Tell Me What You Eat, and I Will Tell Whom to Sue: Big Trouble Ahead for “Big Food”?

Richard C. Ausness
University of Kentucky College of Law, rausness@uky.edu

Click here to let us know how access to this document benefits you.

Follow this and additional works at: https://uknowledge.uky.edu/law_facpub

Part of the Torts Commons

Recommended Citation

This Article is brought to you for free and open access by the Law Faculty Publications at UKnowledge. It has been accepted for inclusion in Law Faculty Scholarly Articles by an authorized administrator of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
TELL ME WHAT YOU EAT, AND I WILL TELL YOU WHOM TO SUCE: BIG PROBLEMS AHEAD FOR “BIG FOOD”?

Richard C. Ausness

TABLE OF CONTENTS

I. INTRODUCTION .................................................. 841

II. PELMAN V. MCDONALD’S CORP. ................................. 844

III. LIABILITY THEORIES ............................................ 850
  A. THE DEFECT REQUIREMENT .................................. 851
  B. DEFECTIVE DESIGN ........................................... 852
     1. The Consumer Expectation Test ........................ 852
     2. The Risk-Utility Test ................................... 855
  C. PRODUCT CATEGORY LIABILITY ................................. 858
  D. FAILURE TO WARN ........................................... 859
  E. FAILURE TO DISCLOSE NUTRITIONAL INFORMATION ...... 863
  F. DECEPTIVE ADVERTISING ..................................... 865
  G. NEGLIGENCE MARKETING ...................................... 866

IV. LIMITATIONS ON LIABILITY .................................... 868
  A. CAUSATION .................................................... 869
     1. The Legal Test for Causation ........................... 869
     2. Proof of Causation in Food or Drink Cases .......... 871
  B. DUTY AND PROXIMATE CAUSE ................................ 873
  C. MISUSE ....................................................... 874
  D. SHIFTING RESPONSIBILITY .................................. 876
  E. FEDERAL PREEMPTION ......................................... 877

F. CONTRIBUTORY NEGLIGENCE, COMPARATIVE FAULT, AND ASSUMPTION OF RISK ................. 882

V. POLICY CONSIDERATIONS ....................... 883
   A. COMPARATIVE INSTITUTIONAL ADVANTAGE .......... 884
   B. ECONOMIC CONSEQUENCES .......................... 886
   C. PERSONAL RESPONSIBILITY AND INDIVIDUAL AUTONOMY ........................... 887

VI. RECOMMENDATIONS .............................. 889
   A. JUDICIAL ACTION ................................ 890
   B. LEGISLATION .................................... 891

VII. CONCLUSION ..................................... 893
I. INTRODUCTION

In August 2000, The Onion published a humorous article entitled "Hershey's Ordered to Pay Obese Americans $135 Billion." The article was a parody of the 1998 Master Settlement Agreement between the states and the tobacco industry and accused "Big Chocolate" of engaging in the same marketing practices as "Big Tobacco." The Onion article, however, proved to be remarkably prescient now that trial lawyers have begun to take aim at the food industry. In June 2003, an organization known as the Public Health Advocacy Institute hosted a conference in Boston to "encourage and support litigation against the food industry." The conference was attended by 120 trial lawyers, public health officials, and consumer advocates. Speakers at the conference made it clear that these groups would like to subject "Big Food" to the same treatment that they meted out to "Big Tobacco" in the 1990s.

The first salvo in this campaign against "Big Food" was Barber v. McDonald's Corp., a lawsuit that was brought in July 2002, against McDonald's, Burger King, Wendy's, and KFC, by Caesar Barber, a middle-aged 272-pound man who alleged that the defendants produced and sold foods that were fattening and unhealthy. Barber not only sought compensatory damages and attorneys' fees, but also asked the court to require the defendants to place nutrition labels on individual food items and to pay for educational programs to teach children and adults about the health

---

2 Id.
4 See Genauer, supra note 3 (calling food lawsuits new "pop tort" of the month).
effects of consuming fast food. However, Barber withdrew his lawsuit several months later.

Undaunted by this defeat, Barber's attorney, Samuel Hirsch, soon filed another lawsuit against McDonald's. In this case, *Pelman v. McDonald's Corp.*, a class action, the plaintiffs alleged that eating McDonald's fast food caused them to become obese.

As with the tobacco litigation, trial lawyers expect to lose some of their cases at this early stage in the litigation cycle, but they are confident that they will eventually pressure the food industry into a lucrative settlement. According to John Banzhaf, law professor, social reformer, and self-proclaimed "legal terrorist," "as was the case with tobacco, it takes time for legal theories to coalesce in a way that forces major societal change." Professor Richard Daynard, head of Northeastern University's Tobacco Products Liability Project agrees, declaring, "I think we'll see a progression similar to what we saw with tobacco." Thus, although unsuccessful in *Barber* and *Pelman*, trial lawyers are not discouraged and will no doubt cook up more litigation in the near future.

That is not to say that lawyers and public health advocates have not already had some impact on "Big Food." For example, McDonald's paid $12 million to settle a suit for allegedly failing to inform consumers that it had cooked its french fries in beef fat. In addition, the manufacturers of Big Daddy's Ice Cream and Pirate's Booty, a snack food, paid $8 million for providing inaccurate nutritional information on its product labeling. The threat of litigation has produced results in other cases as well. Thus, concerns about future tort liability caused Kraft to remove trans-fatty acids

---

7 *Id.* at 871.
8 *Id.*
10 Laura Parker, *Legal Experts Predict New Rounds in Food Fight*, USA TODAY, May 7, 2004, at 3A (stating that tobacco lawyers lost cases for decades before they won).
14 Parker, *supra* note 10, at 3A.
15 *Id.*
from its Oreo cookies and assisted John Banzhaf in persuading the Seattle School Board to reconsider its decision to allow its schools to sell Coca-Cola products exclusively in their vending machines. Professor Banzhaf and Michael Jacobson, Executive Director of the Center for Science in the Public Interest, also sent letters to Baskin-Robbins, Ben & Jerry's, Cold Stone Creamery, Häagen-Dazs Shoppes, Inc., TCBY, and Friendly Ice Cream Corp., threatening potential litigation if these ice cream makers did not add healthier alternatives and place nutritional information on their menus.

These efforts are beneficial to the extent that they induce the food industry to produce healthier products or to provide consumers with more information about nutrition and health. However, this Article concludes that anti-obesity litigation is socially and economically undesirable. While something should be done about obesity and obesity-related health problems, lawsuits like Pelman are not the answer.

Part II briefly discusses some of the arguments made in the Pelman case. Part III examines a number of potential liability theories and concludes that plaintiffs are not likely to prevail under design defect, product category liability, or failure to warn theories. Deceptive advertising claims, especially when based on broadly written consumer protection statutes are more viable, as are negligent marketing claims based on the targeting of young children.

Part IV is concerned with potential limitations on liability. Plaintiffs will find that causation requirements are particularly difficult to overcome. Duty and proximate cause may also be troublesome. In addition, defendants will try to characterize the bad eating habits of obese consumers as product misuse. Suppliers of raw materials and ingredients may be able to transfer liability to the seller of the finished product by relying on the doctrine of shifting responsibility. Furthermore, sellers of packaged foods, if properly labeled, are likely to escape liability altogether by invoking

---

16 Id.
the concept of federal preemption. Restaurants and fast-food vendors may also be able to raise federal preemption as a defense. Finally, sellers of food products will seek to reduce their liability by raising conduct-based defenses such as contributory negligence, comparative fault, and assumption of risk.

The policy aspects of anti-obesity litigation are examined in Part V. The first issue is whether public health policy should be determined by means of litigation. This Article contends that legislatures and administrative agencies are institutionally superior to courts when it comes to formulating and implementing health policy initiatives. Another issue is economic impact. Litigation expenses and payment of large damage awards would impose substantial economic costs on the food industry and those who are associated with it. A third concern is that anti-obesity litigation undermines the principle of autonomy and personal responsibility and reinforces the culture of blame that is spreading throughout our society.

Part VI considers what might be done to discourage further anti-obesity litigation in the future. This Article advocates that courts strictly adhere to existing tort doctrines and reject expansive and novel liability theories. Further, this Article examines possible legislative solutions, including several bills that are currently pending in Congress.

II. PELMAN V. MCDONALD'S CORP.

On August 22, 2002, the parents of two minor children filed a class action suit in state court against the McDonald's Corporation, McDonald's of New York, and two New York City fast-food restaurants. The lawsuit was brought on behalf of all minors in the state of New York who had purchased and consumed McDonald's products ("Pelman"). On September 30, 2002, the defendants petitioned to remove the case to federal district court. Shortly

---

20 Id.
21 Id.
thereafter, the defendants moved to dismiss the complaint. After a hearing on January 22, 2003, the court dismissed all five counts for lack of specificity but granted the plaintiffs leave to file an amended complaint.

Count I of the plaintiffs’ original complaint alleged that the defendants had violated sections 349 and 350 of the New York Consumer Protection From Deceptive Acts and Practices Act (“Consumer Protection Act”). Section 349 of that Act prohibits “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state,” while section 350 bans “[f]alse advertising in the conduct of any business.” Although the plaintiffs did not identify any specific acts, practices, or advertisements in their complaint, the court discussed several statements by McDonald’s that the plaintiffs had later claimed were deceptive. The first was an advertising campaign that used the phrases “McChicken Everyday” and “Big N’ Tasty Everyday.” The second was a statement on McDonald’s website that “McDonald’s can be part of any balanced diet and lifestyle.” The court concluded that the exhortation to eat at McDonald’s “everyday” made no specific health claim and, therefore, was “mere puffery.” The court also refused to characterize as deceptive a statement on McDonald’s website that implied moderate consumption of McDonald’s products could be part of a healthy diet and lifestyle.

The plaintiffs also contended that McDonald’s failure to post nutritional information on its product packaging or at points of purchase amounted to a deceptive practice. In the past, some New York courts had held that a business might violate the state’s

---

22 Id.
23 Id. at 543.
24 Id. at 524.
25 N.Y. GEN. BUS. LAW § 349 (McKinney 2004).
26 Id. § 350.
27 Pelman, 237 F. Supp. 2d at 527.
28 Id.
29 Id. at 528. Puffery is an exaggerated statement that makes no specific claims upon which consumers might rely. Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 246 (9th Cir. 1990).
consumer protection statute by failing to provide information to consumers when "the business alone possesses material information that is relevant to the consumer and fails to provide this information." In this case, however, the court concluded that the plaintiffs had failed to allege that McDonald's alone possessed information about the nutritional content of its products or that consumers could not reasonably obtain this information. In fact, the plaintiffs acknowledged that nutritional information was available at McDonald's website. Consequently, the court dismissed Count I of the plaintiffs' complaint.

