

3-1-2006

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Recommended Citation

Matthew Walker, *Low-Fat Foods or Big Fat Lies?: The Role of Deceptive Marketing in Obesity Lawsuits*, 22 GA. ST. U. L. REV. (2006).
Available at: <https://readingroom.law.gsu.edu/gsulr/vol22/iss3/3>

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LOW-FAT FOODS OR BIG FAT LIES?: THE ROLE OF DECEPTIVE MARKETING IN OBESITY LAWSUITS

INTRODUCTION

On an episode of *Seinfeld* entitled “The Non-Fat Yogurt,” unexpected weight gain prompts Jerry and Elaine to test the fat content of their favorite “non-fat” frozen yogurt.¹ To their dismay, they discover the yogurt does, in fact, contain fat.² In 2003, life imitated television when consumers brought a class action suit against the DeConna Ice Cream company for inaccurately labeling the fat content of its “Big Daddy Ice Cream.”³ Actually, this basic scenario has occurred multiple times since the episode aired—and that is just within the ice cream industry.⁴

Today, obesity is the second leading cause of death in the United States, with estimated costs reaching approximately \$117 billion annually.⁵ With increasing societal concerns over nutrition and weight gain, our society demands more and better information regarding the food we eat.⁶ Consequently, the food industry increasingly markets products with an emphasis on their nutritional value, and some marketers have arguably done so even when the

1. *Seinfeld: The Non-Fat Yogurt* (NBC television broadcast Nov. 4, 1993), summary available at <http://www.tv.com/seinfeld/the-non-fat-yogurt/episode/2311/summary.html>.

2. *Id.*

3. See Hal Davis, *I'm Outraged. Two More, Please*, DAYTON DAILY NEWS, Oct. 6, 2003, at E1 (stating DeConna settled the suit).

4. See, e.g., Veronika Belenkaya & Lisa L. Colangelo, *New York Regulators Say 'Low-Calorie' Snack a Whopper*, N.Y. DAILY NEWS, Dec. 31, 2003 (noting a test of CremaLita's low-calorie ice cream revealed over four times the advertised calories); John Murawski, *The Chilling Truth Behind 'Sugar-Free'*, PALM BEACH POST, May 8, 2003, at A1 (reporting a local frozen yogurt vendor's “sugar-free” yogurt in fact contained “[u]p to 2 ½ teaspoons” of sugar per serving).

5. 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).

6. See, e.g., Rob Stein, *Huge Effort Urged to Curb Epidemic of Obese Kids/ Panel Calls for More Exercise, Less Junk Food, Video Games*, S.F. CHRON., Oct. 1, 2004, A6; A. Elizabeth Sloan, *American Consumers Are Focused on “Do-It-Yourself” Health*, J. AM. DIETETIC ASS'N, Apr. 1, 2002, available at <http://www.dushkin.com/text-data/articles/33505/body.pdf> (“75 percent of supermarket shoppers [are] trying to lower the risk of a [health] condition through food purchases and 58 percent [are] trying to manage or treat an existing condition.”).

products are relatively unhealthy.⁷ In 2004, KFC settled Federal Trade Commission (FTC) charges that a recent health-oriented advertising campaign made false claims suggesting KFC products were relatively healthy compared to other fast food.⁸ Similarly, the American Heart Association (AHA) prevented Laura's Lean Beef from using its "heart-check" seal when it determined that some of the company's products contained three or four times as much fat and saturated fat as advertised.⁹ Additionally, the makers of the snack food Pirate's Booty recently paid \$4 million to settle a class action suit for "understating fat grams" in their product.¹⁰

In 2002, New York resident Cesar Barber filed suit against multiple fast food corporations, alleging their products caused his obesity, diabetes, and two heart attacks.¹¹ Later that year, the parents of two obese teenagers sued McDonald's for causing their children's obesity and obesity-related health problems.¹² Suddenly, the food industry's role in the nation's obesity epidemic became a hot topic in the news, the legal community, and particularly among the food and beverage industry's manufacturers and marketers.¹³

In 2004, to protect the food industry from "frivolous lawsuits," the House of Representatives passed House Bill 339, known as the "Cheeseburger Bill."¹⁴ The Commonsense Consumption Act would

7. See Press Release, Fed. Trade Comm'n, KFC's Claims That Fried Chicken Is a Way to "Eat Better" Don't Fly (June 3, 2004), <http://www.ftc.gov/opa/2004/06/kfccorp.htm>.

8. *Id.* The advertisements also featured "a woman putting a bucket of KFC fried chicken down in front of her husband and announcing, 'Remember how we talked about eating better? Well, it starts today!'" *Id.*

9. Press Release, Ctr. for Sci. in the Pub. Interest, Heart Association Praised for 'Laura's Lean Beef' Crackdown (June 2, 2003), http://www.cspinet.org/new/200306021_print.html.

10. Kate Zernike, *Lawyers Shift Focus from Big Tobacco to Big Food*, N.Y. TIMES, Apr. 9, 2004, at A1.

11. Jonathan Wald, *McDonald's Obesity Suit Tossed*, CNN, <http://money.cnn.com/2003/01/22/news/companies/mcdonalds/> (last visited Mar. 16, 2006).

