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Big Soda: Too Sweet to Fail?

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BIG SODA: TOO SWEET TO FAIL?

*Cara Kaplan**

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INTRODUCTION

As much as Americans love sugar, overconsumption can turn something so sweet into something deadly. Excessive sugar consumption is linked to obesity and an increased risk of heart disease.¹ The rise in obesity rates is clearly correlated with the increase of sugar in the American diet—between 1980 and 1990, United States obesity rates rose parallel to increases in the production of sugar in the food supply, with similar trends continuing into the twenty-first century.² Obesity is a serious condition that can cause severe health problems³ and even death.⁴ Additionally, the estimated direct and indirect costs of obesity have risen to a staggering \$190 billion each year.⁵ Some experts adamantly assert that sugar is the cause of obesity and advocate that a reduction in sugar intake could have significant health benefits within the United States.⁶

1. Allison Aubrey, *PepsiCo Pledges to Cut Sugar As Big Soda Comes Under Scrutiny*, NPR (Oct. 17, 2016), <http://www.npr.org/sections/thesalt/2016/10/17/498274851/pepsico-pledges-to-cut-sugar-as-big-soda-comes-under-scrutiny> [<https://perma.cc/E3W2-BMBM>]. See generally Kimber L. Stanhope, *Sugar Consumption, Metabolic Disease and Obesity: The State of the Controversy*, CRITICAL REVIEWS IN CLINICAL LAB. SCI. 52 (Sept. 17, 2015); Gary Taubes, *Is Sugar Toxic?*, N.Y. TIMES MAG. (Apr. 13, 2011), <http://www.nytimes.com/2011/04/17/magazine/mag-17Sugar-t.html> [<https://perma.cc/K9LM-5RB4>].

2. MARION NESTLE, SODA POLITICS: TAKING ON BIG SODA AND WINNING 42-43 (2015).

3. Obesity increases an individual's risk of—and may even cause—coronary heart disease, high blood pressure, stroke, type 2 diabetes, abnormal blood fats, metabolic syndrome, cancer (specifically colon, breast, endometrial, and gallbladder cancers), osteoarthritis, sleep apnea, obesity hypoventilation syndrome, reproductive problems, and gallstones. *Health Risks of Being Overweight*, NAT'L INST. OF DIABETES & DIGESTIVE & KIDNEY DISEASES, <https://www.niddk.nih.gov/health-information/weight-management/health-risks-overweight> [<https://perma.cc/APF7-2BXF>].

4. In 2000, the Journal of the American Medical Association found that obesity caused 400,000 deaths. Samuel J. Romero, *Obesity Liability: A Super-Sized Problem or a Small Fry in the Inevitable Development of Product Liability?*, 7 CHAP. L. REV. 239, 241 (2004) (citing Alit H. Mokdad et al., *Actual Causes of Death in the United States, 2000*, 291 JAMA 1238, 1238-40 (2004)).

5. In 2001, the Surgeon General estimated the direct and indirect costs of obesity were approximately \$117 billion a year. Romero, *supra* note 4, at 241 (citing OFF. OF THE SURGEON GEN., THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 10 (2001), <https://www.ncbi.nlm.nih.gov/books/NBK44206/> [<https://perma.cc/6WD5-FNSJ>]). Economists in 2012 estimated the cost at \$190 billion per year. MARION NESTLE, FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH 393 (2002) (citing J. Cawley & C. Meyerhoefer, *The Medical Care Costs of Obesity: An Instrumental Variables Approach*, 31 J. HEALTH ECON. 219-30 (2012)).

6. See generally Taubes, *supra* note 1.

Dr. William Dietz, a preventative health expert at George Washington University, explains that “[w]e know that sugar intake is an important contributor to obesity, and . . . soft drinks and soda and juices are a major source of sugar calories.”⁷ As a major source of sugar calories, sodas alone account for one third of daily American sugar consumption⁸ and, therefore, reducing soda consumption is a meaningful way to reduce sugar intake. For example, a single twelve ounce can of Coca-Cola contains thirty-nine grams of sugar (or ten sugar cubes), approximately 156 and 108 percent of the daily recommended sugar intake that the American Heart Association (“AHA”) recommends for women and men, respectively.⁹ Sodas pose various health risks, as the ingredients in soda, most notably sugar, are linked to a number of health conditions, including “obesity, type 2 diabetes, coronary artery disease, stroke dental disease, bone disease, gout, asthma, cancers, rheumatoid arthritis, behavioral problems, [and possibly] addiction.”¹⁰ While many believe diet is an individual choice, large food corporations, including big soda companies, have undue influence over how society views nutrition, diet, and their specific products.¹¹ Individuals and governments should hold these large corporations, and specifically soda companies, accountable for creating products that contain extreme levels of sugar. Only then will the companies be forced to acknowledge the inherently dangerous qualities of their products and modify them to create a safer dietary environment for children and adults alike.

Data shows that certain populations are more likely to drink regular soda (with large amounts of sugar) and are therefore more

7. Aubrey, *supra* note 1; *see also* Editorial Board, *Mexico’s Soda Tax Success*, BLOOMBERG (Jan. 8, 2016), <https://www.bloomberg.com/view/articles/2016-01-08/mexico-s-soda-tax-success> [<https://perma.cc/8ZAM-NXGX>] (“Sugary drinks are among the primary drivers of obesity.”).

8. NESTLE, *supra* note 2, at 42.

9. The American Heart Association recommends men consume no more than nine teaspoons (or thirty-six grams) of added sugar a day and women consume no more than six teaspoons (or twenty-five grams) of added sugar a day. *Sugar 101*, AM. HEART ASS’N, http://www.heart.org/HEARTORG/HealthyLiving/HealthyEating/Nutrition/Sugar-101_UCM_306024_Article.jsp#.WBwo6OErJ-U [<https://perma.cc/FC7G-JF65>] (last updated Oct. 11, 2016).

10. NESTLE, *supra* note 2, at 64.

11. *See generally* NESTLE, *supra* note 5. D. Mark Hegsted, one of the scientists paid by the Sugar Association to play down the link between sugar and adverse health effects, became the head of nutrition at the United States Department of Agriculture and helped draft the federal government’s dietary guidelines in 1977. Anahad O’Connor, *How the Sugar Industry Shifted Blame to Fat*, N.Y. TIMES (Sept. 12, 2016), <http://www.nytimes.com/2016/09/13/well/eat/how-the-sugar-industry-shifted-blame-to-fat.html> [<https://perma.cc/TV4P-KTE9>].

vulnerable to the significant health risks noted above.¹² The Beverage Marketing Corporation¹³ routinely collects information about soda consumers and analyzes consumption within certain demographic groups.¹⁴ This data shows that blue-collar workers and those earning less than \$10,000 engage in “higher-than-average soda” intake than the overall population.¹⁵ Hispanic and African Americans also consume more soda and exhibit an increased occurrence of obesity and type 2 diabetes than white Americans.¹⁶ Approximately seventy percent of Hispanic and African Americans reported routinely drinking regular (sugar-sweetened) sodas, and these populations are more likely to consume regular soda when compared to the overall population.¹⁷ These figures, taken together, paint a clear picture—minority populations living in low-income areas are more likely to engage in overconsumption of soda, and therefore have increased exposure to the resulting health dangers.¹⁸

The soda industry’s intentional marketing practices, not individual choice, create this increased risk. First, the soda industry specifically targets Hispanic and African American communities.¹⁹ Both Pepsi and Coca-Cola market to these populations and also use seemingly charitable contributions to form relationships with these communities.²⁰ Many leaders within the Hispanic and African

12. NESTLE, *supra* note 2, at 34-35.

13. The Beverage Marketing Corporation provides consulting, research, and advisory services to the food and beverage industries. See *Who We Are*, BEVERAGE MKTG. CORP., <https://www.beveragemarketing.com/who-we-are.asp> [<https://perma.cc/VV6N-AMCA>].

14. NESTLE, *supra* note 2, at 34-35.

15. Individuals with a yearly income of less than \$10,000 are sixteen percent more likely to consume regular soda than the overall population. *Id.* at 35.

16. *Id.* at 186.

17. Hispanics and African Americans are twenty-one and thirteen percent more likely, respectively, to consume regular soda. *Id.* at 35, 186.

18. These dangers will be discussed in detail in *infra* Part II.

19. NESTLE, *supra* note 2, at 185. The Hispanic Institute’s president, Gus West stated, “[o]f course, we’re responsible for what we eat and drink . . . but we’re also subject to the effects of massive advertising and misleading promotional campaigns—especially on our children and the poor.” *Id.*

20. Soda companies target Hispanic children by advertising on Spanish-language television and by using Spanish-speaking celebrities. These companies use similar tactics when advertising to African American children featuring African American celebrities. In addition to targeted television advertisements, soda companies also produce print publications aimed at promoting cultural values. *Id.* at 194-95. Additionally, soda companies promote brand loyalty through seemingly philanthropic foundations that now appear to be further marketing techniques that are manipulative rather than beneficial for these minority communities. *Id.* at 194-96. When journalists and leaders within these communities receive funding or

communities have noticed, and have begun distancing themselves and denouncing soda companies.²¹ These leaders recognize that health concerns relating to obesity are blighting their communities and place significant blame on the soda companies.²² Second, these minority communities are not choosing increased exposure to soda and the health risks contained therein. Those living in low-income, urban populations often have limited or no access to healthy food options.²³ Even when minority populations living in urban areas have physical access to fresh and healthy foods, low-income individuals may not be able to afford the often hefty and unattainable price tag.²⁴ Ultimately, through limited access to healthy alternatives and the specific targeting of minority groups, these often urban populations are more susceptible to overconsumption and are more vulnerable to the health risks indicated by consuming large amounts of sugary sodas.²⁵ Therefore, minority and urban communities are disproportionately impacted by the dangerous health risks inherent in overconsumption of sugary sodas.²⁶

This Note addresses the current health risks that can arise from consuming large or excessive volumes of sugary sodas and offers legal proposals to prevent further harm. Section I.A provides background information about the current public health crisis related to the rise in obesity and diabetes among Americans. Section I.B offers insight into the use of sugar by large food corporations. Section I.C describes Big Soda's intentional use of sugar within its products. Part II

philanthropic gifts, these individuals can hardly be expected to write stories or publicly criticize soda companies for creating products that contribute to the poor health in their communities. *Id.* at 196.

21. The Hispanic Institute of Washington, D.C. in 2013 urged its Hispanic constituents to cease collaboration with soda companies. *Id.* at 185.

22. West urged community organizations to “walk away from funding by the processed food and big sugary drink companies,” demonstrating a break with soda companies similar to many Hispanic organizations’ break in the 1990s with tobacco companies. *Id.*

23. SARAH TREUHAFT & ALLISON KARPYN, POL’YLINK & FOOD TR., THE GROCERY GAP: WHO HAS ACCESS TO HEALTHY FOOD AND WHY IT MATTERS 7 (2010), http://thefoodtrust.org/uploads/media_items/grocerygap.original.pdf [https://perma.cc/N34S-J5JR]; see also INST. OF MED., ACCELERATING PROGRESS IN OBESITY PREVENTION 3 (2012).

24. Many Americans living in low-income urban areas are concerned with whether they will eat, rather than the nutritional value of what they will eat. SASHA ABRAMSKY, BREADLINE USA: THE HIDDEN SCANDAL OF AMERICAN HUNGER AND HOW TO FIX IT 14 (2011). Unfortunately, “unhealthy diets cost less, while the recommended healthier diets cost more.” Adam Drewnowski, *Obesity, Diets, and Social Inequalities*, 67 NUTRITION REV. S36, S37 (2009).

25. NESTLE, *supra* note 2, at 35-36, 185-86.

26. *Id.*

examines potential approaches to addressing the current health concerns, including the effectiveness of federal and state governments, past food litigation, and finally reviews the success of previous tobacco litigation. Part III identifies the most successful avenues and legal theories that will best protect consumers in future years.

I. HOW COULD SOMETHING SO SWEET BE SO DANGEROUS?

The current health crisis did not develop overnight. Since 1958, the percentage of Americans diagnosed with diabetes rose by 700 percent.²⁷ This rise in diabetes is not disappearing anytime soon, as one in three Americans born after 2000 will be diagnosed with early-onset diabetes.²⁸ Additionally, since 1980 the percentage of the United States' population that is obese has increased.²⁹ Both obesity and diabetes pose serious health risks, and are largely preventable by eating a healthy diet.³⁰ Obesity and diabetes are serious health conditions in themselves, but they also increase the likelihood of metabolic syndrome, coronary heart disease, and even cancer, among other diseases.³¹ In addition to the serious health concerns posed by the rise in obesity, this disease poses significant economic costs. In 2001, the estimated annual direct and indirect cost of obesity was \$117 billion and rose to \$190 billion a year in 2012.³²

27. In 1958, 1.58 million people, less than one percent of the United States population, were diagnosed with diabetes. Since then, these statistics have risen dramatically. As of 2015, over 23.35 million people, comprising 7.4 percent of the United States' population, have been diagnosed with diabetes. CDC, LONG-TERM TRENDS IN DIABETES (Apr. 2016), http://www.cdc.gov/diabetes/statistics/slides/long_term_trends.pdf [<https://perma.cc/CT46-LF8S>].

28. FOOD, INC. (Robert Kenner 2009).

29. In 2014, 28.9 percent of adults were obese (up from 28.4 percent in 2011) and approximately twenty-two million adults have been diagnosed with diabetes (in 1980, 5.5 million adults were diagnosed with diabetes). In 2013, 13.7 percent of adolescents were obese (up from 11.8 percent in 2009). CDC, *Nutrition, Physical Activity and Obesity: Data, Trends and Maps*, https://nccd.cdc.gov/NPAO_DTM/LocationSummary.aspx?statecode=94 [<https://perma.cc/4NUW-MQNA>].

30. *Obesity and Overweight*, WORLD HEALTH ORG., <http://www.who.int/mediacentre/factsheets/fs311/en/> [<https://perma.cc/TW2V-JQLH>] (last updated June 2016); *Diabetes is Preventable*, NAT'L INST. OF DIABETES & DIGESTIVE & KIDNEY DISEASES, <https://www.niddk.nih.gov/health-information/health-communication-programs/ndep/am-i-at-risk/diabetes-preventable/Pages/diabetesispreventable.aspx> [<https://perma.cc/XN9G-E9A6>].

31. NESTLE, *supra* note 2, at 64-73.

32. Romero, *supra* note 4, at 241 (citing OFF. OF THE SURGEON GEN., THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 10 (2001)); *see also* NESTLE, *supra* note 5, at 393.

As obesity rates and the number of Americans diagnosed with type 2 diabetes have increased in recent decades, so too has the consumption of sugar within the United States.³³ This correlation has led many researchers and experts to conclude that overconsumption of sugar is linked to obesity and diabetes, two health and diet related diseases.³⁴ In addition to sugars in everyday foods, sweetened sodas interact differently with the body.³⁵ Some scholars believe that consuming sugar through soda leads to sugar overconsumption, and therefore sodas are a large cause of the obesity epidemic.³⁶

A. The Problem with Sugar

Sugar, in moderation, is a perfectly acceptable part of any nutritious diet.³⁷ The issue is what constitutes an excessive amount or an overconsumption of sugar that can reach a dangerous level. The risk of heart disease death begins to increase when fifteen percent of daily calories come from added sugars and increases significantly above that fifteen-percentage threshold.³⁸ With that in mind, “[i]n the United States, children are said to consume an average of 16 percent of their daily calories from sugars added to foods and drinks, and adults 13 percent.”³⁹

Considered in pounds of sugar per person per year, by the early twenty-first century, the U.S. Department of Agriculture (“USDA”) calculated that on average, Americans consumed over ninety pounds per person per year.⁴⁰ Further demonstrating the mass availability of sugar, in 2011, the U.S. supply produced domestically (less exports,

33. See Aubrey, *supra* note 1. “This correlation between sugar consumption and diabetes is what defense attorneys call circumstantial evidence. It’s more compelling than it otherwise might be, though, because the last time sugar consumption jumped markedly in this country, it was also associated with a diabetes epidemic.” Taubes, *supra* note 1, at 8.