Count II alleged that some of McDonald's deceptive advertising was targeted at young children. Although the plaintiffs failed to identify any specific example of such advertising in their complaint, the court discussed two promotions that were clearly aimed at minors. The first featured a plastic beef steak figure named "Slugger" who was accompanied by a pamphlet on nutrition that assured children that eating two servings a day from the meat group would help them to "climb higher and ride [their] bikes farther." The court indicated that this statement might have been specific enough to survive a motion to dismiss if it had been set forth in the original complaint; however, the court warned that if the plaintiffs filed an amended complaint, they would have to show that the statement was deceptive and that they suffered injury as a consequence. The second promotion involved "Mightier Kids Meal," a super-sized version of the "Happy Meal." The plaintiffs maintained that the term "Mightier Kids Meal" led children to believe that they would become "mightier" or more grown-up if they consumed larger portions of McDonald's products. The court,

---

32 Pelman, 237 F. Supp. 2d at 529.
33 Id. at 530.
34 Id.
35 Id.
36 Id.
37 Id.
38 Id.
39 Id.
however, rejected this argument, concluding once again that McDonald's claim was mere "puffery."  

Count III argued that McDonald's products were "inherently dangerous" because they contained high levels of cholesterol, fat, salt, and sugar. Although the plaintiffs characterized this as a negligence claim, the court looked to the strict liability scheme of the Restatement (Second) of Torts § 402A for guidance. Relying primarily on comment i, the court concluded that food products that were harmful only when consumed in excessive amounts were not defective or unreasonably dangerous, particularly when the health effects of overconsumption were generally known by consumers.

Count IV asserted that McDonald's had a duty to warn about the potential health risks associated with consuming (or overconsuming) its products and failed to do so. While conceding that this was normally an issue for the jury to decide, the court concluded that the health risks of eating too much fast food were open and obvious to the general population. In addition, because the plaintiffs had not established that McDonald's products significantly contributed to their obesity and health problems, the court concluded that the plaintiffs had failed to show any causal connection between the defendant's failure to warn and their injuries. For these reasons, the court dismissed Count IV.

Finally, in Count V, the plaintiffs charged that McDonald's products contained ingredients that were addictive. The court pointed out that the presence of addictive ingredients in McDonald's products, in contrast to the risk of obesity, was not so "open and obvious" that consumers could be expected to know about it. Thus,

40 Id.
41 Id. at 531.
42 RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965) ("Many products cannot be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption.").
43 Pelman, 237 F. Supp. 2d at 531-33.
44 Id. at 540.
45 Id. at 541.
46 Id. at 541-42.
47 Id. at 542.
48 Id.
49 Id.
if McDonald's products actually contained addictive ingredients, its products might be unreasonably dangerous under the consumer expectation test, and the defendant might have a duty to warn about this characteristic. The court dismissed Count V, however, because the plaintiffs failed to identify any specific ingredient or combination of ingredients in McDonald's products that could be characterized as addictive. The plaintiffs had also failed to explain the general nature of their alleged addiction.

The plaintiffs filed an amended complaint on February 19, 2003, and McDonald's again filed a motion to dismiss. In an unreported opinion ("Pelman II"), the district court granted this motion on September 3, 2003, and refused to allow the plaintiffs to amend their complaint any further. The amended complaint was much narrower than the original complaint and contained three counts, all of which were based on alleged violations of sections 349 and 350 of New York's Consumer Protection Act. Count I contended that McDonald's advertising and publicity campaigns misled the plaintiffs by claiming that its food products were nutritious and could be safely consumed on a daily basis. Count II alleged that McDonald's failed to disclose that processing and artificial ingredients made its products less healthy than represented in its advertising and publicity. Finally, Count III declared that McDonald's engaged in unfair and deceptive acts and practices by falsely stating that it provided nutritional brochures and information in all of its restaurants.

McDonald's contended that all of these claims should be dismissed because the applicable statute of limitations had run for

50 Id. (stating claim of addictive quality of fast food currently under investigation).
51 Id.
52 Id.
54 Id. at *14.
55 Id. at *2. The plaintiffs also alleged that McDonald's negligently failed to warn consumers about the health risks of eating the highly processed foods served at its restaurants. Id. However, the plaintiffs abandoned this common-law claim before oral arguments on the motion to dismiss. Id.
56 Id.
57 Id.
58 Id.
each of the alleged misrepresentations. McDonald's also maintained that the plaintiffs had not alleged that they actually saw any of the alleged misrepresentations. Furthermore, McDonald's declared that plaintiffs had failed to assert that any of these alleged misrepresentations caused any injury to them. Finally, McDonald's argued that the alleged misrepresentations were not deceptive, but were, at most, "nonactionable puffery."

The court agreed that claims by adult plaintiffs were barred by the statute of limitations but concluded that the statute had been tolled during the infancy of the minor plaintiffs and had not run when the lawsuit was first brought. The court also addressed McDonald's claim that the plaintiffs had not seen any of the statements or advertisements described in their amended complaint, concluding that reliance was necessary for a false advertising claim under section 350 of the Consumer Protection Act, but not for a deceptive practices claim under section 349. Consequently, the court ruled that in order to proceed with their § 350 claim, the plaintiffs must plead the substance of the advertisements upon which they allegedly relied. In this case, since the plaintiffs claimed that they would not have consumed so much of McDonald's food had the company not misled them about the nutritional content of its food, the court concluded that the plaintiffs had satisfied the reliance requirement.

However, the court also found that the plaintiffs had failed to show an adequate causal connection between the consumption of McDonald's food and their alleged injuries. In particular, the court observed that the plaintiffs failed to discuss the extent to which other factors may have caused their health problems. Finally, the
court concluded that plaintiffs had not shown that McDonald's advertising was objectively misleading.\textsuperscript{69} The plaintiffs had asserted that McDonald's claim that its french fries and hash brown potatoes were cooked in 100% vegetable oil and were cholesterol-free was misleading.\textsuperscript{70} However, the court concluded that McDonald's had not made such a claim and that its statements regarding vegetable oil and cholesterol were essentially accurate.\textsuperscript{71} Consequently, having determined that the plaintiffs had failed to allege that McDonald's caused the plaintiffs' injuries or that McDonald's representations to the public were deceptive, the court dismissed the plaintiffs' complaint without leave to amend.\textsuperscript{72}

The trial court's decision, however, was reversed on appeal.\textsuperscript{73} The Second Circuit Court of Appeals agreed that the claims based on § 350 of the New York General Business Law should have been dismissed because the plaintiffs failed to allege that they had relied on any particular advertisement or promotional material.\textsuperscript{74} However, the appeals court concluded that proof of actual reliance was not required for claims based on § 349 of the Business Law statute.\textsuperscript{75} Furthermore, the court determined that the limited notice pleading standard of Rule 8(a)\textsuperscript{76} did not require the plaintiffs to provide any specific information to support their claim that the consumption of McDonald's fast food products caused their obesity.\textsuperscript{77} According to the court, such information should be obtained through discovery rather than from the plaintiffs' Rule 8(a) pleadings.\textsuperscript{78}

III. LIABILITY THEORIES

Plaintiffs and their lawyers are likely to rely upon a wide variety of liability theories, including defective design, product category

\textsuperscript{69} Id. at *12.
\textsuperscript{70} Id.
\textsuperscript{71} Id. at *13 (citing text of advertisements cited by plaintiffs that were inaccurately cited).
\textsuperscript{72} Id. at *14.
\textsuperscript{73} Pelman v. McDonald's Corp., 396 F.3d 508, 512 (2d Cir. 2005).
\textsuperscript{74} Id. at 510-11.
\textsuperscript{75} Id. at 511.
\textsuperscript{76} Fed. R. Civ. P. Rule 8(a).
\textsuperscript{77} Pelman, 396 F.3d at 512.
\textsuperscript{78} Id.
liability, failure to warn, failure to provide nutritional information, deceptive advertising, and negligent marketing. However, there are potential problems with claims based on many of these theories, particularly defective design, product category liability, and failure to warn. Deceptive advertising, when based on the violation of a statute, is more promising, as is negligent marketing, insofar as it involves advertising directed at young children.

A. THE DEFECT REQUIREMENT

American products liability law has traditionally limited the imposition of liability to sellers whose products are defective in some way. Thus, section 402A of the Second Restatement of Torts declares that "one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm," and section 1 of the Third Restatement of Torts provides that one "who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect." Courts typically distinguish between manufacturing defects, design defects, and defective warnings. A manufacturing defect is a one-of-a-kind condition that arises because of a flaw in the production process. Design defects occur when every product in a particular production line that conforms to the intended design has the same dangerous character-

79 Michael J. Toke, Note, Categorical Liability for Manifestly Unreasonable Designs: Why the Comment d Caveat Should Be Removed from the Restatement (Third), 81 CORNELL L. REV. 1181, 1205-06 (1996) ("At the center of traditional products liability doctrine is the idea that a product must be defective in some way before its manufacturer will be held legally responsible for injuries resulting from its use.").

80 RESTATEMENT (SECOND) OF TORTS § 402A (1965).


83 Caprara v. Chrysler Corp., 417 N.E.2d 545, 552-53 (N.Y. 1981) (stating that defectively manufactured product results from "some mishap in the manufacturing process itself, improper workmanship, or because defective materials were used in construction").
Finally, a product may be defective if the seller fails to provide adequate warnings or instructions.\(^8^5\)

### B. DEFECTIVE DESIGN

Although we normally associate design defects with mechanical products, it is possible to apply a form of "design defect" analysis to processed foods and possibly to natural food products as well. For example, a plaintiff may argue that products such as milk, cheese, eggs, or red meat are defective because they contain large amounts of fat or cholesterol in their natural states. A plaintiff might also claim that food products such as baked goods, candy, soft drinks, hamburgers, or french fries are defectively designed because they contain large quantities of oil, fat, salt, caffeine, or sugar, while other foods might be considered defectively designed because they contain additives, preservatives, or artificial ingredients. A more persuasive argument can be made that certain products are defectively designed because of the way they are prepared or processed. For example, one might claim that products such as corn chips or potato chips are defective when they are fried instead of baked; likewise, a plaintiff might maintain that a product is defective because a producer uses animal fat instead of vegetable oil in the cooking process. Furthermore, a plaintiff might allege that certain products are defective because they are addictive. Finally, a plaintiff might argue that a product is defective because the serving size or portion is too large for ordinary consumption.

1. **The Consumer Expectation Test.** Over the years, courts have used a variety of tests in design defect cases, the two most important being the consumer expectation test and the risk-utility test.\(^8^6\) According to the consumer expectation test, a product is considered defective if it is more dangerous than an ordinary consumer would

---

\(^8^4\) Thibault v. Sears, Roebuck & Co., 395 A.2d. 843, 846 (N.H. 1978) ("A design defect occurs when the product is manufactured in conformity with the intended design but the design itself poses unreasonable dangers to consumers.").