12. *Pelman v. McDonald's*, No. 02 CV 7821, 2003 U.S. Dist. LEXIS 15202, at *6-7 (S.D.N.Y. Sept. 3, 2003), *vacated in part and remanded* by 396 F.3d 508 (2d Cir. 2005); Wald, *supra* note 11.

13. See, e.g., Laura Bradford, *Fat Foods: Back in Court*, TIME, Aug. 11, 2003, at A2 (reporting that the view of obesity as a "societal problem with societal solutions . . . has food companies scrambling to put on a healthier face").

14. See H.R. 339, 108th Cong. (2004); Press Release, Physicians Comm. for Responsible Med., *Why the Commonsense Consumption Act Is Anything But Common Sense: Blaming the Consumer Won't*

have essentially eliminated consumer lawsuits against the food industry based on “a person’s weight gain, obesity, or any health condition related to weight gain or obesity.”¹⁵ Proponents say the Act would have placed an emphasis on consumer personal responsibility and prevented “regulation through litigation.”¹⁶ Florida Representative Ric Keller, who sponsored the House bill, argued that our society’s focus should be on encouraging people, particularly children, to be more active.¹⁷ Opponents argued the Act would have been anti-consumer and would have prematurely relieved the food industry from the threat of lawsuits that “could result in truly healthy changes by [the] industry”¹⁸ They also argued that the determination as to when a lawsuit is “frivolous” is a legal decision that should be left to the courts, and such a law would be premature, given the failure of obesity lawsuits to date.¹⁹

Notably, the Act would have provided an exception for violations of “Federal or State statute[s] applicable to the manufacturing, marketing, distribution, advertisement, labeling, or sale of the product”²⁰ Similarly proposed, and in some cases enacted, state laws also allow for this exception.²¹ But these laws generally allow for private causes of action only where the state law violation is “knowing and willful,” essentially barring claims based on negligence.²²

This Note focuses on the role of deceptive marketing in obesity lawsuits and the potential for deceptive marketing claims in light of

Solve America’s Obesity Epidemic (July 2004), <http://www.pcrm.org/news/statement040722.html> [hereinafter PCRM].

15. S. 1428, 108th Cong. (2003). Obesity is “a bodily condition marked by excessive generalized deposition and storage of fat.” WEBSTER’S THIRD NEW WORLD DICTIONARY 1555 (Philip Babcock Gove et al. eds., 1986).

16. The Center For Consumer Freedom, *Halting Frivolous Obesity Lawsuits*, http://www.consumerfreedom.com/news_detail.cfm/headline/2174 (last visited Mar. 16, 2006).

17. *Perspective on Cheeseburger Bill* (CNN television broadcast March 9, 2004).

18. PCRM, *supra* note 14.

19. *Perspective on Cheeseburger Bill*, *supra* note 17; see Editorial, “*Burger Bill*” Only Protects Fat Cats, S. CHINA MORNING POST, Mar. 14, 2004, at 10 [hereinafter “*Burger Bill*”].

20. S. 1428, 108th Cong. § 3 (2003). A similar bill (with a similar exception) was proposed in the Senate in 2005. See S. 908, 109th Cong. § 3 (2005).

21. See, e.g., UTAH CODE ANN. § 78-27d-103 (2004); IDAHO CODE ANN. § 39-8702 (2004).

22. See S. 1428, 108th Cong. § 3 (2003).

the fact that such claims could soon be one of the only theories by which consumers could hold a food industry defendant liable for obesity and related health problems.²³ Part I examines the deceptive marketing issues in the most important obesity case to date, *Pelman v. McDonald's*.²⁴ Part II discusses the viability of bringing deceptive marketing claims under theories set forth by proponents such as Joseph Banzhaf and Richard Daynard.²⁵ Part III looks at the potential for bringing negligence claims in obesity lawsuits under several different theories.²⁶ Finally, Part IV concludes that precisely because of the difficulties in bringing such claims, state and federal legislation should continue to allow claims based on negligent marketing in order to ensure the most accurate communication of nutrition information.²⁷

I. *PELMAN V. MCDONALD'S*: THE PROTOTYPICAL OBESITY LAWSUIT

In *Pelman v. McDonald's*, the parents of several minors brought suit against McDonald's on behalf of their children and sought to impose liability for their children's obesity and obesity-related illnesses.²⁸ Though still teenagers, the minor plaintiffs had allegedly already developed "obesity, diabetes, coronary heart disease, [and] high blood pressure"²⁹ The plaintiffs initially asserted claims that McDonald's was negligent in serving food high in fat content and "addictive foods," and McDonald's was liable for failing to properly warn them of the dangers of these foods.³⁰ With respect to

23. *See id.*

24. *See* discussion *infra* Part I; 237 F. Supp. 2d 512 (S.D.N.Y. 2003) (granting leave to amend); *Pelman v. McDonald's*, No. 02 CV 7821, 2003 U.S. Dist. LEXIS 15202 (S.D.N.Y. Sept. 3, 2003) (dismissing claims with prejudice), *vacated in part and remanded by* 396 F.3d 508 (2d Cir. 2005).

