

A TAXONOMY OF OBESITY LITIGATION

*Theodore H. Frank**

I. INTRODUCTION

I come to the topic of obesity litigation from the unique perspective of an obese litigator. In my case, the causes of my obesity are genetics, spending too much time litigating and not enough time exercising, and, probably, my grandmother's recipes.¹ This analysis may seem flippant, but the individualized circumstances of my obesity highlight a fundamental problem with the use of class action litigation to address obesity. Class action litigation is a procedural device to aggregate claims where common issues predominate.² The causes of any one person's obesity, however, will be highly individualized—different genetics, different exercise patterns, different eating patterns, and different choices.³ Only through abuse of the class action mechanism can litigation be feasibly used by plaintiffs' attorneys. The risk of that abuse, however, is very real.

In 2000, the very idea of lawsuits over obesity was the subject of parody in *The Onion* in a piece satirizing recent tobacco litigation successes.⁴ Less than two years later, a concerted entrepreneurial effort emerged to duplicate the fruits of the tobacco litigation, namely, the billions of dollars extracted by attorneys from the tobacco industry and tobacco users.⁵

* Resident Fellow and Director of the AEI Liability Project, American Enterprise Institute. Portions of this paper were originally presented at a conference organized by the American Enterprise Institute for Public Policy Research in March 2005. My thanks to Michael Greve, Philip Wallach, Dan Greenberg, and Amber Taylor for their comments on earlier drafts; to Philip Wallach for his able research assistance; and to the AEI Liability Project for its support.

1. Cf. JOHANNA HURWITZ, *ONCE I WAS A PLUM TREE* (William Morrow Junior Books & Co., 1980) (detailing a fictionalized account of growing up with my grandmother).

2. FED. R. CIV. PROC. 23(b)(3). Richard A. Epstein, *Class Actions: Aggregation, Amplification and Distortion*, 2003 U. CHI. LEGAL F. 475, 475 (2003). See also *In re Bridgestone/Firestone Tire Prod. Liab. Litig.*, 288 F.3d 1012, 1019–20 (7th Cir. 2002).

3. NATIONAL HEART, LUNG, AND BLOOD INSTITUTE, *CLINICAL GUIDELINES ON THE IDENTIFICATION, EVALUATION, AND TREATMENT OF OVERWEIGHT AND OBESITY IN ADULTS*, at xi (1998) (“Obesity is a complex multifactorial chronic disease developing from interactive influences of numerous factors—social behavioral, physiological, metabolic, cellular, and molecular in addition to cultural and genetic factors”); The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity, 1 (2001) (“Overweight and obesity are caused by many factors. For each individual, body weight is determined by a combination of genetic metabolic, behavioral, environmental, cultural, and socioeconomic influences.”).

4. *Hershey's Ordered To Pay Obese Americans \$135 Billion*, *THE ONION*, Aug. 2, 2000, available at <http://www.theonion.com/content/index/3626> (last visited Apr. 28, 2006).

5. See, e.g., Walter K. Olson, *Taking Cola to Court*, 16 *CITY JOURNAL* 9–10 (Winter 2006).

It is well understood that the United States is getting fatter and that obesity and morbid obesity are on the increase.⁶ The issue is not new: a November 1961 *Atlantic Monthly* article was titled “We May Be Sitting Ourselves to Death.”⁷ The problem rose higher on the public policy agenda when the Centers for Disease Control (CDC) announced in 2004 that obesity was responsible for an additional 400,000 American deaths a year.⁸ A CDC researcher has since released a study showing the real figure to be a fifteenth of that size,⁹ but the lower number has not deterred some attorneys from seeking to make obesity litigation “the next tobacco.”¹⁰

Just as doctors engage in defensive medicine,¹¹ fast-food chains have engaged in defensive restauranting by cluttering their menus with McLean Deluxe sandwiches (McDonald’s),¹² Border Light tacos (Taco Bell),¹³ and low-fat baguette sandwiches (Burger King).¹⁴ These healthy options, however, are routinely ignored by customers, at costs of millions to corporate shareholders in wasted advertising dollars and development costs.¹⁵ Funda-

6. See UNITED STATES DEP’T. OF HEALTH & HUMAN SERVS., 2002 CHARTBOOK ON TRENDS IN THE HEALTH OF AMERICANS (2002), available at <http://www.cdc.gov/nchs/data/has/has20cht.pdf> (last visited Apr. 28, 2006).

7. Frank R. Neu, *We May Be Sitting Ourselves to Death*, ATLANTIC MONTHLY (Nov. 1961), available at <http://www.theatlantic.com/issues/61nov/neu.htm> (last visited Apr. 28, 2006).

8. Ali H. Mokdad, et al., *Actual Causes of Death in the United States*, 291 JAMA 1238–45 (Mar. 10, 2004), available at <http://jama.ama-assn.org/cgi/content/abstract/291/10/1238>. (last visited Apr. 28, 2006).

9. Katherine M. Flegal, et al., *Excess Deaths Associated With Underweight, Overweight, and Obesity*, 293 JAMA 1861 (Apr. 23, 2005), available at <http://jama.ama-assn.org/cgi/content/abstract/293/15/1861> (last visited Apr. 28, 2006).

10. Roger Parloff, “Is Fat the Next Tobacco?” FORTUNE Jan. 21, 2003 at 50; Melanie Warner, *The Food Industry Empire Strikes Back*, N.Y. TIMES Jul. 7, 2005.