\(^8^5\) Koonce v. Quaker Safety Prods. & Mfg. Co., 798 F.2d 700, 716 (5th Cir. 1986) ("The absence of adequate warnings or directions may render a product defective and unreasonably dangerous, even if the product has no manufacturing or design defects.").

expect it to be. Two comments to section 402A of the Second Restatement of Torts provide the foundation for this approach. Comments g and i use a consumer expectation test to define the terms “defective condition” and “unreasonably dangerous” respectively. Under the heading “defective condition,” the drafters state that a seller would be subject to strict liability “only where the product is, at the time it leaves the seller’s hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.” In their discussion of “unreasonably dangerous,” the drafters declare that “[t]he article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

It seems clear that foods that are potentially unhealthy in their natural states are not considered defective under the consumer expectation test as long as the general public is aware of these characteristics. In comment i, the drafters acknowledge that the consumption of certain products necessarily involves some risk of harm. For example, sugar can be extremely harmful to diabetics. However, as long as such products are not contaminated or adulterated with foreign substances, they will not be regarded as unreasonably dangerous. Thus, “good” whiskey is not unreasonably dangerous although it can make people drunk and cause some consumers to become alcoholics; “good” tobacco is not unreasonably dangerous although smoking might cause health problems; and “good” butter is not unreasonably dangerous although it deposits cholesterol in the arteries and increases the risk of heart attacks. It should be noted that these examples include products, such as cigarettes and butter, that pose health risks even when consumed in moderation, as well as products, like whiskey, that are regarded as unhealthy only when consumed in excess.

88 RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1965).
89 Id. § 402A cmt. i.
90 Id.
91 Id.
92 Id.
93 Id.
Foods that contain large amounts of salt, fat, oil, or sugar as a result of preparation or processing might be defective under the consumer expectation test if the public is not generally aware that these ingredients are present. The plaintiffs in *Pelman* made such an argument, but the court concluded that McDonald's fast food was not defective or unreasonably dangerous since consumers knew that such products often contained high amounts of fat, salt, and sugar.\(^9\)

On the other hand, a food product might be considered defective under the consumer expectation test if the producer adds artificial ingredients to it, particularly if processing results in a product that is more dangerous than the generic version. Thus, the plaintiffs in *Pelman* argued that some of McDonald's products were defective because they were processed in such a way as to make them unhealthier than more commonplace versions.\(^9\) The court seemed to agree, describing Chicken McNuggets as "a McFrankenstein creation of various elements not utilized by the home cook."\(^9\) The same was true of some of the ingredients that McDonald's added to its french fries.\(^9\) The plaintiffs, however, failed to follow up on this theory in their amended complaint.

In theory, a plaintiff can argue that a product is defective because it is cooked or prepared in a particular way when a safer or healthier alternative method is available. Once again, however, this argument fails under the consumer expectation test if the consumer is able to determine the method of cooking or preparation by casual inspection. Although the average consumer is not particularly well informed about basic nutrition, he or she presumably realizes that fried foods are generally less healthy than baked foods. The same reasoning applies to a claim that french fries or hash brown potatoes are defectively designed because they contain more fat and calories than plain baked potatoes. An interesting issue is whether plaintiffs might successfully argue that foods fried in animal fats, such as lard, are defectively designed because they contain high

---


\(^9\) *Id.* at 534.

\(^9\) *Id.* at 535.

\(^9\) *Id.*
amounts of cholesterol and saturated fats, while foods fried in vegetable oil have lower amounts of these substances.

Plaintiffs might also contend that a food item is defective because it contains addictive ingredients. However, the fact that a product ingredient is potentially addictive does not necessarily make it defective under the consumer expectation test. Alcohol is obviously addictive and yet beer, wine, liquor, and other alcoholic beverages are not considered defective because the addictive character of alcohol is a matter of common knowledge.\textsuperscript{98} In Pelman, the plaintiffs claimed that certain McDonald's fast-food products were addictive.\textsuperscript{99} While the court suggested that an addiction claim might be valid under some circumstances, it ruled that the plaintiffs' claim was too vague to withstand a motion to dismiss.\textsuperscript{100} As the court pointed out, the plaintiffs failed to identify any specific ingredient or combination of ingredients that might be addictive.\textsuperscript{101}

The last design defect argument involves packaging and serving sizes. Here again, the consumer expectation test is not likely to result in liability. Consumers can easily determine how large packaged food portions are because the product is either sold by weight, or the weight is clearly marked on the package labeling. Restaurant patrons can also tell when a serving portion is larger than normal, particularly when they can choose between a normal serving size and a higher-priced, “super-sized” portion.

2. The Risk-Utility Test. The risk-utility test is only slightly more promising for plaintiffs. This test originally merely enumerated various “factors” for courts or juries to take into consideration in determining whether a product was defective.\textsuperscript{102} In its more sophisticated form, however, the risk-utility test compares the risks and benefits of the product as designed with a safer alternative design proposed by the plaintiff.\textsuperscript{103} For example, the Third Restate-
ment section 2(b) declares that a product is defective in design "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller . . . and the omission of the alternative design renders the product not reasonably safe."^{104}

The risk-utility test's requirement of a safer alternative design would seemingly preclude design defect claims against producers of food and other products that are unhealthy in their natural states. In such cases there is no safer alternative design that would qualify as an exact substitute for the product involved. For example, it is absurd to argue that a hamburger made from ground beef is defective because one could make something from tofu that would contain less fat and fewer calories.^{105} A tofuburger is simply not a hamburger! This appears to be the Third Restatement's position. Comment d to section 2 of the Third Restatement states that "[c]ommon and widely distributed products such as alcoholic beverages, firearms, and above-ground swimming pools may be found to be defective only upon proof of the requisite conditions in subsection (a), (b), or (c)."^{106} In addition, comment d declares that "[a]bsent proof of defect under those Sections, however, courts have not imposed liability for categories of products that are generally available and widely used or consumed, even if they pose substantial risks of harm."^{107}

A plaintiff might do better by arguing that less salt, sugar, fat, or oil could be used in some processed foods or that healthier or less caloric substitutes are available. Likewise, in the case of additives or artificial ingredients, a plaintiff might satisfy the Restatement's

---

^{104} RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998).
^{105} In such a case, however, a plaintiff might propose a hamburger made from ground round with a fat content of ten percent as a safer alternative design to one made from ordinary ground beef with a fat content of twenty-five percent. In other words, a hamburger made from ground round is a safer or healthier hamburger than one made from ordinary ground beef.
^{107} Id.
safer alternative design requirement by alleging that the producer could have used a substitute for the ingredient in question or could have left it out altogether. For example, most canned soups and frozen dinners contain substantial amounts of salt, and many cereals contain large quantities of sugar. Since some brands of soups, frozen dinners, and cereals do not contain as much salt or sugar as standard varieties, it is obviously feasible to produce healthier versions of these products. Under the risk-utility test, once plaintiffs establish that additives are not necessary or that healthier alternatives are available, sellers will have to show that existing products are substantially cheaper or better tasting than more expensive, but healthier, alternatives. It will then be up to the jury to decide whether the benefits of the healthier version of the food product outweigh its added expense or less palatable taste.

Plaintiffs might also contend that a seller's choice of mode of cooking, such as frying, is defective if a healthier alternative, such as baking, is feasible. Sellers, however, would no doubt respond by arguing that fried food products are a distinct category and that baked food products are not legitimate substitutes even if they are healthier. Thus, baked chicken is not a substitute for fried chicken, and baked potatoes are not substitutes for french fries. Plaintiffs might find the Third Restatement's safer alternative design approach more useful if their design defect claim involves the seller's choice of cooking medium, such as lard instead of vegetable oil. Plaintiffs could plausibly argue that fried chicken or french fries are defectively designed when cooked in materials that contain large amounts of cholesterol and saturated fat when healthier vegetable oils could be used instead.

Finally, plaintiffs might claim that certain food products are defectively designed under the risk-utility test because the products are addictive, either in their natural states or because of the way they are processed. If plaintiffs expect to base their design defect claims on substance addiction, however, they will have to demonstrate that the seller could have substituted ingredients that were nonaddictive or less addictive and chose not to do so.

108 This argument is analogous to saying that a plaintiff cannot prove that a convertible is defectively designed by offering a sedan as a safer alternative design.
C. PRODUCT CATEGORY LIABILITY

From a plaintiff's perspective, product category liability is a more promising approach than the design defect theories discussed above. Product category liability allows a court to conclude that an entire product category, such as cigarettes or handguns, is defective if its inherent risks outweigh its apparent benefits.\textsuperscript{109}

During the past two decades, plaintiffs have urged courts to adopt the theory of product category liability on numerous occasions, almost entirely without success.\textsuperscript{110} In those few instances where courts have accepted product category liability, state legislatures promptly overruled those decisions.\textsuperscript{111} Academic commentators have also been critical of this concept.\textsuperscript{112} For example, they point out that it is virtually impossible to calculate aggregate risks and benefits for such products as cigarettes, firearms, and alcoholic beverages.\textsuperscript{113} Furthermore, they have also questioned whether courts are institutionally competent to make decisions that may have profound social and economic effects.\textsuperscript{114} The Third Restatement has rejected product category liability as well. In their comments to section 2, the Reporters declare that products such as alcoholic beverages,
firearms, and above-ground swimming pools can only be found defective if they satisfy the requirements of section 2.\textsuperscript{115}

The plaintiffs in \textit{Pelman} may have had product category liability in mind when they alleged that McDonald's manufactured and sold "inherently dangerous" products.\textsuperscript{116} Although the court described this as a negligence claim, the plaintiffs seemed to suggest that fast-food products containing high levels of cholesterol, fat, salt, and sugar were defective because the health risks of such products outweighed their benefits.\textsuperscript{117} In any event, the court agreed with McDonald’s contention that the presence of such unhealthy ingredients in McDonald’s products would not make those products defective if consumers were aware of the risks associated with them.\textsuperscript{118} The result in \textit{Pelman} suggests that product category liability will not be helpful to plaintiffs in anti-obesity cases.

D. FAILURE TO WARN

Plaintiffs might argue that sellers of food products have a duty to warn about the health risks of overconsumption. Manufacturers normally have a duty to provide adequate warnings and instructions to foreseeable users or consumers of their products.\textsuperscript{119} Thus, the Third Restatement provides that a product will be treated as defective if "the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller . . . and the omission of the instructions or warnings renders the product not reasonably safe."\textsuperscript{120}

However, product sellers ordinarily have no duty to warn consumers about risks that are obvious or commonly known.\textsuperscript{121} The

\textsuperscript{115} \textsc{Restatement (Third) of Torts: Products Liability} § 2 cmt. d (1998).


\textsuperscript{117} Id.

\textsuperscript{118} Id.


\textsuperscript{120} \textsc{Restatement (Third) of Torts: Products Liability} § 2(c) (1998).