25. *See* discussion *infra* Part II.

26. *See* discussion *infra* Part III.

27. *See* discussion *infra* Part IV.

28. *Pelman*, 2003 U.S. Dist. LEXIS 15202, at *1; Ben Falit, *Fast Food Fighters Fall Flat: Plaintiffs Fail to Establish That McDonalds Should Be Liable for Obesity-Related Illnesses*, 31 J.L. MED. & ETHICS 725, 726 (2003).

29. *Pelman*, 2003 U.S. Dist. LEXIS 15202, at *6-7.

30. *Pelman v. McDonald's*, 237 F. Supp. 2d 512, 520 (S.D.N.Y. 2003), *vacated in part and remanded by* 396 F.3d 508 (2d Cir. 2005). Though not the focus of this Note, products liability claims such as these can be brought based on defects. *See, e.g.,* Romero, *supra* note 5.

marketing, the plaintiffs claimed that McDonald's violated New York's Consumer Protection Act by unfairly targeting children, representing its food as nutritious, and failing to disclose ingredients and their harmful potential.³¹ In particular, the plaintiffs cited to two campaigns: "McChicken Everyday!" and "Big N' Tasty Everyday!," which they alleged indicated the products were nutritious enough to eat daily.³² However, because the plaintiffs were unable to show McDonald's claimed a "specific effect on health," the court considered the statements to be "mere puffery at most."³³

Judge Sweet initially dismissed all of the claims against McDonald's with leave to amend, finding no evidence to suggest the children's obesity was not caused by willful over-consumption and lack of exercise.³⁴ He noted, however, that some older advertisements in evidence were clearly deceptive; if the plaintiffs could show reliance on these advertisements, they might state a claim, provided the statute of limitations did not bar it.³⁵

On re-filing, the plaintiffs relied primarily on claims under the New York Consumer Protection Act for misleading advertising.³⁶ In particular, the plaintiffs pointed to a series of campaigns launched in the 1980s, some of which the New York Attorney General targeted.³⁷ These included "[o]ne advertisement [that] touted that 'sodium is down across the menu,' and then proceeded to mention four products whose sodium content had not been lowered in the past year."³⁸ Here, the court noted that the plaintiffs successfully overcame the consumer protection law's three-year statute of limitations because it was tolled due to their minority.³⁹ But the court pointed out that, unlike

31. *Pelman*, 237 F. Supp. 2d at 520.

32. *Id.* at 527.

33. *Id.* at 528.

34. *Id.* at 537-40, 543.

35. *Id.* at 528-29. For example, Judge Tjoflat wrote: "[t]he advertisement touting the 'real' milk in McDonald's shakes says that they contain 'Wholesome milk, natural sweeteners, a fluid ounce of flavoring, and stabilizers for consistency. And that's all.' In fact, that's not really all. McDonald's own ingredient booklet shows that a typical shake [also includes] . . . two chemical preservatives." *Id.* at 529.

36. *Pelman v. McDonald's*, No. 02 CV 7821, 2003 U.S. Dist. LEXIS 15202, at *9-11 (S.D.N.Y. Sept. 3, 2003), *vacated in part and remanded by* 396 F.3d 508 (2d Cir. 2005).

37. Falit, *supra* note 28, at 726.

38. *Id.*

39. *Pelman*, 2003 U.S. Dist. LEXIS 15202, at *17-18; Falit, *supra* note 28, at 726.

California's and some other states' consumer protection laws, to state a claim under New York law requires some showing that the deceptive marketing actually caused the injury.⁴⁰

Because the minor plaintiffs were not alive when most of the misleading advertisements were in the market, they were only able to show reliance on a single campaign.⁴¹ McDonald's had recently advertised that its fries "contained zero milligrams of cholesterol," and were cooked in "100 percent vegetable oil."⁴² Plaintiffs contended they would not have purchased the fries had McDonald's disclosed that they "contain[ed] beef or extracts and trans fatty acids."⁴³ But the court ultimately held the campaign was not "objectively deceptive," and that the plaintiff's failure to show their obesity and related illnesses "were not merely hereditary or caused by environmental or other factors" required dismissal of their claims.⁴⁴

On appeal from the dismissal of the amended complaint, however, the Second Circuit vacated in part, and remanded.⁴⁵ The court found that while New York's false advertising statute required a showing of reliance, the plaintiffs had also asserted a claim under a consumer protection law prohibiting deceptive business practices, which did not require such a showing.⁴⁶ Thus, the *Pelman* case returned to the district court again in 2005.⁴⁷

Though the merits of the *Pelman* case are still in question, the fact that the court initially allowed the plaintiffs to amend their complaint, and the court gave the plaintiffs some guidance on how to do so, created a great deal of media attention.⁴⁸ In response, proponents of

40. *Pelman*, 2003 U.S. Dist. LEXIS 15202, at *20-21 & n.3.

41. *Id.* at *17-18, 25.

42. *Id.* at *25.

43. *Id.*

44. *Id.* at *32, 34.