11. Defensive medicine is the practice of unnecessary and costly procedures meant to protect oneself from future litigation. See, e.g., Daniel Kessler & Mark McClellan, *Do Doctors Practice Defensive Medicine?*, THE QUARTERLY JOURNAL OF ECONOMICS 353–90 (May 1996).

12. Wally Bock, *McDonald’s: When the Passion is Gone, the Profits are Over*, MONDAY MEMO (Mar. 17, 2003), available at <http://www.mondaymemo.net/030317feature.htm> (last visited Apr. 28, 2006) (explaining the place of the McLean in McDonald’s corporate history).

13. Louise Kramer, *Taco Bell Lightens Up on Border Lights*, NATION’S RESTAURANT NEWS (Mar. 11, 1996), available at http://www.findarticles.com/p/articles/mi_m3190/is_n10_v30/ai_18101385 (last visited Apr. 28, 2006) (recounting the rise and fall of several low-fat offerings at fast food restaurants, including Taco Bell’s).

14. Ken Hoffman, *Even Burger-King Goes Low-Fat*, KING FEATURES SYNDICATE (Oct. 18, 2003), available at <http://www.spcnetwork.com/mii/2003/031034.htm> (last visited Apr. 28, 2006).

15. Even Subway, which generally tries to position itself in the fast-food market as a healthier option than its competitors, has recently given in to consumer preference and started making a pitch for a cheese-and-sauce-laden-fried-patty chicken parmesan sandwich.

mental flaws in modern-day tort litigation combined with the risk of changes in the legal landscape decades down the line suggest that, while such defensive maneuvering may be economically inefficient, it may also be legally prudent.

The plaintiffs' bar and media have claimed early "success" in obesity and lifestyle litigation;¹⁶ however, several fundamentally different kinds of lawsuits are being grouped under one "obesity litigation" umbrella, and each one has different policy implications for obesity and for the legal system. A closer look shows that the plaintiffs' successes have been thin gruel and that the obesity litigation to date has been much more successful in transferring wealth to attorneys than in advancing legitimate public policy concerns.

A. The *Seinfeld* Yogurt Shop Lawsuits

In the 1993 *Seinfeld* episode "The Non-Fat Yogurt,"¹⁷ Kramer invests in a store that sells a popular, tasty frozen yogurt that is advertised as non-fat.¹⁸ *Seinfeld* and Elaine become suspicious when they gain weight. When they eventually test the yogurt, it turns out to contain fat, and humorous complications ensue.¹⁹

At least two lawsuits classified as "obesity lawsuits" actually involve this sort of run-of-the-mill affirmative misrepresentation: a falsifiable claim involving calories, fat grams, or carbohydrates is simply false. In Florida, DeConna Ice Cream labeled its "Big Daddy" ice cream as having 100 calories, two grams of fat, and nineteen grams of carbohydrates per serving.²⁰ In fact, the product had triple the fat claimed.²¹ When the *South Florida Sun-Sentinel* uncovered the discrepancy, DeConna blamed it on a database error and changed the label.²² Then, a class action suit, free-riding off of the disclosure, ensued.²³

David Kiley, *Product Placement Appears in More Scripted Venues*, BUSINESS WEEK ONLINE (Sept. 29, 2005), available at http://www.businessweek.com/the_thread/brandnewday/archives/2005/09/product_placement.html?campaign_id=search (last visited Apr. 28, 2006) (describing how the advertising campaign for new sandwich was started with an appearance on NBC's "Will and Grace").

16. E.g., Laura Parker, *Legal Experts Predict New Rounds in Food Fight*, USA TODAY, May 7, 2004, at 3A. ("There have been eight 'fat' lawsuits. Five of them were at least partially successful.") *Id.*

17. *Seinfeld: The Non-Fat Yogurt* (NBC television broadcast, Nov. 4, 1993).

18. *Id.*

19. *Id.*

20. *DeConna Settles Big Daddy Suits*, 16 ICE CREAM REPORTER 3 (Oct. 20, 2003).

21. *Id.*

22. *Id.*

23. *Id.*

Similarly, in December 2001, the Good Housekeeping Institute discovered that “Pirate’s Booty,” a puffed-rice snack, understated its calories and fat content.²⁴ Robert’s American Gourmet Foods, the manufacturer, blamed it on a manufacturing error and immediately recalled the product.²⁵ Again, attorneys filed a free-riding class action, and the company quietly settled for a nuisance sum.²⁶

While activists like John Banzhaf trumpeted these cases as examples of successful obesity lawsuits,²⁷ it is hard to see how these lawsuits have any public policy implications beyond highlighting the problem with rent-seeking class action attorneys who receive millions of dollars for little effort or benefit to their clients. Whatever the cause of the nation’s obesity problem, mislabeled food is a slim to infinitesimal proportion of it. In both cases, the correction in labeling came from existing market institutions, with lawyers getting involved only after the problem was admitted by the defendants.²⁸ The “Big Daddy” case is an especially poor example of a litigation solution to the obesity problem because while customers with receipts received refunds, those without receipts who filled out claim forms received coupons for free ice cream.²⁹ Similarly, the proposed Pirate’s Booty settlement offered only coupons for the fattening products.³⁰