\textsuperscript{121} David G. Owen et al., \textit{1 Madden & Owen on Products Liability} § 10:1 (3d ed. 2000); \textit{see also} Am. Tobacco Co. v. Grinnell, 951 S.W.2d 420, 428 (Tex. 1997) (declaring that health risks of smoking were well known).
Restatement (Second) of Torts section 402A comment j declares that a seller is not required to warn when the product, or one of its ingredients, is potentially harmful only "when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized." Comment j goes on to say that the health risks of excessive consumption are well known, as are "those of foods containing such substances as saturated fats, which may over a period of time have a deleterious effect upon the human heart." A comment to the Third Restatement declares that "[t]he rule that no duty is owed to warn of obvious and generally known dangers is supported by an overwhelming majority of jurisdictions." This principle is illustrated by a number of cases involving failure-to-warn claims brought against brewers and distillers. For example, the plaintiffs in Garrison v. Heublein, Inc., who had consumed vodka for twenty years, argued that the defendant had a duty to warn that "consumption of its products may be hazardous to the consumer's health and physical and economic well-being." The trial court's dismissal of this claim was upheld on appeal. Relying on comment j, the federal appeals court concluded that the dangers of alcoholism were sufficiently well known that no warning was necessary. In Pemberton v. Am. Distilled Spirits Co., the Tennessee Supreme Court also invoked comment j to support its conclusion that a seller of grain alcohol did not have a duty to warn about the danger of acute alcohol poisoning. Maguire v. Pabst Brewing Co. involved a claim by the driver of an automobile that was struck by another vehicle driven by an intoxicated driver. The plaintiff contended that the defendant's beer was unreasonably dangerous because it did not contain any warnings about the dangers of intoxication. Once again, this claim was rejected on

122 Restatement (Second) of Torts § 402A cmt. j (1965).
123 Id.
125 673 F.2d 189, 190 (7th Cir. 1982).
126 Id. at 192.
127 Id. at 191-92.
128 664 S.W.2d 690, 692-94 (Tenn. 1984).
129 387 N.W.2d 565, 566 (Iowa 1986).
130 Id. at 569.
the basis of comment j when the court concluded that most beer
drinkers knew about the consequences of intoxication.\textsuperscript{131} The
plaintiff in \textit{Morris v. Adolph Coors Co.} was also injured by an
inebriated driver.\textsuperscript{132} As in \textit{Maguire}, the plaintiff in \textit{Morris} argued
that the defendant had an obligation to warn beer drinkers about
the dangers of intoxication and drunk driving.\textsuperscript{133} Once again, the
court concluded that comment j relieved manufacturers of alcoholic
beverages of the duty to warn about the risk of intoxication.\textsuperscript{134}
Finally, in \textit{Joseph E. Seagram \\& Sons, Inc. v. McGuire}, the Texas
Supreme Court held that the risk of alcoholism from prolonged and
excessive consumption of alcoholic beverages was a matter of
common knowledge.\textsuperscript{135}

This "obvious risk" exception to the duty to warn is likely to
undercut any claim based on a seller's failure to disclose the link
between obesity and the consumption of certain food products. For
example, in \textit{Pelman} the plaintiffs asserted that McDonald's had a
duty to warn about the potential health risks associated with
consuming (or overconsuming) its fast-food products and failed to do
so.\textsuperscript{136} Quoting from \textit{Liriano v. Hobart Corp.},\textsuperscript{137} the court declared
that under New York law, manufacturers had a duty to warn about
latent dangers arising from foreseeable uses of its products about
which they knew or should have known.\textsuperscript{138} At the same time, the
court observed that New York law did not require manufacturers to
warn consumers about "open and obvious" dangers.\textsuperscript{139} While
conceding that this was normally an issue for the jury to decide, the
court concluded in this case that the health risks of eating too much
fast food were open and obvious to the general population.\textsuperscript{140} In
addition, because the plaintiffs had not established that McDonald's

\begin{itemize}
  \item \textsuperscript{131} \textit{Id.} at 570.
  \item \textsuperscript{132} 735 S.W.2d 578, 581 (Tex. Ct. App. 1987).
  \item \textsuperscript{133} \textit{Id.}
  \item \textsuperscript{134} \textit{Id.} at 583.
  \item \textsuperscript{135} 814 S.W.2d 385, 388 (Tex. 1991). \textit{But see} \textit{Brune v. Brown Forman Corp.}, 758 S.W.2d
827, 831 (Tex. Ct. App. 1988) (holding that risk of death from acute alcohol poisoning might
not be matter of common knowledge).
  \item \textsuperscript{136} \textit{Pelman v. McDonald's Corp.}, 237 F. Supp. 2d 512, 540 (S.D.N.Y. 2003).
  \item \textsuperscript{137} 700 N.E.2d 303, 303 (N.Y. 1998).
  \item \textsuperscript{138} \textit{Pelman}, 237 F. Supp. 2d at 540.
  \item \textsuperscript{139} \textit{Id.} at 541.
  \item \textsuperscript{140} \textit{Id.}
products significantly contributed to their obesity and health problems, the court also ruled that they had failed to show any causal connection between the defendant's failure to warn and their injuries. Consequently, the court dismissed the plaintiffs' failure to warn claim.

A potentially stronger failure to warn claim involves the risk of addiction. While most consumers know that eating fast food may contribute to weight gain and obesity, few consumers are aware of the possibility that certain food items might contain addictive ingredients. The plaintiffs in *Pelman* alleged that McDonald's products contained ingredients that could be addictive, but did not clearly indicate whether they sought to impose liability upon McDonald's for selling "inherently dangerous" products, or whether their liability claim was based on McDonald's failure to warn that their products were addictive. However, the court pointed out that the presence of addictive ingredients in McDonald's products, in contrast to the risk of obesity, was not so "open and obvious" that consumers would know about it. Thus, the court suggested that the defendant might have a duty to warn about addiction if McDonald's products actually contained addictive ingredients.

In *Pelman*, however, the court rejected the plaintiffs' failure-to-warn claim because it failed to meet even minimal cause-in-fact requirements. In order to survive a motion to dismiss, the plaintiffs would have had to allege that they were in fact addicted to McDonald's products and have described the characteristics of this addiction. Furthermore, the court concluded that the plaintiffs must also have shown how they and others became addicted. Finally, the plaintiffs would have had to establish a causal link between their addiction to fast food and their alleged health problems.

---

141 *Id.* at 541-42.
142 *Id.* at 542.
143 *Id.*
144 *Id.*
145 *Id.*
146 *Id.*
147 *Id.*
148 *Id.*
149 *Id.* at 542-43.
The experience in Pelman suggests that an addiction-based failure-to-warn claim may be more successful than one that is based on a seller's failure to warn about the general health risks of obesity or poor nutrition. However, even when a plaintiff alleges that the purveyor of fast food or highly processed food failed to warn about the addictive nature of its product, that plaintiff cannot merely speculate about the possibility of addiction. Rather, he or she must be able to make an addiction claim with great specificity and back it up with credible scientific evidence.

E. FAILURE TO DISCLOSE NUTRITIONAL INFORMATION

Plaintiffs may also claim that sellers have a duty to disclose nutritional information about their products. This claim is distinct from failure to warn since it is not based on a duty to inform consumers about a specific product-related risk, but rather involves a duty to disclose more general information. In the case of packaged foods, the duty to disclose nutritional information is statutory in nature. The Federal Nutritional Labeling and Education Act requires sellers of packaged foods to place nutritional information on their product labels. At the same time, however, the Act declares that its labeling requirements do not apply to food served in restaurants or other establishments where food is served for immediate consumption.

In Pelman, the plaintiffs contended that McDonald's failure to post nutritional information on its products and at points of purchase violated the New York Consumer Protection Act. The court looked to Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank for guidance. In that case, the New York Court of Appeals concluded that the defendant bank had violated the Consumer Protection Act when it failed to inform depositors that

---

151 Id. § 343(q).
152 Id. § 343(q)(5)(A)(i).
for-profit entities would not receive interest on accounts that exceeded $100,000.\textsuperscript{155} The court in Oswego stated that the statute did not ordinarily require businesses to determine consumers' individual needs or to provide information in response to those needs; however, it determined that a duty to provide such information may arise "where the business alone possesses material information that is relevant to the consumer."\textsuperscript{156} The Pelman court, however, concluded that the plaintiffs had failed to satisfy the requirements of Oswego because they had not alleged that McDonald's alone possessed information about the nutritional content of its products or that consumers could not reasonably obtain this information.\textsuperscript{157} In fact, elsewhere in the opinion, the court observed that nutritional information was available on McDonald's website.\textsuperscript{158}

A claim based on failure to disclose nutritional information would probably be successful if such disclosure were required by a state statute or by the Federal Nutritional Labeling and Education Act. Courts normally treat noncompliance with statutory or administrative regulatory requirements as negligence per se.\textsuperscript{159} A failure to disclose claim, however, would be more problematic in the absence of such a statutory mandate. Products liability law requires a seller to warn about a product's inherent risks and to provide instructions for safe use, but it does not seem to impose a separate duty to disclose any other information about the product. Therefore, in the absence of a statutory duty to disclose, plaintiffs will have to argue that failure to disclose nutritional information, at least in the case of products that are high in fat, salt, sugar, alcohol, or other harmful ingredients, is either tantamount to failing to warn consumers about the health risks of such products or that it is part of a larger scheme to misrepresent the nature of these risks.

\textsuperscript{155} \textit{Id.} at 743-44.
\textsuperscript{156} \textit{Id.} at 745.
\textsuperscript{157} \textit{Pelman}, 237 F. Supp. 2d at 529.
\textsuperscript{158} \textit{Id.} at 530.
F. DECEPTIVE ADVERTISING

A deceptive advertising claim may be based on a statute, or it may be based on common-law principles of fraud or misrepresentation. A product seller whose statements or advertisements violate a deceptive advertising statute is potentially liable under the doctrine of negligence per se. Even in the absence of a statute, however, plaintiffs may seek damages on the basis of common-law fraud or misrepresentation. In *Pelman*, the plaintiffs based their deceptive advertising claim on an alleged violation of the New York Consumer Protection Act. The plaintiffs charged McDonald’s with both deceptive acts and omissions. The plaintiffs pointed to an advertising campaign that used the phrases “McChicken Everyday” and “Big N’ Tasty Everyday.” The court concluded, however, that the invitation to eat at McDonald’s “everyday” made no specific health claim and, therefore, was “mere puffery.” The plaintiffs also alleged that an assurance on the defendant’s web site that “McDonald’s can be part of any balanced diet and lifestyle” was deceptive. According to the plaintiffs, this statement implied that moderate consumption of McDonald’s products was consistent with

---

160 See generally DAVID G. OWEN ET AL., supra note 121, § 3:2-3:5 (discussing bases for claims).
161 N.Y. GEN. BUS. LAW §§ 349-350 (McKinney 2004). Section 349 prohibits “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state,” while section 350 bans “[a]lso advertising in the conduct of any business.” To recover under this statute, the plaintiff must prove that: (1) the act, practice, or advertisement was directed at consumers; (2) the act, practice, or advertisement was misleading in some material respect; and (3) the act, practice, or advertisement caused injury to the plaintiff. However, unlike a common-law fraud claim, a claim under the New York statute does not require the plaintiff to establish either reliance or scienter. Blue Cross & Blue Shield, Inc. v. Philip Morris, Inc., 178 F. Supp. 2d 198, 231 (E.D.N.Y. 2001) (upholding jury verdict under N.Y. GEN. BUS. LAW § 349); rev’d in part on other grounds by 344 F.3d 211 (2d Cir. 2003); rev’d and remanded on other grounds sub nom Empire Healthchoice, Inc. v. Philip Morris USA, Inc., 2004 U.S. App. LEXIS 26883 (2d Cir. Dec. 22, 2004). Furthermore, a deceptive practices claim under the Consumer Protection Act may be based on omissions as well as affirmative acts. Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank, 647 N.E.2d 741, 745 (N.Y. 1995) (including representations and omissions equally as deceptive acts under § 349).
162 *Pelman*, 237 F. Supp. 2d at 527.
163 Id.
164 Id. at 528.
165 Id. at 527.
a healthy diet and lifestyle. However, the court concluded that the statement was not deceptive. In order to satisfy the statutory standard for deception, McDonald's would have had to claim that eating their products every day was consistent with good nutrition.\textsuperscript{166} The \textit{Pelman} court would need to read the advertisements and the web site statement together in pari materia to find that McDonald's had made such a claim, but the court was not willing to do so.\textsuperscript{167}

