. 61, 83 (2006) (discussing tobacco ad recall by children, especially with "Joe Camel," the cartoon character associated with Camel cigarettes).

78. See *supra* note 20.

79. These could include increased costs due to higher priced sweeteners, fats, or other additives or from more technical requirements for labels. The cost of labels is beyond the scope of this article but is always controversial—for example, many American food companies resist labels for genetically modified ingredients, county of origin, and trans fat. See, e.g., Mandatory County of Origin Labeling of Beef, 68 Fed. Reg. 61,944 (Oct. 30, 2003) (codified at 7 C.F.R. pt. 60).

and its content: 1) preemptive product and marketing changes, 2) settlement to avoid suit, and 3) settling suits at the complaint and answer stage.

Any change that promotes health should be viewed positively, but the process for change needs to be examined closely. Why should parents or private organizations have to sue or threaten to sue in order to get corporations to sell nutritious food? Why should it take thirty years?

Ironically, or perhaps preemptively, as *Pelman* was set for discovery, McDonald's was one of the first fast food restaurants to begin adding healthy options to its menu. Salad items, fruits, and low fat dairy options are examples. A parent can now choose between 1% milk or apple juice and fries or apple slices with dip as Happy Meal choices rather than a cookie.⁸⁰ Larger chain restaurants such as T.G.I. Friday's⁸¹ and Wendy's⁸² have followed suit with expanded "healthy" options, increased visibility of nutritional information, and greater options for children's meals. These are excellent changes, which some corporations attribute to changing tastes, though most media coverage links it with risk avoidance.⁸³ And, while high fat, sugar, and sodium items may remain on the menu, the consumer clearly has a choice. Whether she makes the right one remains to be seen. However, without greater federal support of regulation in this area, it is clear that the consumer makes this choice alone.

Pelman targeted fast food, but snacking is also an American institution⁸⁴ susceptible to suit; like restaurants, snack makers are increasingly proactive. A great example is Pepperidge Farm—maker of child snacking staple "Goldfish" crackers, marketed to kids as "The Snack That Smiles Back."⁸⁵ Owned by Campbell Soup Company

80. McDonald's, *Happy Meal Choices*, <http://www.mcdonalds.com/usa/ronald/newchoices.html> (last visited Feb. 25, 2008).

81. Press Release, T.G.I. Friday's Restaurants, T.G.I. Friday's Restaurants Announces Plan to Go Trans Fat Free (Feb. 15, 2007), *available at* http://fridays.mediaroom.com/index.php?s=press_releases&item=100.

82. Wendy's, *See What's New, Learn the Facts*, http://www.wendys.com/about_us/news/index.jsp?news=4 (last visited Feb. 25, 2008).

83. *See* Dan Crane, *McNasty: The new "healthy" fast food items taste bad (and aren't so healthy either)*, SLATE, Nov. 25, 2003, <http://www.slate.com/toolbar.aspx?action=print&id=2091621> (last visited Feb. 25, 2008).

84. CRISTER, *supra* note 5, at 39-44 (noting that "[i]n the 1980s, snacking was flat-out encouraged. The first to do so were the decade's ever more economically busy parents, who simply wanted to make sure that their kids ate *something* . . . [f]ood companies, of course, were happy to join the party.").

85. Pepperidge Farm, *Our History*, <http://www.pepperidgefarm.com/History.aspx> (last visited Feb. 25, 2008).

since 1961, the company also manufactures breads, cookies, and other snacks achieving over one billion dollars in sales in 2001.⁸⁶ In 2004, it removed trans fat from some of its product lines, including Goldfish.⁸⁷ It followed in 2006 with the addition of whole grain to its Goldfish and 100-calorie snack packs.⁸⁸ The Pepperidge Farm website also has a prominent section about health and nutrition which promotes balanced nutrition.⁸⁹ Finally, while the children-oriented Goldfish website has virtually no nutritional information and uses some of the most criticized marketing techniques (cartoons, games, wallpaper, and friend networking), it at least uses a warning sign called “ad nooze” to indicate what is direct advertising.⁹⁰ While there is no known direct threat of litigation involving Goldfish, perhaps risk-avoidance and market savvy advisors saw the need to make changes before parents decided to take matters into their own hands.⁹¹

Kellogg’s was targeted for suit but chose to settle before legal action was filed. It satisfied the potential plaintiffs with a marketing commitment that makes marketing and product changes similar to those that Pepperidge Farm has implemented.⁹² Kellogg’s is the manufacturer of a number of children’s foods including Pop-Tarts, Frosted Flakes, Froot Loops, and Apple Jacks.⁹³ By contrast, it is also

86. *Id.*

87. BakeryandSnacks.com, *Campbell to Cut the Trans Fat*, <http://www.bakeryandsnacks.com/news/ng.asp?id=49994-campbell-to-cut> (last visited Feb. 25, 2008).

88. Dave Fusaro, *Editor’s Plate: Healthier products abound at this year’s FMI show*, <http://www.foodprocessing.com/articles/2006/098.html> (last visited Feb. 25, 2008).

89. Pepperidge Farm, *Pepperidge Farm Whole Grain Breads—Home*, <http://www.pfwholegrains.com> (last visited Feb. 25, 2008).

90. Pepperidge Farm, *Goldfish Kids Site*, <http://www.pfgoldfish.com/default.aspx> (last visited Feb. 25, 2008).

91. Vinnee Tong, Associated Press, *Feds, Legal Threats put snacks on a diet* (June 20, 2007) (quoting Margo Wootan’s statement that “[manufacturers are] trying to take enough steps so Congress won’t pass laws and they won’t get sued”; quoting Professor David Levitsky’s prediction that “there’s a major confrontation that’s going to come up between the health industry and the food industry and that’s what we’re seeing”).

92. See Press Release, CSPI, *Kellogg Makes Historic Settlement Agreement, Adopting Nutrition Standards for Marketing to Children* (June 14, 2007), *available at* <http://www.cspinet.org/new/200706141.html>.

93. Kellogg’s, *Ready-to-eat Cereals*, <http://www.Kelloggcompany.com/brands.aspx?id=51> (last visited Feb. 25, 2008); see also Kellogg’s, *Wholesome/Portable Snacks*, <http://www.kelloggcompany.com/brands.aspx?id=52> (last visited Feb. 25, 2008).

the parent company of Kashi, a well-known brand of high fiber, whole grain cereals and snacks (though Kashi is not marketed to children).⁹⁴ Rather than face litigation from the Center for Science in the Public Interest and two parent-plaintiffs, Kellogg's agreed that by the end of 2008 its products marketed to children would have the following per serving limits: 200 calories, 2 grams of saturated fat, 0 grams of trans fat, 230 milligrams of sodium (except on Eggo frozen waffles because they are served as entrees), and 12 grams of sugar.⁹⁵ These nutritional limits were qualified as only a starting point, and they were to serve as a basis for innovation to "work toward providing consumers even more product choices with enhanced nutritional value."⁹⁶ The nutritional criteria are applied to determine marketing practices, as well. For example, products that do not meet the nutritional criteria will not be marketed in print media to children under twelve.⁹⁷

One of the most forward thinking parts of the settlement specifies Internet marketing techniques.⁹⁸ Kellogg's will modify the content of websites targeted to children under twelve to: "(i) include an automatic use break feature that kicks in after 15 minutes of screen time; (ii) include healthy lifestyle messaging (i.e., energy balance, activity, nutrition); (iii) not place on these websites clips or downloads of commercials" that are not permitted in mass media under the terms of the agreement; and "(iv) where products (i.e., foods, brand logos, packaging) are themselves integrated into an online interactive activity (including downloads, wallpapers, and games), [it] will only depict those products which meet the Nutrient Criteria in those types of activities."⁹⁹

Nabisco did not avoid being sued for its Oreo cookies, but rather than battling the plaintiffs in court, it settled quickly and decisively. Stephen Joseph, a lawyer and founder of BanTransFat.com, sued Nabisco for selling a dangerous product, Oreo cookies, under the California Consumer Protection Act.¹⁰⁰ In the first few days fol-

94. Kellogg's, *Our Brands*, <http://www.kelloggcompany.com/brands.aspx?id=50> (last visited Feb. 25, 2008).

95. CSPI, *supra* note 92.

96. *See id.*

97. *See id.*

98. *See* Council of Better Business Bureaus, *Children's Food and Beverage Advertising Initiative: Kellogg Company Pledge*, at 4 (on file with author).