34. See generally NESTLE, *supra* note 2, at 60-63; Stanhope, *supra* note 1; Taubes, *supra* note 1.

35. See NESTLE, *supra* note 2, at 47; Taubes, *supra* note 1.

36. See generally NESTLE, *supra* note 2, at 45-48, 64-69; NESTLE, *supra* note 5, at 405-06.

37. NESTLE, *supra* note 2, at 38. “Dr. Robert Lustig, a pediatric endocrinologist concerned about the effects of sugars on children’s health, calls sugar a poison, although one directly related to dose. A dose of up to 50 grams a day, he says, poses little risk.” *Id.*

38. *Id.*

39. *Id.*

40. Taubes, *supra* note 1, at 7-8 (noting that in 1986, the USDA estimated that Americans were consuming seventy-five pounds of sugar per capita yearly, representing an increase of sugar consumption).

plus imports) totaled nearly 132 pounds per capita.⁴¹ Both domestic and global health organizations recommend a much smaller daily sugar intake.⁴² The AHA recommends men consume no more than nine teaspoons (or thirty-six grams) of added sugar a day and women consume no more than six teaspoons (or twenty-five grams) of added sugar a day.⁴³ In pounds, the AHA recommends men and women consume approximately twenty-nine and twenty pounds of sugar annually, roughly one third of the current average consumption.⁴⁴ Globally, the World Health Organization (“WHO”) strongly recommends that both children and adults reduce their daily sugar⁴⁵ consumption to less than ten percent of total calories.⁴⁶ While many authorities agree on the ten percent (or approximately fifty gram) daily sugar recommendation, Dr. Lustig, a pediatric endocrinologist, asserts that consuming twice the recommended “dose” of sugar can prove toxic.⁴⁷ Putting things in perspective, a single twelve ounce can of regular Coca Cola contains thirty-nine grams of sugar and a twelve ounce can of Pepsi contains forty-one grams of sugar, both of which exceed the AHA daily recommendation for sugar consumption for both men and women.⁴⁸ Because sodas only account for

41. NESTLE, *supra* note 2, at 41-42 (noting that “67 pounds of cane and beet sugars (sucrose), 47 pounds of high-fructose corn syrup (HFCS), and the rest from honey, maple syrup, and other such sources.”).

42. “[M]ost health authorities recommending consuming no more than 10 percent of calories from added sugars per day.” NESTLE, *supra* note 2, at 38.

43. AM. HEART ASS’N, *supra* note 9.

44. *Id.* “By the early 2000s, according to the U.S.D.A., we had increased our [sugar] consumption to more than 90 pounds per person per year.” Taubes, *supra* note 1, at 7-8.

45. “Free sugars include monosaccharides and disaccharides added to foods and beverages by the manufacturer, cook or consumer, and sugars naturally present in honey, syrups, fruit juices and fruit juice concentrates.” WORLD HEALTH ORG., GUIDELINE: SUGARS INTAKE FOR ADULTS AND CHILDREN 16 (2015), http://apps.who.int/iris/bitstream/10665/149782/1/9789241549028_eng.pdf [<https://perma.cc/KXF9-SWQ7>].

46. *Id.*

47. Nestle notes “Dr. Lustig’s 100-gram toxic dose is close to the upper level of nutritional safety—25 percent of total calories—proposed in 2002 by the Institute of Medicine”; however, the Institute of Medicine intended that percentage as the upper limit for safety purposes and was not intended to represent a recommendation. NESTLE, *supra* note 2, at 38.

48. *Product Facts*, COCA-COLA, <http://www.coca-colaproductfacts.com/en/coca-cola-products/coca-cola/> [<https://perma.cc/SYU2-YMFP>]; *The Facts About Your Favorite Beverages: Pepsi*, PEPSICO, http://www.pepsicobeveragefacts.com/Home/product?formula=35005*26*01-01&form=RTD&size=12 [<https://perma.cc/Y68A-PSTC>] (last updated Mar. 23, 2017). One twelve ounce can of Coca-Cola represents approximately 156 and 108 percent of the American Heart Association’s daily added sugar recommendation for women and men, respectively. One twelve ounce can of

approximately one third of Americans' daily added sugar consumption, even limiting soda consumption to a single serving a day would still likely result in consuming more than the daily recommendation.⁴⁹ Obesity and sugar consumption are intrinsically connected and overconsumption of sugar can often result in obesity as well as associated health risks.⁵⁰

B. What Makes Soda So Bad?

One common question is “what makes soda so bad?” First and foremost, despite the common misconception, all calories are not created equal. A calorie is not simply a calorie.⁵¹ Due to its liquid form, soda rapidly delivers large amounts of sugar to the blood stream.⁵² Soda calories are empty calories devoid of any nutritional benefit.⁵³ Studies have further found that consumption of sugar through liquid form bypasses the psychological regulatory system controlling appetite and food intake in rats and mice.⁵⁴ This means the brain does not communicate with the rest of the body that it is full.⁵⁵ Furthermore, soda (and other processed foods) is specifically formulated so that human taste buds are not overwhelmed with any single flavor in the product.⁵⁶ Soda and processed food

Pepsi represents approximately 164 and 114 percent of the American Heart Association's daily added sugar recommendation for women and men, respectively. AM. HEART ASS'N, *supra* note 9.

49. NESTLE, *supra* note 2, at 42.

50. From 1980 to the late 1990s, “obesity rose in parallel to the increasing production of sugars in the food supply.” *Id.* at 43; Taubes, *supra* note 1, at 8. As Judge Sweet noted in *Pelman v. McDonald's Corp.*, “studies have shown that both modest and large weight gains are associated with significantly increased risk of diseases.” 237 F. Supp. 2d 512, 520 (S.D.N.Y. 2003).

51. As Dr. Robert Lustig explains, when you consume 160 calories in almonds, the food will not be absorbed into the body immediately because the fiber in the almonds will not be absorbed immediately. Therefore, the body's blood sugar will rise more slowly. Dr. Lustig goes on to contrast the almond with 160 calories of a soft drink. “Because there is no fiber [in the soda, the calories] get absorbed straight through the portal system to the liver. The liver gets this big sugar rush. When your liver gets that onslaught, it has no choice but to turn it into fat immediately.” FED UP (Stephanie Soechtig 2014).

52. NESTLE, *supra* note 2, at 45; Taubes, *supra* note 1, at 6.

53. NESTLE, *supra* note 2, at 45-46 (“Some studies of human eating behavior support this idea: the more sugary drinks people consume, the more calories they consume from any source.”).

54. “Most research suggests that it is only the sugars consumed in drinks that bypass physiological regulatory controls.” *Id.* at 46.

55. MICHAEL MOSS, SALT, SUGAR, FAT: HOW THE FOOD GIANTS HOOKED US 98-99 (2013). High levels of insulin caused by consumption of soda also block your brain from receiving the signal that you are full. *See* FED UP, *supra* note 51.

56. MOSS, *supra* note 55, at 105.

manufacturers encourage overconsumption with products that bypass the psychological regulatory system controlling appetite, and they utilize a formula that will not overwhelm the consumer.⁵⁷ In humans, studies have shown that “the more sugary drinks people consume, the more calories they consume from any source.”⁵⁸ Individuals who drink soda are at risk of consuming too many calories on a daily basis without gaining any nutritional benefit from the empty soda calories.

Soda is also particularly problematic, because fructose (which usually makes up at least half of the sweeteners in sodas), unlike glucose or sucrose, is metabolized almost completely in the liver.⁵⁹ Although a hundred calories of glucose is the same number of calories as a hundred calories of sugar (half glucose, half fructose), the metabolic consequences are different.⁶⁰ Because fructose is metabolized solely by the liver, any sudden increase in fructose could overwhelm liver function.⁶¹ In response to the fructose, the body, and specifically the pancreas, creates insulin to maintain blood sugar levels.⁶² While the pancreas is generally capable of managing reasonable rises in blood sugar, when blood sugar is consistently and rapidly rising, it cannot keep up with the demand.⁶³ At this point the body is suffering “pancreatic exhaustion,” as the pancreas can no longer create the necessary insulin to control the body’s blood sugar levels, and the individual now has diabetes.⁶⁴ Additionally, “[w]hen fructose is consumed in excessive amounts, it is converted to fat in the liver and causes a rise in levels of blood triglycerides.”⁶⁵ Studies suggest there is an association between added fructose, such as the

57. *Id.* at 104-06.

58. NESTLE, *supra* note 2, at 45-46.

59. *Id.* at 47; Taubes, *supra* note 1, at 5; *see also* FED UP, *supra* note 51 (“[W]hen your liver is pushed to the max the pancreas comes to the rescue by creating excess amounts of a hormone called insulin . . . [and] insulin [then] turns sugar into fat for storage. That’s insulin’s job.”).

60. Taubes, *supra* note 1, at 5.

61. *Id.* at 6.

In animals, or at least in laboratory rats and mice, it’s clear that if the fructose hits the liver in sufficient quantity and with sufficient speed, the liver will convert much of it to fat. This apparently induces a condition known as insulin resistance, which is now considered the fundamental problem in obesity, and the underlying defect in heart disease and in the type of diabetes, type 2, that is common to obese and overweight individuals. It might also be the underlying defect in many cancers.

Id.

62. *Id.* at 11.

63. *Id.*

64. *Id.* at 11-12.

65. *Id.*

fructose found in sodas, and metabolic problems, including “metabolic syndrome,” a condition known to raise the risk of heart disease and type 2 diabetes.⁶⁶ These health conditions are discussed in greater detail in Section I.C.

Another issue unique to soda is the possibility that, due to the combination of certain ingredients, it may be addictive.⁶⁷ The scientific evidence supporting this is still being developed, and this topic is discussed at greater length in Part III. Ultimately, because sodas contribute such a significant percentage of daily sugar in the American diet, “they raise the same concerns as sugar alone.”⁶⁸ Therefore, many of the concerns related to general overconsumption of sugar can be applied to the overconsumption of soda.

C. Soda and the Obesity Crisis

Between 1980 and 2000, production of soda rose from twenty-seven gallons per person a year to over forty gallons per person a year.⁶⁹ Along with this notable rise in soda production, obesity rates in the United States doubled from fifteen percent to approximately thirty percent of the population.⁷⁰ Additionally, the prevalence of obesity among specific population groups closely aligns with their patterns of soda consumption.⁷¹ In 2012, over one hundred health groups and individuals urged the Surgeon General in a press release to produce a report concerning soda consumption, similar to the Surgeon General’s reports on smoking in previous decades:

Soda and other sugary drinks are the only food or beverage that has been directly linked to obesity, a major contributor to coronary heart disease, stroke, type 2 diabetes, and some cancers, and a cause

66. *Id.* (citing Trevor J. Carden & Timothy P. Carr, *Food Availability of Glucose and Fat, But Not Fructose, Increased in the U.S. between 1970 and 2009: Analysis of the USDA Food Availability Data System*, 12 NUTRITION J. 130 (2013)). As Gary Taubes explains,

[c]onsuming sugar (fructose and glucose) means more work for the liver than if you consumed the same number of calories of starch (glucose). And if you take that sugar in liquid form—soda or fruit juices—the fructose and glucose will hit the liver more quickly than if you consume them, say, in an apple (or several apples, to get what researchers would call the equivalent dose of sugar). The speed with which the liver has to do its work will also affect how it metabolizes the fructose and glucose.

Taubes, *supra* note 1.

67. NESTLE, *supra* note 2, at 49.

68. *Id.* at 45.

69. *Id.* at 67.

70. *Id.*

71. “Both soda consumption and obesity are highest among African and Hispanic Americans, followed by whites and Asians.” *Id.*

of psychosocial problems . . . Yet, each year, the average American drinks about 40 gallons of sugary drinks, all with little, if any, nutritional benefit.⁷²

It is helpful to look at other health problems to further understand the causal connection between soda consumption and obesity. Research pertaining to childhood obesity presents glaring evidence that children who habitually drink soda consume more calories, have worse eating habits, and ultimately weigh more than children who do not.⁷³ Consuming even a single additional soda in a child's daily diet increases the chance of becoming overweight.⁷⁴ Further emphasizing the concerns of childhood obesity and soda consumption, the 2010 Dietary Guidelines Advisory Committee concluded that children should be discouraged from consuming sugar-sweetened beverages.⁷⁵ Research has shown that sodas are linked to poor diets. Although sodas contain many ingredients:

Studies often link one or another ingredient in soda, mostly sugars, to a broad array of chronic health conditions, most notably obesity, type 2 diabetes and coronary heart disease, but also stroke, dental disease, bone disease, gout, asthma, cancers, rheumatoid arthritis, behavioral problems, and even psychological disorders and premature aging, not to mention addiction.⁷⁶

Most independent research—funded by grants from government agencies or private foundations—similarly concluded that habitual soda consumption is not good for an individual's health.⁷⁷

Sodas contain large amounts of sugar⁷⁸ that are metabolized in a particularly harmful way. Because soda delivers the sugar (fructose) in liquid form, it floods the body's metabolic system, thereby exacerbating the already harmful effect of sugar consumption.⁷⁹ Additionally, soda's formula encourages and likely causes overconsumption of sugar on a daily basis.⁸⁰ Based on the large

72. NESTLE, *supra* note 5, at 405-06 (citation omitted).

73. NESTLE, *supra* note 2, at 67.

74. *Id.* at 68.

75. *Id.*

76. *Id.* at 64-65. It is important to note that the soda industry sponsors its own research studies, but “practically all studies reporting adverse effects of sodas on health were funded by grants from government agencies or private foundations.” *Id.* at 65.

77. *Id.* at 66.

78. COCA-COLA, *supra* note 48; PEPSICO, *supra* note 48.

79. For a full description of soda's metabolic effect, see discussion *supra* Section I.B.

80. MOSS, *supra* note 55, at 98-99, 104-06. See also discussion *supra* Section I.B.

amounts of sugar in soda and the correlation between soda consumption and obesity, many authorities have asserted that soda is a major cause of the current obesity crisis.⁸¹ Beyond scholastic and scientific analyses, a former president of the North and South America division in Coca-Cola admits:

The obesity trend is an epidemic, [a]nd there is no question its roots are directly tied to the expansion of fast food, junk food, and soft drink consumption. Whether you can identify any one of those things is probably a fair question. Soft drink guys prospect on that all the time. But you can look at the obesity rates, and you can look at per capita consumption of sugary soft drinks and overlap those on a map, and I promise you: They correlate about .99999 percent.⁸²

Soda consumption is significant, real, dangerous, and expensive to the American consumer. Given the rise in diseases that are connected to sugar consumption, and more specifically soda consumption, research should begin exploring the role of sugary sodas in the obesity and diabetes epidemics.

D. Sugar versus Fat: How the Food Companies Sculpted the Public Health Narrative

Through funding research and lobbying, the food industry consistently seeks to influence domestic nutrition guidelines to benefit companies in the industry.⁸³ As a general matter, studies suggest that industry-funded research may favorably bias the findings towards the industry providing funding.⁸⁴ In fact, “[a] recent analysis of beverage studies . . . found that those funded by Coca-Cola, Pepsi, the American Beverage Association and the sugar industry were five times more likely to find no link between sugar drinks and weight gain than studies whose authors reported no financial conflicts.”⁸⁵ Recently uncovered documents from the sugar industry “suggest that five decades of research into the role of nutrition and heart disease, including many of today’s dietary recommendations, have been largely shaped by the sugar industry.”⁸⁶ Specifically, the Sugar

81. NESTLE, *supra* note 5, at 405-06.

82. MOSS, *supra* note 55, at 100.

83. See Romero, *supra* note 4, at 242 (citing NESTLE, *supra* note 5, at 67-92); see generally MOSS, *supra* note 55.

84. See Anahad O’Connor, *Coca-Cola Funds Scientists Who Shift Blame for Obesity Away From Bad Diets*, N.Y. TIMES (Aug. 9, 2015), <http://well.blogs.nytimes.com/2015/08/09/coca-cola-funds-scientists-who-shift-blame-for-obesity-away-from-bad-diets/> [<https://perma.cc/Y4TU-EZ29>].