The court did cite several advertisements made by McDonald's in the 1980s, but currently barred by the statute of limitations, as examples of the sort of statements that might qualify as deceptive. For example, the court described one advertisement in which McDonald's asserted that "[o]ur sodium is down across the menu" when the amount of sodium remained unchanged in its regular french fries, regular cheeseburgers, Chicken McNuggets, and vanilla milkshakes.\textsuperscript{168} In another advertisement mentioned by the court, McDonald's claimed that its milkshakes contained "[w]holesome milk, natural sweeteners, a fluid ounce of flavoring, and stabilizers for consistency. And that's all."\textsuperscript{169} In fact, McDonald's milkshakes contained other ingredients such as artificial flavor and two chemical preservatives, sodium benzoate and sodium hexametaphosphate.\textsuperscript{170} Finally, the court described a third advertisement, which extolled the relatively low cholesterol content of McDonald's hamburgers, but failed to mention that the hamburgers contained saturated fat, an ingredient that also contributes to the risk of heart disease.\textsuperscript{171}

G. NEGLIGENT MARKETING

The concept of negligent marketing assumes that product sellers should not engage in marketing strategies that increase the risk that their products will be purchased by persons who are more likely

\begin{footnotes}
\item[166] Id. at 528.
\item[167] Id. at 527-28.
\item[168] Id.
\item[169] Id. at 529.
\item[170] Id.
\item[171] Id.
\end{footnotes}
than ordinary consumers to injure themselves or others.\textsuperscript{172} One form of negligent marketing involved the targeting of unsuitable consumers. Antismoking advocates, for example, contend that a considerable amount of cigarette advertising is deliberately calculated to encourage teenagers to smoke.\textsuperscript{173} Handgun manufacturers have been accused of directing their advertising at unsuitable persons. In \textit{Merrill v. Navegar}, for example, the plaintiffs claimed that a manufacturer of semi-automatic firearms advertised its products in magazines such as \textit{Soldier of Fortune}, \textit{SWAT}, \textit{Combat Handguns}, \textit{Guns}, \textit{Firepower}, and \textit{Heavy Metal Weapons}, which were widely read by militarists and survivalists, and called attention to certain features that made its products particularly suitable for criminal use.\textsuperscript{174}

The plaintiffs in \textit{Pelman} seem to have made a similar claim of negligent marketing when they alleged that some of McDonald's advertising was targeted at young children.\textsuperscript{175} The first advertisement featured a plastic beef steak figure named “Slugger” who was accompanied by a pamphlet on nutrition that assured children that eating two servings a day from the meat group would help them to “climb high and ride [their] bikes farther.”\textsuperscript{176} The court indicated that this statement, had it been set forth in the complaint, might have been specific enough to survive a motion to dismiss, but that the plaintiffs, in order to recover, would also have to show that the statement was deceptive and that they had been injured as a consequence.\textsuperscript{177} In other words, targeting children was not, on its own, a basis for liability.

The second promotion involved the “Mightier Kids Meal,” a super-sized version of the “Happy Meal.”\textsuperscript{178} The plaintiffs main-


\textsuperscript{173} See Frank J. Vandall, \textit{Reallocating the Costs of Smoking: The Application of Absolute Liability to Cigarette Manufacturers}, 52 OHIO ST. L.J. 405, 420 (1991) (claiming considerable amount of cigarette company advertising is directed at teenage and preteenage market).

\textsuperscript{174} 89 Cal. Rptr. 146, 156-57 (Ct. App. 1999), \textit{rev'd}, 28 P.3d 116 (Cal. 2001).

\textsuperscript{175} \textit{Pelman}, 237 F. Supp. 2d at 530.

\textsuperscript{176} Id.

\textsuperscript{177} Id.

\textsuperscript{178} Id.
tained that this appellation led children to think that they would become "mightier" or more grown-up if they consumed larger portions of McDonald's products. The court, however, rejected this argument, concluding that any such claim by McDonald's was nothing more than "puffery."

Despite the Pelman court's negative reaction, the prospect of a negligent marketing claim based on targeting children looks promising primarily because the targeting claims that were made in recent tobacco litigation provide a template for plaintiffs in unhealthy food cases. It appears that some fast-food companies have used many of the same marketing techniques as the tobacco companies employed prior to the 1998 Master Settlement Agreement. In both cases, the groups targeted were children and teenagers who were likely to exercise poor judgment. To be sure, the charge against the tobacco companies was more serious because they were accused of encouraging conduct that was prohibited by law. Nevertheless, encouraging children to engage in risky conduct by means of sophisticated marketing techniques, if proven, is not likely to meet with judicial approval.

IV. LIMITATIONS ON LIABILITY

Even if the courts recognize one or more of the liability theories discussed above, plaintiffs must overcome a formidable array of legal doctrines that affect liability. These include causation, duty and proximate cause, misuse, shifting responsibility, and federal

---

179 Id.
180 Id.
182 See John Alan Cohan, Obesity, Public Policy, and Tort Claims Against Fast-Food Companies, 12 WIDENER L.J. 103, 112 (2003) (noting that teenagers are "notoriously capricious in their reasoning skills" and "much more likely to be motivated by mere emotion or peer pressure than are adults").
183 Most states have laws that prohibit the purchase or smoking of cigarettes by those below a certain age. Gregory R. Veal, Note, The Model Drug Paraphanalia Act: Can We Outlaw Headshops—and Should We?, 16 GA. L. REV. 137, 165 (1981). Cigarette advertisements that target underage consumers are encouraging them to commit a criminal act.
preemption, as well as conduct-based defenses such as contributory negligence, comparative fault, and assumption of risk.

A. CAUSATION

1. The Legal Test for Causation. The "sine qua non" or "but for" test is the prevailing test for determining cause in fact. Under this approach, the plaintiff must prove that he or she would not have been injured if the act in question had not occurred. Some states use the "substantial factor" test instead of the traditional "but for" test. Under the substantial factor approach, the defendant's act is treated as a cause in fact of the plaintiff's injury, even though the injury would have occurred anyway, if the jury determines that the act was a substantial factor in causing the injury. This test is properly used in cases where two actions occur and either one is sufficient alone to cause the injury. Some states, however, employ the substantial factor test as an alternative to the "but for" test,
even though only one causal factor is involved, while other states allow either test to be used.

Proof of causation can be particularly difficult when multiple potential causes are involved. When each actor is independently liable, the issue is treated as one of apportionment of damages. However, a more difficult causation problem arises when some, but not all, of the actors may have caused the plaintiff's injury. Under the traditional rules, the plaintiff must prove that a specific defendant caused his or her injury. Thus, a plaintiff who is injured by a generic product that is made by several manufacturers must identify the actual maker in order to recover. Some courts, however, have adopted causation rules that relax the plaintiff's traditional proof requirements with regard to causation. One example of this trend is "enterprise liability," a doctrine that permits a plaintiff to sue an industry trade association, as well as its individual members. The rationale for enterprise liability is that the trade association owes a duty to promulgate adequate safety standards when individual companies within the association delegate this power to it. The concept of market share liability also enables plaintiffs to overcome proof problems. When a plaintiff is injured by a generic product and the actual manufacturer cannot be identified, the theory of market share liability allows the plaintiff to

189 See, e.g., Morales v. Am. Honda Motor Co., 151 F.3d 500, 507 (6th Cir. 1998) (upholding product liability verdict where jury could have found defendant's product substantially contributed to plaintiff's motorcycle accident); Parks v. AlliedSignal, Inc., 113 F.3d 1327, 1332-33 (3d Cir. 1997) (remanding for new trial to include jury instruction that plaintiff could recover, though contributorily negligent, if defendant's product was substantial factor in causing harm); Rutherford v. Owens-Ill., Inc., 941 P.2d 1203, 1223 (Cal. 1997) (reinstating jury verdict where defendant asbestos manufacturer's product could be found to be substantial factor in plaintiff's illness).


recover a pro rata amount from each of the companies that manufactures the product based on its share of the overall market.\textsuperscript{193}

Regardless of which test is used, plaintiffs will often be required to rely on expert testimony to satisfy the causation requirement. Such expert testimony, however, must meet the applicable evidentiary admissibility standards. The prevailing standard for admissibility was developed by the United States Supreme Court in the 1990s, beginning with \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc.}\textsuperscript{194} According to \textit{Daubert}, the trial judge should exercise a "gatekeeper" function by assessing the reliability of proffered expert testimony, taking into account such factors as the testability of the expert's theory or technique; peer review and publication of the expert's theory or technique; the rate of error of the technique; and the general acceptance of the theory or technique within the relevant scientific community.\textsuperscript{195} \textit{Daubert}'s rigorous admissibility requirements may be difficult for some plaintiffs to meet.

2. \textit{Proof of Causation in Food or Drink Cases.} Each type of claim in a food or drink case involves its own particular causation issues. One type of claim alleges that some substance used in the production or processing of the product causes cancer or some other disease. For example, some claimants have charged that french fries at certain fast-food restaurants contain acrylamide, a chemical byproduct that allegedly causes cancer.\textsuperscript{196} To recover in such a case, a plaintiff would have to prove that he or she has been diagnosed with cancer, that he or she consumed french fries at the defendant's restaurant, that the french fries in question contained acrylamide, that acrylamide is a carcinogen, that the amount of acrylamide consumed and the manner of consumption was sufficient to cause the plaintiff's cancer, and that the plaintiff's cancer was not due to other causes.


\textsuperscript{195} 509 U.S. at 593-94.

\textsuperscript{196} Cohan, supra note 182, at 110.
Another claim is that the product, or one of its ingredients, is addictive. It has been suggested that consuming foods that are high in fat or sugar can stimulate the brain's natural opioids and produce effects similar to, though less intense than, those produced by heroin or cocaine. Any plaintiff, however, who makes such a claim will have to provide expert testimony backed by scientific evidence that satisfies the Daubert standard. Likewise, a plaintiff who alleges that the defendant's product caused a specific health problem will have to show a causal connection between consumption of the product and that health condition. Moreover, in a jurisdiction that follows the "but for" test, the plaintiff will have to prove that the health condition would not have occurred otherwise. This presents particular difficulties for a plaintiff whose health problems are due to obesity, since other factors such as lifestyle or heredity may cause obesity regardless of the plaintiff's eating habits.