99. *Id.*

100. *See* BanTransFats.com, *The Oreo Case*, <http://www.bantransfat.com/theoreocase.html> (last visited Feb. 25, 2008); *see also* BanTransFats.com, *About Us*, <http://www.bantransfat.com/aboutus.html> (last visited Feb. 25, 2008).

lowing the filing, Kraft (Nabisco's parent company) responded stating, "[w]e stand behind Oreo, a wholesome snack people have known and loved for more than 90 years."¹⁰¹ Plaintiff BanTransFats.com emphasized that the suit was *not* simply an obesity claim, but a more serious allegation about the dangers of trans fat.¹⁰² When Kraft characterized the cookies as wholesome Joseph was irked—going on to state how parents had no idea how harmful trans fat could be, but that manufacturers did.¹⁰³

Ultimately, the suit lasted only a few days, but it also shows that actually filing a lawsuit is sometimes necessary for the consumer to be heard. The plaintiff withdrew its claims when Kraft issued a press release committing itself to reducing trans fats in its products generally, and specifically in Oreos.¹⁰⁴ Whether Kraft sensed times had changed since *Children's TV* or whether it perceived a legal theory based on the trans fat dangers rather than obesity as meritorious is unknown. However, Kraft is now committed to removing and reducing trans fat in its products.¹⁰⁵

D. Litigation's Future

It seems that Americans groan when they learn that lawsuits are filed against favorite foods—Oreos, hamburgers, fries, and sugar cereal. Yet, these suits or threats to sue appear to have made more progress against the forces causing childhood obesity, like advertising and trans fat, than the federal government. The reader should consider why citizens are suing food manufacturers. Why is our

101. Interview by Anderson Cooper with Stephen Joseph (the lawyer who filed the lawsuit), CNN television broadcast (May 12, 2003), *transcript available at* <http://transcripts.cnn.com/TRANSCRIPTS/0305/12/se.15.html> (last visited Aug. 27, 2007) [hereinafter Joseph Interview].

102. BanTransFats.com, *The Oreo Case*, *supra* note 100.

103. See Joseph Interview, *supra* note 101.

104. Press Release, Kraft Foods, Oreo Takes on a New Twist with New Varieties that Contain Zero Grams TransFat per Serving (Apr. 6, 2004) (on file with author). The Oreo line is now trans fat free and also offers 100-calorie snack packs as well as Oreos made with organic flour. See Nabisco World, *Our Brand: Oreo*, <http://www.nabisco.com/oreo/> (follow "Product Info" link) (last visited Feb. 25, 2008); see also Nabisco World, *Our Brands: 100 Calorie Pack*, <http://www.nabisco.com/100caloriepacks/> (follow "100 Calorie Pack Varieties" link) (last visited Feb. 25, 2008).

105. Press Release, Kraft Foods, Kraft Foods Reformulates Hundreds of U.S. Products as Part of Voluntary Trans Fat Reduction Efforts (Dec. 20, 2005), *available at* http://www.kraft.com/mediacenter/country-press-releases/us/2005/us_pr_12202005.html.

national food system—including farms, groceries, and restaurants—the way it is? Is it a function of the economy, government regulation, or consumer preferences? Understanding the answers to these questions is the first step towards crafting workable solutions to the obesity epidemic. The answers will also help America address the underlying problems found in our national food policies that probably promoted the obesity crisis in the first place. However, litigation is not the best way to shape health policy, because private parties with private agendas shape the cases.

If the responsibility to shape national nutritional policy excludes the courts, then the legislative and executive branches are responsible for defining what is “unhealthy.” This can be difficult given that the answer is arguably anything in excess—including water.¹⁰⁶ And the result of trying to answer such a difficult question is often inertia. This inertia is what brings plaintiffs to the courts for some remedial action. But can the excess of the consumer become the legal liability of the manufacturer? *Pelman* and *Children’s TV* illustrate that, to date, lawyers have found the only viable theory is a tough case based on deceptive advertising. But, what is deceptive? The court in *Children’s TV* was right when it suggested that the proper arena to resolve this question is through better regulation of food content, advertising, and claims. However, the Congressional response to *Pelman* was not greater concern about the healthfulness of foods manufactured to Americans, but legislation to ban such suits.¹⁰⁷

III. IS BIG BROTHER FAT, TOO? FEDERAL LEGISLATION AND REGULATION

The obesity crisis has prompted Congressional response. Here, three important bills are discussed: one banning class actions suits like *Pelman*,¹⁰⁸ another granting the Federal Trade Commission (FTC) greater regulatory power over marketing to children,¹⁰⁹ and

106. Coco Ballyntyne, *Strange but True: Drinking too Much Water Can Kill*, SCIENTIFIC AMERICAN.COM, June 21, 2007, available at <http://www.sciam.com/article.cfm?articleID=4EC337D6-E7F2-99DF-3549D1F6684BC11A>

(“Where did people get the idea that guzzling enormous quantities of water is healthful? . . . no scientific studies support the ‘eight x eight’ dictum In fact, drinking this much or more could be harmful.”).

107. See generally H.R. 339, 108th Cong. (2004); see also H.R. 554, 109th Cong. (2005).

108. H.R. 554, 109th Cong. (2005).

109. H.R. 5737, 109th Cong. (2005).

finally, the Farm Bill.¹¹⁰ These three pieces of legislation illustrate that, while Congress certainly wants to have a voice in the obesity crisis, small-scale efforts such as banning class actions or regulating certain ads closely may have little effect if larger legislation like the Farm Bill is not analyzed for its role in obesity. To effectively regulate in this area, federal initiatives must strike a *balance* between individual choice, corporate responsibility, and public health demands.

A. *Ban the Class Action!*

In 2004, Congress' response to food liability class action suits like *Pelman* was legislation to ban such suits, unless the plaintiff could prove that "at the time of sale, the product was not in compliance with applicable statutory and regulatory requirements."¹¹¹ Commonly known as the "Cheeseburger Bill,"¹¹² the "Personal Responsibility in Food Consumption Act" would also dismiss any ongoing suits at the time of passage.¹¹³ H.R. 554 is pending in the Senate, though with the Democratic majority, it is unlikely it will go further.¹¹⁴ The striking aspect of the original proposal is that lawmakers would shift responsibility for foods away from manufacturers and corporations and further onto the government and consumer.¹¹⁵ It is striking because food manufacturers who comply with governmental standards, even if the standard is unhealthful, would not be liable to the customers for the health effects on consuming the food.¹¹⁶ Certainly, given the obesity crisis and that food liability suits have generated positive changes, the legislation is at least premature.