45. *Pelman v. McDonald's*, 396 F.3d 508, 512 (2d Cir. 2005).

46. *Pelman*, 396 F.3d 508 at 511.

47. See Henry Weinstein, *Court Reinstates Fast-Food Lawsuit*, L.A. TIMES, Jan. 26, 2005, at A16.

48. See Bradford, *supra* note 13.

obesity litigation went public with their theories on how plaintiffs might bring a successful suit against the food industry.⁴⁹

II. DECEPTIVE MARKETING THEORIES AND APPLICABILITY TO FUTURE OBESITY LAWSUITS

Prior to and in connection with the *Pelman* case, consumer rights advocates developed theories by which consumers could successfully bring deceptive marketing claims against food manufacturers.⁵⁰ Joseph Banzhaf, a professor at George Washington University Law School and a major force in the tobacco litigation of the past 20 years, began to believe that plaintiffs could sue food producers and marketers for obesity under theories similar to those used in tobacco litigation when he learned that the cost to the United States for the obesity epidemic had nearly reached the costs associated with tobacco.⁵¹ In response, Banzhaf suggested that, as with tobacco, those responsible for creating the costs of obesity should be responsible for bearing them: those who engage in unhealthy lifestyles and those who promote them.⁵² Banzhaf noted that as “consumer protection statutes can be violated by not disclosing material facts as well as by outright lying, the failure of major fast food chains to clearly and prominently disclose the fat and calorie content of many of their meals might also support a class action law suit.”⁵³ One deceptive marketing lawsuit against a fast food company has already involved Banzhaf.⁵⁴ In 2001, McDonald’s settled a suit brought by a group of Banzhaf’s former students who argued that, by advertising its french fries were cooked in vegetable oil, McDonald’s implied its fries were

49. See Nicole Haley, *Prof: Fast Food Reason for Obesity*, N.E. NEWS, Apr. 9, 2003, <http://www.nu-news.com/news/2003/04/09/News/Prof-Fast.Food.Reason.For.Obesity-412516.shtml>.

50. See John F. Banzhaf, *Who Should Pay for Obesity?*, S.F. DAILY J., Feb. 4, 2002, <http://banzhaf.net/docs/whopay.html>; see also Haley, *supra* note 49; John W. Schoen, *McDonald’s to Offer Lower-Fat Fries*, MSNBC NEWS, Sept. 3, 2004, <http://msnbc.msn.com/id/3073068/>.

51. Bradford, *supra* note 13 (noting that, according to a 2001 Surgeon General’s Report, obesity costs reached \$117 billion in the previous year, which was close to the \$150 billion average annual costs associated with smoking).

52. See Banzhaf, *supra* note 50.

53. *Id.*

54. Bradford, *supra* note 13.

appropriate for vegetarians, when in fact McDonald's cooked them in beef tallow.⁵⁵ The lawsuit settled when McDonald's agreed to stop using beef tallow, issued an apology, and paid \$12.5 million.⁵⁶

Richard Daynard of Northeastern University's School of Law proposed similar litigation strategies against the food industry.⁵⁷ Daynard agrees that plaintiffs would bring successful suits under consumer protection laws, noting that "a danger in deceptive advertising when it is used to sell a harmful product."⁵⁸ Furthermore, Daynard notes that because children are often the targets of marketing by the food industry (e.g. McDonald's Happy Meals), plaintiffs might bring successful lawsuits on behalf of minors.⁵⁹ According to Daynard, "the most disturbing part of deceptive advertising" is that marketing towards children creates unhealthy habits early in life that become difficult to change later.⁶⁰

Thus, according to Daynard's and Banzhaf's theories, the strongest case for an obesity lawsuit based on deceptive marketing would likely come with a child plaintiff under a state consumer protection law.⁶¹

A. *Obesity Lawsuits Under State Consumer Protection Laws*

Traditionally, proof of fraudulent misrepresentation requires a material and knowing misrepresentation of fact resulting in damages to the plaintiff.⁶² Intentional misrepresentation is "usually a fact-intensive inquiry and requires that the plaintiff allege reliance upon the misrepresentation."⁶³ Claims of fraudulent misrepresentation in advertising often fail because of the plaintiff's failure to show

55. *Id.*

56. *Id.*

57. *See* Haley, *supra* note 49.

58. *See* Richard C. Ausness, *Tort Liability for the Sale of Non-Defective Products: An Analysis and Critique of the Concept of Negligent Marketing*, 53 S.C. L. REV. 907, 942 (2002); *see generally* John Alan Cohan, *Obesity, Public Policy, and Tort Claims Against Fast-Food Companies*, 12 WIDENER L.J. 103 (2003).

59. *See* Haley, *supra* note 49.

60. *Id.*

61. *See id.*; *see also* Banzhaf, *supra* note 50.

62. *See* RESTATEMENT (SECOND) OF TORTS § 525 (1977).