In such cases, even the more relaxed substantial factor test might pose difficulties for plaintiffs, as Pelman illustrates. In Pelman, the court declared that the plaintiffs would have to show that the consumption of McDonald's products was a "substantial cause" of their health problems. To determine whether the consumption of McDonald's products was a substantial cause of the plaintiffs' injuries, the court would have to consider a number of factors, including "the aggregate number of actors involved which contribute towards the harm and the effect which each has in producing it" as well as "whether the situation was acted upon by other forces for which the defendant [was] not responsible." The Pelman court concluded that "no reasonable person could find probable cause based on the facts in the Complaint without resorting to 'wild speculation.'" Claims based on misrepresentation, targeting, or failure to warn may also raise causation issues. In most states, a plaintiff who

197 Rogers, supra note 6, at 877.
199 Pelman, 237 F. Supp. 2d at 537-38.
200 Id. at 538.
201 Id. (citing Price v. Hampson, 530 N.Y.S.2d 392, 394 (App. Div. 1988)).
alleges misrepresentation must establish reliance.\(^{202}\) Thus, one who claims that a producer who made false claims about the nutritional value of its product must also prove that he or she would not have purchased or consumed the product if the false claim had not been made. The same would be true of a negligent marketing claim based on targeting. A plaintiff who alleges that the defendant directed its marketing at a vulnerable group must show that he or she would not have otherwise bought or consumed the product. Generally, causation is less of a problem for plaintiffs in failure-to-warn cases. In theory, one who brings a failure-to-warn claim must also prove that he or she would have heeded the warning and, thus, avoided injury if an adequate warning had been given. However, many courts provide that the plaintiff is entitled to a rebuttable presumption that he or she would have heeded such a warning.\(^{203}\)

B. DUTY AND PROXIMATE CAUSE

Food sellers are likely to contend that they owe no duty to prevent plaintiffs from overeating. There is some precedent for such a “no duty” argument. For example, defendants in “social host” cases have often successfully maintained that they have no duty to determine whether adult guests are sober enough to drive.\(^{204}\) In a number of cases, courts have employed similar reasoning to relieve handgun manufacturers from liability for injuries to third parties.\(^{205}\)


\(^{205}\) McCarthy v. Olin Corp., 119 F.3d 148, 156-57 (2d Cir. 1997) (refusing to hold manufacturer of hollow-point bullets liable for injuries due to criminal use of nondefective product); Leslie v. United States, 986 F. Supp. 900, 912-13 (D.N.J. 1997) (preventing recovery from manufacturer of hollow-point bullets used in homicide); Resteiner v. Sturm, Ruger &
Similarly, sellers of food and drink might claim that as long as their products are unadulterated and properly labeled, they owe no additional duty to adult consumers and cannot be held responsible for the poor lifestyle choices some consumers make. This sort of duty analysis is attractive to courts when they believe that policy concerns militate against holding the defendant liable. Because duty is not a jury issue, the court can hold in the defendant’s favor on duty grounds and keep the case away from a jury.

Defendants might also make a proximate cause argument by suggesting that a customer’s decision to overeat is a superseding cause sufficient to relieve them of liability for any resulting obesity. Ordinarily, proximate cause rests on foreseeability: An unforeseeable intervening cause breaks the chain of causation, but a foreseeable intervening cause does not. However, sometimes a court will conclude that a deliberate act by a mentally competent adult is a superseding cause even though it is not particularly unforeseeable. In the past, for example, courts have sometimes treated suicide as a superseding cause, not because it was unforeseeable, but because the courts regarded it as more significant than the defendant’s original act of negligence. That being said, it is hard to argue that eating a Big Mac is as morally significant as committing suicide. Therefore, this type of analogy is not likely to be very persuasive.

C. MISUSE

Food producers may also argue that the doctrine of misuse should bar consumers from recovering damages for their obesity. Product misuse may appear in various guises. For example, if the court regards the misuse as unforeseeable, it will probably characterize


206 E.g., Brown v. Am. Steel & Wire Co., 88 N.E. 80, 85 (Ind. Ct. App. 1909) (finding defendant employer not liable where employee violently took own life ten months after debilitating manufacturing accident); Daniels v. N.Y., N.H. & Hartford R.R. Co., 67 N.E. 424, 426 (Mass. 1903) (holding railroad not liable for death effected by accident victim’s deliberate suicide three weeks after he was struck by train); Lancaster v. Montesi, 390 S.W.2d 217, 221-22 (Tenn. 1965) (rejecting liability of allegedly abusive boyfriend for suicide of plaintiff’s mother).
the misuse as a superseding cause and completely relieve the product manufacturer of liability. Another approach is to treat misuse as a form of comparative fault, which will reduce damages but not bar them altogether. Finally, misuse may affect the question of whether a product is defective or not. Most courts hold that a manufacturer has a duty to design its product in a way that eliminates, or at least reduces, the risk of harm from foreseeable misuse, but relieves the manufacturer from liability if the misuse is unforeseeable. Foreseeability affects the duty to warn as well: Courts usually hold that a manufacturer has no duty to warn about the risks of unforeseeable misuse, however, if the misuse is foreseeable, the manufacturer will be held liable for failing to warn about the risks of such misuse.

Food producers may try to argue that obese plaintiffs have “misused” their products by overeating. This argument has a certain amount of intuitive appeal, but there are a number of problems with it. First, there is no objective standard for determining whether a particular pattern of consumption constitutes misuse. For example, most people would agree that consuming fast-food meals three times a day, seven days a week for any length of time constitutes misuse, but what about one fast-food meal a day or five fast-food meals a week? Does “super-sizing” a fast-food meal constitute misuse? Furthermore, what constitutes misuse in a particular case might depend on the age, weight, lifestyle, and


210 E.g., Moran v. Faberge, Inc., 332 A.2d 11, 19-21 (Md. 1975) (reinstating jury verdict for plaintiff where cologne bottle had no warning that contents were flammable); Brune v. Brown Forman Corp., 758 S.W.2d 827, 831 (Tex. Ct. App. 1988) (finding jury issue of liability where manufacturer did not warn of dangers of alcohol poisoning on tequila label).

211 Laura Parker, Legal Experts Predict New Rounds in Food Fight, USA TODAY, May 7, 2004, at 3A. In his movie, Super Size Me, director Morgan Spurlock ate McDonald’s cuisine for thirty days. During that time, he gained almost twenty-five pounds, and his liver accumulated fat so quickly that his doctor referred to it as pâté. Id.
overall health and physical condition of the consumer. Thus, a physically fit thirty-year-old may be safely able to consume more high-fat, high-calorie food than a fifty-year-old, sedentary individual with high blood pressure or heart disease.

Another problem with the misuse argument is that the alleged misuse is not unforeseeable. In fact, there is considerable evidence that food producers employ advertising and marketing strategies that encourage the consumption (or overconsumption) of potentially unhealthy products such as fast food and high-sugar cereals. Thus, the misuse argument would lose much of its force if plaintiffs could prove that food producers encourage poor nutrition.

D. SHIFTING RESPONSIBILITY

Even if restaurants and manufacturers of packaged food products are held liable for obesity-related injuries, suppliers of raw materials or ingredients can try to avoid liability by making a "shifting responsibility" argument. These suppliers can maintain that they are not responsible for the finished products that are produced by others, nor do they have a duty to warn consumers about the health risks associated with the consumption of such products. Clearly, those who place finished products into the stream of commerce may be held liable for any defects in their products and may also have a duty to warn users or consumers about any inherent risks associated with their products. The new Restatement of Torts, however, acknowledges that suppliers of raw materials and component parts should not be held liable for injuries caused by defective finished

---

212 Comm. on Children's Television, Inc. v. Gen. Foods Corp., 673 P.2d 660, 676 (Cal. 1983) (declaring that defendant cereal companies were "engaged in a nationwide, long-term advertising campaign designed to persuade children to influence their parents to buy sugared cereals"); Karl A. Boedecker et al., Excessive Consumption: Marketing and Legal Perspectives, 36 AM. BUS. L.J. 301, 303 (1999) (stating that McDonalds targeted Arch Deluxe sandwich, an item with high fat content, at older consumers, many of whom had high blood cholesterol levels); Michael A. McCann, Economic Efficiency and Consumer Choice Theory in Nutritional Labeling, 2004 WIS. L. REV. 1161, 1182 (arguing that large portion of fast-food advertising is directed at children).

213 For a discussion of shifting responsibility in the context of the duty to warn, see generally Richard C. Ausness, Learned Intermediaries and Sophisticated Users: Encouraging the Use of Intermediaries to Transmit Product Safety Information, 46 SYRACUSE L. REV. 1185 (1996).
products when the materials they supply are not themselves defective.\textsuperscript{214} According to the Restatement, suppliers of raw materials or component parts are liable for defects in the finished product only if the material or part is defective or if the supplier substantially participates in the integration of the material or component into the design of the finished product and this integration causes the finished product to be defective, and the resulting defect causes the plaintiff's harm.\textsuperscript{215}

Producers of raw materials, such as sugar, corn syrup, salt, and vegetable oil, will no doubt argue that their products are not unhealthy in their natural state but only when consumed in excess and that they have no control over the producers of finished products. Even those who supply ingredients that may be potentially unhealthy in their natural state may rely on this rationale. Thus, pepperoni suppliers may try to shift the blame to pizza sellers, while purveyors of ground beef can point the finger at fast-food restaurants.

E. FEDERAL PREEMPTION

Preemption is concerned with the power of Congress to prohibit the states from regulating in certain areas or to assert primacy when there is a conflict between state and federal regulatory schemes.\textsuperscript{216} The power to preempt ensures that federal law will prevail over conflicting state statutes,\textsuperscript{217} local ordinances,\textsuperscript{218} and state common-law doctrines.\textsuperscript{219} Over the years, courts and commen-

\textsuperscript{214} Restatement (Third) of Torts: Products Liability § 5 cmt. a (1998).
\textsuperscript{215} Id. § 5.
\textsuperscript{218} See, e.g., City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 640 (1973) (holding municipal airport curfew preempted by FAA regulations).
tators have divided preemption into two basic categories, express and implied, and further subdivided implied preemption into field preemption and conflict preemption.\(^{220}\) Express preemption occurs when a federal statute specifically excludes state regulation in a particular area.\(^{221}\) Congress may also impliedly preempt state law when a federal regulatory scheme effectively occupies the field and leaves no room for state regulation or when state law conflicts in some way with federal law.\(^{222}\)

Business enterprises that are subject to federal regulatory standards have often raised federal preemption as a defense in tort cases.\(^{223}\) In two recent cases, fast-food sellers argued that the Federal Nutritional Labeling and Education Act (NLEA)\(^{224}\) preempted state tort claims. The NLEA requires sellers of packaged food to provide certain nutritional information, such as applicable serving size, calories, fat, and cholesterol, on their product


labeling, but exempts restaurants from this requirement. In addition, the NLEA contains an express preemption provision, which declares that no state may require nutrition labeling that is not identical to that mandated by the Act.

In Pelman, McDonald's argued that the NLEA preempted the plaintiffs' claim that failure to provide nutritional information in its restaurants violated New York’s Consumer Protection Act. In response, the court pointed out that the NLEA expressly permitted states to impose nutritional labeling requirements for food that was not covered by federal law. Furthermore, the FDA had acknowledged that states were free to enforce their own consumer protection laws against restaurants whose menus contained false or misleading information. Accordingly, the Pelman court rejected McDonald's preemption argument.