85. *Id.*

86. O’Connor, *supra* note 11.

Association (then called the Sugar Research Association) paid Harvard scientists in 1967 to publish a review on sugar, fat, and heart disease to debunk contemporaneous anti-sugar studies in Europe conducted by sugar critic, John Yudkin.⁸⁷ The industry-funded research was likely in response to Yudkin's⁸⁸ research and experiments surrounding the health effects of sugar consumption, including higher triglyceride levels associated with heart disease and increased insulin levels directly linked with type 2 diabetes.⁸⁹ Realizing that this research could threaten the sugar industry, John Hickson, a top executive in the sugar industry, proposed disputing the worrying findings on sugar with industry-funded research.⁹⁰

In addition to research funding, the uncovered documents suggest that the researchers were in relatively close contact with executives while conducting the studies.⁹¹ The hired scientists shared and reviewed early drafts with sugar industry executives, and Hickson himself expressed satisfaction with the content of their presented writings.⁹² One of the researchers even assured Hickson that “[w]e are well aware of your particular interest and will cover this as well as we can.”⁹³ The particular interest, of course, was to shift public opinion and minimize the link between sugar and heart health by instead emphasizing the role of fat and saturated fat in cardiovascular problems.⁹⁴

The industry-funded research successfully minimized the criticism of sugar and shifted the focus to fat.⁹⁵ In 1976, the Sugar Association won the Silver Anvil award (a public relations award) for “influencing the public opinion about the health effects of sugar consumption.”⁹⁶ The industry-funded research was published in the New England

87. *Id.*

88. John Yudkin was a leading authority on nutrition in the United Kingdom. Taubes, *supra* note 1, at 5.

89. In the mid-1960s, “studies had begun pointing to a relationship between high-sugar diets and the country’s high rates of heart disease . . . [and a top sugary industry executive] proposed countering the alarming findings on sugar with industry-funded research.” Marion Nestle also explained that the recently uncovered documents “provided ‘compelling evidence’ that the sugar industry had initiated research ‘expressly to exonerate sugar as a major risk factor for coronary heart disease.’” O’Connor, *supra* note 11; *see also* Taubes, *supra* note 1, at 5.

90. O’Connor, *supra* note 11.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. SUGAR COATED (Michele Hozer 2015).

96. *Id.*

Journal of Medicine, a prominent journal that authorities rely on when shaping the overall scientific discussion.⁹⁷ One of the Harvard scientists, D. Mark Hedsted, became the head of nutrition at the USDA and used the research funded by the sugar industry to “influence the government’s dietary recommendations,” emphasizing saturated fat as the leading cause of cardiovascular disease while identifying sugar as “empty” or benign calories.⁹⁸ More generally, the results of the industry-funded research has had long-term impact for both dietary guidelines and general nutrition policy where “[f]or many decades, health officials encouraged Americans to reduce their fat intake, which led many people to consume low-fat, high-sugar foods that some experts now blame for fueling the obesity crisis.”⁹⁹

Coca-Cola recently came under criticism for funding scientists who shift blame for obesity from bad diets to lack of exercise.¹⁰⁰ The largest soda company collaborated with influential scientists advocating the message, “to maintain a healthy weight, get more exercise and worry less about cutting calories,” in journals, at conferences, and through social media.¹⁰¹ This message is misleading and a thinly veiled attempt by Coca Cola to deflect blame about its products’ role in the rise in obesity and type 2 diabetes.¹⁰² In fact, scientific evidence suggests that exercise has a minimal impact on weight when compared with the food people consume.¹⁰³ Coca-Cola is assisting scientists in their advocacy by providing financial and logistical support to a new nonprofit organization—the Global Energy Balance Network—and donated approximately \$1.5 million in 2014 to start the organization.¹⁰⁴ The soda giant has consistently characterized the obesity epidemic as an exercise problem (despite scientific evidence to the contrary), but now is going one step further by “enlisting” respectable scientists to advocate its case.¹⁰⁵ Marion Nestle sharply criticized Coca-Cola’s actions stating, “[t]he Global Energy Balance Network is nothing but a front group for Coca-Cola.

97. O’Connor, *supra* note 11.

98. *Id.*

99. O’Connor, *supra* note 84.

100. *See generally id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. “Barry M. Popkin, a professor of global nutrition at the University of North Carolina at Chapel Hill, said Coke’s support of prominent health researchers was reminiscent of tactics used by the tobacco industry, which enlisted experts to become ‘merchants of doubt’ about the health hazards of smoking.” *Id.*

Coca-Cola's agenda here is very clear: get these researchers to confuse the science and deflect attention from dietary intake."¹⁰⁶

II. THE BATTLE OF THE BULGE (A/K/A, LOVE HANDLES)

The current health crisis has not gone unnoticed. Federal and local governments are taking meaningful action to curb obesity rates in the United States by targeting the food industry through updated nutrition labeling requirements and soda taxes. Noticing the increased public concern and recent government action, some companies are being proactive, pledging to reduce the sugar content of their products. Beyond government and industry action, in 2003 consumers attempted to bring a private action against McDonald's in *Pelman v. McDonald's Corp.* in the Southern District of New York. The legal community today may study this past attempt to impose liability on a food company through obesity litigation—as well as the successful litigation brought against tobacco corporations—to develop a powerful and successful strategy for future litigation.

A. Federal Action: Lobbying and the Existing Revolving Door

One response to the growing health concerns related to overconsumption of soda is increased government regulation of the food and beverage industry. Interest groups, including the American Beverage Association (“ABA”),¹⁰⁷ as well as individual companies such as Coca-Cola and Pepsi, invest significant time and money to influence congressional and agency actions.¹⁰⁸ Specifically:

The ABA has lobbied against any government action . . . that might raise the cost of soda production and marketing or discourage consumption . . . [including] against nutrition labeling, packaging standards, fair labor standards, the exclusion of sodas from food assistance programs and school meals, limitations on franchises,

106. *Id.*

107. The American Beverage Association is:

[T]he soda industry's principal trade association, public relations agent, and staunch defender The ABA represents dozens of beverage producers, bottlers, distributors, franchise companies, and support industries, but bottlers predominate, particularly those connected to Coca-Cola, PepsiCo, and Dr. Pepper Snapple.” The ABA considers itself a neutral party and “a liaison between the industry, government, and the public, and a strong voice for the industry in legislative and regulatory matters The ABA lobbies aggressively on behalf of the industry and weighs in loudly, forcefully, and persistently on a broad range of issues affecting the soda marketing environment.

NESTLE, *supra* note 2, at 98.

108. *Id.* at 315.

quotas on sugar, container deposit laws, and restrictions on television advertising to children, among other issues.¹⁰⁹

In the 2016 election cycle, the food and beverage industry contributed over twenty-three billion dollars to campaigns, with Coca-Cola as the top contributor with approximately \$1.4 billion.¹¹⁰ In 2016, Coca-Cola, Pepsi, and the ABA combined spent over twelve billion dollars in lobbying.¹¹¹ Among all the companies spending money on lobbying within the food and beverage industry, Coca-Cola, Pepsi, and the ABA rank number one, two, and seven in amount spent on lobbying.¹¹² These figures show the soda industry takes lobbying seriously, invests significant money into lobbying efforts, and employs lobbyists or lobbying firms to “promote soda interest to federal or state governments.”¹¹³ These lobbyists meet with members of both houses in Congress, the White House, and various government agencies integral in setting food-related regulations including the USDA, Food and Drug Administration (“FDA”), and other federal agencies.¹¹⁴ Soda lobbyist groups will reach out to government officials to voice the companies’ interest when any issue or initiative that may affect soda production, marketing, or profitability—regardless of how apparently indirect or obscure—is considered.¹¹⁵

The food and beverage industry sends both its money and its professionals into government, through the revolving door. A revolving door describes a strong relationship between the

109. *Id.* (citing CHERYL HARRIS LOFLAND, *THE NATIONAL SOFT DRINK ASSOCIATION: A TRADITION OF SERVICE* (1986)).

110. Ctr. for Responsive Pol., *Food & Beverage: Long-term Contribution Trends*, OPENSECRETS.ORG, <http://www.opensecrets.org/industries/totals.php?cycle=2016&ind=N01> [<https://perma.cc/BGD5-WRVP>].

111. Ctr. for Responsive Pol., *Food & Beverage: Lobbying, 2016*, OPENSECRETS.ORG, <http://www.opensecrets.org/industries/lobbying.php> [<https://perma.cc/8A9F-43JY>].

112. *Id.*

113. These organizations and companies increase investment in lobbying when particularly relevant issues arise within Congress or agencies. *See, e.g.*, NESTLE, *supra* note 2, at 317 (detailing Coca-Cola’s lobbying expenditures from 2008 to 2009 while Congress was considering a soda tax). Additionally, the American Beverage Association has spent millions of dollars challenging and opposing soda tax bills in recent years. Roberto A. Ferdman, *Why the Sugar Industry Hates the FDA’s New Nutrition Facts Label*, WASH. POST (May 20, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/05/20/why-the-sugar-industry-hates-the-fdas-new-nutrition-facts-label/> [<https://perma.cc/4E94-JKH3>].

114. NESTLE, *supra* note 2, at 318.

115. *Id.* at 318-19.

government agencies and the industries those agencies are intended to regulate, wherein professionals continuously and seamlessly move within the industry between the private and public sectors.¹¹⁶ Lester Crawford, the head of the FDA, was formerly the Executive Vice President of the National Food Processors Association.¹¹⁷ In 2006, Lester Crawford pleaded guilty to “conflict of interest and false reporting of information about stocks he owned in food, beverage, and medical device companies he was in charge of regulating.”¹¹⁸ More generally, many Big Soda lobbyists formerly held positions within government, as legislative aides, research directors, staff assistants, or advisors to various governmental actors, ranging from Members of Congress to key advisory roles within federal agencies.¹¹⁹ When former government officials become lobbyists, they bring “an intimate knowledge of how the system operates, connections to leaders and staff of both political parties, and a vast address book of personal contacts accumulated on their jobs.”¹²⁰ Such close relationships present conflicts of interest when former government officials use their familiarity with the system to further the interests of the same industry they previously regulated.¹²¹ Within the revolving door structure of the food and beverage industry, there is also the risk that government agencies creating and enforcing regulations affecting the food and beverage industry may become “captured” by these professionals who previously worked for food or soda corporations, and who may return to their former employees.¹²²

From the significant spending on lobbying efforts, as well as the revolving door effect creating a close and intimate relationship between the food and beverage industry and governmental actors, it

116. *Id.* at 319.

117. Additionally, the Chief of Staff at the USDA was the former chief lobbyist to the beef industry. These examples of a revolving door structure provide evidence of regulatory agencies being controlled by the companies they are meant to regulate and scrutinize. FOOD, INC., *supra* note 28.

118. Andrew Bridges, *Ex-FDA Chief Pleads Guilty in Stock Case*, ASSOCIATED PRESS (Oct. 17, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/10/17/AR2006101700573_pf.html [<https://perma.cc/SU7L-JJB7>].

119. NESTLE, *supra* note 2, at 319-20.

120. *Id.* at 320.

121. *Id.* at 319.

122. *See, e.g.*, O'Connor, *supra* note 11 (“One of the scientists who was paid by the sugar industry [to conduct research downplaying a link between sugar and heart disease and promote saturated fat as the cause] was D. Mark Hegsted, who went on to become the head of nutrition at the U.S.D.A., where in 1977 he helped draft the forerunner to the federal government’s dietary guidelines.”). *See generally* FOOD, INC., *supra* note 28.

is clear that conflicts of interests can compromise effective policy and regulation.¹²³

B. Successful Federal Regulation: The FDA Takes Action

In May 2016, the Food and Drug Administration took a big step toward increased regulation in the interest of consumer protection within the food industry by updating the Nutrition Facts label for the first time in over twenty years.¹²⁴ The new label requires packaged foods to list the amount of sugar added by the manufacturer and the percentage of the daily recommended consumption of added sugar (see figure below).¹²⁵

NEW LABEL / WHAT'S DIFFERENT

Nutrition Facts	
8 servings per container	
Serving size	2/3 cup (55g)
Amount per serving	
Calories	230
% Daily Value*	
Total Fat 8g	16%
Saturated Fat 1g	2%
Trans Fat 0g	
Cholesterol 0mg	0%
Sodium 150mg	7%
Total Carbohydrate 37g	13%
Dietary Fiber 4g	14%
Total Sugars 12g	20%
Includes 10g Added Sugars	
Protein 3g	
Vitamin D 2mcg	10%
Calcium 260mg	20%
Iron 8mg	45%
Potassium 235mg	6%

*The % Daily Value (DV) tells you how much a nutrient in a serving of food contributes to a daily diet. 2000 calories a day is used for general nutrition advice.

Annotations:

- Servings: larger, bolder type
- Serving sizes updated
- Calories: larger type
- Updated daily values
- Actual amounts declared
- New footnote
- New: added sugars
- Change in nutrients required

The FDA attempted to update the Nutrition Facts in 2014, but faced strong opposition from General Mills and the Grocery Manufacturers Association.¹²⁶ Following the 2016 announcement, the Grocery Manufacturers Association welcomed the new labeling

123. Documents from the 1960s demonstrated the significant role of the food industry in recommending the American diet. See generally Ferdman, *supra* note 113.

124. See Lisa Baertlein, *New U.S. Food Label Rules to Require Added Sugars to be Detailed*, REUTERS (May 20, 2016), <http://www.reuters.com/article/us-fda-nutritionlabel-idUSKCN0YB10F> [<https://perma.cc/YER6-TQ3S>]; see also Ferdman, *supra* note 113.

125. See Annie Gasparro & Mike Esterl, *FDA Approves New Nutrition Panel That Highlights Sugar Levels*, WALL ST. J. (May 20, 2016), <http://www.wsj.com/articles/fda-approves-controversial-changes-to-nutrition-facts-panel-1463750195> [<https://perma.cc/NKY6-QQ3X>].

126. See Dan Charles, *An "Added Sugar" Label Is On The Way for Packaged Food*, NPR (May 20, 2016), <http://www.npr.org/sections/thesalt/2016/05/20/478837157/the-added-sugar-label-is-coming-to-a-packaged-food-near-you> [<https://perma.cc/L2VQ-NLEE>].

requirements, while the Sugar Association criticized it, claiming it will only confuse consumers and vilify the food and beverage industry.¹²⁷ The updated labeling requirements will affect approximately 800,000 products ranging from Coca-Cola to yogurt and pasta sauce.¹²⁸ Furthermore, updating the labels will cost food and beverage manufacturers about two billion dollars, but is estimated to benefit the consumer between twenty and thirty billion dollars by reducing the costs of treating obesity-related health issues.¹²⁹

Beyond the fiscal burden imposed on the manufacturers and food and beverage industry by the new FDA labeling requirements, it is unclear what effect the new labels will truly have on consumers' purchasing and eating habits. Some advocacy groups and individuals praise the labeling changes as a necessary development to enable consumers to make more informed choices and to encourage food manufacturers to reduce the amount of sugar used.¹³⁰ The food industry, however, emphasizes that added sugar and natural sugar have the same effect on weight gain, and therefore distinguishing between the two types of sugar through labeling is unnecessary and will only confuse the consumer.¹³¹ Professor Jeremy Kees, a nutrition label expert at Villanova University School of Business, concludes that consumers respond more to front of package labeling changes, and believes the impact of the nutritional label change will be relatively small.¹³² Despite label placement, the contents of the labels may have a particularly large impact on the soda industry—a twelve ounce can of Coca Cola would show thirty-nine grams of sugar, amounting to approximately 156 and 108 percent of a recommended daily intake for women and men, respectively.¹³³ Considering that Coca Cola derives seventy percent of its sales from carbonated soft drinks, the soda industry leader has significant stakes in how added sugar is perceived in its products.¹³⁴ The pressure from federal

127. *Id.*

128. *See* Baertlein, *supra* note 124.