B. The Pinprick Suits

1. *The Trans-Fat Suits*

There have been a few minor “obesity suits” filed by public interest firms that coincided with action that a defendant was inclined to take anyway. Activist Steven Joseph sued Kraft and McDonald’s over trans fatty acids (or “trans fats”) in their foods. In the Kraft case, Steven Joseph sought

24. Bob Condor, *Lawyer Tweaks Food Industry For Obesity Trend*, CHICAGO TRIBUNE, May 18, 2003, at C9.

25. *Id.*

26. *Id.* A state appeals court in Brooklyn recently reversed the trial court’s 2002 approval of this settlement on the grounds that the plaintiffs’ attorneys had failed to justify their proposed \$789,000 in fees for the \$3.5 million-in-discount-coupon settlement. *Klein v. Robert’s American Gourmet Food, Inc.*, 808 N.Y.S.2d 766 (N.Y. App. Div. 2006); Tom Perrotta, *Court Panel Rejects Class Settlement and Attorney Fees in Suit Over Nutrition Data*, 235 N.Y.L.J. 1 (Feb. 6, 2006).

27. Andrew Gumbel, *An Appetite for Litigation: The US Lawyer John Banzhaf Was the First to Sue the Tobacco Companies in the Mid-Sixties. But Now He Wants to Prosecute the Junk-Food Industry for Making Americans Obese. Has He Bitten Off More Than He Can Chew?*, INDEPENDENT (London), June 4, 2002, at 4–6.

28. *See supra*, notes 20–26 and accompanying text.

29. *De Conna, supra* note 20, at 3.

30. *Klein*, 808 N.Y.S.2d at 769.

an injunction from the use of trans fats in Oreos sold to children.³¹ Kraft instantly agreed to reduce or eliminate trans fat from their products. McDonald's had previously announced that it would switch to a lower-trans-fat cooking oil by February 2003 but had operational issues preventing the switch.³² As a result, McDonald's was sued for allegedly failing to notify the public that the switch had not taken place.³³ McDonald's agreed to pay \$8.5 million dollars with some of the money going to the American Heart Association and the rest paying for advertising that notified consumers of the failure to switch, plus plaintiffs' attorneys' fees.³⁴

It is unclear to what extent Kraft's response was driven by the lawsuit or driven by market pressure caused by the combination of increasing public awareness of the newly understood dangers of partially hydrogenated oils and of the FDA's expected change in labeling regulations that would require the identification of trans fat content.³⁵ The publicity from the suits likely had more effect than the suits themselves given that Kraft announced its plans the day after the suit was filed.³⁶ The new Oreo products are indeed heart-healthier, given their successful elimination of partially hydrogenated oils; however, they contain the same number of calories.³⁷ Therefore, the new Oreo products are unlikely to affect obesity.

Similarly, McDonald's settlement transferred a charitable donation it would have likely made anyway to the ledger of class action settlement.³⁸ McDonald's was already going to change its cooking oil as soon as it created a commercially feasible alternative, so the lawsuit did not change this.³⁹ Any new cooking oil will have less or no trans fat, but will not have

31. Kim Severson, S.F. Lawyer Plans To Drop Oreo Suit, *THE SAN FRANCISCO CHRONICLE*, May 15, 2003, at A3.

32. Steven Joseph, *Plaintiff's Press Release on Settlement of McDonald's Trans Fat Litigation* (Feb. 11, 2005), available at <http://www.bantransfats.com/mcdonalds.html> (last visited Apr. 28, 2006).

33. *Id.*

34. *Id.*; Joe Garofoli, *\$7 Million for Suit on Trans Fats McDonald's To Pay Heart Association*, *SAN FRANCISCO CHRONICLE*, Feb. 12, 2005 at A2.

35. 68 Fed. Reg. 41433 (Jul. 11, 2003) (implementing Nov. 17, 1999, proposed rule from 64 Fed. Reg. 62746 at 21 C.F.R. 101.9(c)(2)(ii)).

36. Severson, *supra* note 31, at A3.

37. *Oreos Stacking Up*, *WASHINGTON POST*, Feb. 22, 2006, at F4.

38. For example, on February 1, 2006, McDonald's announced the donation of \$50 million to Ronald McDonald House Charities. Press Release, McDonald's Corporation, *McD's Reaches Goal to Raise \$50 Million for Children of the World in Honor of its 50th Anniversary* (Feb. 1, 2006). In September 2005, McDonald's donated \$5 million in cash and millions of dollars in products for Hurricane Katrina relief. Press Release McDonald's Corporation, *McDonald's Announces Additional Support for Disaster Relief* (Sept. 10, 2005).

39. Press Release, McDonald's Corporation, *McDonald's TFA Settlement Announcement*, Feb. 9, 2005, available at http://www.mcdonalds.com/corp/news/corppr/2005/cpr_02092005.printfriend.html (last visited Apr. 28, 2006) (noting that the company "continues to work hard on our initiative to

fewer calories.⁴⁰ Again, this litigation will have no effect on obesity; therefore, its primary effect is the wealth transfer to attorneys.

2. *The Vegetarian Suits*

Coincidentally, the McDonald's shift to partially hydrogenated vegetable oil was in response to previous activism asking it to end the use of beef tallow in making French fries.⁴¹ That shift was later the subject of another so-called "obesity lawsuit."⁴² Hindus and vegetarians sued McDonald's for consumer fraud for identifying its French fries as vegetarian when, in fact, a minuscule amount of beef tallow was used to blanch the fries.⁴³ McDonald's apologized and paid \$10 million to charity.⁴⁴ Public relations alone would dictate such a move. There is no reason to believe the lawsuit had any effect on obesity.