The bill's preamble declared that its purpose is "[t]o prevent legislative and regulatory functions from being usurped by civil li-

110. H.R. 2419, 110th Cong. (2006).

111. HENRY COHEN, CONGRESSIONAL RES. SERV., ISSUE BRIEF FOR CONGRESS, PRODUCTS LIABILITY: A LEGAL OVERVIEW 10 (2003), available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-4060:1>.

112. Personal Responsibility in Food Consumption Act of 2005, H.R. 554, 109th Congress (2005); see also David Burnett, Note, *Fast Food Lawsuits and the Cheeseburger Bill: Critiquing Congress's Response to the Obesity Epidemic*, 14 VA. J. SOC. POL'Y & L. 357, 365 (noting further that twenty-three states have adopted state cheeseburger laws).

113. *Id.* at 388.

114. *Id.* at 365 (asserting that the Republican led initiative is now moot in a Democratic Congress).

115. H.R. 554, 109th Cong. (2005).

116. *Id.*

ability actions or continued against food manufacturers, marketers, distributors, advertisers, sellers or trade associations for claims of injury relating to a person's weight gain, obesity, or any health condition associated with weight gain or obesity"¹¹⁷ The rationale cited for protecting food purveyors from responsibility for the overall healthfulness of their food was that "fostering a culture of acceptance of personal responsibility is one of the most important ways to promote a healthier society"¹¹⁸ Furthermore, the legislation posits "a person's weight gain or obesity cannot be attributed to the consumption of any specific food or beverage."¹¹⁹

Even though it is doubtful that this federal legislation will ever be successful, it shows that some lawmakers prefer to place responsibility for supporting wise personal choices even more squarely within the government's responsibility by holding food manufacturers to a single governmental standard. For example, if the government sets a standard permitting high sodium content, the consumer will assume that high sodium foods pose no health risk.¹²⁰ Further, limiting liability absolves food manufacturers of any responsibility beyond that government standard and provides no incentive for food manufacturers to pursue nutritional science. This is not good for the nation's health. Given the history of the regulatory process of the Food and Drug Administration (FDA), it is a dangerous path.¹²¹ It would remove the proper system of checks and balances from one of the most fundamental necessities of a modern society—healthful, nutritious, and safe foods—because private citizens would lose their ability to hold food manufacturers responsible for their product content in court.

Since there is some Congressional concern that civil litigation will usurp its role in food regulation, Congress should do a better job of making sure that the United States Department of Agriculture

117. *Id.*

118. *Id.* § 2(4).

119. *Id.* § 2(3).

120. See, e.g., Press Release, American Medical Association, AMA Calls for measure to reduce sodium intake in U.S. Diet (June 13, 2006), available at <http://www.ama-assn.org/ama/pub/category/16461.html> (calling for the FDA to revoke the "generally recognized as safe" status of salt and develop regulatory measures to limit sodium in processed and restaurant foods); see also Press Release, CSPI, Group Asks FDA to Limit Salt in Processed Foods (Nov. 8, 2005), available at <http://www.cspinet.org/new/200511081.html> (summarizing the CSPI's FDA petition).

121. See generally NESTLE, *supra* note 53, at 93-71 (chronicling several flaws in FDA oversight, including industry influence through lobbying and close relationships with executive branch regulators).

(USDA) and the FDA are well-equipped to regulate and enforce. Congress should also take action to coordinate all federal level programs that touch on obesity. Only when the federal government is successfully and effectively addressing obesity with the right balance of individual choice, corporate regulation, and public health protection should food liability suits be banned.

B. Silence the Messenger? Regulating the Ads

Congress is more supportive of efforts to curb marketing of food to children. Legislative proposals are a clear attempt at greater governmental oversight of the corporate marketing strategies at issue in *Children's TV* and *Pelman*. As recently as the 109th Congress, there have been proposals to grant the FTC greater regulatory authority over advertisements aimed at children.¹²² The bill's sponsor noted that the authority would "help eliminate an epidemic of overweight and obesity that studies link to pervasive advertising of junk food."¹²³ In addition, recent moves by the FTC show that it is finally moving to regulate with the power it already has.¹²⁴

While some may scoff at the notion that advertising has created the obesity crisis, science has shown it has a significant effect; therefore, regulating advertising aimed at children is a reasonable option in the fight against obesity.¹²⁵ The Institute of Medicine's 2006 review of snacking patterns and obesity shows a link between ads and eating patterns.¹²⁶ In addition, most children under seven or eight cannot understand that the intent of ads is to sell them a product.¹²⁷ Given that advertising is aimed at children, and experts have shown that children do not understand its intent, it seems there is little

122. H.R. 5737, 109th Cong. (2005).

123. 154 CONG. REC. E1326 (2006) (statement of Rep. Eleanor Norton Holmes (D.C.)).

124. *Marketplace: FTC takes a hard look at selling to kids*, National Public Radio broadcast (July 17, 2007), available at http://marketplace.publicradio.org/display/web/2007/07/17/ftc_takes_hard_look_at_selling_to_kids/ (referring to the FTC's release of proposed rules scheduled for July 18, 2007). The FTC also held a conference entitled "Weighing In: A Check Up on Marketing, Self-Regulation & Childhood Obesity" on July 18, 2007 in Washington, D.C. to highlight not only self-regulation, but also future steps necessary for proper oversight of advertising to children.

125. FOOD MARKETING, *supra* note 25, at 306-09.

126. *Id.* at 82.

127. *Id.* at 296-98. See also AM. ACAD. OF PEDIATRICS, POLICY STATEMENT ON CHILDREN, ADOLESCENTS AND ADVERTISING, available at <http://pediatrics.aappublications.org/cgi/content/full/118/6/2563>.

reason not to closely regulate ad content aimed at children under a certain age.¹²⁸

As Congress considers allowing the regulation of advertising to children, it should also pay particular attention to minority populations. Minority populations are shown to be at higher risk for obesity, diabetes, heart disease, and metabolic syndrome.¹²⁹ In fact, the sponsor's introduction specifically noted the targeting of minority populations by food manufacturers' ads.¹³⁰ It is not realistic, however, for the government to regulate marketing to target audiences. But, the issue should be addressed particularly where the availability of more healthful foods in urban centers is lacking.

Those opposed to having the FTC oversee marketing to children believe that either the issue is too difficult to regulate or that corporations should voluntarily police their actions.¹³¹ While marketing to children may be difficult to regulate, it was only recently that corporations showed interest in curbing marketing to children. For example, *Children's TV* raised the sugar issue thirty years ago and acknowledged the difficulty in regulating it, yet soda has been one of the major sources of sugar—and in particular high fructose corn syrup—in American kids' diets.¹³² But not until May 2006 did beverage manufacturers promote significant change.¹³³ In what was

128. Countries such as Sweden and Norway have banned ads aimed at children under twelve, and other such countries as Greece and Denmark severely restrict it. See AM. ACAD. OF PEDIATRICS, *supra* note 127. The issue of commercial speech in the United States is beyond the scope of this article, but is an issue that regulators must consider. See FOOD MARKETING, *supra* note 25, at 342-51.

129. See *infra* note 233. See, e.g., M.L. Cruz et al., *The Metabolic Syndrome in overweight Hispanic Youth and the role of insulin sensitivity*, 89 J. CLIN. ENDOCRINOLOGY & METABOLISM 108 (2004).