129. In 2008, the annual medical cost of obesity was \$147 billion. *Id.* Another article indicates “[t]he FDA estimates that implementing the change will cost the food and beverage industry roughly \$500 million a year, while providing approximately \$2 billion annually in benefits such as reduced health costs, over 20 years.” Gasparro & Esterl, *supra* note 125.

130. *See* Charles, *supra* note 126. Additionally, Marion Nestle, a professor of nutrition and food studies at NYU, has called the FDA announcement a huge win for the consumer. *See* Ferdman, *supra* note 113.

131. *See* Gasparro & Esterl, *supra* note 125.

132. *See* Baertlein, *supra* note 124.

133. *See* Charles, *supra* note 126.

134. *See* Gasparro & Esterl, *supra* note 125.

agencies may ultimately push the major food manufacturers to reformulate their products and substantially reduce the amount of added sugar.¹³⁵

C. Local Governments Take Action

Even if government action on the federal level may be ineffective to enact meaningful change, cities have attempted to address the health issues posed by excessive consumption of sugary soda beverages in a number of ways. In 2012, New York City approved the Sugary Drinks Portion Cap Rule proposed by Mayor Michael Bloomberg, a ban on sodas of a certain size.¹³⁶ After a contentious and well-publicized legal battle, the highest court in the state of New York, the Court of Appeals, invalidated the ban.¹³⁷ More recently, Philadelphia became the first major United States city to pass a tax on soda and other high-sugary beverages.¹³⁸ Although California courts upheld a similar provision in Berkeley for combating sugar consumption from soft drinks,¹³⁹ the Philadelphia soda tax is currently being challenged in the Pennsylvania courts.¹⁴⁰

1. New York City Soda Ban

In May 2012, New York City Mayor Michael Bloomberg proposed the Sugary Drinks Portion Cap Rule and the New York City Board of Health passed the rule in September 2012.¹⁴¹ The rule “prohibit[ed] food-services establishments that are subject to the city’s health department from selling sodas and other sugary drinks in containers

135. *Id.*

136. See Hery (Michelle) Min, Note, *Large-Sized Soda Ban as an Alternative to Soda Tax*, 23 CORNELL J. L. & PUB. POL’Y 187, 190 (2013).

137. See generally N.Y. Statewide Coal. of Hisp. Chambers of Com. v. N.Y.C. Dep’t of Health & Mental Hygiene, 16 N.E.3d 538 (N.Y. 2014).

138. See generally Michael Burke, *Philadelphia Becomes First Major City to Pass Soda Tax*, USA TODAY (June 16, 2016), <http://www.usatoday.com/story/news/2016/06/16/philadelphia-becomes-first-major-city-pass-soda-tax/85999128/> [<https://perma.cc/4669-8BVT>].

139. See Dan Charles, *Berkeley’s Soda Tax Appears to Cut Consumption Of Sugary Drinks*, NPR (Aug. 23, 2016), <http://www.npr.org/sections/thesalt/2016/08/23/491104093/berkeley-soda-tax-appears-to-cut-consumption-of-sugary-drinks> [<https://perma.cc/6L5R-TW9N>].

140. See generally Dan Packel, *Philly Defends Soda Tax Against Beverage Groups’ Challenge*, LAW360 (Oct. 11, 2016), <https://www.law360.com/articles/850051/philly-defends-soda-tax-against-beverage-groups-challenge> [<https://perma.cc/F7QS-CBKV>]; Stephen St. Vincent, *Is the Soda Tax Legal?*, PHILA. CITIZEN (June 15, 2016), <http://thephiladelphiacitizen.org/is-philadelphia-soda-tax-legal/> [<https://perma.cc/6WUT-DNT9>].

141. Min, *supra* note 136, at 190.

larger than sixteen ounces.”¹⁴² This type of restriction was unprecedented in the United States, but it was ultimately struck down by New York’s Court of Appeals.¹⁴³ The court invalidated the ban on two primary grounds. First, the court found that the New York City Board of Health lacked the authority to impose the ban, because only the legislative branch—in New York City, the City Council—has the authority to make policy.¹⁴⁴ The court explained that the ban was an effort “to promote a healthy diet without significantly affecting the beverage industry [t]he value judgments entailed difficult and complex choices between broad policy goals—choices reserved to the legislative branch.”¹⁴⁵ Second, the ban was arbitrary and capricious, largely due to its seemingly subjective exclusions.¹⁴⁶ The current de Blasio Administration was disappointed by the ruling,¹⁴⁷ and reports from 2014 indicated the administration was exploring other ways to regulate large sodas.¹⁴⁸ Although the de Blasio Administration held

142. See *id.* (citing Vivian Yee, *Your Guide to New York’s Soda Ban*, N.Y. TIMES (Mar. 11, 2013), <http://cityroom.blogs.nytimes.com/2013/03/11/your-guide-to-new-yorks-soda-ban/> [<https://perma.cc/J8WQ-3CQR>]); see also Jill Colvin, *New York Soda Ban Approved: Board of Health Okes Limiting Sale of Large-Sized, Sugary Drinks*, HUFFINGTON POST (Sept. 13, 2012), http://www.huffingtonpost.com/2012/09/13/new-york-approves-soda-ban-big-sugary-drinks_n_1880868.html [<https://perma.cc/F3G9-RCFL>]; Michael M. Grynbaum, *Soda Makers Begin Their Push Against New York Ban*, N.Y. TIMES (July 1, 2012), <http://www.nytimes.com/2012/07/02/nyregion/in-fight-against-nyc-soda-ban-industry-focuses-on-personal-choice.html> [<https://perma.cc/Q6JK-4W49>].

143. The New York Supreme Court invalidated the soda ban on two grounds—(1) that the agency did not possess policy-making authority under *Boreali* and (2) that the soda ban regulation was arbitrary and capricious. However, the First Department of the New York Appellate Division only discussed the authority under *Boreali*, and therefore the New York Court of Appeals specifically rejected the ban due to the agency’s lack of authority to pass policy-making regulations. Rather, under *Boreali*, policy-making is restricted to the legislative power. See *Boreali v. Axelrod*, 517 N.E.2d 1350 (N.Y. 1987).

144. See *id.*; see also Chris Dolmetsch, *New York Big-Soda Ban Rejected by State’s Highest Court*, BLOOMBERG (June 26, 2014), <https://www.bloomberg.com/news/articles/2014-06-26/new-york-big-soda-ban-rejected-by-n-y-top-court-as-overreach>.

145. N.Y. Statewide Coal. of Hisp. Chambers of Com. v. N.Y.C. Dep’t of Health & Mental Hygiene, 16 N.E.3d 538, 547 (N.Y. 2014).

146. The regulation excluded some state-regulated businesses, such as convenience stores, and did not apply to other high-sugary beverages. Dolmetsch, *supra* note 144; see also N.Y. Statewide Coal., 16 N.E.3d at 546, 560.

147. In response to news that the ban was improperly promulgated and would not be reinstated “City Council Speaker Melissa Mark-Viverito said lawmakers would consider a ban on large soft-drink servings if de Blasio seeks one.” Dolmetsch, *supra* note 144.

148. Michael Howard Saul, *Forward Push on Soda Ban: De Blasio Administration Considers New Ways to Cap Sugary Drinks*, WALL ST. J. (Oct. 16, 2014),

“high-level” meetings with beverage industry executives and public health advocates in 2014,¹⁴⁹ no meaningful policy or legislation is being pursued at this time.

2. Philadelphia Soda Tax

In June 2016, Philadelphia became the first major city in the United States to pass a soda tax.¹⁵⁰ The Philadelphia City Council passed the new tax by a thirteen to four vote, imposing a 1.5 cent per ounce tax on sodas and other sugary beverages.¹⁵¹ Of note, this new soda tax would be in addition to the eight percent sales tax already applied to soda in Pennsylvania.¹⁵² The tax will impact both regular and diet beverages,¹⁵³ while milk, baby formula, and beverages that contain over fifty percent fruit or vegetables are exempt.¹⁵⁴ The tax went into effect on January 1, 2017, and is expected to raise ninety-one million dollars annually.¹⁵⁵ According to Mayor Jim Kenney, the revenue from this new tax will go back to communities with the greatest need by expanding pre-kindergarten programs in the city, creating community schools, and developing community resources, including parks, recreation centers, and libraries.¹⁵⁶

Although the tax passed with a clear majority in the City Council, it was criticized and challenged throughout the process. The ABA

<https://www.wsj.com/articles/new-york-city-mayor-bill-de-blasio-pushes-forward-on-soda-ban-1413421275> [<https://perma.cc/9D7U-VDSL>].

149. *Id.*

150. While Philadelphia is held out to be the first major United States city to pass the soda tax, Berkeley, California was the first city in the United States to impose a soda tax in 2014. Burke, *supra* note 138. Furthermore, attempts to pass similar soda tax proposals have failed in over thirty states in recent years. Dann Cuellar, *Philadelphia City Council Passes Beverage Tax with 13-4 Vote*, 6ABC NEWS (June 17, 2016), <http://6abc.com/news/philadelphia-city-council-passes-beverage-tax-/1388228/> [<https://perma.cc/EQY4-XMUM>].

151. Burke, *supra* note 138.

152. Soda is classified as a food for taxation purposes, but is not exempt from sales tax in the state of Pennsylvania. Jeanne Sahadi & Aaron Smith, *Philadelphia Passes a Soda Tax*, CNN MONEY (June 16, 2016), <http://money.cnn.com/2016/06/16/pf/taxes/philadelphia-passes-a-soda-tax/> [<https://perma.cc/6RT9-AAS9>].

153. Cuellar, *supra* note 150.

154. Tricia L. Nadolny, *Soda Tax Passes; Philadelphia is First Big City in Nation to Enact One*, PHILLY.COM (June 16, 2016), http://www.philly.com/philly/news/politics/20160617_Philadelphia_City_Council_to_vote_on_soda_tax.html [<https://perma.cc/69DT-YR7X>].

155. Sahadi & Smith, *supra* note 152.

156. Nadolny, *supra* note 154. While the health benefit motivations seem apparent, Mayor Kenney focused on public interest issues when making the argument to tax sugary drinks. He noted that any health benefits resulting from the tax would be a bonus. Cuellar, *supra* note 150.

spent nearly five million dollars on advertisements opposing the tax, while a non-profit created in support of the initiative spent a little over two million dollars.¹⁵⁷ Critics of the tax emphasized its regressive nature and claimed it was discriminatory and would disproportionately impact poor and working class families.¹⁵⁸ In response, proponents emphasized the reinvestment of revenue raised from the tax back into the city, ultimately lifting poor Philadelphians out of poverty.¹⁵⁹

The group Philadelphians Against the Grocery Tax and the powerful ABA quickly took legal action against the tax,¹⁶⁰ and Mayor Kenney was prepared for the legal battle.¹⁶¹ The complaint alleged that the Philadelphia soda tax was illegal, because (1) it violated Pennsylvania's conformity clause; (2) the tax was preempted by the state's power over sales tax and the soda tax on top of the sales tax constituted illegal double taxation; and (3) the city cannot tax items that may be purchased through SNAP [colloquially, food stamp] benefits.¹⁶²

Of the three claims, the strongest challenge to the tax is that the tax is a sales tax and thus is preempted by state law.¹⁶³ In Pennsylvania, the state levies sales taxes, already taxes soda, and therefore the additional city tax "runs counter to a state law preventing a local government from taxing the same subject of property as an existing state law."¹⁶⁴ The City contended that sales taxes are imposed on tangible property and services, while the current soda tax "is levied on the wholesale distribution of sweetened beverages when they

157. Of the two million dollars spent by the non-profit, \$1.6 million came from former New York City Mayor, Michael Bloomberg, who is a strong proponent of public health as it relates to soda consumption. In response to the successful passage of the soda tax, Bloomberg congratulated Philadelphia Mayor Kenney and the City Council for "standing up to the beverage industry." Nadolny, *supra* note 154.

158. Burke, *supra* note 138.

159. Nadolny, *supra* note 154.

160. Burke, *supra* note 138.

161. Nadolny, *supra* note 154.

162. Claudia Vargas & Tricia L. Nadolny, *Soda Tax Lawsuit Dismissed*, PHILLY.COM (Dec. 19, 2016), http://www.philly.com/philly/news/20161220_Soda_tax_lawsuit_dismissed.html [<https://perma.cc/9ZUV-MCUP>].

163. Packel, *supra* note 140.

164. *Id.* Arguing the soda tax is a sales tax is ultimately asserting a state preemption argument. Because the state already imposes a sales tax, including a sales tax on soda, "Philadelphia cannot legally impose a[n additional] sales tax without approval from Republican dominated Harrisburg, which has often received tax proposals coolly." Ryan Briggs, *A Legal Challenge to Soda Tax Pops Up*, CITY & ST. PA. (June 8, 2016), <http://www.cityandstatepa.com/content/legal-challenge-soda-tax-pops> [<https://perma.cc/WL9H-9KJG>].

come into the city, is assessed based on volume, and is paid by the distributor.”¹⁶⁵ The City further asserted that any concerns that the tax would eventually be passed on to the consumer are “legally irrelevant.”¹⁶⁶

The plaintiffs also claim that the tax violated Pennsylvania’s Uniformity Clause. Article VIII of the Pennsylvania Constitution states, “[a]ll taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.”¹⁶⁷ This clause requires that goods belonging to the same class must be taxed at the same rate, and the complaint alleged that the tax violated the Pennsylvania Constitution because it is assessed on the volume, not the value or price, of the item.¹⁶⁸ The City responded that sugared and unsweetened beverages are separate classes, and therefore the uniformity clause did not apply.¹⁶⁹ Furthermore, because the soda tax is not a property tax, the City claimed it is within its right to tax the beverages based on volume or quantity, rather than volume alone.¹⁷⁰

165. Packel, *supra* note 140.

166. *Id.* While perhaps not legally relevant, the fact that the tax represents a regressive tax that will disproportionately impact low-income residents certainly represents a socially relevant concern asserted by critics, as noted above. Burke, *supra* note 138.

167. PA. CONST. art. VIII, § 1.

168. Packel, *supra* note 140; St. Vincent, *supra* note 140. Plaintiffs’ Complaint alleges the soda tax violates the uniform clause in four ways:

First, the Tax is imposed on the class of soft drinks in a non-uniform way based solely on volume, not value—at both the distributor wholesale level and the consumer market price level—in contravention of long-standing precedent precluding such a non-value based method of calculation of taxes on property (such as soft drinks). Second, the Tax is imposed on distributors in an unequal and unreasonable way because the Tax is much greater on large, inexpensive products than on small, more expensive products. Third, the Tax is imposed on retailers in an unequal and unreasonable way. Either the distributor passes on the Tax to the retailer, or the retailer itself is responsible for payment of the Tax in the first instance (a) pursuant to its role as a “dealer,” or (b) because the distributor has failed to pay the Tax. Among retailers that sell affected beverages, the retailers will suffer starkly different tax burdens depending on whether they sell large, inexpensive products rather than small, more expensive products. Fourth, the burden of the Tax is borne by consumers in unreasonably disparate ways. The amount of the Tax borne by the consumer is less on a percentage basis for small, more expensive products and wildly higher for large, less expensive products.

Complaint at 5, *Williams v. City of Philadelphia* (Phila. Ct. C.P. 2016) (No. 1452).