63. *See* Romero, *supra* note 5, at 258.

reliance on a specific misrepresentation.⁶⁴ Courts have generally held that “exaggerated general statements that make no specific claims on which consumers could rely” are “mere puffery” and offer no basis for reliance.⁶⁵

Furthermore, courts are hesitant to impose liability when advertising is concerned because courts consider advertising commercial speech protected under the First Amendment.⁶⁶ The Supreme Court initially recognized a constitutional protection for commercial speech in the 1970s.⁶⁷ However, the Court has held that commercial speech warrants less protection under the First Amendment than other types of speech.⁶⁸ Beyond that, the Court has held that “neither deceptive speech nor speech that proposes an illegal transaction is protected by the First Amendment.”⁶⁹ Nevertheless, any lawsuit challenging advertising will face some challenges based on First Amendment considerations.⁷⁰

Consumer protection laws offer another, and arguably easier, method for bringing deceptive marketing claims.⁷¹ In the 1960s, the American Bar Association approved the first model consumer protection statute, the Uniform Deceptive Trade Practice Act (UDTPA).⁷² The statute would provide for private causes of action for a variety of deceptive practices, including “conduct which . . . creates a likelihood of confusion or of misunderstanding.”⁷³ This

64. See, e.g., *Cooper v. R.J. Reynolds Tobacco Co.*, 158 F. Supp. 22, 24-25 (Mass. Dist. Ct. 1957).

65. *Pelman v. McDonald's*, 237 F. Supp. 2d 512, 527-28 & n.14 (S.D.N.Y. 2003) (“[T]he advertisements encouraging persons to eat at McDonalds ‘everyday!’ do not include any indication that doing so is part of a well-balanced diet.”), *vacated in part and remanded by* 396 F.3d 508 (2d Cir. 2005).

66. Roscoe B. Starek, *The ABC's at the FTC: Marketing and Advertising to Children* (July 25, 1997), <http://www.ftc.gov/speeches/starek/minnfin.htm>; see Mark R. Ludwowski, Comment, *Proposed Government Regulation of Tobacco Advertising Uses Teens to Disguise First Amendment Violations*, 4 COMMLAW CONCEPTS 105, 106-09 (1996).

67. Ludwowski, *supra* note 66, at 107.

68. See *id.*; see also *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

69. *Starek*, *supra* note 66; see *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

70. See generally *Starek*, *supra* note 66.

71. See generally ALI-ABA Course of Study Materials, 1 Product Distribution and Marketing, *State Consumer Protection Laws and Unfair Competition*, Mar. 2000 [hereinafter ALI-ABA].

72. *Id.* at 2-3.

73. *Id.* at 3 (quoting the UDTPA).

proposed statute “allow[ed] the plaintiff to obtain injunctive relief against future violations by the defendant.”⁷⁴ Since then, many states have adopted at least one model consumer protection statute in whole or in part, and most have expanded their remedies to include monetary recovery, costs, and attorney’s fees.⁷⁵

The interpretation of state consumer protection laws differs greatly from traditional tort law.⁷⁶ As the ABA-ALI states in its Course of Study Materials for Consumer Protection:

The “reasonable person” of tort law gives way to “the ignorant, the unthinking, and the credulous.” Hiding away in the fine print the most important points of a transaction will not do. Intent is irrelevant. Case law clearly indicates that . . . intent to deceive, reliance, and damage are not elements of a consumer protection cause of action.⁷⁷

For plaintiffs in an obesity lawsuit, filing suit for violation of state consumer protection laws is particularly appealing as the requirement of proving causation is often eliminated or relaxed.⁷⁸ As previously noted, traditional misrepresentation claims require a showing that the plaintiff suffered an injury caused by an intentionally false statement.⁷⁹ “[T]he UDTPA relieves a consumer from having to prove actual confusion, reliance, damage or the intent to deceive”⁸⁰ Some states have therefore adopted statutes requiring no showing of a causal link between the false representation and the injury.⁸¹ As a

74. *Id.*

75. *See id.* at 3, 13.

76. *See id.* at 9.

77. ALI-ABA, *supra* note 71, at 9.

78. *See, e.g.,* Comm’n on Children’s Television, Inc. v. Gen. Foods Corp., 673 P.2d 660, 668-69 (Cal. 1983); Pelman v. McDonald’s, 396 F.3d 508, 511 (2d Cir. 2005) (noting that one New York state consumer protection statute required a showing of reliance, while another did not).

79. *See* Romero, *supra* note 5, at 258.

80. ALI-ABA, *supra* note 71, at 3.

81. *Id.* at 9.; *see, e.g.,* FTC v. Figgie Int’l Inc., 994 F.2d 595, 605-06 (9th Cir. 1993) (applying California law); FTC v. Sec. Rare Coin & Bullion Corp., 931 F.2d 1312, 1316 (8th Cir. 1991) (applying Minnesota law); Resort Car Rental Sys., Inc. v. FTC, 518 F.2d 962, 964 (9th Cir. 1975) (applying Oregon law); Spiegel, Inc. v. FTC, 494 F.2d 59, 62 (7th Cir. 1974) (applying Illinois law); People v. McKale, 602 P.2d 735-36 (Cal. 1979).