3. *The School-Board Suits*

Threatened lawsuits against school boards to ban the sale of soft drinks in schools have had success. Rather than fight the litigation, school boards usually agree to changes that satisfy the attorneys. But this is part of a larger trend against soft drinks in schools; therefore, it cannot be entirely credited to activist litigation. Chicago unilaterally chose to end its working relationship with Coca-Cola, as did Los Angeles, San Francisco, and Nashville.⁴⁵ In addition, the states of Maine and Texas have banned soda and junk food from their schools statewide.⁴⁶ The lawsuit threats thus may well have been superfluous. Indeed, four school-board members in Seattle successfully campaigned on an anti-junk-food platform.⁴⁷ As of 2005, according to the School Nutrition Association, two-thirds of United States schools have lim-

reduce TFAs in our cooking oil").

40. See Kim Severson & Melanie Warner, *Fat Substitute, Once Praised, is Pushed Out of Kitchen*, N.Y. TIMES, Feb. 13, 2005, §1 at 5 (recounting of how trans fat's rise and fall were both due to public health activists; discussing current substitutes' shortcomings).

41. *Id.*

42. Lynn Thompson, *Latest Beef Over Fries Who Gets The Money*, SEATTLE TIMES, Aug. 4, 2002, at A1.

43. *Id.*

44. *Id.* While deciding which charities would get the money was a hotly disputed topic, the additional \$2.4 million designated as attorney fees was not. *Id.*

45. Matt Richmond, *Coke Booted from Chicago Schools*, THE JOURNAL STANDARD, Nov. 15, 2004.

46. *Id.*

47. *Id.* See also Marguerite Higgins, *Seattle School Board Targeted For Soda Pact*, WASHINGTON TIMES, July 19, 2003, at A1. The soft drink changes were not initiated by warnings of lawsuits, Ms. Waldman said, adding that the school board is not worried about obesity-related litigation. *Id.*

its on junk food of some sort.⁴⁸ These limitations seem to have had some effect on children's beverage habits. The American Beverage Association reports that the amount of non-diet soft drinks sold in United States schools dropped more than 24% between 2002 and 2004.⁴⁹ It is less than clear, however, whether there has been a concomitant drop in obesity because the majority of the replacement beverages were highly-sugared "sports" or "fruit drinks."⁵⁰ And, as with all prohibition measures, the new rules have spurred a healthy black market in unhealthy forbidden snacks.⁵¹ In sum, while it is unclear to what extent new school regulations are affecting obesity, it does seem that the litigation process has very little to do with the trend. Such litigation is a ham-handed form of lobbying—a kind of lobbying in which taxpayers foot the bill when attorneys' fees are demanded for prevailing.

C. The Tobacco-Style Suits

With the ersatz obesity lawsuits out of the way, we come to the lawsuits that are of central concern—claims of personal injury based on eating fattening food or claims of consumer fraud based on an alleged lack of sufficient disclosure of the nutritional impact of junk food. The idea behind the lawsuits is to achieve the same results for the vendors of unhealthy food as for the vendors of cigarettes.⁵² The attorneys behind this new wave of litigation plainly believe that the effect is more likely to sway public opinion in the long run towards a favorable view of obesity litigation rather than an unfavorable view of the tobacco litigation.⁵³

The culmination of the tobacco litigation was the \$246 billion settlement over Medicaid reimbursement.⁵⁴ It is unclear what the settlement (of

48. J.M. Hirsch, ASSOCIATED PRESS, Dec. 1, 2005, *available at* <http://www.azcentral.com/health/kids/articles/1201teensoda-ON.html> (last visited Apr. 28, 2006).

49. *Id.*

50. *Id.*

51. *E.g.*, Matthew Obernauer, *Sweet Vending Victory at Austin High; Candy Ban Spawns Black Market; Now Some Treats Have Returned*, AUSTIN AMERICAN-STATESMAN, Feb. 19, 2005, at A1; Anthony Ribaud, *R-Jeneration: Clandestine Candy Sales*, LAS VEGAS REVIEW-JOURNAL, Feb. 22, 2005, at 53; Anne Ryman, *Senate OKs Junk-Food Ban; Prohibition on Daytime Sales Wouldn't Apply to High Schools*, THE ARIZONA REPUBLIC, Apr. 15, 2005, at 1A; Jennifer Obakhume, *Junk Food Goes Underground in California Schools*, NPR MORNING EDITION, Nov. 7, 2005.

52. *See* Olson *supra* note 5.

53. Warner, *supra* note 10 ("Professor Banzhaf acknowledges that public opinion is not currently in favor of obesity litigation. But he added that the situation for tobacco was similar 15 years ago when people began suing cigarette companies for making smokers sick.")

54. For a comprehensive examination of the tobacco settlement, see MARTHA DERTHICK, *UP IN SMOKE: FROM LEGISLATION TO LITIGATION IN TOBACCO POLITICS*, (CQ Press

questionable constitutionality)⁵⁵ did for public health.⁵⁶ The main effects appear to be the creation of a cartel of tobacco companies and the establishment of a regressive tax on tobacco consumers with a significant portion of the funds ending up in the pockets of trial lawyers.⁵⁷ The possibility of a future lottery payout of billions of dollars in fees has encouraged attorneys to start building an obesity case now through class actions.