169. Briggs, *supra* note 164.

170. Packel, *supra* note 140.

The Philadelphia Court of Common Pleas dismissed the plaintiffs' case entirely, rejecting these arguments; however, the parties challenging the tax quickly filed an appeal.¹⁷¹ While the soda tax has been implemented throughout Philadelphia, its legality is still under scrutiny. The Pennsylvania Commonwealth Court has granted an expedited appeal and arguments are expected to begin in early April 2017.¹⁷²

D. Self-Regulation Within the Industry

Perhaps the growing public concern surrounding high-sugar beverages, such as soda, exemplified by new FDA labeling requirements and potential city taxation of soda beverages, has prompted the industry to take action through self-regulation.¹⁷³ On October 17, 2016, Pepsi announced it would cut the sugar content and calories of its products worldwide in response to the most recent World Health Organization dietary guidelines.¹⁷⁴ Specifically, Pepsi plans to cut calories from added sugar to less than 100 calories in two-thirds of its single serving drinks by the year 2025.¹⁷⁵ The chairman and CEO of Pepsi partially credited this new pledge to advances in technology that will enable companies to make equally tasty products without the same levels of sugar, resulting in "lower sweetness levels" for the consumer.¹⁷⁶ Pepsi did not indicate specifically which products would be seeing the reduction in sugar content or how the reduction would impact the production and marketing of the regular Pepsi formula and, considering the wide range of products produced

171. Dan Packel, *Pa. High Court To Hold Off On Philly Soda Tax Appeal*, LAW360 (Feb. 13, 2017), <https://www.law360.com/foodbeverage/articles/891541/pa-high-court-to-hold-off-on-philly-soda-tax-appeal> [<http://perma.cc/ZR2L-EHPJ>].

172. Julia Terruso, *Anti-Soda Tax Coalition Makes Appeal for Speedy Appeal*, PHILLY.COM (Dec. 30, 2016), <http://www.philly.com/philly/blogs/heardinthehall/Anti-soda-tax-attorneys-make-appeal-for-speedy-appeal.html> [<http://perma.cc/B92A-WHWN>].

173. *See, e.g.*, Aubrey, *supra* note 1 (noting Dr. William Dietz's observation that big soda companies are under increasing pressure, some of it coming from taxation of sugary drinks).

174. *See* Press Release, PepsiCo, *PepsiCo Launches 2025 Sustainability Agenda Designed to Meet Changing Consumer and Societal Needs* (Oct. 17, 2016), <http://www.pepsico.com/live/pressrelease/pepsico-launches-2025-sustainability-agenda-designed-to-meet-changing-consumer-a10172016> [<http://perma.cc/2TWW-JULG>] [hereinafter PepsiCo Press Release]; *see also* Aubrey, *supra* note 1.

175. *See* PepsiCo Press Release. These products include Gatorade, Pepsi, Mountain Dew, and Tropicana (among others). Abby Norman, *Pepsi Will Cut the Amount of Sugar in Its Sodas, & It's a Small Step Forward*, ROMPER (Oct. 18, 2016), <https://www.romper.com/p/pepsi-will-cut-the-amount-of-sugar-in-its-sodas-its-a-small-step-forward-20664> [<http://perma.cc/FVR9-WG4M>].

176. Norman, *supra* note 175.

by Pepsi,¹⁷⁷ the number of soda products impacted by the pledge remains unclear.¹⁷⁸ Pepsi's announcement and sugar reduction pledge is the first instance of a soda company taking potentially meaningful steps to reduce the amount of sugar in its products. Coca-Cola and the Dr. Pepper Snapple Group (along with Pepsi) pledged to reduce the American caloric consumption of sugary drink by an average of twenty percent by 2025 at the Clinton Global Initiative's annual conference in September 2014,¹⁷⁹ but other than Pepsi's 2016 announcement, no other company has made specific promises to accomplish the goal of reducing sugar consumption through soda (or other sugary beverages).¹⁸⁰

E. Consumer Product Liability Law

When regulations are inadequate to hold large corporations accountable, citizens may become a sort of private attorney general by bringing private suits against large companies for defective products. One potential approach to challenging companies creating unhealthy products is to file a civil claim under product liability law. The Third Restatement of Torts assigns liability to manufacturers for three types of product defects. First, the product manufacturer is liable for injury caused by defects or production flaws, which occur when "the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product."¹⁸¹ The second is design defects, wherein "the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe."¹⁸² Manufacturers are ultimately liable for design defects, because there is an element of the product that is inherently and unreasonably dangerous.¹⁸³ The final defect is in the information or warning provided to the customer, or lack thereof.¹⁸⁴ A manufacturer

177. *Brands You Love*, PEPSICO, <http://www.pepsico.com/brands> [<http://perma.cc/5M8G-VLXR>].

178. PepsiCo Press Release, *supra* note 174.

179. Saul, *supra* note 148.

180. While Coca-Cola and the Dr. Pepper Snapple Group may have made vague promises in 2014, Dr. William Dietz, a preventative health expert at George Washington University, believed this announcement and pledge is a meaningful commitment. Aubrey, *supra* note 1.

181. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 (1998).

182. *Id.*

183. Romero, *supra* note 4, at 245.

184. *Id.*

is liable for warning defects “when products become unreasonably dangerous because ‘no information explains their use or warns of their dangers.’”¹⁸⁵ If manufacturers include adequate labels properly warning consumers of the potential dangers posed by the product, then the product is considered reasonably safe.¹⁸⁶ When assigning potential liability to soda companies, the two relevant product liability claims are design defect and failure to warn.

Courts have adopted a number of approaches when considering design defects in product liability law. One approach is the consumer expectation (or unreasonably dangerous) test where the court determines a product’s design defect in relation to the consumer’s expectation of safety.¹⁸⁷ Under this analysis, a defectively designed product is one which “at the time it leaves the seller’s hands [is] in a condition not contemplated by the ultimate consumer [and] which will be unreasonably dangerous to him.”¹⁸⁸ Furthermore, the defective product “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.”¹⁸⁹ A second approach is the risk-utility, or risk-benefit, test. This test “requires the trier of fact to weigh such factors as the risks of harm, the benefits or utility of the chosen design, and the burden of taking precautions against that harm, to determine whether the product was unreasonably unsafe or dangerous in design.”¹⁹⁰ Some courts have adopted a hybrid test that “requires the trier of fact to consider risk-benefit factors in deciding what a reasonable consumer expects.”¹⁹¹

The other relevant defect in product liability law is failure to warn, when the manufacturer fails to provide sufficient warning to the

185. *Id.* at 245-46.

186. *Id.* at 246.

187. JOHN S. ALLEE ET AL., PROD. LIAB. § 2.05(2)(a) (2016); Mary Griffin, *The Smoldering Issue in Cipollone v. Liggett Group, Inc.: Process Concerns in Determining Whether Cigarettes Are a Defectively Designed Product*, 73 CORNELL L. REV. 606, 610 (1988).

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

189. *Id.* For a food context, see, e.g., *Austin v. W.H. Braum, Inc.*, 249 F.3d 805 (8th Cir. 2001) (holding that hot chocolate was not an unreasonably dangerous product when sold to consumers at 160 to 180 degrees Fahrenheit, which was the industry standard).

190. ALLEE, *supra* note 187, at § 2.05(2)(b). While juries generally determine questions of fact, the judge will consider the factors in the risk-utility test to determine whether the plaintiff has a prima facie valid claim.

191. *Id.* at § 2.05(2)(c).

consumer regarding the inherent risks of the product's typical use.¹⁹² While "most courts have held that the basic standard of responsibility is negligence and that the manufacturer's duty is to use due care in warning of dangers it 'knew or should have known' to exist," a number of other courts simply assume the defendants knew the risks of harm, eliminating this requirement altogether.¹⁹³ Some plaintiffs have attempted to apply these product liability standards to food products, but to little avail. Part III further discusses the potential application of product liability to soda products.

F. Obesity Litigation: *Pelman v. McDonald's Corp.*

In 2003, the Southern District of New York decided the seminal case involving obesity litigation in *Pelman v. McDonald's Corp.*¹⁹⁴ In *Pelman*, the plaintiffs, two minors and their parents on their behalf, filed multiple claims against McDonald's for allegedly causing them to become obese, thus causing a multitude of health problems.¹⁹⁵ The plaintiffs filed five claims against McDonald's. Counts one and two alleged McDonald's violated New York State consumer protection law and engaged in deceptive trade practices by creating unhealthy products, not fully disclosing the ingredients or health effects of consuming the product, and using marketing to entice customers to buy the products without disclosure of the risks.¹⁹⁶ Count two specifically criticized McDonald's marketing to children.¹⁹⁷ Plaintiffs' counts three through five asserted negligence claims against McDonald's.¹⁹⁸

Judge Sweet in his decision ultimately rejected the plaintiffs' claims for a variety of reasons. Counts one and two had alleged McDonald's violated the New York Consumer Protection Act.¹⁹⁹ For a successful claim of deceptive practices, the plaintiff must show: "(1) that the act,

192. *Id.* at § 2.05(3).

193. *Id.*

194. *See Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003). The Court considered these arguments during a procedural 12(b)(6) motion to dismiss for failure to state a claim. *See generally* FED. R. CIV. P. 12(b)(6).

195. *Pelman*, 237 F. Supp. 2d 512.

196. *Id.* at 520, 527.

197. *Id.* at 520, 530.

198. *Id.* at 530.

199. *Id.* at 524. New York General Business Law § 349 makes "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state" unlawful. *Id.* (quoting N.Y. GEN. BUS. LAW § 349(a) (McKinney 2014)). New York General Business Law § 350 forbids "[f]alse advertising in the conduct of any business." *Pelman*, 237 F. Supp. 2d at 525 (quoting N.Y. GEN. BUS. LAW § 350 (McKinney 2017)).

practice or advertisement was consumer-orientated; (2) that the act, practice or advertisement was misleading in a material respect, and (3) that the plaintiff was injured as a result of the deceptive practice, act or advertisement.”²⁰⁰ To determine whether an act or practice was misleading, the court used an objective standard, demanding evidence that a “reasonable consumer would have been misled by the defendant’s conduct.”²⁰¹ The court rejected count one, because the plaintiffs did not identify a single instance of deceptive acts.²⁰² Specifically, plaintiffs failed to identify an advertisement where McDonald’s claimed that its products could be eaten on a daily basis without any risk of health consequences.²⁰³ The court also rejected the claims in count two, because the plaintiffs failed to present a single specific advertisement, promotion, or statement targeting minor consumers.²⁰⁴

In count three, plaintiffs claimed that McDonald’s products were inherently dangerous due to the high levels of cholesterol, fat, salt, and sugar; however, McDonald’s defended its products by noting public awareness of these nutritional facts.²⁰⁵ McDonald’s also pointed to the Restatement (Second) of Torts emphasis that no product can be entirely safe for all consumption.²⁰⁶ For plaintiffs’

200. *Pelman*, 237 F. Supp. 2d at 525.

201. *Id.* (citing *Marcus v. AT&T*, 138 F.3d 46, 64 (2d Cir. 1998); *Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank*, 647 N.E.2d 741 (N.Y. 1995)).

202. The plaintiffs identified only two potentially deceptive advertising campaigns—“McChicken Everyday!” and “Big N’ Tasty Everyday”—and a statement found on the McDonald’s website claiming that “McDonalds can be part of any balanced diet and lifestyle.” *Pelman*, 237 F. Supp. 2d at 527.

203. *Id.* at 528.

204. The Court noted that “if plaintiffs are only concerned about the appellation ‘Mightier Kids Meal,’ such name is seemingly puffery, rather than any claim that children who eat a ‘Mightier Kids Meal’ will become mightier.” *Id.* at 530.

205. *Id.* at 531.

206. *Id.* at 531-32 (citing RESTATEMENT (SECOND) OF TORTS § 402A, cmt. i, which explains unreasonably dangerous: “The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by ‘unreasonably dangerous’ in this Section. The 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. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fuel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably

count three to survive the motion to dismiss, it needed to “allege either that the attributes of McDonald’s products are so extraordinarily unhealthy that they are outside the reasonable contemplation of the consuming public or that the products are so extraordinarily unhealthy as to be dangerous in their intended use.”²⁰⁷ While the complaint alleged the food contains high levels of cholesterol, fat, salt, and sugar, the court found that it did not clear the necessary bar.²⁰⁸ The court emphasized the common knowledge that McDonald’s products contain these nutritional elements.²⁰⁹

The court then addressed plaintiffs’ count four, the failure to warn of the unhealthy attributes of McDonald’s products. In evaluating duty to warn claims, New York law considers the “feasibility and difficulty of issuing warnings in the circumstances . . . ; obviousness of the risk from actual use of the product; knowledge of the particular product user; and proximate cause.”²¹⁰ There are two situations that bar a showing of proximate cause in duty to warn cases—obviousness of the risk of harm and the knowledgeable user.²¹¹ Plaintiffs in *Pelman* failed to allege that the McDonald’s products consumed by the minors were dangerous in a way that was not “open and obvious,” meaning “the risks were sufficiently obvious to the user without a warning.”²¹² Finally, the court rejected plaintiffs’ count five, alleging the sale of addictive products as overly vague, because it lacked specific facts as to what about McDonald’s products makes them addictive.²¹³ Plaintiffs also failed to provide evidence suggesting McDonald’s purposely created addictive products.²¹⁴ Ultimately, Judge Sweet granted defendant’s motion to dismiss the complaint in its entirety, but granted leave for the plaintiffs to amend the complaint to address the deficiencies identified within the opinion.²¹⁵

Although the plaintiffs failed to survive a 12(b)(6) motion in *Pelman*, that does not mean that potential litigation against large food or beverage corporations is not possible in the future. In fact, Judge

dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.”).

207. *Pelman*, 237 F. Supp. 2d at 532.

208. *Id.*

209. *Id.*

210. *Id.* at 540.

211. *Id.*

212. *Id.* at 541.

213. *Id.* at 542.

214. *Id.*

215. *Id.* at 543.

Sweet's decision in *Pelman* may have opened the door for litigation by providing the precise information and evidence necessary for a successful claim. First, if plaintiffs seek consumer protection claims, they must present specific instances where the defendant corporation or manufacturer created and disseminated deceptive advertising expressly claiming its products were healthy for the consumer or would actively assist the consumer lose weight. Second, plaintiffs will face significant challenges bringing common law negligence claims against fast food corporations, because it is well-known among the public and consumers that such food is unhealthy and overconsumption carries significant health risks. If consumers attempt food litigation against the food and beverage industry, other than specifically fast food restaurants, consumers should consider whether the health risks are common knowledge. If, however, the health risks are not well known, and have potentially been downplayed by the food and beverage industry itself, consumers may have a more persuasive claim than in *Pelman*.

G. Tobacco Litigation

Although recent consumer products liability claims against a fast food corporation have been unsuccessful,²¹⁶ consumers have prevailed in claims against large corporations who create dangerous products, specifically against tobacco and cigarette companies. Tobacco litigation is now considered one of the successful mass tort litigations brought against large corporations; however, this was not always the case. Tobacco companies prevailed in the early cases primarily because plaintiffs lacked sufficient scientific evidence proving there was a link between their diseases and smoking cigarettes.²¹⁷ However, big tobacco's early success came to an end in the 1988 New Jersey case, *Cipollone v. Liggett Group, Inc.*²¹⁸ In *Cipollone*, the jury awarded Antonio Cipollone \$400,000 in damages for the death of his wife, Rose Cipollone, who died from cancer

216. *See generally id.*

217. Douglas N. Jacobson, *After Cipollone v. Liggett Group, Inc.: How Wide Will the Floodgates of Cigarette Litigation Open?*, 38 AM. U. L. REV. 1021, 1022 (1989). Some plaintiffs failed in early tobacco litigation cases because plaintiffs had contributed to their own health problems, while other plaintiffs simply could not afford the lengthy and expensive court battles. *See id.* at 1022-23.