result, in these states “it may be enough that the consumers were simply the recipient of a statement that was false or deceptive.”⁸² Consequently, damages for violations of consumer protection laws need not be based on physical harm but may be based on “purely economic injuries—such as refund of the purchase price.”⁸³ Furthermore, because “individualized proof, like reliance on the statement, is not required” under consumer protection laws, it may be easier to obtain class action certification.⁸⁴ All of these “relaxations” of fraudulent misrepresentation requirements would favor plaintiffs in obesity lawsuits.⁸⁵

Plaintiffs have successfully brought a number of class action suits against the tobacco industry for violations of state consumer protection laws.⁸⁶ In the Illinois district court case of *Price v. Philip Morris Inc.*, plaintiffs brought a class action suit against a major cigarette manufacturer based on allegations that although the company marketed its “light” cigarettes as less harmful than regular cigarettes, evidence indicated that they were in fact more harmful.⁸⁷ Plaintiffs pointed to statements on packages of Marlboro Lights claiming the cigarettes contained “lowered tar and nicotine,” and contrasted those statements with evidence “that the ‘tar’ from . . . [“light”] cigarettes is higher in toxic substances and more mutagenic than the tar from regular . . . cigarettes.”⁸⁸ Finding the manufacturer violated state consumer protection laws, the district court indicated that “the representations were fraudulent and misleading because matters materially qualifying the representations were not stated.”⁸⁹

82. Kenneth J. Parsigian & U. Gwyn Williams, *Obesity Litigation – The Next “Tobacco”?*, FINDLAW, <http://library.findlaw.com/2004/Jul/22/133526.html> (last visited Mar. 16, 2006).

83. *Id.*

84. *Id.*

85. *Id.*

86. See *Cooper v. R.J. Reynolds Tobacco*, 234 F.2d 170, 173-74 & n.1 (1st Cir. 1956) (finding tobacco manufacturer liable for various statements that indicated cigarettes were harmless); *Reynolds Will Pay \$10 Million in Joe Camel Lawsuit*, USA TODAY, Sept. 12, 1997 [hereinafter *Reynolds*].

87. *Price v. Philip Morris, Inc.*, 2003 WL 22597608, at *4, 29-30 (Ill. Cir. 2003) (finding tobacco company fraudulent in advertising “light” cigarettes as healthier than other cigarettes), *rev’d*, 2005 WL 3434368 (Ill. 2005); see Jennifer Batchelor, *Philip Morris to Pay \$10.1 Billion in Damages*, LEGAL INTELLIGENCER, Mar. 25, 2003, available at <http://www.law.com/jsp/article.jsp?id=1048518184203>.

88. Batchelor, *supra* note 87.

89. *Id.*

Furthermore, the district court in *Price* used economic harm to the plaintiffs—money spent on “light cigarettes”—as the basis for calculating damages, and the “judge awarded \$7.1 billion in compensatory damages to the million plus class members.”⁹⁰ Ultimately, the Illinois Supreme Court disagreed with the trial court’s assessment, noting that the FTC had authorized Philip Morris to use qualifying terms such as “low” and “light” in its advertising, and that consequently the use of such terms could not be a basis for a consumer protection suit.⁹¹

Despite the Illinois Supreme Court’s ruling, one could argue the theory accepted by the *Price* trial court in food industry cases arising from similar facts.⁹² For instance, in the FTC’s case against KFC, the FTC noted an advertisement that indicated “[t]wo KFC [fried chicken] breasts have less fat than a BK Whopper.”⁹³ However, KFC failed to state “matters materially qualifying” that statement—specifically, that while “it is true that the two fried chicken breasts have slightly less total fat and saturated fat than a Whopper, they have more than three times the trans fat and cholesterol, more than twice the sodium, and more calories.”⁹⁴ Thus, KFC’s omission could result in liability for violation of consumer protection laws under the theory accepted by the *Price* district court.⁹⁵

As shown in *Pelman*, some states have more stringent requirements for proving causation under their consumer protection laws.⁹⁶ In *Shannon v. Boise Cascade Corp.*, plaintiffs filed suit in Illinois state court for violation of the state’s consumer fraud laws based on alleged misrepresentations in advertisements regarding the quality of the defendant’s products.⁹⁷ The plaintiffs did not allege, however, that they actually purchased the products as a result of the

90. *Id.*; see *Price*, 2003 WL 22597608, at *24.

91. See *Price v. Philip Morris, Inc.*, 2005 WL 3434368, at *45 (Ill. 2005).

92. See generally *KFC*, *supra* note 7.

93. *Id.*

94. *Id.*

95. See Batchelor, *supra* note 87.

96. See, e.g., *Pelman v. McDonald’s*, 396 F.3d 508, 512 (2d Cir. 2005) (noting that New York’s false advertising statute does require a showing of reliance).