As of the beginning of 2006, these cases have been more hypothetical than real: two class actions against fast food restaurants in New York,⁵⁸ and a threatened but still-unfiled Massachusetts class action against soda manufacturers.⁵⁹ Of the two filed cases, one was abandoned,⁶⁰ and the other was saved only by an erroneous court ruling on a technical procedural issue.⁶¹ Each of the cases, however, have fatal flaws that make their underlying theory both bad law and bad public policy.⁶²

1. Barber *and* Pelman

On July 23, 2002, Caesar Barber sued McDonald's Corp., Burger King Corp., KFC Corp., and Wendy's International, Inc. in New York state court in Bronx County.⁶³ Caesar, a 270 pound fifty-six year old, alleged that the fast food restaurants were responsible for his and the class members' poor health.⁶⁴ In the face of poor public reaction, Barber's attorneys put his case on hold and adopted a new strategy of singling out one restaurant and using children as plaintiffs.⁶⁵

That suit, *Pelman v. McDonald's*,⁶⁶ was also filed in Bronx County and removed to federal court in the Southern District of New York.⁶⁷ At first,

2002).

55. E.g., Michael Greve, *How To Think About Constitutional Change, Part II*, AEI FEDERALIST OUTLOOK, Aug. 2, 2005, available at http://www.aei.org/publications/filter.all.pubID.22942,filter.all/pub_detail.asp (last visited May 1, 2006) (arguing that 1998 tobacco agreement violates Compact Clause).

56. For a brief discussion, see Michael Greve, *Compacts and Collusion*, AEI FEDERALIST OUTLOOK, Apr. 1, 2002, available at http://www.aei.org/publications/pubID.13782/pub_detail.asp (last visited May 1, 2006).

57. *Id.*

58. See *infra* § II.C.1.

59. See *infra* § II.C.2.

60. See *infra* notes 63–65 and accompanying text.

61. See *infra* notes 66–91 and accompanying text.

62. See *infra* § II.C.3.

63. Ellen Sorokin, *What's Eating Him? Obese Man Sues Fast-Food Chains for Health Woes*, WASHINGTON TIMES, July 27, 2002, at A1.

64. *Id.*

65. Bonnie Brewer Cavanaugh, *Parents Sue McD*, NATION'S RESTAURANT NEWS, Sept. 23, 2002, at 1.

66. No. 02 Civ. 7821, 2003 U.S. Dist. LEXIS 15202, at *1 (S.D.N.Y. Sept. 2, 2003) ("*Pelman I*"), reversed and vacated in part by, 396 F.3d 508 (2d Cir. 2005) ("*Pelman III*").

the plaintiffs alleged a full-fledged products liability case.⁶⁸ After this was dismissed without prejudice,⁶⁹ the amended complaint limited itself to allegations of personal injury on grounds of violations of the New York Consumer Protection Act⁷⁰ and failure to warn.⁷¹ The plaintiffs dropped their failure to warn allegations before oral argument, and Judge Sweet dismissed the remainder of the amended complaint with prejudice.⁷²

To bring a Consumer Protection Act claim in New York, a plaintiff “must show that the defendant’s ‘material deceptive act’ caused the injury.”⁷³ The causation requirement is distinct from a reliance requirement, which the trial court acknowledged that the plaintiffs had barely alleged.⁷⁴ Rather, the trial court held that the plaintiffs failed to adequately allege that the supposed fraud had caused their injuries.⁷⁵ Without a particularized explanation of causation, the complaint was insufficient.⁷⁶

The United States Court of Appeals for the Second Circuit vacated and remanded.⁷⁷ Its holding—which led to a significant substantive result—rested on a technical, procedural issue. The court held that a consumer fraud claim under Section 349 of the New York General Business Law was not an “avermment of fraud” and, thus, did not need to be stated with particularity under Rule 9(b) of the Federal Rules of Civil Procedure.⁷⁸ Because the complaint met the bare-bones requirement of Rule 8(a)(2) of the Federal Rules of Civil Procedure⁷⁹ by simply alleging injury from a violation of the statute, the Second Circuit held that dismissal was inappropriate.⁸⁰

How did the Second Circuit come to the conclusion that an averment of consumer fraud was not an “avermment of fraud”? The court’s only support for this certainly counterintuitive proposition was a tortured extension

67. *Pelman v. McDonald’s Corp.*, 237 F.Supp. 2d 512, 519 (S.D.N.Y. 2003) (“*Pelman I*”).

68. *Id.* at 520.

69. *Id.*

70. N.Y. GEN. BUS. LAW §§ 349, 350 (Consol. 2005).

71. *Pelman II*, 2003 U.S. Dist. LEXIS 15202, at *5.

72. *Id.* at *5-6.

73. *Id.* at *27 (quoting *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 (N.Y. 2000)).

74. *Id.* at *27-*28.

75. *Id.* at *30. The trial court also dismissed the individual claims of the parent co-plaintiffs as time-barred. *Id.* at *18. The plaintiffs did not appeal this decision. See *Pelman VI*, 396 F.3d at 508.

76. *Id.* at *41.

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

78. *Id.* at 511. “In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” FED. R. CIV. P. 9(b).

79. “A pleading which sets forth a claim for relief...shall contain...a short and plain statement of the claim showing that the pleader is entitled to relief” FED. R. CIV. P. 8(a)(2).