130. 154 Cong. Rec. E1326 (statement of Rep. Eleanor Norton Holmes (D.C.)). One issue related to obesity is the quality of food available in inner city areas that often contain greater populations of minorities. See, e.g., C. GORDON ET AL., N.Y. CITY DEP'T OF HEALTH & MENTAL HYGIENE, EATING WELL IN HARLEM: HOW AVAILABLE IS HEALTHY FOOD? 3-4 (2007), available at <http://www.nyc.gov/html/doh/downloads/pdf/dpho/dpho-harlem-report2007.pdf> (noting that Harlem's large minority population has more limited access to fresh produce compared to the Upper East Side of Manhattan, New York City); but see FOOD MARKETING, *supra* note 25, at 299 (finding inconclusive data on minority response to ads).

131. See AM. ACAD. OF PEDIATRICS, *supra* note 127.

132. SCHLOSSER, *supra* note 3, at 51-57.

133. *Id.*; see also ROBERT WOOD JOHNSON FOUND., BALANCE: A REPORT ON STATE ACTION TO PROMOTE NUTRITION, INCREASE PHYSICAL ACTIVITY, AND PREVENT OBESITY, ISSUE 3, at 15 (Oct. 2006), available at <http://www.rwjf.org/files/publications/other/Balance102006.pdf> [hereinafter BALANCE 3].

characterized as a “monumental agreement,”¹³⁴ the Alliance for a Healthier Generation entered a memorandum of understanding (the beverage memorandum) with major beverage manufacturers including the American Beverage Association, Cadbury Schweppes Americas Beverages, the Coca Cola Company, and PepsiCo to set a new school beverage policy.¹³⁵

The beverage memorandum definitely represents a victory for children’s health. Its terms are similar to the USDA school lunch “School Beverage Guidelines.”¹³⁶ Specifically, the memorandum provides that the signatories will limit sales to elementary schools to only water, low- and non-fat milk products, milk alternatives (which cannot exceed 150 calories per eight-ounce serving) and juice with no added sweeteners.¹³⁷ While it may be easy to criticize the memorandum as non-binding, it is significant that the parties agreed to a third-party analysis of compliance beginning in August 2007.¹³⁸ The third-party analysis shows that manufacturers understand that they will only be free of government oversight in this area if its terms are followed. However, the question is whether the government should permit “third-party analysis” to substitute reasonable government oversight.

The recent beverage memorandum is an excellent example of how industry, public health leaders, and local schools can privately negotiate policy change without the need for legislation or regulation. However, it holds the same problem as the food litigation settlements—it is brokered between private parties.¹³⁹ Here, the signatories are certainly broader than private parties to litigation, but the fact that the government remains on the sidelines is problematic. While the memorandum mirrors the USDA school lunch guidelines indicating some government involvement,¹⁴⁰ that involvement is far too limited. But there is a larger question for all interested parties: how does U.S. agricultural policy support the continued production of high sugar, high fat, and highly processed foods? More impor-

134. BALANCE 3, *supra* note 133, at 8.

135. See *id.*; see also Alliance for a Healthier Generation, <http://www.healthiergeneration.org> (last visited Feb. 25, 2008). This organization is a joint effort of the American Heart Association and the Clinton Foundation.

136. See Am. Beverage Ass’n, *New School Beverage Guidelines & Wellness Policies*, <http://www.ameribev.org/industry-issues/school-beverage-guidelines/index.aspx> (last visited Feb. 25, 2008).

137. BALANCE 3, *supra* note 133, at 9.

138. *Id.* at 10.

139. *Id.*

140. *Id.* at 8-9.

tantly, can it be changed to support a more healthful food supply in America?

C. The Elephant in the Room—the Farm Bill

There is one federal bill that has an enormous impact on America's food supply and its nutritional options—the omnibus “Farm Bill.” This complicated piece of legislation sets policy for everything from subsidies to school lunch.¹⁴¹ Any solution to the obesity crisis must consider how the bill shapes agricultural policy and our food supply. The Farm Bill and its history help explain why high fructose corn syrup is in everything from ketchup to yogurt.¹⁴² It also helps explain how partially hydrogenated oils (trans fats) became so pervasive in our food supply.¹⁴³ The Farm Bill has promoted growing the crops that make high fructose corn syrup and partially hydrogenated soy and cottonseed oil. For example, the 2002 Farm Bill appropriated at least \$15 billion to crops such as soy, wheat, and corn¹⁴⁴ and less than \$1 million to promote local farmer's markets.¹⁴⁵ This is the case even though farmer's markets are a good way for consumers to access fresh produce, while at the same time supporting local agriculture.¹⁴⁶

141. See Michael Pollan, *You Are What You Grow*, N.Y. TIMES, Apr. 22, 2007, at 15; see generally NAT'L AGRIC. L. CTR., *United States Farm Bills*, <http://www.nationalaglawcenter.org/farmbills/> (last visited Feb. 25, 2008).

142. See CRISTER, *supra* note 5, at 10-11.

[I]n 1971 food scientists in Japan found a way to economically produce a cheaper sweetener. They called it high-fructose corn syrup, or HFCS That meant that the cost of producing any high-sugar product could be slashed. . . . HFCS also had one attribute that posed a potentially troubling question to those in the food industry. Fructose, unlike sucrose or dextrose, took a decidedly different route into the human metabolism. Where the latter would go through the a complex breakdown process before arriving in the human liver, the former, for some reason, bypassed that breakdown and arrived almost completely intact in the liver.

Id. at 10-11.

143. IMHOFF, *supra* note 8, at 90-91; see also CRISTER, *supra* note 5, at 10-11.

144. IMHOFF, *supra* note 8, at 92.

145. *Id.* at 60-61; see generally NAT'L AGRIC. L. CTR., *supra* note 141.

146. The “local food” or “slow food” movement is beyond the scope of this article; however, if it gains greater momentum, it will probably garner greater attention from Congress. See generally Slow Food USA, *About Us*, <http://www.slowfoodusa.org/about/index.html> (last visited Feb. 25, 2008); W.K. KELLOGG FOUND., MEDIA GUIDE TO COVERING THE LOCAL FOOD MOVEMENT (highlighting the multifaceted nature of the local food movement and showcasing various community projects related to local foods).

Critics of the Farm Bill blame it for harmful farming practices, the demise of the family farm, and obesity.¹⁴⁷ Conversely, it is also regarded as one of the foremost pieces of conservation and “green” legislation.¹⁴⁸ For example, past farm bills have conserved millions of acres of land while also establishing important new initiatives such as the National Organic Program and the USDA Fruit and Vegetable Program.¹⁴⁹ In fact, the 2002 Farm Bill was probably the most sensitive to obesity issues in history.¹⁵⁰ But that does not mean that there is not room for significant improvement and greater balance between individual, corporate, and public health interests.

The 2007 Farm Bill contains a start at improvements. Passed by the House Committee on Agriculture on July 20, 2007, the bill promises increased financial assistance for “specialty crops,” meaning fruits, vegetable, and organic products.¹⁵¹ Specifically, the House Committee version would commit \$1.6 billion “to strengthen and support the fruit and vegetable industry in America.”¹⁵² Significantly, the appropriation would be mandatory under the Farm Bill and not subject to annual Congressional approval.¹⁵³ The bill also

147. Pollan, *supra* note 141; see also HEATHER SCHOONOVER & MARK MULLER, INST. FOR AGRIC. & TRADE POL’Y, FOOD WITHOUT THOUGHT: FARM POLICY CONTRIBUTES TO OBESITY 5 (2006), available at <http://www.healthobservatory.org/library.cfm?RefID=80627>; see generally HEATHER SCHOONOVER, INST. FOR AGRIC. & TRADE POL’Y, A FAIR FARM BILL FOR PUBLIC HEALTH (2007), available at <http://www.iatp.org/iatp/publications.cfm?accountID=258&refID=98598>.