218. 693 F. Supp. 208 (D.N.J. 1988), *aff'd in part, rev'd in part*, 893 F.2d 541 (3d Cir. 1990), *aff'd in part, rev'd in part*, 505 U.S. 504 (1992); Jacobson, *supra* note 221, at 1023. This was the first court to award a monetary judgment for injuries caused by smoking cigarettes. *Id.*

caused by smoking cigarettes.²¹⁹ The jury found Liggett Group liable because the cigarette company failed to warn consumers of the risks of smoking before 1966 and breached its express warranty that the cigarettes were safe.²²⁰ *Cipollone* was also the first case where plaintiffs introduced evidence showing the cigarette companies conspired to prevent third parties from providing information about the health hazards cigarettes posed.²²¹

Under strict product liability the plaintiff does not need to prove that the defendants were negligent “or otherwise at fault for the harm caused by the product.”²²² Rather, the plaintiff must only prove that “the manufacturer sold its product in a defective or dangerous condition.”²²³ When determining whether the manufacturer in fact sold a product that was in a defective or dangerous condition, many jurisdictions have adopted the risk-utility test explained above.²²⁴ Specifically, in the cases preceding *Cipollone*, as well as the New Jersey court in *Cipollone*, courts analyzed cigarette companies’ liability under a risk-utility analysis.²²⁵ The risk-utility test balances the risks of the potentially dangerous products against the product’s benefit to decide whether a product is unreasonably dangerous or defective. “Under [the] utility test the product is defective only if the magnitude of the potential hazards outweighs the utility or other benefits of the product.”²²⁶

In *Cipollone*, the plaintiffs asked the court to find that cigarettes were so inherently dangerous and provided so little utility, that the cigarette was a defective product.²²⁷ In so doing, the *Cipollone* court

219. Jacobson, *supra* note 221, at 1023. As factual background, Rose Cipollone began smoking cigarettes when she was sixteen and in 1981 developed a malignant tumor in her right lung. Rose Cipollone had the upper lobe of her lung and then the entire right lung removed. She and her husband filed a suit against the cigarette companies who manufactured and sold the cigarettes she had smoked. The complaint alleged that she developed bronchogenic carcinoma as a result of using the defendants’ products for over forty years. During the pretrial procedures, Rose Cipollone died of complications from lung cancer, and her husband, Antonio Cipollone, continued the case individually and on behalf of his wife’s estate. *Id.* at 1043-44.

220. *Id.* at 1023. The failure to warn claim was prior to 1966, because warning labels placed on cigarettes in 1966 in compliance with the FDA’s Federal Cigarette Labeling and Advertising Act of 1965 preempted state tort claims. *Id.* at 1023, 1028.

221. *Id.* at 1023.

222. *Id.* at 1037.

223. *Id.* at 1039 (citing RESTATEMENT (SECOND) OF TORTS § 402(A) (1965)).

224. Jacobson, *supra* note 221, at 1039.

225. *Id.* at 1036-40.

226. *Id.* at 1039-40 (citations omitted).

227. Griffin, *supra* note 187, at 607.

analyzed the facts under the risk-utility test in a number of ways under New Jersey Law.²²⁸ First, the court refused to “consider in [its] calculus the collateral economic benefits from the manufacture and sale of the product.”²²⁹ The court held that “the manufacturer’s reasonableness in placing the product on the market depends only upon the social benefits of cigarettes to the cigarette smoker, and not upon the collateral social benefits of cigarette production.”²³⁰ The second, more challenging piece of the risk-utility test was balancing the utility of cigarettes against the risks associated with the product. The court reasoned that a plaintiff could “prove a design defect in two ways: (1) prove that the manufacturer was unreasonable because it marketed the product as designed instead of using a technologically feasible alternative; or (2) when no technologically feasible alternative is available, prove the manufacturer was unreasonable in selling the product at all.”²³¹ While both analyses compare the defendant’s alternative course of conduct, the second approach is quantifiably more difficult for a court to determine.²³² Comparing a specific product to a technologically feasible alternative—such as a prior product model, or a new feasible alternative—provides the court quantifiable data and evidence to compare, such as increasing the cost of a product in order to add a certain safety feature.²³³ However, a court comparing an existing product against a hypothetical world without the product must consider an overwhelming number of competing values without any quantifiable data to compare.²³⁴

228. Under New Jersey tort law, “[t]he elements of a *prima facie* case for design defect are evidence that (1) the product design was defective, (2) the defect existed when the defendants distributed the product, and (3) the defect caused injury to a reasonably foreseeable user.” *Id.* at 609.

229. *Id.* at 611-12. For example, “[i]n analyzing the utility of the handguns the court considered only the utility of such handguns to the consumer for recreational use or protection, and not production benefits resulting from handgun manufacture or sale.” *Id.* at 612 (citing *Moore v. R.G. Indus.*, 789 F.2d 1326, 1327 (9th Cir. 1986)).

230. Griffin, *supra* note 187, at 613.

231. *Id.* at 615 (citing *Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140, 150 (N.J. 1979) (“Did the manufacturer act as a reasonably prudent person by designing the item as he did and by placing it on the market in that condition, or should he have designed it to incorporate certain safety features or some other modifications?”)).

232. Griffin, *supra* note 187, at 615.

233. *Id.* at 615-22.

234. Notably:

When the plaintiff posits the removal of an entire product line from the market, the court cannot focus on one small, incremental change at a time. The court can no longer, for example, hold constant the price and relaxation benefits of cigarettes and focus solely on the tradeoff between a bitter

The *Cipollone* court also considered the failure to warn claim.²³⁵ The defendants argued that this claim was preempted because Congress had passed the Federal Cigarette Labeling and Advertising Act of 1965, requiring cigarettes to contain a warning label by 1966.²³⁶ The United States Supreme Court held that the failure to warn claim was preempted for injuries occurring after the 1966 label was implemented, and the plaintiff was limited to injuries predating the federal warning.²³⁷ Despite this limitation, the “jury found Liggett to be negligent and assigned 20% of the fault for Cipollone’s illness to the defendant,” and held the plaintiff eighty percent responsible for her injuries through the assumption of risk doctrine.²³⁸

Shortly after *Cipollone*, the climate of tobacco litigation changed significantly. Plaintiffs began consolidating claims to create class-action tort challenges to the tobacco industry.²³⁹ Beyond plaintiffs’ private causes of action, states began “seeking reimbursement from tobacco companies for health-related costs associated with smoking.”²⁴⁰ These developments occurred as industry documents

aftertaste and reduced health risks. The ‘should not have sold any cigarettes at all’ alternative brings all the defendants’ design choices into the fray at once.

Id. at 621-22.

235. As the court summarized:

The ‘failure to warn claims’ allege both that the product was ‘defective as a result of [respondents’] failure to provide adequate warnings of the health consequences of cigarette smoking’ and that respondents ‘were negligent in the manner [that] they tested, researched, sold, promoted and advertised’ their cigarettes. The ‘express warranty claims’ allege that respondents had ‘expressly warranted that smoking the cigarettes which they manufactured and sold did not present any significant health consequences.’ The ‘fraudulent misrepresentation claims’ allege that respondents had willfully, ‘through their advertising, attempted to neutralize the [federally mandated] warning’ labels, and that they had possessed, but had ‘ignored and failed to act upon,’ medical and scientific data indicating that ‘cigarettes were hazardous to the health of consumers.’ Finally, the ‘conspiracy to defraud claims’ allege that respondents conspired to deprive the public of such medical and scientific data.

Cipollone v. Liggett Grp., 505 U.S. 504, 509-10 (1992).

236. *See generally id.* The required warning label read: “WARNING: THE SURGEON GENERAL HAS DETERMINED THAT CIGARETTE SMOKING IS DANGEROUS TO YOUR HEALTH.” Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §§ 1331-1340 (2012).

237. Jacobson, *supra* note 217, at 1046.

238. *Cipollone*, 505 U.S. at 512; *see also* Brooke Courtney, *Is Obesity Really the Next Tobacco? Lessons Learned from Tobacco for Obesity Litigation*, 15 ANN. HEALTH L. 61, 86 (2006).

239. Courtney, *supra* note 238, at 85.

240. *Id.*

surfaced and revealed efforts to “conceal and misrepresent tobacco-related health concerns,” and that tobacco industry executives knew of nicotine’s addictive nature.²⁴¹ Using this newly discovered evidence, plaintiffs shifted their focus to the addictive qualities of tobacco.²⁴² While the tobacco and cigarette companies previously claimed that the health risks associated with smoking cigarettes were well-known to the consumer (especially after the Federal Cigarette Labeling and Advertising Act) and therefore consumers assumed those risks when they voluntarily chose to smoke,²⁴³ “the addictive character of nicotine was less familiar to smokers than the health effects of tobacco.”²⁴⁴ In addition to shifting the focus to nicotine addiction, state attorneys general began bringing state health care reimbursement claims, beginning with the Mississippi Attorney General.²⁴⁵ Mississippi and the other states sought recovery on equitable grounds of unjust enrichment, as well as “consumer fraud and violations of consumer protection law.”²⁴⁶ Soon, similar government lawsuits were filed by almost every state, and the tobacco industry avoided significant litigation by settling individually with four states and settling with the remaining forty-six states in a \$206 billion master settlement agreement in 1998.²⁴⁷

III. THE BITTER TRUTH OF POTENTIAL SOLUTIONS

American consumers should pursue two courses of action to hold soda companies accountable for their role in the current obesity and health crisis. First, following the litigation against tobacco and cigarette companies, consumers should pursue product liability civil actions. Second, consumers should pursue legislative action on the local and state levels to encourage cities and states to adopt a per

241. *Id.* at 87 (citing Robert L. Rabin, *The Third Wave of Tobacco Tort Litigation*, in REGULATING TOBACCO 176, 179, 183 (Robert L. Rabin & Stephen D. Sugarman eds., 2001)).

242. Courtney, *supra* note 238, at 86-88.

243. *See supra* note 236. In addition to requiring warning labels on cigarette packages, the act “specified in great detail the appropriate phrasing of warnings, requirements for outdoor billboards, and appropriate size fonts for each warning. Armed with the statute, Big Tobacco repeatedly won cases asserting that the smoker knew that the habit was dangerous and voluntarily chose to smoke knowing the risks.” John J. Zefutie, Jr., *From Butts to Big Macs – Can the Big Tobacco Litigation and Nation-Wide Settlement with States’ Attorneys General Serve as a Model for Attacking the Fast Food Industry?*, 34 SETON HALL L. REV. 1383, 1388-89 (2004).

244. Courtney, *supra* note 238, at 87 (citing Rabin, *supra* note 241, at 186).

245. *Id.* at 88.

246. *Id.*

247. *Id.*

ounce tax on beverages, particularly soda, that contain over fifty percent sugar, using the recently upheld Philadelphia soda tax as a model. Both civil actions and local legislation may ultimately encourage other companies to respond to public health concerns and modify their products to make them healthy, just as Pepsi is promising to do.

The current public health crisis surrounding obesity and diabetes presents a costly and dangerous problem for American society today.²⁴⁸ Despite the recent development of new FDA labeling guidelines requiring the disclosure of “added sugars,” it is unclear how effective or responsive Congress or federal agencies will be in the future. Federal agencies may be unable to create and enforce meaningful regulation, because companies in the food and beverage industry, as well as special interest groups (such as the ABA), are willing to pay exorbitant amounts of money in lobbying and campaign contributions to protect their interests, which do not align with increased regulations.²⁴⁹ Furthermore, as long as there is a revolving door between private and public sector employees, where industry insiders hold positions within federal agencies, the agencies themselves may be ineffective in regulatory action.²⁵⁰ Rather, individuals should serve as private attorneys general and hold Big Soda companies accountable through the courts. Given the difficulty plaintiffs have faced in the past regarding obesity litigation brought against fast food restaurants, cities and states should take local action to reduce obesity, diabetes, and other related health issues, by imposing a soda or sugary beverage tax.

A. Renewed Litigation Efforts: No Sugar-Coating

Litigation brought against food and beverage corporations, and specifically large soda companies, on the basis of sugar overconsumption may prove more successful than obesity litigation brought strictly against fast food restaurants.²⁵¹ Plaintiffs should use the success in tobacco litigation to make a claim of design and

248. See Romero, *supra* note 4, at 241; see also NESTLE, *supra* note 5, at 393.

249. See discussion *supra* Section II.A.

250. See discussion *supra* Section II.A.

251. There are many avenues through which consumers can hold Big Soda accountable for creating and selling such unhealthy products. Although the plaintiffs failed to survive a 12(b)(6) motion in *Pelman*, potential litigation against large food or beverage corporations may still be possible. In fact, Judge Sweet’s decision in *Pelman* may have opened the door for litigation by providing the precise information and evidence necessary for a successful claim. See *generally* *Pelman v. McDonald’s Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003).

warning defects against large soda companies.²⁵² Of the two claims, the failure to provide sufficient warning claim is likely stronger than the design defect claim, but both offer potential approaches to pursue litigation.

1. *Design Defect*

The design defect claim exists 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 or other distributor . . . and the omission of the alternative design renders the product not reasonably safe.”²⁵³ For a successful design defect claim, plaintiffs must first show that consumer soda posed a foreseeable risk. Once the plaintiffs have demonstrated this foreseeable risk existed, they must show the existence of a reasonable and safe design that the soda companies should have pursued and used. Specifically, plaintiffs would claim that soda companies could have created a formula with less sugar, thereby reducing the health risks of consuming the product.

Soda companies are likely aware of the dangers posed by consuming large amounts of sugar²⁵⁴ and, therefore, would be attuned to the foreseeable risks posed by high-sugar content sodas. Because sugar comprises a significant portion of the soda formula, plaintiffs should target the dangers inherent in sugar consumption and overconsumption. As discussed in Parts I and II, there is significant evidence pointing to sugar as one of the—if not the—primary causes of obesity and diabetes.²⁵⁵ After carbonated water, high fructose corn syrup is the largest ingredient in most regular (non-diet or sugar-free) sodas, including Coca-Cola, Pepsi, Sprite, and Dr. Pepper.²⁵⁶ Furthermore, because it delivers fructose in a liquid form, sodas present a uniquely dangerous product.²⁵⁷ When sugar, specifically fructose, is consumed in liquid form, the fructose rushes to the liver.²⁵⁸ Consuming fructose in liquid form exacerbates the health

252. See Romero, *supra* note 4.

253. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 (1998); *supra* Section II.E.

254. See O'Connor, *supra* note 84; see also O'Connor, *supra* note 11.

255. NESTLE, *supra* note 5, at 405-06, NESTLE, *supra* note 2, at 66; see generally GARY TAUBES, THE CASE AGAINST SUGAR (2016).

256. COCA-COLA, *supra* note 78; PEPSICO, *supra* note 78; *Dr Pepper*, DR. PEPPER, <http://www.drpepper.com/en/products/drpepper> [https://perma.cc/5A36-557R]; *Sprite*, COCA-COLA, <http://www.coca-colaproductfacts.com/en/coca-cola-products/sprite/> [https://perma.cc/SCA6-9QCS].

257. See discussion *supra* Sections I.A, I.B.

258. Taubes, *supra* note 1; FED UP, *supra* note 51.

risks that already exist with typical sugar consumption because it overloads the liver, forcing it to convert the fructose into fat, which can induce insulin resistance.²⁵⁹ Insulin production can then cause obesity, metabolic syndrome, and a number of related adverse health conditions.²⁶⁰

A notable challenge in the design defect argument is that, despite some calls that sugar is a toxin in any amount,²⁶¹ recent experts have emphasized that sugar ingestion is particularly harmful when it is over-consumed.²⁶² Even if sugar is considered a toxin analogous to tobacco or alcohol, it would not constitute a toxin for product liability purposes under existing tort law.²⁶³ So long as design defect tort law is limited to products that contain true “toxic” materials and the soda serving-size remains within the bounds of the “healthy” daily sugar intake, design defect claims will likely prove futile. If the original product at issue is not considered harmful, then there would be no reason for the company to pursue a safer alternative. Even if the court found that a single serving of soda was harmful, plaintiffs may nevertheless have difficulty pursuing a design defect claim because of the balancing inquiry required by the risk-utility test.