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

of two Supreme Court cases, *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*⁸¹ and *Swierkiewicz v. Sorema*.⁸² *Leatherman* and *Swierkiewicz* merely held that Rules 8 and 9 mean what they say and that a short and plain statement of relief is all that is required if Rule 9(b) does not require particularity.⁸³ Thus, the Supreme Court ruled, it was inappropriate to require a heightened standard of pleading for a Section 1983 action⁸⁴ or a Title VII action.⁸⁵ But neither case—nor any appellate court—has construed Rule 9(b) as narrowly as it was interpreted in *Pelman III*. The Second Circuit extended these straightforward Supreme Court holdings to rule that because Section 349 claims require no showing of reliance, New York's "consumer fraud" statute was not an "avertment of fraud;" therefore, the more lenient Rule 8 pleading standard applied.⁸⁶

But Rule 9(b) hardly means that it applies only to common-law and not statutory, fraud. Courts regularly and consistently understand Rule 9(b) to apply in numerous statutory contexts. For example, numerous cases hold that "securities fraud," while different from "fraud," is a claim that "sounds in fraud," and, thus, must meet the Rule 9(b) requirements.⁸⁷ The New York consumer fraud laws "sound in fraud," and, thus, require Rule 9(b) pleading with particularity; thus, the failure of *Pelman* to meet that standard should have resulted in the Second Circuit's affirmance of the dismissal.⁸⁸ No court has held otherwise with respect to any other state's consumer fraud laws, even though other states have similarly broad consumer fraud laws that purport to disclaim the need to show reliance.⁸⁹

81. 507 U.S. 163 (1993) (holding that § 1983 action is not a fraud action and need not be pleaded with particularity).

82. 534 U.S. 506 (2002) (holding that a Title VII action need not be pleaded with particularity).

83. *Leatherman*, 507 U.S. at 168; *Swierkiewicz*, 534 U.S. at 514–15.

84. *Leatherman*, 507 U.S. at 168.

85. *Swierkiewicz*, 534 U.S. at 514–15.

86. *Pelman III*, 396 F.3d at 511.

87. *E.g.*, *Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 368 (5th Cir. 2001); *Anderson v. Clow (In re Stac Elecs. Sec. Litig.)*, 89 F.3d 1399, 1404–05 (9th Cir. 1996); *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 288 (3d Cir. 1992); *Sears v. Likens*, 912 F.2d 889, 892–93 (7th Cir. 1990). *See also* *Williamson v. Allstate Ins. Co.*, 204 F.R.D. 641, 643–44 (D. Ariz. 2001) (consumer fraud).

88. Although the Supreme Court's decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005) leaves open the question of whether Rule 9(b) applies to the causation element of fraud claims in securities fraud cases, Second Circuit precedent does require a particularized showing of causation. *E.g.*, *Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111, 120 (2d Cir. 1982); *In re Merrill Lynch Tyco Research Sec. Litig.*, No. 03 CV 4080, 2004 U.S. Dist. LEXIS 2247, at *1 (S.D.N.Y. Feb 18, 2004).

89. *E.g.*, *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1108 (9th Cir. 2003) (holding that although fraud "is not an essential element" of CAL. BUS. & PROF. CODE § 17200 and although the complaint did not use the word "fraud," the underlying allegations against two defendants were grounded in fraud; thus, they had to comply with Rule 9(b)'s heightened

Under Rule 8 of the Federal Rules of Civil Procedure, a bald allegation is enough to survive a motion to dismiss, and because Pelman met this more lenient standard, his case briefly remains alive under the Second Circuit's misguided view.⁹⁰ While Judge Sweet's earlier rulings indicate that he is unlikely to countenance intrusive discovery motions that would permit plaintiffs to engage in discovery fishing expeditions,⁹¹ the Second Circuit's decision permits future plaintiffs to shop for a judge who will allow such discovery, free from the constraints of the requirement of a plausible theory of liability or causation in a complaint.

2. *The Next Generation: Soda Suits*

As 2006 began, the Public Health Advocacy Institute was threatening, but had not yet brought, a class action against soft drink companies for marketing and selling soda to children on grounds of "attractive nuisance" and violating Massachusetts's broad consumer fraud laws.⁹² The institute's strategy appears to be to create a wedge issue where popular opposition to obesity litigation is not quite as strong by targeting soda machines in schools and other marketing.⁹³

Suing on the attractive nuisance theory would be an abuse of the doctrine. First, it is analogous to the absurd suggestion that refrigerator and swimming pool manufacturers should be liable when a landowner abandons a refrigerator or leaves an unfenced swimming pool where children can play in it and harm themselves. Second, there is no precedent for the idea that a commercial transaction can be an attractive nuisance. The concept has dangerous implications: why stop with soda? Why is selling soda an attractive nuisance, but selling baseball bats or books about UFOs or Internet connectivity is not? Are all commercial transactions with seventeen year olds to be barred?

The soda suits, along with the fast-food suits, also suffer from a fundamental problem of causation. Many factors other than diet contribute to obesity.⁹⁴ Weight gain comes not just from excess calories, but also from

pleading standard).

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

91. *Pelman I* and *Pelman II* were both highly critical of plaintiffs' theory of causation. A summary judgment motion by McDonald's on the causation element will require only discovery of the plaintiffs, and McDonald's will likely be able to successfully request the court to bifurcate discovery on this issue.