148. IMHOFF, *supra* note 8, at 48-50.

149. *Id.*; see also Press Release, U.S. H.R. Comm. on Agric., House Agriculture Committee Passes Groundbreaking Farm Bill (July 20, 2007), available at http://www.house.gov/apps/list/press/agriculture_dem/pr_072007_FarmBill_Passage.html.

150. See generally Farm Security & Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134.

151. H.R. 2419, 110th Cong. (2007); see also U.S. H.R. Comm. on Agric., *supra* note 149.

152. See U.S. H.R. Comm. on Agric., *supra* note 149.

153. See H.R. Comm. on Agric., *2007 Farm Bill Horticulture and Organic Title: Providing New Resources for Fruit and Vegetable Producers*, <http://agriculture.house.gov/inside/Legislation/110/FB/Horticulture%20and%20Organic%20Title.pdf> (last visited Feb. 25, 2008); see also USDA, SUMMARY XI: SPECIALTY CROPS, available at <http://www.usda.gov/documents/07sumspecialtycrops.pdf>. The issue of price supports for crops is likely open to significant wrangling. For example, former Secretary of Agriculture Mike Johanns has stated that one draft commodities title “fails to recognize the need for greater equity and predictability in farm policy Beginning farmers legitimately question policy that delivers more than half of government payments to 9% of farms—large, commercial operators. Yet, the House draft continues this disparate policy.” Press Release, USDA, Statement by Agriculture Secretary Mike Johanns Regarding Farm Bill Legislation Advanced by House

includes \$32 million in mandatory funding for the Farmer's Market Promotion Program.¹⁵⁴ This preliminary package, anticipated to pass the House in late July 2007, begins to recognize the power of the Farm Bill to respond to the obesity crisis. However, the 2007 Farm Bill still must move through more rounds of political negotiations.

If critics are right that the Farm Bill has contributed to the obesity crisis, in part because it has created a national food supply that is not optimal, then the Farm Bill should also become the progenitor of a more healthful, sustainable food supply.¹⁵⁵ This is of vital importance to the obesity issue from an economic standpoint as well. If Americans eat less and change their food preferences, it is essential that agriculture policy stay in step with changing consumer demand. Therefore, in the coming negotiations on the 2007 Farm Bill, lawmakers should carefully consider how the appropriations and the policy decisions underlying those appropriations trigger consumer behavior both in the foods that are available to purchase and those that are perceived as healthful by the consumer.

D. Where Should Congress Go from Here?

In addition to examining the Farm Bill to fund programs and offer incentives that result in more healthful foods at an affordable cost to consumers, lawmakers would be wise to examine the outcome of food liability cases (whether settled or litigated). Armed with an understanding of the issues in litigation and the current federal food policies, Congress could then take steps to address obesity by leveraging federal policy and dollars with the promising smaller-scale programs discussed below.

Subcommittees (June 19, 2007), *available at* http://www.usda.gov/wps/portal/lut/p/_s.7_0_A/7_0_1RD?printable=true&contentidonly=true&contentid=2007/06/0171.xml.

154. See H.R. Comm. on Agric., *supra* note 149.

155. See Neil Hamilton, *Putting a Face on Our Food: How State & Local Food Policies Can Promote the New Agriculture*, 7 DRAKE J. AGRIC. L. 407, 410 (2000) (noting how the creation of the Leopold Center for Sustainable Agriculture at Iowa State University signaled Iowa's recognition that "a truly sustainable agriculture will not emerge if only resource issues, like soil and water quality, are considered but the human and social issues of how food is produced and marketed are ignored.").

IV. STATE AND LOCAL GOVERNMENT SOLUTIONS: PROMISING INITIATIVES

The food liability litigation and lack of meaningful federal legislation to curb the increase of childhood obesity has engendered a wealth of state and local initiatives.¹⁵⁶ This is good. States and localities are trying solutions that Washington is afraid to try, or knows will fail, as independent federal initiatives. Below are three specific examples of how government can work well to control the factors contributing to obesity: the Farm to School Program, New York City's trans fat ban, and Body Mass Index reporting to parents.¹⁵⁷ These examples illustrate three trends that can contribute to reducing obesity: 1) federal support of local food programs, 2) banning harmful food additives, and 3) educating the public with specific, concrete information about body weight and its health implications. Individually, these trends may be insignificant; however, viewed together they represent a way to reshape America's relationship with food.

Viewing these initiatives individually also highlights how state and local regulation is an excellent way to help communities deal with obesity. Each population is unique—one state's programs may be ill-suited to the needs of other states because of demographic differences. What they also illustrate is that innovation and risk-taking are important to solving a problem as pervasive as obesity.

A. Leveraging Federal Dollars and Local Foods: Farm to School Programs

One contributor to obesity is the lack of fresh fruits and vegetables available to children, especially during the school day. To address this issue, the United States Department of Agriculture (USDA) established the Farm to School Program in an effort to put

156. See generally BALANCE 3, *supra* note 133; see also ROBERT WOOD JOHNSON FOUNDATION, BALANCE: A REPORT ON STATE ACTION TO PROMOTE NUTRITION, INCREASE PHYSICAL ACTIVITY, AND PREVENT OBESITY, ISSUE 2 (July 2006), available at <http://www.rwjf.org/programareas/resources/product.jsp?id=15936&pid=1138> [hereinafter BALANCE 2].

157. This article's focus is on food law and policy. A related topic, but one beyond the scope of this article, is how the American healthcare system is involved. Even the surgeon general reports that the U.S. health care system is spending over \$100 billion annually on obesity and its related illness. *The Obesity Crisis in America: Testimony Before the Subcommittee on Education Reform, Committee on Education and the Workforce, United States House of Representatives* (July 16, 2003) (statement of Richard H. Carmona, U.S. Dep't of Health & Human Servs.), available at <http://www.surgeongeneral.gov/news/testimony/obesity07162003.htm>.

fresh fruits and vegetables in the hands of children.¹⁵⁸ In 2002, Congress authorized the pilot Fresh Fruit and Vegetable Program in four states and one Indian Tribal Organization covering 207 schools.¹⁵⁹ On its success, the program was renewed as part of the National School Lunch Act¹⁶⁰ and has continued to enjoy increasing federal appropriations.¹⁶¹

Colorado is one of the most recent states to commit to the Farm to School program, citing its health benefit for children.¹⁶² In May 2006, Colorado appropriated \$150,000 to reimburse schools that provide free fresh fruits and vegetables to their students.¹⁶³ The schools may purchase the fruits and vegetables from wholesalers, but are also encouraged to “support local agricultural producers by buying fresh produce at farmers’ markets, orchards and growers in [the] community.”¹⁶⁴ The nutritional goals of the program are assisting children in meeting the “5-a-day” fresh fruits and vegetable servings recommended by the USDA food pyramid,¹⁶⁵ exposing children to a wide variety of fresh produce, and helping children view fresh produce as the first choice for snacking.¹⁶⁶

158. JEAN BUZBY ET AL., USDA., EVALUATION OF THE USDA FRUIT AND VEGETABLE PILOT PROGRAM: REPORT TO CONGRESS iii-v (May 2003), *available at* <http://www.ers.usda.gov/publications/efan03006>.