97. 805 N.E.2d 213, 215 (Ill. 2004).

alleged misrepresentations.⁹⁸ The Supreme Court of Illinois held misleading advertising could not satisfy proximate cause under the consumer fraud laws unless the consumer actually relied on that advertising.⁹⁹ When consumer protection laws do not relax duty and causation requirements, the chance for success in an obesity lawsuit under those laws becomes much lower.¹⁰⁰

Furthermore, the Commonsense Consumption Act would have limited the use of consumer protection laws under this reasoning in obesity cases, as the exception for intentional violation of the law by marketers or manufacturers requires the violation be the “proximate cause of the claim of injury resulting from a person’s weight gain, obesity, or health condition related to weight gain or obesity”¹⁰¹ In other words, consumers bringing claims in states with consumer protection laws that do not ordinarily require reliance would have to prove reliance to meet this federal law’s causation requirement.¹⁰² For now, however, a food industry defendant in an obesity case could still theoretically be held liable in some states without a showing of reliance or causation.¹⁰³

B. Deceptive Marketing Towards Children

In 1999, children were estimated to have influenced \$485 billion in purchase decisions.¹⁰⁴ Therefore, from a business standpoint, it is logical that the food and beverage industry spends \$13 billion each year marketing to children.¹⁰⁵ However, this figure raises concerns in light of the dramatic impact the nation’s obesity epidemic has had on children.¹⁰⁶ Obesity rates among children and adolescents are increasing rapidly, especially among African-Americans and

98. *Id.* at 525.

99. *Id.*

100. *Cf. Pelman*, 2003 U.S. Dist. LEXIS 15202 at *20 (noting that requiring reliance on the false advertisement makes a successful obesity lawsuit more difficult).

101. S. 1428, 108th Cong. (2003).

102. *See id.*

103. *See* discussion *supra* Part II.A.

104. MARION NESTLE, *Exploiting Kids, Corrupting Schools*, FOOD POLITICS 176 (2002).

105. Marguerite Higgins, *Obesity Suits Eye Children as Props*, WASH. TIMES, Aug. 7, 2003, at C10, available at <http://www.washtimes.com/business/20030806-094947-7703r.htm>.

106. *See generally* NESTLE, *supra* note 104, 175-81.

Hispanics.¹⁰⁷ Pediatricians report that excessive caloric intake in kids has resulted in a rise in “serum cholesterol, high blood pressure, and ‘adult’-onset diabetes at earlier and earlier ages”¹⁰⁸ While the rise in popularity of computer games and the Internet have contributed to a more sedentary lifestyle, the role food advertising plays in the health of our nation’s children “raises issues of special concern, especially when it is deliberately targeted to the youngest and most impressionable children.”¹⁰⁹ Even the Supreme Court noted that the overwhelming and persistent influence of fast food restaurant advertising on children is troubling.¹¹⁰

While a jury may be more sympathetic to a child plaintiff, Banzhaf notes that child plaintiffs are particularly effective in obesity (and tobacco) lawsuits because “arguments about personal responsibility don’t wash very well with the jury”¹¹¹ Furthermore, as shown in *Pelman*, children not only make sympathetic plaintiffs but also provide other advantages in obesity lawsuits.¹¹² One problem with proving injury and causation in obesity cases (when required) is that obesity develops over a longer period of time than most injuries.¹¹³ Because of this, by the time the injury manifests symptoms, it is likely the statute of limitations for a claim under a consumer protection law will have run.¹¹⁴ However, the statute of limitations for an injury to a minor generally tolls until the child turns 18 years old.¹¹⁵ Consequently, minors should be able to bring claims when

107. *Id.* at 175.

108. *Id.*

109. *Id.* at 176.

110. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 588 (2001) (Thomas, J., concurring) (stating that “even though fast food is not addictive in the same way tobacco is, children’s exposure to fast food advertising can have deleterious consequences that are difficult to reverse”); see Jeremy H. Rogers, Note, *Living on the Fat of the Land: How to Have Your Burger and Sue It Too*, 81 WASH. U. L.Q. 859, 879 (2003).

111. Higgins, *supra* note 105.

112. See *Pelman v. McDonald’s*, No. 02 CV 7821, 2003 U.S. Dist. LEXIS 15202 at *17-18 (S.D.N.Y. Sept. 3, 2003), *vacated in part and remanded* by 396 F.3d 508 (2d Cir. 2005); see also Romero, *supra* note 5, at 258.

113. See Romero, *supra* note 5, at 258.

114. *Id.*

115. See, e.g., *Pelman*, 2003 U.S. Dist. LEXIS 15202, at *17.

health problems arise, even many years after being exposed to the marketing.¹¹⁶

Because many feel that marketers owe a special duty toward minors, consumers often bring claims of deceptive marketing on behalf of children.¹¹⁷ In *Committee on Children's Television, Inc. v. General Foods Corp.*, the Supreme Court of California upheld a complaint against a major cereal manufacturer for using deceptive advertising to encourage children to consume unhealthy products.¹¹⁸ Similarly, in 1997 consumers brought a lawsuit against cigarette manufacturer R.J. Reynolds claiming its Joe Camel cartoon mascot was part of a campaign designed to target minors; the company ultimately settled for \$10 million, more than \$9 million of which was earmarked for "anti-smoking education aimed at young people."¹¹⁹

While lawsuits like these brought under consumer protection laws pose some likelihood of success, negligence lawsuits pose more problems, offer less chance of success, and therefore pose less of a threat to the food industry.¹²⁰