2. *Failure to Warn*

Plaintiffs should investigate three different avenues for a duty to warn claim against soda companies. The first is that sodas are scientifically addictive based on their ingredients. Second, plaintiffs should encourage courts to adopt an expanded duty-to-warn standard for practical addiction where the scientific evidence is still being developed. Finally, plaintiffs should allege that due to the large amount of sugar in a serving of soda, the beverage companies had a duty to warn the consumer about the risks of consuming large amounts of sugar.

259. See discussion *supra* Section I.B; see generally JOHN YUDKIN, PURE, WHITE, AND DEADLY: HOW SUGAR IS KILLING US AND WHAT WE CAN DO TO STOP IT (1986).

260. “[Dr. Robert Lustig’s] argument . . . is that sugar has unique characteristics, especially in the way the human body metabolizes the fructose in it . . . that may make it singularly harmful, at least if consumed in *sufficient quantities*.” Taubes, *supra* note 1 (emphasis added).

261. *Id.*

262. *Id.*

263. See RESTATEMENT (SECOND) OF TORTS § 402A, cmt. i. (see also *supra* note 206 and accompanying text).

There is developing evidence that soda may be addictive.²⁶⁴ Sugar is the largest ingredient in soda after carbonated water. As such, evidence that sugar possesses addictive qualities should imply that sodas containing large amounts of sugar would be similarly addictive. While “sweetness is well established to reinforce the desire to eat,”²⁶⁵ the debate surrounding whether sugar is addictive is controversial and still developing.²⁶⁶ Researchers have studied the potential for sugar addiction by comparing sugars with other abusive drugs.²⁶⁷ Unlike traditional substance abuse, the effects of sugar addiction may not be as visible or immediate.²⁶⁸ Scientific evidence shows that sugar induces the same response in the brain’s reward center as nicotine, cocaine, heroin, and alcohol, all substances known to cause addiction.²⁶⁹ A critical question for determining scientific addiction is what differentiates a substance that triggers the reward center causing pleasure from a substance that is addictive, and what results when a substance is both.²⁷⁰ In 2007, French scientists compared sugar and cocaine cravings in rats,²⁷¹ and found that “[r]ats given sweetened water in experiments find it significantly more pleasurable than cocaine, even when they’re addicted to the latter, and more than heroin as well.”²⁷² Furthermore, scientists addicted rats to cocaine over the course of months and then offered the addicted rats a sweet solution or its cocaine fix; it only took two days for the rats to choose the sweets over the cocaine.²⁷³

264. See generally NESTLE, *supra* note 2, at 64-65.

265. *Id.* at 49.

266. While “[s]ugar craving does seem to be hard-wired in our brains,” the debate may ultimately be whether sugar is actually addictive or whether society just treats it as such. TAUBES, *supra* note 255, at 33, 37. But this begs the question of whether scientific addiction should be distinguished from practical addiction when the company knowingly creates the product.

267. *Id.* In fact, sweet and sugary beverages are sometimes used to wean addicts off harder drugs. *Id.* at 41.

268. Critically:

[S]ugar appears to be a substance that causes pleasure with a price that is difficult to discern immediately and paid in full only years or decades later. With no visible, directly noticeable consequences . . . questions of ‘long-term nutritive or medical consequences went unasked and unanswered.’ Most of us today will never know if we suffer even subtle withdrawal symptoms from sugar, because we’ll never go long enough without sugar to find out.

Id. at 34.

269. *Id.* at 40.

270. *Id.* at 41.

271. Magalie Lenoir et al., *Intense Sweetness Surpasses Cocaine Reward*, 2 PLOS ONE 8, 1 (2007).

272. TAUBES, *supra* note 255, at 41.

273. See *id.*

Research into the addictive qualities of sugar is ongoing and may take years to develop hard-scientific evidence, especially because human studies are scarce or non-existent. Nevertheless, the current evidence paints a picture of likely addiction, similar to that of illicit drugs. Soda not only contains high levels of likely addictive sugar, but also contains caffeine, which is known to be addictive.²⁷⁴ Again, there is currently little known research to scientifically answer whether soda is addictive. However, given the strong evidence of addictive qualities of sugar, compounded with the known evidence of caffeine addiction, there is sufficient suggestion to give courts pause before dismissing such claims. For plaintiffs to pursue a successful failure to warn claim, they must show that the defendant was aware of the risk and did not disclose this information to the consumer. Therefore, plaintiffs would need some reason to believe and prove that internal research within the food and beverage industry exposed evidence that soda (or substantial ingredients in soda, such as sugar) is addictive.²⁷⁵

Beyond scientific addiction, plaintiffs and courts should expand failure to warn claims to practical addiction because soda formulas are created to specifically bypass certain neurological signals to encourage overconsumption. Soda formulas are carefully created and manipulated to ensure that no single flavor overpowers the consumer's palate.²⁷⁶ This effect enables the consumer to drink more soda, because she does not "get sick" of the flavor. Additionally, because soda is a liquid, the brain may not receive the psychological

274. Notably:

Addiction researchers are especially interested in sodas because they contain another potentially addictive substance, caffeine, as well as sugars. The caffeine in sodas is low—less than 40 milligrams in a 12-ounce serving—but that may be enough to stimulate dependence, especially in combination with sugars The caffeine is there for a different purpose [than taste]; it makes people enjoy drinking the product even more than does sugar on its own. At least one study found that the addition of even small amounts of caffeine to sugary drinks makes people drink more of them.

NESTLE, *supra* note 2, at 49 (citing Russell S. J. Keast & Lynn J. Riddell, *Caffeine as a Flavor Additive in Soft Drinks*, 49 *APPETITE* 255, 255-59 (2007); Russell S. J. Keast et al., *Caffeine Increases Sugar-Sweetened Beverage Consumption in a Free-Living Population: A Randomized Controlled Trial*, 113 *BRIT. J. NUTRITION* 366, 366-71 (2015)).

275. Courts should look at the addition of caffeine, a known addictive substance, to soda to determine whether the caffeine serves any legitimate purpose other than to enhance the soda-drinking experience. *Id.*

276. Moss, *supra* note 55, at 105.

regulatory signal that it is full.²⁷⁷ Calories from soda are more than empty calories—they are dangerous calories containing fructose that, due to the liquid form, can overwhelm the body’s metabolic system.²⁷⁸ Furthermore, even though the body just consumed nearly sixty percent of the daily value of sugar by drinking one twelve ounce serving of soda, it does not think it is full and therefore will likely seek additional sustenance to feel satiated.²⁷⁹ This additional sustenance will almost certainly contain more sugar. Ultimately, by consuming soda, the body is deceived and unknowingly consumes nearly sixty percent of its recommended daily sugar value without feeling full. This entire scenario certainly encourages, and likely directly leads to, overconsumption of sugar on a daily basis. Again, plaintiffs will have to prove that the industry is aware of these risks; however, given the fact that food products are intentionally created to promote consumption, and soda companies are aware of the amount of sugar in each serving, the industry is, or should be, aware of the potential for practical addiction that likely results in sugar overconsumption.²⁸⁰

The final failure to warn argument does not depend on a claim of scientific or practical addiction, but it points to the health risks associated with sugar. The *Pelman* plaintiffs asserted a general failure to warn about the health risks associated with food products, but the court rejected the claim that McDonald’s failed to warn consumers about the dangers of eating too much of its fast food products, by emphasizing that the reasonable consumer is aware of the inherent danger in eating fast food.²⁸¹ Unlike the danger of consuming foods high in fat and cholesterol, the public is less knowledgeable about the dangers of consuming sugar. In fact, many Americans likely do not know how much sugar they should consume on a daily basis.²⁸² The

277. “Most research suggests that it is only the sugars consumed in drinks that bypass physiological regulatory controls.” NESTLE, *supra* note 2, at 46; *see also supra* Sections I.A, I.B.

278. Taubes, *supra* note 1, and accompanying text; FED UP, *supra* note 51.

279. In humans, studies have shown that “the more sugary drinks people consume, the more calories they consume from any source.” NESTLE, *supra* note 2, at 45-46.

280. *See generally* MOSS, *supra* note 55, at 98-99, 104-06 (discussing how sodas are created to encourage “heavy usage”).

281. *Pelman v. McDonald’s Corp.*, 237 F. Supp. 2d 541 (S.D.N.Y. 2003) (finding the risk associated with eating a large amount of fast food was sufficiently obvious to not require a warning).

282. Until recently, nutrition labels were not required to include the daily value percentage for sugar consumption. *See* discussion *supra* Sections II.A, II.B. Furthermore, the average American consumes far more sugar than recommended by various health authorities, suggesting consumers are not aware of the risk of overconsumption. *See* discussion *supra* Part I.

limited knowledge is due, in large part, to the sugar industry's active campaign to shift focus from the role of sugar to the role of fat in causing various health concerns (concerns that are now becoming associated with sugar).²⁸³ Unlike the developing research into whether sugar is addictive, soda companies should have been well aware of the risks posed by consuming sugar,²⁸⁴ but they did not disclose this information to the public in any form. Rather, the soda companies sought to change the conversation and encourage a reduction of *all* calories, a reduction in fat consumption, and an increase in activity.²⁸⁵

In *Pelman*, the court held that the failure to warn claim failed because of the well-known health risks associated with eating fast food on a regular basis.²⁸⁶ The same cannot be said for the dangers associated with consuming sugar. While it may be common knowledge that sugar consumption should be modified to some extent, until the new FDA labeling requirements are implemented and widely understood, the general public is likely unaware of how much someone should consume on a daily basis. Furthermore, there is clear evidence that the food industry sought to redirect attention and criticism from sugar to fat.²⁸⁷ Through a winning public relations campaign, the sugar industry successfully changed the narrative to fat as the evil cause of obesity and related health problems.

Proving causation presents a major challenge to litigation against soda companies. In *Pelman*, Judge Sweet identified the plaintiffs' inability to prove that the McDonald's products, rather than other foods or lifestyle choices, caused the plaintiffs' injuries.²⁸⁸ Similarly, it would be nearly impossible to identify regular soda as the individual cause of an individual's health problems (such as obesity or diabetes). Most notably, sugar (and added sugar) is found in most processed foods, so it would likely be impossible to separate the sugar from the product at issue in litigation from the sugar in other foods. The best potential approach to causation is the market share liability approach

283. See O'Connor, *supra* note 11 (explaining how the Sugar Association paid scientists in the 1960s to promote saturated fat as the main cause of heart disease, thus downplaying the developing research suggesting a strong link between sugar and heart disease); see also O'Connor, *supra* note 84.

284. Throughout the 1960s, British nutrition authorities did a series of experiments exposing the dangers of consuming sugar and published a criticism of sugar called "Sweet and Dangerous." Taubes, *supra* note 1.

285. O'Connor, *supra* note 84.

286. *Id.*

287. O'Connor, *supra* note 11.

288. *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 536 (S.D.N.Y. 2003).

developed in *Sindell v. Abbott Laboratories*.²⁸⁹ Under the market share liability theory, plaintiffs who are unable to identify a single manufacturer, through no fault of their own, can sue multiple actors who produced the injurious product, and the industry actors pay damages based on their share of the market.²⁹⁰ Soda litigation, however, still fails to meet certain requirements necessary for market share liability. First, unlike the *Sindell* cases, sodas are unlikely to be considered fungible goods, because each soda company likely uses a different, highly protected formula.²⁹¹ Additionally, because soda can cause a number of related health problems later in life, plaintiffs would be unable to demonstrate a “signature illness” associated with soda consumption.²⁹² Even assuming plaintiffs could demonstrate they only consumed soda from one producer, thereby ignoring the market share liability argument, they would face the same causation challenges illustrated in *Pelman* and would likely face dismissal.²⁹³

B. Sweet Success: Increasing Local and State Government Action

Consumers and legislatures should encourage and support soda, or high-sugar beverage, taxes at the local and state levels.²⁹⁴ The federal

289. 607 P.2d 924 (Cal. 1980). In *Sindell*, due to the delayed adverse impact of a medicine, plaintiffs were unable to identify the specific manufacturer who had created the specific pills they consumed. Rather than find in favor of defendants, the court adopted a new theory of market share liability, wherein all manufacturers who created the dangerous product could be held partially liable for the resulting injury. See generally Harv. L. Rev. Ass'n, *Market Share Liability: An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668 (1981).

290. Harv. L. Rev. Ass'n, *supra* note 289, at 673-77.

291. Cf. *Sindell*, 607 P.2d at 926 (“DES was produced from a common and mutually agreed upon formula as a fungible drug interchangeable with other brands of the same product; defendants knew or should have known that it was customary for doctors to prescribe the drug by its generic rather than its brand name and that pharmacists filled prescriptions from whatever brand of the drug happened to be in stock.”); see also *Skipworth v. Lead Indus. Ass'n*, 690 A.2d 169 (Pa. 1997) (finding market share liability inapplicable to lead paint cases, because paint formulas vary and therefore paint was not a fungible good). Furthermore, even if plaintiffs attempted to identify sugar as the specifically harmful element of soda, the sugar in processed foods can be different combinations of pure cane sugar, glucose, fructose, etc. See Taubes, *supra* note 1.

292. See generally *Sindell*, 607 P.2d 924.

293. No reasonable person could find probable cause based on the facts in the complaint without resorting to “wild speculation.” *Pelman*, 237 F. Supp. 2d. at 538 (citing *Price v. Hampson*, 142 A.D.2d 974, 975-76 (N.Y. App. Div. 1988) (ruling on causation as matter of law as jury could find causation only by engaging in “wild speculation.”)).

294. “[T]ax policies were demonstrably effective in discouraging cigarette smoking [and r]esearchers published systematic reviews arguing that taxes on

government has considered the implementation of local and state soda taxes and, in 2010, the White House Obesity Task Force recommended an analysis of the effect of state and local taxing on “energy-dense” foods, including sodas.²⁹⁵ Two years later, health advocates found the evidence against soda “so compelling that more than one hundred groups and individuals called on [the Department of] Health and Human Services to produce a Surgeon General’s report on soda consumption equivalent in authority to the Surgeon General’s reports on smoking.”²⁹⁶ A number of counties and now one major city in the United States have already passed such an initiative, either through legislation or referendums.²⁹⁷

Berkeley, California, was the first city to adopt a soda tax in 2015, and recent studies show promising data that this type of tax may be successful in reducing or curbing high-sugar soda beverage consumption.²⁹⁸ The data illustrates that low-income neighborhoods, areas where there is higher soda and sugar consumption rates, as well as higher rates of obesity and diabetes, have seen a decrease in soda consumption as high as twenty-one percent.²⁹⁹ Just south of the United States border, Mexico passed a national sugary beverage tax in 2014³⁰⁰ and after one year saw the sale of sugary beverages decrease twelve percent.³⁰¹ In response to these promising results, “[p]ublic health authorities hailed the findings as the first hard

sugary drinks were justified historically and would produce substantial economic benefits, along with improvement.” NESTLE, *supra* note 5, at 405.

295. *Id.*

296. *Id.*

297. See Charles, *supra* note 139; see also Alexandra Sifferlin, *Mexico’s Sugary Drink Tax is Working, Study Suggests*, TIME (Jan. 6, 2016), <http://time.com/4168356/mexico-sugar-drink-soda-tax/> [<https://perma.cc/D8NA-WBPX>].