159. FOOD & NUTRITION SERV., USDA, FRESH FRUIT AND VEGETABLE PROGRAM HANDBOOK FOR SCHOOLS: MAKING THE BEST DECISIONS FOR INTRODUCING FRUITS & VEGETABLES TO STUDENTS 3 (Nov. 2005), *available at* <http://www.fns.usda.gov/cnd/FFVP/Guidance/handbook.pdf> [hereinafter HANDBOOK].

160. Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2006, Pub. L. No. 109-97, 119 Stat. 2120.

161. See H.R. COMM. ON AGRIC., *2007 Farm Bill Nutrition Title: Promoting Health & Fighting Hunger in the U.S.*, <http://agriculture.house.gov/inside/Legislation/110/FB/Nutrition%20Title.pdf> (last visited Feb. 25, 2008) (noting that under the current version of the 2007 Farm Bill, the program is scheduled to continue and be expanded to all fifty states).

162. See generally COLO. INST. OF PUB. POL’Y, HEALTHY KIDS & HEALTHY ECONOMIES, *available at* http://www.cipp.colostate.edu/pdf/RMFU_Healthy_Kids.pdf (last visited Feb. 25, 2008).

163. Letter from Dan McMillian, Dir. of Nutrition & Transp., Colo. Dep’t of Educ., to Nutrition Servs. Dirs., Fresh Fruit and Vegetable Pilot Program Application Materials, CN07-G-007 (Oct. 11, 2006), *available at* <http://www.cde.state.co.us/cdenutritran/download/pdf/CN07-G-007FFVPPilotProgram.pdf>.

164. HANDBOOK, *supra* note 159, at 16.

165. The CDC’s “5-a-day” program has been replaced by a new initiative, “Fruits & Veggies—More Matters.” See CDC, *Introducing the Next Generation of 5 a Day!*, <http://www.5aday.gov> (last visited Feb. 25, 2008).

166. CTR. FOR INTEGRATED AGRIC. SYS., FARM-TO-SCHOOL PROGRAM PROVIDES LEARNING EXPERIENCE, RES. BRIEF #74, *available at* www.cias.wisc.edu/pdf/rb74.pdf.

Participants in the federal pilot gave the program high marks as an excellent way to change children's eating habits and food preferences.¹⁶⁷ Surveys found the students were consuming over 90% of the offered produce.¹⁶⁸ One important aspect of the pilot program's success was the ability of the participating states and local school districts to make changes unique to their environment.¹⁶⁹

Success of the Farm to School program shows that partnerships between federal, state, and local agencies can be very successful in changing children's eating habits. Federal lawmakers should continue to find ways to provide leadership through the Farm Bill, while also preserving state and local freedom to tailor programs to meet individual community needs. This approach offers the greatest possibility for maintaining a national agriculture and nutrition policy, while still allowing local innovation in implementation.¹⁷⁰

B. Ban the "Bad Stuff": NYC Trans Fat Regulation

Another contributor to obesity, and particularly to heart disease in the obese, is fat, and some believe trans fat in particular.¹⁷¹ While several groups have petitioned the federal government to remove trans fat from foods, it has refused, choosing instead to require disclosure of trans fat on food labels.¹⁷² By contrast, New York City has taken a straightforward approach to the harmful fat—ban it.¹⁷³

167. BUZBY, *supra* note 158, at iv, 15-16.

168. *Id.* at 7.

169. *Id.* at 9, 12.

170. Another example, but one that is beyond the scope of this article, is greater federal support of local farmer's markets. While there is currently some federal support, an increase would help states and communities establish strong local agricultural networks. Such networks provide greater access to fresh produce, while supporting smaller, local farmers struggling to stay on their land. See *supra* note 146 and accompanying text.

171. See generally Alberto Ascherio et al., *Trans-Fatty Intake & Risk of Myocardial Infarction*, 89 CIRCULATION 94 (1994). Dr. Walter Willett of Harvard Medical School is often cited as establishing a link between trans fat and heart disease, though some argue that it is not a "proven" link. For a brief view of Dr. Willett's views on nutrition, see Frontline, PBS, *Interview with Dr. Willett* (Jan. 9, 2004), available at <http://www.pbs.org/wgbh/pages/frontline/shows/diet/interviews/willett.html>.

172. There is an interesting dichotomy between the NYC and FDA approaches to trans fat. While NYC chose to ban it, the FDA requires labeling it. In a lesser-publicized regulation, NYC is also requiring calorie content posting on restaurant menus. The compliance rate is low and few expect any real effort for most vendors to comply. This issue is beyond the scope of this article, but is undoubtedly an emerging issue in food law. See Associated Press, *NYC Fast Food Joints Won't Post Calorie Info*, June 26, 2007, available at <http://www.msnbc.msn.com/id/19441035/>

The notorious trans fat ban, which began on July 1, 2007,¹⁷⁴ is simple; New York City licensed food vendors—including restaurants, caterers, and street vendors—cannot use artificial trans fat in foods sold to the public.¹⁷⁵ In passing the ban, New York City relied on trans fat's relationship to heart disease and declared that “[c]onservative estimates suggest that trans fat is responsible for at least 500 deaths from heart disease in New York City each year.”¹⁷⁶

The ban is this simple. Effective July 1, 2007, vendors cannot use products containing partially hydrogenated vegetable oils, shortenings, or margarines for frying, sautéing, grilling, or spread¹⁷⁷ *unless* they have labels or manufacturer documentation showing the per serving trans fat content is 0.5 grams or less.¹⁷⁸ Additionally, vendors cannot use, serve, or store products with more than 0.5 grams of trans fat per serving.¹⁷⁹ The only exemption is for prepackaged foods that are retailed by the vendor in their original package.¹⁸⁰ For example, a restaurant cannot use trans fat in its soups, but if it serves prepackaged soup crackers in the packaging then the crackers are not regulated.

New York City included reasonable enforcement measures in the ban. While the Health Department may cite violations beginning on July 1, 2007, they are not counted towards inspection scores but will be posted on the Health Department's Restaurant Inspec-

(“Burger King, McDonald's and Wendy's are among the chains planning to defy New York City's rule that they begin posting calorie entries on [July 1, 2007].”).

173. See N.Y. City Health Code § 81.08 (2007); *see also* N.Y. City Dep't of Health & Mental Hygiene, Notice of Adoption of an Amendment (§ 81.08) to Article 81 of the New York City Health Code, *available at* <http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-08.pdf> [hereinafter Notice of Adoption].

174. N.Y. City Health Code § 81.08(d) (2007).

175. See Notice of Adoption, *supra* note 173.

176. See N.Y. CITY DEP'T OF HEALTH & MENTAL HYGIENE, THE REGULATION TO PHASE OUT ARTIFICIAL TRANS FAT IN NEW YORK CITY FOOD SERVICE ESTABLISHMENTS (2007), *available at* <http://www.nyc.gov/html/doh/downloads/pdf/cardio/cardio-transfat-bro.pdf> [hereinafter THE REGULATION].

177. N.Y. City Health Code § 81.08(b); *see also* THE REGULATION, *supra* note 176. On July 1, 2008, the same provision will apply to deep frying cake batter and yeast dough (doughnuts, fried dough). *Id.*

178. See FDA Nutrition Labeling of Food, 21 C.F.R. § 101.9 (2006). The FDA's food labeling requires that manufacturers claim “no trans fat” or “0 g trans fat” even if the product contains artificial trans fat, so long as it has 0.5 grams per serving or less. *Id.*

179. N.Y. City Health Code § 81.08(a) (2007).

180. *Id.*

tion website.¹⁸¹ There is a three month grace period for fines, but after October 1, 2007, penalties ranging from \$200 to \$2,000 may be assessed by the Health Department.¹⁸² New York City's decision to phase in the ban, along with eased enforcement action in early stages, shows sensitivity to the vendors but at the same time sends a clear public health message—trans fat should be avoided.