92. MASS. GEN. LAWS. ch. 93A; Michael Blanding, *Hard on Soft Drinks*, B. GLOBE, Oct. 30, 2005, at 24; Caroline E. Mayer, *Lawyers Ready Suit Over Soda*, WASH. POST, Dec. 2, 2005 at D2.

93. See Blanding, *supra* note 92, at 24.

94. NATIONAL INSTITUTES OF HEALTH, CLINICAL GUIDELINES ON THE IDENTIFICATION, EVALUATION, AND TREATMENT OF OVERWEIGHT AND OBESITY IN ADULTS, at xi, 27 (1998)

inadequate exercise.⁹⁵ Simple labor-saving devices can therefore result in weight gain. For example, a 150-pound person who replaces six minutes a day of manual dish-washing with using an electric dish-washer and watching additional television instead with the time saved, is burning ten fewer calories a day, which adds up to an extra pound a year in weight gain if that person does not substitute additional exercise elsewhere.⁹⁶ Someone who spends an hour reading articles about obesity litigation in the *UALR Law Review* or watching *Buffy the Vampire Slayer* has the same differential in calories consumed and burned as someone who spent that hour walking at brisk pace but also ate a candy bar or drank a can of Mr. Pibb.⁹⁷ (One looks forward to the suits against the University of Arkansas at Little Rock for their contribution to the obesity problem for their role in publishing this reading material.) There is also a significant genetic component.⁹⁸ Finally, weight loss is a feasible option for those who set their minds on it.⁹⁹

Attorneys perhaps hope to target children's advertising. Nevertheless, advertising is not a proximate cause of obesity in the simple way that plaintiffs' briefs would have to suggest. Advertisers cannot force consumers to

available at http://www.nhlbi.nih.gov/guidelines/obesity/ob_gains.pdf (last visited May 1, 2006) (stating that "Obesity is a complex multifactorial chronic disease developing from interactive influences of numerous factors—social, behavioral, physiological, metabolic, cellular, and molecular" in addition to cultural and genetic factors); UNITED STATES DEP'T OF HEALTH & HUMAN SERVS., *The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity*, at 1 (2001) available at <http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf> (last visited May 1, 2006) (stating that "Overweight and obesity are caused by many factors. For each individual, body weight is determined by a combination of genetic, metabolic, behavioral, environmental, cultural, and socioeconomic influences.").

95. James O. Hill et al., *Obesity and the Environment: Where Do We Go from Here?* 299 SCI. 853, 854 (2003) (noting that 3500-calorie surplus of calories ingested and stored over calories exerted equals 1 pound of weight-gain).

96. According to calorie-count.com, washing dishes burns 168 calories/hour, while watching television while sitting burns 68 calories/hour. CALORIE-COUNT DATABASE, *Activity Browser*, available at <http://www.caloriecount.com/calories/activities/7.html> (last visited May 1, 2006). For a discussion of the general trend, see Tomas J. Philipson & Richard A. Posner, *The Long-Run Growth in Obesity as a Function of Technological Change* (University of Chicago Law School, John M. Olin Law & Economics Working Paper No. 78) May 1999, available at http://papers.ssrn.com/paper.taf?abstract_id=167008.

97. This observation is based on a similar one by Thomas Haynes. Thomas Haynes, *Who Is to Blame for Obesity*, Panel Discussion at the American Enterprise Institute for Public Policy Research Conference (Mar. 3, 2005), available at <http://www.aei.org/events/filter.all,eventID.1024/transcrip.asp> (last visited May 1, 2006).

98. See *supra*, note 94.

99. Of course, the health problems ascribed to tobacco in the Medicaid reimbursement suits also have multiple causes, and millions of people, about half of all American smokers, have voluntarily quit smoking. See UNITED STATES DEP'T OF HEALTH & HUMAN SERVS., *The Health Benefits of Smoking Cessation: A Report of the Surgeon General* 593-94 tbl.4 Pub. No. (CDC) 90-814 (1990).

purchase what they do not desire, or we would all be drinking New Coke, Crystal Pepsi, and Zima.¹⁰⁰ As Todd Zywicki has noted, the worldwide trend of increasing obesity is similar to that of the United States, be it Brazil, Haiti, Ghana, Morocco, or Egypt, and there is no reason to think that “Al-Jazeera is awash in Cocoa Pebbles ads.”¹⁰¹

3. *The Fatal Flaws of Obesity Suits*

There are two dangerous problems with the obesity class actions, each of which is an attempt by the plaintiffs’ bar to avoid the likely fatal issue of causation. First is the very nature of the class action. A class action is meant to address groups of suits where the common issues predominate.¹⁰² Because of the individualized issues of causation discussed above, obesity litigation is inappropriate for the class-action context. Nevertheless, some judges let the tail wag the dog; class actions are regularly certified when the individualized issues predominate, simply by structuring a trial plan in which the individualized issues are not tried at all.¹⁰³ This is inappropriate, but it happens often enough that it is a risk for “Big Food.” With billions of dollars at stake, the defendants must win every suit, while the plaintiffs need win only one out of a hundred. A class certification is often enough to provoke a settlement for billions.¹⁰⁴

100. Indeed, my own obesity is in spite of the fact that my parents steadfastly refused to purchase heavily sugared cereals such as Lucky Charms and Count Chocula, notwithstanding my entreaties to the contrary. Even Sherri Carlson, the lead plaintiff in a proposed (but, as of March 2006, still unfiled) lawsuit against Viacom and Kellogg’s over alleged consumer fraud in cereal advertising admits that she has withstood her children’s request for cereals she finds insufficiently nutritious, but still seeks billions of dollars of damage for the supposed insult. Press Release, Center for Science in the Public Interest (Jan. 18, 2006). The Carlson/CSPI suit suffers from the same problems as the *Pelman*-style suits, with the additional problem that even the lead plaintiff cannot even be said to have suffered cognizable injury. See Section III.C.3, *infra*.