298. See Charles, *supra* note 139.

299. See *id.*; see also Yasmin Anwar, *Soda Tax Linked to Drop in Sugary Beverage Drinking in Berkeley*, BERKELEY NEWS (Aug. 23, 2016), <http://news.berkeley.edu/2016/08/23/sodadrinking/> [<https://perma.cc/VR2E-8K2P>]. One significant criticism of the Philadelphia soda tax is that it is a regressive tax, meaning it disproportionately affects and harms low income individuals. While this may be a valid characterization of the tax, it may be a necessary evil. Low-income communities are more likely to consume larger amounts of sugar and, furthermore, have relatively high risks of obesity and diabetes. NESTLE, *supra* note 2, at 35-36, 185-86. Perhaps it is not entirely negative that these taxes will discourage low-income individuals from consuming this harmful and largely unnecessary product.

300. “In January 2014, Mexico implemented an excise tax of 1 peso per liter for sugar-sweetened beverages as a way to cut down on the country’s growing obesity epidemic.” Sifferlin, *supra* note 297.

301. Anahad O’Connor, *Mexican Soda Tax Followed by Drop in Sugary Drink Sales*, N.Y. TIMES (Jan. 6, 2016), <http://well.blogs.nytimes.com/2016/01/06/mexican-soda-tax-followed-by-drop-in-sugary-drink-sales/> [<https://perma.cc/5SC8-JZFD>].

evidence that a nationwide tax could spur behavioral changes that might help to chip away at high obesity rates.”³⁰² Although the immediate data shows decreases in soda and sugary-beverage consumption, it will likely take many years to see if the sugary beverage taxes show any impact on obesity rates or the health risks associated with obesity. But this fact should not discourage increased soda tax initiatives throughout the United States.

The recent court decision in the Court of Common Pleas of Philadelphia County³⁰³ should also encourage consumers and local and state legislatures to adopt and expand soda tax initiatives. As explained in Part II, Philadelphia was the first major city in the United States to adopt a soda tax, 1.5 cents per ounce for sodas and other sugary beverages.³⁰⁴ Shortly after the Philadelphia City Council passed this groundbreaking legislation, a group of Philadelphia residents, businesses, and industry associations challenged the tax as allegedly violating the Pennsylvania Constitution, as preempted by the state’s taxing power, and as taxing an item under SNAP benefits.³⁰⁵ The Philadelphia Court of Common Pleas rejected plaintiff’s claims and dismissed the case in its entirety.³⁰⁶ Because the uniformity clause may be unique to Pennsylvania’s Constitution, the court’s rejection of this argument likely bears little influence on subsequent taxes or legal battles that may ensue.

The court’s rejection of the preemption claim and SNAP benefits claim, however, could extend beyond Pennsylvania. The court’s dismissal is a major blow to the ABA and likely represents a viable future for soda, or high-sugar beverage, taxes moving forward.³⁰⁷

302. *Id.* Notably, “Mexico’s obesity epidemic has attracted worldwide attention. Of the 34 developed countries that are members of the O.E.C.D., Mexico has the highest rate of adults who are overweight or obese—about 70 percent—and the highest rate of Type 2 diabetes. It also has the highest per capita intake of soft drinks, which account for 70 percent of the total added sugars consumed by the average Mexican.” While all socio-economic groups saw a decline in soda sales, the decrease was greatest among those people of low-income, who saw a seventeen percent decrease in consumption. *Id.*

303. Opinion & Order, *Williams v. City of Philadelphia* (Phila. Ct. C.P. 2016) (No. 1452).

304. Burke, *supra* note 138.

305. Vargas & Nadolny, *supra* note 162.

306. *Id.*

307. The plaintiffs have a right to appeal the court’s opinion. The president of the Pennsylvania Food Merchants Association indicated that the industry coalition challenging the tax would appeal the court’s ruling. Scott Calvert, *Judge Dismisses Lawsuit Against Philadelphia Soda Tax*, WALL ST. J. (Dec. 19, 2016), <http://www.wsj.com/articles/judge-dismisses-lawsuit-against-philadelphia-soda-tax-1482181175> [<https://perma.cc/YG24-5L8V>].

Specifically, the court rejected plaintiffs' claims that the soda tax was preempted by the state's sales tax, "because the two taxes are fundamentally different."³⁰⁸ Sales taxes are levied at the point of sale, while the soda tax is to be levied at the point of distribution.³⁰⁹ Although the plaintiffs alleged that the distributors are likely to pass some of the tax burden onto the consumer, thus effectively creating a sales tax, Judge Glazer found that argument was "not relevant" and what matters is how the tax "operates, not what private actors will do in response to the tax to offset the burden of the tax."³¹⁰ Ultimately, because the tax is collected from the distributor, it does not matter whether that burden is then shifted to the consumer. The court also rejected the plaintiffs' argument that "cities or states are barred from taxing items that are purchased with federally funded food stamps under . . . SNAP."³¹¹ By rejecting these two arguments that could be brought by other states where soda taxes are implemented, the court signaled that soda taxes burdening beverage distributors could be upheld as a separate tax from sales taxes and are not preempted by the states' power to levy a sales tax.

Even without the court victory for Philadelphia's soda tax legislation, momentum from the success of the Philadelphia soda tax has been gaining.³¹² In November 2016, residents in four counties passed ballot measures to impose a soda tax.³¹³ San Francisco, Oakland, and Albany counties in California passed a referendum to

308. Vargas & Nadolny, *supra* note 162.

309. *Id.*

310. *Id.*

311. *Judge Rejects Lawsuit to Stop Philadelphia Soda Tax*, CSP DAILY NEWS (Dec. 20, 2016), <http://www.cspdailynews.com/category-news/beverages/articles/judge-rejects-lawsuit-stop-philadelphia-soda-tax> [<https://perma.cc/Y3Q4-36M8>].

312. Aubrey, *supra* note 1. Of note, the soda industry has reportedly reserved nearly \$9.5 million in airtime ad buys aimed at defeating the initiative in San Francisco.

313. See Nancy Fink Huehnergath, *Passage of Four Soda Tax Measures Deals Major Blow to the Beverage Industry*, FORBES (Nov. 9, 2016), <https://www.forbes.com/sites/nancyhuehnergath/2016/11/09/passage-of-four-soda-tax-measures-deals-major-blow-to-the-beverage-industry> [<https://perma.cc/8T65-3TQB>]:

In California, San Francisco's Measure V passed with 61.87% of the vote, Oakland's Measure HH received a winning 60.75% of the vote, and Albany's Measure O1 was approved with 70.67% support. All three California measures will tax sugary drinks at a penny-per-ounce. Voters also approved a fourth soda tax measure, 2H, on the ballot in Boulder, Colorado with an unofficial 54.01% of the vote. The Boulder tax will be the largest of the four, adding two-cents-per-ounce to a variety of sugary beverages.

Id.

levy a tax on sugar-sweetened beverages.³¹⁴ Residents in Boulder, Colorado passed the highest soda tax, imposing a two cent per ounce tax on distributors of soda and other sugar-sweetened beverages.³¹⁵ Many have hailed the November 2016 results as a victory over the soda industry and, given the success in California, Colorado, and Philadelphia, more local governments should pursue similar regulations or voter referendums in the near future.³¹⁶

Expanding soda taxes to more cities and states will create multiple positive results for the consumer. First, these taxes thus far have resulted in a decrease in soda consumption,³¹⁷ even if the taxes are not created to burden the consumer. It will be years before research or studies can be conducted to show what effect a decrease in soda consumption may have on obesity and diabetes rates but, until those studies are conducted, public health advocates should celebrate the decreased consumption of a beverage that ultimately encourages daily overconsumption of sugar. Beyond the direct effect of a potential decrease in soda consumption, revenue from soda taxes can be used to fund much-needed public programs, as the Philadelphia mayor emphasized.³¹⁸ In addition to the local effect of the tax, instituting these taxes throughout the country could put pressure on

314. See Heather Knight, *S.F., Oakland, Albany Voters Pass Soda Tax*, SFGATE (Nov. 8, 2016), <http://www.sfgate.com/politics/article/Sugar-tax-measure-results-10593882.php> [<https://perma.cc/C5Y6-LTFK>]. For the San Francisco ballot measure, see *San Francisco, California, Soda and Sugary Beverages Tax, Proposition V (November 2016)*, BALLOTOPEDIA, [https://ballotpedia.org/San_Francisco,_California,_Soda_and_Sugary_Beverages_Tax,_Proposition_V_\(November_2016\)](https://ballotpedia.org/San_Francisco,_California,_Soda_and_Sugary_Beverages_Tax,_Proposition_V_(November_2016)) [<https://perma.cc/J4B7-TN6L>]. For the Albany ballot measure, see *Albany, California, Sugar-Sweetened Beverage Tax, Measure O1 (November 2016)*, BALLOTOPEDIA, [https://ballotpedia.org/Albany,_California,_Sugar-Sweetened_Beverage_Tax,_Measure_O1_\(November_2016\)](https://ballotpedia.org/Albany,_California,_Sugar-Sweetened_Beverage_Tax,_Measure_O1_(November_2016)) [<https://perma.cc/U944-GA9L>].

315. Alex Burness, *Boulder Passed the Nation's Steepest Soda Tax; Now, to Implement It*, DAILY CAMERA: BOULDER NEWS (Nov. 21, 2016), http://www.dailycamera.com/news/boulder/ci_30593248/boulder-passed-nations-steepest-soda-tax-now-implement/ [<https://perma.cc/5U38-HDZL>].

316. Winston Cho, *Oakland Celebrates Soda Tax Victory as "Huge Win Over Corporations"*, E. BAY EXPRESS (Nov. 9, 2016), <http://www.eastbayexpress.com/SevenDays/archives/2016/11/09/oakland-celebrates-soda-tax-victory-as-huge-win-over-corporations> [<https://perma.cc/WQ2N-73A6>]; Huehnergath, *supra* note 313.

317. See Anwar, *supra* note 299; Charles, *supra* note 139; O'Connor, *supra* note 301.

318. The Philadelphia soda tax is "expected to bring in \$91 million to fund pre-K, community schools, parks and recreation systems and the city's fund balance." Claire Sasko, *Judge Dismisses Anti-Soda Tax Lawsuit*, PHILLY MAG. (Dec. 19, 2016), <http://www.phillymag.com/news/2016/12/19/court-dismisses-soda-tax-lawsuit/> [<https://perma.cc/8ZJA-8PP4>].

private beverage companies to take action to modify their current high sugar formulas and create healthier products.³¹⁹

Pepsi's pledge to reduce sugar in its products over the next nine years may represent the result of mounting pressure to reduce sugar in the American diet. However, American consumers have seen apparent self-regulation within the food industry before and during Michelle Obama's "Let's Move" campaign.³²⁰ In response to Michelle Obama's initiation of the program to combat childhood obesity, the food companies announced proactive measures to show cooperation with the Obama Administration, by reducing the total number of calories they sell annually.³²¹ However, the food companies did not pull the unhealthy products from the shelves, but rather created "healthier" alternatives, such as low-calorie or fat-free products.³²² These alternatives could prove to be more harmful than healthier ones, because when a food company removes fat from its product, it generally replaces that fat with sugar, thus reducing the amount of fat or calories in a product but increasing the amount of sugar.³²³ Pepsi's pledge directly targets sugar and therefore may represent meaningful self-regulation, but it will be important to see what products are chosen for sugar reduction. Although Pepsi pledged to reduce the sugar content in two-thirds of its products, Pepsi owns and controls a large number of food brands, and therefore could reduce the amount of sugar in products with already low levels

319. See Aubrey, *supra* note 1.

320. See discussion *supra* Section II.D.

321. In 2010, Michelle Obama announced, "I am thrilled to say that [the processed food industry has] pledged to cut a total of one trillion calories from the food they sell annually by the year 2012, and 1.5 trillion calories by 2015." MOSS, *supra* note 55, at 256; see also FED UP, *supra* note 51.

322. See MOSS, *supra* note 55, at 256 (observing that "[t]he math of all this is less compelling . . ."). Furthermore, in creating these "healthier" products with less fat, the companies generally add more sugar. See also FED UP, *supra* note 51.

323. See Edward Malnick, Jasper Copping & Matthew Payton, *Low Fat Foods Stuffed with "Harmful" Levels of Sugar*, TELEGRAPH (Mar. 7, 2014), <http://www.telegraph.co.uk/news/health/news/10668189/Low-fat-foods-stuffed-with-harmful-levels-of-sugar.html> [<https://perma.cc/7GRV-P5R4>] (explaining that products designated as "low fat" or "fat free" contained large amounts of sugar). These proactive measures may have only been a way to redirect the public health conversation from nutrition and food to increasing exercise. It is imperative to note that "[i]n the months just prior to Mrs. Obama's speech [announcing the Let's Move campaign was shifting its focus to increasing exercise], the food industry has succeeded in delaying federal standards for marketing foods to children, and defeated proposals to tax sodas." At the time of the Let's Move campaign and subsequently, government agency attempts to enact anti-obesity measures were met with "systematic and heavily-funded industry opposition." NESTLE, *supra* note 5, at 392.

of sugar while keeping the Pepsi—or other sugary beverage formulas—the same.

A more meaningful pledge would be a commitment to reduce or cap sugar content in all products, as Kraft proposed in 2003. Kraft is one of the largest food producers and, in 2003, proposed an initiative that would cap the amount of salt, sugar, and fat that food scientists and brand managers could add to new products.³²⁴ Again, this proposal only applied to new products and not products currently in circulation; however, the motivation behind adopting this policy was to begin decreasing the salt, sugar, fat, and calorie values of its entire thirty-five billion dollar portfolio.³²⁵ Whether Kraft is also committed to removing known unhealthy products from the shelves remains unclear, but the initiative certainly demonstrates an awareness of their potential culpability in the obesity crisis and “wanting to do the right thing by consumers.”³²⁶ Whether industry self-regulation is genuine or superficial, increased local action, such as imposing soda taxes in more cities and states throughout the country, will continue to challenge the powerful food and beverage industry in the fight for public health.

CONCLUSION

The food and beverage industry—especially the soda companies—has gone too long without having to take responsibility for its role in the current public health crisis affecting individuals everywhere. The soda companies created an unhealthy product with a dangerous amount of sugar without regard to the potential health risks that could ensue. Furthermore, the food and beverage industry helped create and totally exploited the information vacuum that shifted the blame for health problems from sugar to fat,³²⁷ or even away from an unhealthy diet altogether.³²⁸ The result is an uninformed public consuming dangerously unhealthy soda products on a daily basis without the proper disclosures about the associated risks.

Changing this status quo is long overdue. Because large-scale federal regulations will likely prove ineffective,³²⁹ ultimately consumers should challenge the soda industry through local government. To date, six cities in the United States have adopted a

324. Moss, *supra* note 55, at 255.

325. *Id.*

326. *Id.*

327. See O'Connor, *supra* note 11.

328. See O'Connor, *supra* note 84.

329. See discussion *supra* Section II.A, Part III.

soda tax either through city council ordinances or voter referendums, demonstrating a significant blow to Big Soda.³³⁰ Furthermore, as the 2015 soda tax in Berkeley, California demonstrates, a soda tax may significantly reduce soda consumption.³³¹ If more cities continue to adopt these health-conscious economic policies, it may put sufficient pressure on food and beverage companies to take meaningful proactive steps to reduce the sugar content in their products and help curb the United States' obesity and diabetes epidemic.³³²

330. See discussion *supra* Sections II.C, III.B.

331. Charles, *supra* note 139.

332. The most recent example is Pepsi's pledge to reduce the amount of sugar in two-thirds of its products by 2025. See Jeff Daniels, *PepsiCo Pledges to Slash Beverage Calorie Counts by 2025*, CNBC (Oct. 17, 2016), <http://www.cnn.com/2016/10/14/pepsico-pledges-to-slash-beverage-calorie-counts-by-2025.html> [<https://perma.cc/M3QY-B2C4>]. Although no other large food companies have made a similar pledge, if consumers pursue private and public actions, additional companies may feel pressured to take action to avoid either legal liability, increased government regulation, or bad public relations that may hurt commercial value.