While the regulation takes a simple approach, the public reaction is more complex. The ban has gone into effect smoothly, but it raises issues of the best balance between individual, corporate, and public health interests. In New York City, the initial response to the December 2006 vote to ban trans fat was mixed,¹⁸³ but the transition has caused little difficulty.¹⁸⁴ However, the popular press has been more vocal. For example, the *Wall Street Journal* concluded that the “ultimate goal of these so-called consumer advocates” who supported the trans fat ban in New York City is to cause the FDA to ban the substance, triggering “a move that would serve the food industry up as the next entrée on the plaintiff's bar menu.”¹⁸⁵ The *Wall Street Journal's* op-ed piece goes on to note, “[d]on't be surprised if the new Democrat Congress helps [the ‘so-called advocates’] pursue this goal, just like Mayor Bloomberg, on the dubious assumption that people can't decide for themselves what to eat and what not to eat.”¹⁸⁶

Criticizing the ban makes sense if the individual consumer is fully aware of what he is eating, but this is often not the case, particularly in restaurants.¹⁸⁷ New York City's approach shows that

181. See THE REGULATION, *supra* note 176; see also N.Y. City Health Code § 81.08(d) (2007); N.Y. DEP'T OF HEALTH & MENTAL HYGIENE, *Restaurant Inspection Information*, <http://www.nyc.gov/html/doh/html/rii/index.shtml> (last visited Feb. 25, 2008).

182. See THE REGULATION, *supra* note 176.

183. See Editorial, *The Bloomberg Diet*, WALL ST. J., Dec. 9, 2006, at A8 (“The food nannies insist that trans fats raise cholesterol and cause heart disease. The problem . . . is that the studies purporting to show this link are inconclusive at best.”).

184. Associated Press, *Ditching Trans fats no big deal for NYC Eateries* (June 26, 2007), available at <http://www.msnbc.msn.com/id/19441949>.

185. See Editorial, *The Bloomberg Diet*, *supra* note 183.

186. *Id.*

187. One of the cornerstones of *Pelman* is the original consent decree in which McDonald's agreed to disclose nutritional information at its New York City outlets. See *supra* note 58 and accompanying text. In fact, the recent requirement that New York City restaurants disclose calorie content and other information has been ignored by many. Associated Press, *NYC Fast Food Joints Won't Post Calorie Info* (June 26, 2007), available at <http://www.msnbc.msn.com/id/19441035> (last visited Feb. 25, 2008). See also Wendy's, *Special notice to inquiries originating from New York City*, <http://wendys.com/nyc.jsp> (last visited Feb. 25, 2008).

where vendors do not adequately disclose the possible risks of certain foods, banning the dangerous substance is reasonable. By contrast, the federal government requires labeling of trans fat on consumer products.¹⁸⁸ The requirement allows claims of “0 trans fat” on products containing 0.5 grams or less of trans fat per serving.¹⁸⁹ This label requirement is related to the New York City ban, since it relies on the federal standard for what constitutes “0 trans fat.”¹⁹⁰ However, as some critics have pointed out, the FDA’s choice to allow zero trans fat claims for products containing 0.5 grams or less per serving creates another confusing maze for the consumer.¹⁹¹ Eating a few servings of a zero trans fat product can still add up to more than the recommended daily amount.

What New York City has done shows the public and the federal government that in certain cases, government needs to take a stand. Even if science cannot provide a final answer on harmfulness, once enough evidence has amassed to indicate a significant negative health consequence to the public, lawmakers and policy makers have to be more proactive. Otherwise, products that are harmful will remain in our food supply, obesity rates will continue to rise, and our national health will continue its decline.

C. Educating the Public: Body Mass Index Report Cards

Individual consumers must be educated about obesity. This role often falls to the government. A good example of federal nutrition education is the “Food Pyramid,” designed by the USDA.¹⁹² However, most government nutrition education is disseminated generally to the public, not individualized to the citizen.¹⁹³ Can law be used to educate a citizenry that obesity is a critical health issue, not just a superficial concern in a society that is obsessed with appearance? For example, one insulin resistant seventeen-year-old

188. Nutrition Labeling of Food, 21 C.F.R. § 101.9 (2006).

189. *Id.*

190. N.Y. City Health Code § 81.08(b) (2007).

191. See, e.g., *The End of the Line for Trans Fats*, UC BERKELEY WELLNESS LETTER, May 2005, available at <http://www.berkeleywellness.com/html/wl/2005/wlFeatured0505.html>; see also BanTransFats.com, *The Campaign to Ban Partially Hydrogenated Oils*, <http://www.bantransfats.com/transfatnews.html> (last visited Feb. 25, 2008).

192. USDA, *My Pyramid*, <http://www.mypyramid.gov> (last visited Feb. 25, 2008).

193. While historically this may be true, the Internet has certainly improved the ability of the government to provide resources that allow individualized information. See *id.*

who wears a size twenty commented: "I don't care how big I am It's not what you look like, it's who you are."¹⁹⁴ In an attempt to change attitudes like this, Arkansas in 2003 realized that its children needed to be educated about their body size in the same way they are informed about vision and hearing. Their solution was to adopt a "Body Mass Index (BMI) Report Card."¹⁹⁵ Since then, five other states have adopted BMI report card laws or administrative programs—California,¹⁹⁶ Illinois,¹⁹⁷ New York,¹⁹⁸ Pennsylvania,¹⁹⁹ Tennessee,²⁰⁰ and West Virginia²⁰¹—with similar public health goals.

The BMI laws do not simply require a school to calculate BMI and report it to parents—most take a more comprehensive approach to obesity education, treatment, and prevention. For example, in 2003 when Arkansas enacted its law, it also required that school districts do the following: prevent elementary school students from accessing in-school vending machines dispensing food and beverages; include in their annual reports "the amounts and specific sources of funds received and expenditures made from competitive food and beverage contracts"; and inform parents not only of their child's BMI but also provide "an explanation of the possible health effects of body mass index, nutrition, and physical activity."²⁰²

Districts were required to establish school nutrition and physical advisory committees.²⁰³ The task of such committees was to draw on many sectors of the community to promote health education, nutrition, and physical activity.²⁰⁴ In addition, the State Department of Education was required to monitor the effectiveness of the BMI

194. Jodi Kantor, *As Obesity Fight Hits Cafeteria, Many Fear a Note from School*, N.Y. TIMES, Jan. 8, 2007, at A1.

195. ARK. CODE ANN. § 20-7-135 (2006).

196. CAL. EDUC. CODE § 49452.6 (2005).

197. ILL. COMP. STAT. 2310 (2007).

198. N.Y. EDUC. LAW § 903, 904 (2007).

199. 22 PA. CONS. STAT. § 23.7 (2007); *see generally* PA. DEP'T OF HEALTH, PROCEDURES FOR THE GROWTH SCREENING PROGRAM FOR PENNSYLVANIA'S SCHOOL-AGE POPULATION, *available at* <http://www.dsf.health.state.pa.us/health/lib/health/schoolhealth/GrowthManual061604.pdf> (last visited Feb. 25, 2008).

200. TENN. CODE ANN. § 49-6-1401 (2005).

201. W.VA. CODE § 18-2-7A (2006).

202. ARK. CODE ANN. § 20-7-135(c) (2006).

203. *Id.* § 20-7-13(e) (2006).