101. Todd Zywicki, *Who Is to Blame for Obesity*, Panel Discussion at the American Enterprise Institute for Public Policy Research Conference (Mar. 3, 2005) available at <http://www.aei.org/events/filter.all,eventID.1024/transcript.asp> (last visited May 1, 2006). See also Timothy J. Muris, *Don’t Blame TV*, WALL ST. J., Jun. 25, 2004, at A10 (stating that “Even our dogs and cats are fat, and it is not because they are watching too much advertising.”)

102. See *supra* note 2.

103. E.g., *Dukes v. Wal-Mart, Inc.*, 222 F.R.D. 189 (N.D. Cal. 2004). See generally Epstein, *supra* note 2, at 512–14.

104. E.g., *Shaw v. Toshiba Am. Info. Sys. Inc.*, 91 F. Supp. 2d 926 (E.D. Tex. 1999); Andy Pasztor & Peter Landers, *Toshiba to Pay \$2B Settlement on Laptops*, ZDNet.com, Oct. 31, 1999, available at http://news.zdnet.com/2100-9595_22-516294.html (last visited Feb. 8, 2005) (\$2.1 billion settlement). See generally MICHAEL GREVE, HARM-LESS LAWSUITS?: WHAT’S WRONG WITH CONSUMER CLASS ACTIONS (2005).

Second is the increasing breadth of state consumer fraud law; more and more, state law permits recovery when there has been no tangible injury, merely by virtue of the defendant's alleged bad behavior.¹⁰⁵ In cases such as *Price v. Philip Morris, Inc.*¹⁰⁶ and *Desiano v. Warner-Lambert*,¹⁰⁷ plaintiffs allege material and misleading omissions in advertising and claim that they are entitled to damages to provide the benefit of the bargain.¹⁰⁸ In *Price*, it turned out through expert testimony that, by coincidence, the value of the benefit of the bargain from the alleged misrepresentation was supposedly over 90% of the amount paid, requiring nearly an entire refund for "compensatory" damages.¹⁰⁹

These remote, but all-too-plausible, risks of absurd results have provoked the so-called "cheeseburger bills" in state legislatures and in Congress.¹¹⁰ Protection of a single industry against a single set of ludicrous legal theories is a worthy goal. On the other hand, the ability of the plaintiffs' bar to threaten restaurateurs and junk-food sellers comes, not from the power of their theory of obesity liability, but from the too-real possibility of abuse of the conjunction of the consumer fraud laws and the class-action mechanism to blackmail a defendant into settling a case rather than risk the small chance of a bankrupting judgment.¹¹¹ The problems "Big Food" faces are the same problems faced by American business in general. The real solution to the illegitimate litigation discussed in this essay is not gerrymandering the tort laws to provide protection for individual industries with effective

105. GREVE, *supra* note 104.

106. No. 00-L-112, 2003 WL 22597608 (Ill. Cir. Ct. Mar. 21, 2003) ("*Price I*"), *rev'd*, No. 96326, 2005 WL 3434368 (Ill. Dec. 15, 2005).

107. 326 F.3d 339 (2d Cir. 2003).

108. See GREVE *supra* note 104, at 21. In the threatened Massachusetts Carlson/CSPI suit, the plaintiff claims to be injured from seeing the commercial, rather than from buying the product, and seeks a \$25 penalty for each viewing. *Id.*

109. *Price*'s \$10.1 billion damages award was based in part on a finding that the diminution in value of light cigarettes because of the "fraud" was 92.3%. GREVE, *supra*, note 104. The judge was not deterred in his finding by the continued successful purchase of light cigarettes by the vast majority of the class at today's prices, considerably higher than they were during the class period, despite the fact that the "fraud" had been exposed. *Price*, 2005 WL 3434368 at *55 (Karmeier, J., concurring).

110. *E.g.*, H-R 109-554, Personal Responsibility in Food Consumption Act of 2005. The bill's history is discussed by one of its champions, The Center for Consumer Freedom, at http://www.consumerfreedom.com/news_detail.cfm/headline/2903 (last visited May 1, 2006).

111. See *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-16 (7th Cir. 2003); *West v. Prudential Securities, Inc.*, 282 F.3d 935, 937 (7th Cir. 2002); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675 (7th Cir. 2001); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299-1300 (7th Cir. 1995); HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973); see also Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971); Epstein, *supra* note 2.

lobbies but rather meaningful class action and civil justice reform that prohibits actions being brought without tangible injury and that enforces the certification standards to protect the due process rights of defendants from such abuses.¹¹² Nibbling away at class-action abuse through cheeseburger bills rather than establishing comprehensive reforms merely shifts the battleground to other industries that may not have sufficient political power to receive legislative protection from the litigation lobby.¹¹³

112. See, e.g. Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. 475 (2003); GREVE, *supra*, note 104.

113. Cf. Walter Olson, *The Lawsuit Lobby*, AMERICAN SPECTATOR (Mar.–Apr. 2003) (documenting political power of plaintiffs' bar).