However, the preemption argument was more successful in Cohen v. McDonald's Corp., a case decided by an Illinois intermediate appellate court in 2004. The plaintiff in Cohen based his claim on McDonald's alleged violation of the state's Consumer Fraud and Deceptive Business Practices Act as well as on common-law fraud. The case centered around the defendant's failure to...
provide specific nutritional information about its “Happy Meals” menu item. A “Happy Meal,” which was intended for young children, consisted of a food entrée, a small order of french fries, a small drink, and a toy.

Since 1995, McDonald’s has provided nutritional information to its customers in the form of a document entitled “McDonald’s Nutrition Facts.” This document identifies the serving size and number of calories in each of its menu items, along with information about minerals, vitamins, and total fat. McDonald’s Nutrition Facts, however, did not list the “Happy Meal” as one of its menu items, nor did the document provide nutritional information about the “Happy Meal’s” ingredients. The reason for this was that the FDA had not established nutritional standards for fat, cholesterol, sodium, and other ingredients for children under the age of four. Nevertheless, the plaintiff contended that the McDonald’s Nutrition Facts document violated the NLEA’s labeling requirements by not providing separate nutritional information for “Happy Meals.” This, in turn, violated the state consumer protection statute and also constituted common-law fraud. In response, McDonald’s argued that the plaintiff’s claims were preempted by the NLEA and FDA labeling regulations promulgated under the authority of that Act. The trial court agreed and granted the defendant’s motion to dismiss.

three in its Happy Meals thereby offering a food product intended for children under 4 years of age without adequate revision of the nutritional information; and (4) McDonald’s misrepresents nutrient content value for foods targeted for consumption by children, ages one to three.

Id. at 4.

Id.

Id. at 3.

Id. “McDonald’s Nutrition Facts” were displayed on posters and signs in McDonald’s restaurants. Id. McDonald’s also made copies of this document available to customers and displayed it on the Internet. Id. Finally, copies of “McDonald’s Nutrition Facts” could be obtained by writing or telephoning a request to the Company’s headquarters. Id. at 3-4.

Id. at 4.

Id.


Cohen, 808 N.E.2d at 4.

Id.

Id. at 4-5.

Id. at 5.
On appeal, the intermediate appellate court observed that since the NLEA did not provide for lawsuits by private citizens against those who violated its labeling requirements, such plaintiffs had to rely upon such remedies as were available under state law.\textsuperscript{245} Relying on \textit{Morelli v. Weider Nutrition Group, Inc.},\textsuperscript{246} the court determined that the NLEA did not expressly preempt all state law claims based on misleading nutrition information.\textsuperscript{247} The court also concluded, however, that facts in the instant case were distinguishable from those of \textit{Morelli}.\textsuperscript{248} In \textit{Morelli}, the defendant allegedly inaccurately stated the nutritional contents of its sports nutrition product,\textsuperscript{249} but in \textit{Cohen} the defendants were charged with a failure to provide information.\textsuperscript{250}

Since the FDA had not established the daily values of nutrients for foods intended for consumption by children under the age of four, and it had not promulgated nutritional labeling requirements for such foods, the effect of a successful lawsuit by the plaintiff would be to force McDonald's to develop its own nutritional labeling system for "Happy Meals" and similar products.\textsuperscript{251} According to the court, this would result in a nonuniform system of product labeling that would be inconsistent with the NLEA's policy of uniform nutritional labeling requirements.\textsuperscript{252} For this reason, the court held that the plaintiff's claims were preempted.\textsuperscript{253}

The court's reasoning in \textit{Cohen} suggests that food producers may invoke federal preemption as a defense to some failure-to-warn claims, claims based on failure to provide nutritional information, and claims based on deceptive advertising. On the other hand, federal preemption does not seem to be as relevant to design defect or negligent marketing claims.

\textsuperscript{245} Id. at 8.
\textsuperscript{247} \textit{Cohen}, 808 N.E.2d at 8-9.
\textsuperscript{248} Id. at 9.
\textsuperscript{249} \textit{Morelli}, 712 N.Y.S.2d at 552.
\textsuperscript{250} \textit{Cohen}, 808 N.E.2d at 9.
\textsuperscript{251} Id. at 9-10.
\textsuperscript{252} Id. at 10.
\textsuperscript{253} Id.
Finally, food producers might argue that obese plaintiffs are subject to such traditional affirmative defenses as contributory negligence, comparative fault, and assumption of risk. Under the doctrine of contributory negligence, an injured party is completely barred from recovering damages if he or she is also at fault, and this negligence is a proximate cause of the injury.\(^{254}\) Thus, contributory negligence would be an ideal defense if a jury found a plaintiff's eating habits to be unreasonable. However, only a few states still recognize contributory negligence;\(^{255}\) most have replaced it with some form of comparative fault.\(^{256}\) Unlike contributory negligence, comparative fault only reduces the plaintiff's damage award in proportion to his or her fault.\(^{257}\)

To prevail under either contributory negligence or comparative fault, the defendant must prove that the plaintiff failed to exercise reasonable care. In the case of obesity, a food producer would have to establish that the plaintiff acted unreasonably by consuming foods he or she knew were potentially unhealthy or by knowingly consuming excess quantities of foods that were otherwise nutritious. Alternatively, if the plaintiff claimed to be unaware of the health risks of overconsumption and obesity, the defendant could try to prove that a reasonable person would have learned more about these risks and changed his or her eating habits accordingly.

The hostile public reaction to the *Pelman* plaintiffs suggests that juries might be receptive to a fault-based defense such as comparative fault.\(^{258}\) As the tobacco litigation demonstrates, however, public opinion can shift dramatically if evidence of wrongdoing by the defendants starts to emerge.

---


\(^{255}\) These states are Alabama, Maryland, North Carolina, South Carolina, and Virginia. OWEN ET AL., supra note 121, § 15:1 at 95 n.21.

\(^{256}\) Comparative fault is recognized in forty-six jurisdictions. Id. § 15:1 at 95.

\(^{257}\) KEETON ET AL., supra note 254, § 67, at 471-72.

Another conduct-based defense is assumption of risk. Under the traditional doctrine, one who knowingly and voluntarily encountered a risk created by the defendant was barred from recovery.\textsuperscript{259} Assumption of risk rests on the notion that one who consents to incur a risk implicitly agrees to take responsibility for any injuries that may result therefrom.\textsuperscript{260} Assumption of risk has always been controversial, however, and many states have now abolished the doctrine outright\textsuperscript{261} or have merged it with comparative fault.\textsuperscript{262} It might be possible for a food producer to assert assumption of risk as a defense in some cases; however, the producer would have to show that the plaintiff was aware of the specific risk. While many consumers have a general idea of the connection between overeating and obesity, relatively few would have the specific knowledge about nutrition and health that a court would probably require in order to find that the plaintiff assumed the risk.

V. POLICY CONSIDERATIONS

Obesity is undoubtedly a serious public health problem in America. The National Institutes of Health estimates that ninety-seven million persons in the United States are overweight or obese.\textsuperscript{263} Obesity-related health problems, such as diabetes, coronary heart disease, and hypertension, cause 300,000 deaths each year\textsuperscript{264} and cost at least $117 billion in 2000.\textsuperscript{265} Some legal commentators believe that successful tort actions against producers

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{259} Keeton et al., supra note 254, at 486-87.
\item \textsuperscript{260} Owen et al., supra note 121, § 14:3 at 27.
\item \textsuperscript{261} E.g., Parker v. Redden, 421 S.W.2d 586, 592 (Ky. 1967) (abolishing assumption of risk in Kentucky); Bolduc v. Crain, 181 A.2d 641, 644 (N.H. 1962) (continuing to deny assumption of risk as defense); Meistrich v. Casino Arena Attractions, Inc., 155 A.2d 90, 95-96 (N.J. 1959) (finding assumption of risk too similar to contributory negligence).
\item \textsuperscript{262} E.g., Blackburn v. Dorta, 348 So. 2d 287, 292-93 (Fla. 1977) (merging assumption of risk with contributory negligence, applying comparative negligence principles); Perez v. McConkey, 872 S.W.2d 897, 905 (Tenn. 1994) (finding implied assumption of risk to be analyzed under comparative negligence principles).
\item \textsuperscript{264} U.S. Dep’t of Health & Human Servs., supra note 198, Foreword.
\item \textsuperscript{265} Pelman v. McDonald’s Corp., 237 F. Supp. 2d 512, 520 (S.D.N.Y. 2003).
\end{itemize}
\end{footnotesize}
of "unhealthy" food will induce them to produce healthier versions of their products or, at the very least, encourage them to provide more accessible nutritional information to consumers. However, the use of tort litigation by private parties to achieve social objectives is problematic. First, there is a question of whether courts are more qualified than other branches of government to make determinations about public health issues. Second, there is a legitimate concern about the effect of tort litigation on the price of food and its possible adverse effect on the economic health of the food industry. No one wishes to see manufacturers of food products follow in the footsteps of asbestos manufacturers. Finally, if these lawsuits are successful, they will reduce the choices available to consumers.

A. COMPARATIVE INSTITUTIONAL ADVANTAGE

Modern tort theory assumes that manufacturers will not invest sufficiently in product quality or safety as long as product-related accident costs are externalized to the public. On the other hand, if accident victims can recover for their injuries, manufacturers will have an incentive to make their products safer and thereby reduce their liability. Another benefit of cost internalization is that it encourages efficient levels of consumption. When these costs are internalized, consumers can make efficient decisions about consumption, even though they have no specific information about a product's social costs because the price they must pay for the product fully reflects these costs. If accident costs are externalized to third parties, however, the price charged to consumers will be too low, and they will consume too much of the product.

266 E.g., Cohan, supra note 182, at 130-31 (concluding litigation will force companies to provide health warnings); Rogers, supra note 6, at 883 (finding healthier items as indirect benefit of litigation).
Tort law also serves a corrective justice function by forcing product manufacturers to compensate victims who have been injured by the sale or marketing of defective products or other wrongdoing. Finally, tort actions can serve vindicatory and educational functions by providing a forum for injured consumers to tell their stories.

However, there are problems with using tort law to implement public health policy. The traditional way to develop public policy is through legislation. The legislative process is certainly not perfect, but it does provide a forum for all points of view to be heard. In addition, legislators can commission studies and obtain neutral expert opinions on complex issues. Finally, legislative directives are relatively specific and operate prospectively, thereby giving regulated parties a clear idea of what they must do to avoid economic penalties. Rulemaking by administrative agencies has many of these same advantages. The agency will usually have experts on its staff and can obtain additional information if necessary. In addition, the hearing process provides an opportunity to obtain information and opinion from a wide range of interested parties. Like legislation, administrative rules and regulations are usually specific in nature and operate prospectively. Finally, educational initiatives may be even more effective than coercive measures. For example, some of the educational programs that are currently directed at underage smoking could be adapted to promote better health and nutrition.

Courts, on the other hand, are not very well equipped to deal with public health issues. First of all, both judges and lay juries often have difficulty understanding technical or scientific data.