204. *Id.* The use of such advisory committees is growing in popularity and is considered to have great potential for changing societal attitudes that lead to obesity. *See generally* BALANCE 2, *supra* note 156, at 17-28.

program and its implementation.²⁰⁵ Other states have coupled BMI report cards with minimum physical fitness standards. For example, in West Virginia, elementary school students must have at least thirty minutes of activity three days per week²⁰⁶ and high schoolers are required to take one full course credit of physical education.²⁰⁷

The public reaction to BMI Report Cards has been mixed. While some view it as an inappropriate area for school authority, others are thankful for the information.²⁰⁸ For example, a parent in Massachusetts whose daughter brought home a letter stating that her daughter's BMI put her at risk of obesity responded, "it was none of the school's business to meddle in [my daughter's] weight issues."²⁰⁹ On the other hand, a parent in Arkansas responded that while "[y]our heart just starts to sink, as you hear or read that your child is obese . . . I didn't want to think I'd failed him"; the family sought medical help and their child is now "reading food labels and spending less time in front of the T.V."²¹⁰

The U.S. Surgeon General's response to Arkansas's first in the nation BMI report card law was that "the government's primary role is to educate, not regulate."²¹¹ Surgeon General Carmona went on to say that "[p]assing policy that would direct government to do something without a citizenry that understands, probably is a waste of time."²¹² This reaction overlooks the fact that the states using BMI

205. See ARK. DEP'T OF EDUC., *Proposed Rules Governing Nutrition and Physical Activity Standards and Body Mass Index for Age Assessment Protocols in Arkansas Public Schools* (Agency # 005.15, June 19, 2007).

206. W.VA.CODE § 18-2-7A(b)(1) (2006). While many adults recall required physical education throughout their education, such programs have waned since the 1980s in the face of dwindling financial resources and emphasis on academic performance. For an excellent historical overview of "PE" in public schools, see CRISTER, *supra* note 5, at 63-108.

207. W.VA.CODE § 18-2-7A(b)(1) (2006). Provision § 18-2-7A(c) is revealing in that it gives schools without PE teachers or a location for such activities additional time to comply. It is striking that in 2007 schools—where most children spend a majority of the day—have no location for physical activity or adults to guide them. *Id.*

208. Myra Turner, *Should Your Child's BMI be Included on their Report Card?* (Sept. 7, 2007), <http://parenting.families.com/blog/should-your-childs-body-mass-index-bmi-be-included-on-their-report-card> (last visited on Feb. 25, 2008).

209. Val Wadas-Willingham, *Six States get an 'A' for work against kids' obesity* (Jan. 31, 2007), <http://www.cnn.com/2007/HEALTH/diet.fitness/01/30/obesity.report/index.html> (last visited Feb. 25, 2008).

210. Celeste Ford, *Body Mass Report Card*, J. EDITORIAL REP. (April 29, 2005), *available at* <http://www.pbs.org/wnet/journal/editorialreport/042905/briefing.html>.

211. *Id.*

212. *Id.* In response, Margo Wootan of the CSPI noted that the government is already significantly involved in regulating food choices through labeling regula-

Report Cards are trying to do something—educate in a very direct way. The BMI Report Card may be unconventional in its educational approach, but certainly it is better than doing nothing or maintaining the status quo.

Arkansas's program illustrates the controversy that still surrounds BMI reporting laws. In 2007, there were several attempts to repeal the law, with one passing the senate but dying in the house.²¹³ However, the law was weakened when the annual report card was reduced to reports in kindergarten, second grade, fourth grade, sixth grade, eighth grade, and tenth grades with eleventh and twelfth grades being exempted.²¹⁴ Other amendments reveal concerns about the quality of measurements made by schools, and now the law requires standardized body mass index assessment protocols, with a requirement that community health nurses monitor school personnel for compliance with the protocols.²¹⁵ Parents are also permitted to opt-out of the program by notifying the school in writing.²¹⁶

California also has a BMI measurement pilot program, but unlike Arkansas, the California law is directly linked to diabetes prevention—a major concern for obese children.²¹⁷ The law requires measuring not only seventh grade girls' and eighth grade boys' BMIs, but also examines students' necks for *acanthosis nigricans*,²¹⁸

tions by the FDA, USDA regulation of school lunch, and the FTC's general oversight of TV advertising. *Id.*

213. H.B. 1174, Ark. 86th Gen. Assembly (2006); *see also* 2007 Ark. Acts 201 (showing the history of H.B. 1173, which was originally drafted to repeal the BMI report card).

214. *See* ARK. CODE ANN. § 20-7-135(a) & (b)(4) (2007), as amended by 2007 Ark. Acts 201 (H.B. 1173).

215. *See id.*

216. *See id.* § 20-7-135(c)(4)(A). Most other states permit an opt-out for parents. Readers are encouraged to think about whether obesity measurements are more comparable to hearing and vision screening public health initiatives (for which there are probably few opt-outs) or immunization initiatives (which do allow opt-outs from school immunization requirements). The interesting difference is that failure to immunize may mean that a child could infect others with measles but can still opt out; however, failure to see or hear properly will probably only hurt the individual child. Obesity falls in the middle of the spectrum—failure to address it may only hurt the health of the individual but the medical costs may hurt society more broadly.

217. CAL. EDUC. CODE § 49452.b(a) (2005).

218. *Acanthosis nigricans* is dark pigmentation that can indicate a high insulin level. *See generally* CDC, *Diabetes Public Health Resource, Frequently Asked Questions*, <http://www.cdc.gov/diabetes/faq/index.htm> (last visited Feb. 25, 2008).

documents ethnicity,²¹⁹ and examines any available health records for family history.²²⁰ Parents are contacted if the child is at risk and discussions about appropriate treatment are initiated.²²¹ Whether the California approach of linking BMI to a specific disease prevention program makes it more acceptable to parents is not known; however, the approach may be more accepted by parents who remain critical of the state for “interfering” with their child’s weight.

The minor differences between states’ BMI programs show the importance of state and local initiatives because they allow unique populations to tailor responses to obesity. A federal BMI report card requirement makes little sense because it would require a “one size fits all” approach.²²² However, vehicles such as the Farm Bill and those that make appropriations for school lunch programs or even federal programs mandating school performance levels could easily support greater use of the BMI report card. Similar to the Farm to School program and its funding, there could certainly be a BMI awareness program that would encourage states to take a more active role in educating parents and students about the dangers of obesity.

V. CONCLUSION

Obviously, there is no single method or approach that will improve the nutritional habits of all Americans, especially children. The works cited in this article show that it takes the full spectrum of American medicine, education, and law to change nutritional attitudes and health habits. However, among these three areas law has fallen the shortest. Legislators, lawyers, and politicians should think about how the lack of industry responsibility for manufacturing healthful foods has delivered America to its current health crisis. They should also carefully weigh the options going forward.

219. The ethnicities with the highest risk for Type 2 Diabetes are Latino, African-American, Asian, American Indian, and Pacific Islander. CDC, *Frequently Asked Questions: Groups Especially Affected by Diabetes*, <http://www.cdc.gov/diabetes/faq/groups.htm> (last visited Feb. 25, 2008).

220. CAL. EDUC. CODE § 49452.6(b)(1)-(4) (2005).

221. *Id.* at § 49452.6(i).

222. For example, some states may find that their ethnic diversity requires greater emphasis on diabetes, while other states may need to emphasize access to physical education. Zoltan Acs of the Obesity Initiative noted, “[e]very state has a different outlook on diet and nutrition, and so a one-size fits all approach simply would not be feasible.” Wadas-Willingham, *supra* note 209.