---

273 See Dix A. Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 SW. L.J. 256, 258 (1969) (discussing ability of administrative agency to better understand problems after “extensive and impartial research”).
In addition, access to information is limited because litigants have no incentive to provide courts with information unless it supports their position. Furthermore, the case-specific nature of the litigation process induces judges and juries to focus on narrow issues and directs their attention away from broader social or safety concerns. Finally, different courts do not necessarily reach the same conclusions when they decide similar cases. This lack of uniformity and consistency, when it occurs, produces uncertainty and confusion.

B. ECONOMIC CONSEQUENCES

Holding food producers liable for the health risks of excessive consumption could have serious adverse economic consequences for the industry. First, the cost of litigation itself can be very substantial. In addition, due to the large number of plaintiffs who are likely to sue, the potential liability involved is enough to bankrupt the entire industry. Finally, third parties, such as shareholders, creditors, suppliers, and employees, will be seriously harmed if the food industry is subjected to massive liability.

If the courts opened the door to liability of food producers, one would expect to see large-scale litigation similar to that currently being brought against the tobacco companies. Whether injured plaintiffs bring class actions or individual lawsuits, defendants and their insurers can expect to incur substantial legal expenses as they investigate, defend, and settle these claims. Litigation costs are

919-20 (1981) (discussing courts' involvement in motor vehicle design issues despite concern of lack of expertise).


277 See, e.g., W. KIP VISCUSI, REFORMING PRODUCTS LIABILITY 8-9 (1991) (noting courts are not capable of setting safety limits when confined to particular case); Note, A Question of Competence: The Judicial Role in the Regulation of Pharmaceuticals, 103 HARV. L. REV. 773, 780 (1990) (discussing inability of courts to determine complex issues because of narrow focus of trial).

likely to be especially high in food cases because of the complex causation and damages issues that would be involved.

In addition to litigation costs, food producers will sustain huge losses if a large number of plaintiffs win substantial damage awards. The estimated pecuniary cost of obesity, such as lost wages and health care costs, presently exceeds $117 billion. If one adds to that figure damages for pain and suffering and punitive damages, the resulting liability would be truly staggering. Not only will such large-scale tort liability seriously harm, and possibly bankrupt, many food producers, it will also injure a large number of third parties. Obviously shareholders, creditors, and employees will suffer if a company retrenches or ceases operations altogether. Those who transport, distribute, and process food products will also be adversely affected, as well as farmers and others who grow or produce food products or their constituent ingredients. Finally, sellers of food and drink will have to pass the cost of increased tort liability on to their customers in the form of higher prices.

C. PERSONAL RESPONSIBILITY AND INDIVIDUAL AUTONOMY

Finally, the notion that food producers should be held liable for making people fat reflects a view of human nature that is contrary to deeply held attitudes about autonomy and personal responsibility. The principle of personal autonomy demands that individuals be free to control their own lives. At the same time, under this principle of personal autonomy individuals should take responsibility for their actions and not try to shift the blame to others when their bad judgment causes injury.

Classical economic theory, with its emphasis on efficiency through allocation, also recognizes the value of personal autonomy by assuming that people should be able to exercise their preferences

---

279 Cohan, supra note 182, at 106.
281 See id. at 6 (statement of Representative Keller).
283 See id. at 86 (noting close relationship between freedom and responsibility).
for goods and services in a free market. Under the "rational person" or "expected utility" model of decisionmaking, rational persons "seek to maximize [their] subjective expected utility." Thus, individuals who consume the "wrong" type of food arguably do so because they believe that the expected utility of such conduct outweighs the expected adverse health risks. Therefore, in the absence of fraud, consumers should be allowed to eat the foods they like, notwithstanding the disapproval of nutritionists and public health officials. Once consumers have exercised their free will, however, they should not be allowed to shift the blame to sellers of food products when they develop obesity-related health problems.

Some commentators, however, question whether people act rationally when they purchase products in the marketplace. They point out that the human brain cannot process all of the information it receives and, therefore, relies upon cognitive shortcuts or heuristics to cope with this information overload. Unfortunately, this reliance on heuristics often leads to systematic errors in decisionmaking. One such cognitive shortcut is the representative heuristic, in which individuals rely on a small portion of data, which they consider to be representative of the whole, instead of analyzing all of the available data. Another heuristic is known as framing. Framing influences the way people deal with new information once a preliminary risk assessment has been made.

---

Product sellers often take advantage of cognitive limitations and biases in order to influence consumers.\textsuperscript{290} For example, McDonald's exploits what is known as the "affect heuristic by advertising a family-friendly environment and generating positive associations that may cause consumers to devalue their perceptions of the risks arising from unhealthy diets."\textsuperscript{291} In the same manner, alcoholic beverage advertisements typically provide memorable depictions of the good times that accompany the consumption of their products, perhaps leading consumers to underestimate the risks of alcohol.\textsuperscript{292} Manufacturers also make use of the framing effect in their warnings and product descriptions in order to downplay the negative aspects of their products.\textsuperscript{293}

Despite this evidence of market manipulation by product sellers, the argument for personal autonomy and personal responsibility is still viable. First of all, there is very little empirical evidence that advertising actually succeeds in manipulating consumers to any great extent.\textsuperscript{294} Furthermore, in a free society, all people (except those who are insane or mentally incompetent) must be allowed to make decisions for themselves, even though their intelligence, education, and experience may vary widely. Anti-obesity litigation is an attempt by the public health community to impose its lifestyle preferences on consumers by forcing sellers to remove certain products from the marketplace. This strategy, though well-intended, is inconsistent with deeply held notions of autonomy and personal responsibility.

VI. RECOMMENDATIONS

Obesity is a serious threat to public health, and more can be done to combat it. For example, the federal government could mandate better nutrition information on food packaging, and it could also


\textsuperscript{291} Note, \textit{supra} note 274, at 1168.

\textsuperscript{292} Hanson \& Kysar, \textit{supra} note 285, at 731.


\textsuperscript{294} Henderson \& Rachlinski, \textit{supra} note 290, at 230-33.
require fast food restaurants to provide on-site information about the nutritional content of their products. In addition, school boards could restrict the amount of "junk food" that is served to schoolchildren in school lunch programs and in vending machines. Furthermore, government entities, schools, and employers could do more to encourage exercise. Finally, both public and private health organizations could implement programs to educate consumers about diet, nutrition, and the health risks of obesity. What is not needed, however, is more tort litigation like *Pelman*. These lawsuits do little to combat obesity and are economically and morally destructive. Not only should the courts discourage anti-obesity lawsuits, but Congress and state legislatures should consider enacting laws to ban them.

A. JUDICIAL ACTION

Courts should do what they can to discourage anti-obesity lawsuits against food producers and restaurant owners. First, courts should insist that plaintiffs satisfy the requirements of existing tort doctrines. For example, courts should require plaintiffs to offer scientifically credible proof of causation. Courts should also require plaintiffs who rely on design defect theories to prove the existence of a safer alternative design. In addition, courts should enforce the "obvious risk" rule in failure-to-warn cases and rule as a matter of law that consumption of high-calorie foods causes obesity. Moreover, courts should require those who bring deceptive advertising claims to prove that they actually saw and relied on the defendant's representations. Furthermore, courts should refuse to allow recoveries based on novel liability theories such as product category liability, failure to disclose nutritional information, and negligent marketing. Finally, in appropriate cases, courts should find that obesity claims are preempted by federal labeling requirements. If courts react in this manner, plaintiffs' lawyers will eventually give up the fight and seek out easier targets.
B. LEGISLATION

Another option to combat obesity is state or federal legislation banning certain types of lawsuits against the food producers and sellers. The National Restaurant Association developed a model state act that would limit the liability of manufacturers, distributors, sellers, or retailers of food and nonalcoholic beverages for weight gain, obesity, or weight-related health problems.295 The National Restaurant Association, working closely with state restaurant associations, managed to introduce its proposed legislation in a large number of state legislatures296 during 2003 and 2004.297 So far, the Model Act, or something like it, has been enacted in Arizona, Colorado, Florida, Georgia, Idaho, Illinois, Louisiana, Michigan, Missouri, South Dakota, Tennessee, Utah, and Washington.298

Although state legislation is useful, most food producers and fast-food restaurant chains operate in an interstate environment. Consequently, they look to relief from liability at the federal level. In fact, several bills to preempt damage claims based on obesity are currently pending in Congress. The proposed “Personal Responsibility in Food Consumption Act,” House Bill 339, was introduced in the House of Representatives by Congressman Keller on January 27, 2003.299 The House voted in favor of the bill, 276 to 139, on March 10, 2004.300 The proposed act declares that the manufacturer, distributor, or seller of a food or nonalcoholic beverage product shall not be subject to civil liability in either state or federal court for any consumption-based claim unless the plaintiff proves that the product was not in compliance with applicable statutory and regulatory requirements.301

298 Id.
300 Id.
301 Id. §2(a).
A somewhat more elaborate bill known as the "Commonsense Consumption Act of 2003," was introduced in the Senate by Senator McConnell on July 17, 2003. This bill, if enacted, would prohibit "any person" from bringing a "qualified civil liability action" in any state or federal court. The bill defines a "qualified civil liability action" as a civil action "for damages or injunctive relief based on a claim of injury resulting from a person's weight gain, obesity, or any health condition that is related to weight gain or obesity."

The prohibition applies to lawsuits against manufacturers and sellers of a "qualified product" and their trade associations. A "qualified product" is defined as a food as defined in section 201(f) of the Federal Food Drug and Cosmetic Act. This provision defines "food" as "(1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article." The Senate bill's prohibition against lawsuits does not extend to acts by a manufacturer or seller that knowingly and willfully violate state or federal laws applicable to the "manufacturing, marketing, distribution, advertisement, labeling, or sale of the product" if the violation is a proximate cause of the weight gain, obesity, or health condition. The proposed law also permits actions for breach of contract or express warranty in connection with the purchase of a qualified product, as well as actions against the seller of an adulterated product.

Plaintiffs' lawyers, public health advocates, and others will undoubtedly oppose the legislative proposals discussed above.

---

303 The term "person" means "any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity." Id. § 3(3).
304 Id. § 2(a). The bill would also dismiss any qualified civil liability action that was pending on the date of its enactment. Id. § 2(b).
305 Id. § 3(5).
306 Id.
307 Id. § 3(4).
308 Id. § 2(a).
311 Id. § (3)(5)(B).
Nevertheless, it may be necessary to preempt anti-obesity lawsuits through legislation if the courts allow such litigation to proliferate.

VII. CONCLUSION

Obesity is a significant health problem in America. The food industry should provide consumers with healthier food choices, and it should also make more nutritional information available to consumers. Government action may also be warranted if the food industry does not act on its own. At the same time, consumers should be free to consume what they want, even if public health officials disapprove of their culinary preferences.

Anti-obesity litigation is not a good response to the obesity problem. If successful, anti-obesity litigation will interfere with legislative and administrative regulations in this area, cause economic disruption, and undermine personal autonomy. Courts and, if necessary, Congress and state legislatures, should nip this sort of litigation in the bud.