III. NEGLIGENCE CLAIMS IN OBESITY LAWSUITS

Proponents of immunity legislation reasonably point out that choices of what and how much to eat are issues of personal responsibility, and the food industry "needs protection from greedy lawyers."¹²¹ However, while federal and state legislators have attempted to immunize the food industry from liability for consumer obesity, thus far they have left an exception allowing claims for injury based on intentionally misleading marketing.¹²² Presumably, this is based on the idea that if consumers are to exercise personal

116. See, e.g., *id.* at *17-18; see also Romero, *supra* note 5, at 239-40.

117. See Haley, *supra* note 49.

118. See *Comm. on Children's Television v. Gen. Food Corp.*, 673 P.2d 660, 663 (Cal. 1983).

119. See Reynolds, *supra* note 86. R.J. Reynolds "admitted no wrongdoing" in the settlement. *Id.*

120. See Romero, *supra* note 5, at 263-64.

121. Ira Dreyfuss, *Obesity Suit Protection Bills Abound*, DESERET MORNING NEWS, Aug. 29, 2004, at A02.

122. See, e.g., S. 1428, 108th Cong. § 3 (2003); IDAHO CODE ANN. § 39-8702 (2004); UTAH CODE ANN. § 78-27d-103 (2004).

responsibility, they must “be given the facts necessary to make informed choices.”¹²³ However, these laws do not provide an exception for negligent marketing, perhaps because those who oppose these suits see negligence as based in “vague principles.”¹²⁴ Ultimately, though, obesity lawsuits based on negligent marketing present more obstacles and a much lower likelihood of success than those brought under consumer protection laws for intentional violations of those laws.¹²⁵ While plaintiffs could bring negligence suits under various theories, none present a strong opportunity for success.¹²⁶

A. *Negligent Failure to Warn*

Plaintiffs could bring claims of negligent marketing under a products liability theory for the food industry defendant’s failure to warn of the dangerous aspects of its product.¹²⁷ Under this theory, food industry marketers have a duty to warn consumers “of the unhealthy attributes of their products.”¹²⁸ However, there is no duty to warn of open and obvious dangers — those a consumer should reasonably be aware of without a warning.¹²⁹ In a lawsuit against a fast food manufacturer, it is likely that a court would find that a reasonable consumer is aware fast food is generally unhealthy.¹³⁰ But it is also possible that a court could determine the excessive fat content and calories in most fast food are beyond what the reasonable consumer believes.¹³¹ Ultimately, the question of duty may hinge on the availability of nutritional information for consumers either in

123. ALI-ABA, *supra* note 71, at 2 (quoting President John F. Kennedy, *On Protecting the Consumer Interest*, 1962 CONG. Q. 890-93 (1962)).

124. *See, e.g.*, S. 1428, 108th Cong. § 3 (2003); IDAHO CODE ANN. § 39-8702 (2004); UTAH CODE ANN. § 78-27d-103 (2004).

125. *See, e.g.*, Romero, *supra* note 5, at 263-64.

126. *See* discussion *infra* Part III.A-C.

127. *See* Jonathan S. Goldman, Comment, *Take That Tobacco Settlement and Super-Size It!: The Deep-Frying of the Fast Food Industry?*, 13 TEMP. POL. & CIV. RTS. L. REV. 113, 140 (2003). Products liability claims can also be brought on strict liability grounds for manufacturing or marketing an unreasonably dangerous product. *See generally* Romero, *supra* note 5, at 261-62.

128. Romero, *supra* note 5, at 262.

129. *Id.*

130. *See* Goldman, *supra* note 127, at 140.

131. *See id.* at 140-41.

restaurants and websites (as currently required) or on packaging (as some say should be required).¹³²

However, even where a court found a duty existed to warn consumers of a danger in eating fast foods, a successful negligence claim would also require that the breach of such duty proximately caused the obesity-related health problems.¹³³ This requirement would be a major hurdle in any obesity case based on negligence.¹³⁴ In *Pelman*, for instance, the court initially held that because the complaint failed to detail how often the plaintiffs ate at McDonald's, there was no way to tell what role the consumption of McDonald's food played in their obesity.¹³⁵ Furthermore, because the plaintiffs failed to eliminate the many other factors that could contribute to obesity — including cultural, genetic, “social behavioral, physiological, metabolic, cellular, and molecular” factors — the court found that a finding of causation would require “wild speculation.”¹³⁶ After the plaintiffs filed the amended complaint, the court found that despite having mandated in the initial hearing that the plaintiffs “address these other variables,” they had failed “to isolate the particular effect of McDonald's foods on their obesity and other injuries.”¹³⁷ Because of the many factors that contribute to obesity, showing a food industry defendant proximately caused a plaintiff's obesity related injuries is extremely difficult.¹³⁸

132. *See id.*; *see also* Haley, *supra* note 49. In late 2005, McDonald's announced it would begin printing nutritional information for many of its products on individual packaging. *See* Elizabeth Lee, *McDonald's Labels To Tell All*, AUSTIN AM.-STATESMAN, http://www.statesman.com/money/content/shared/money/stories/MCDONALDS_1026_COX.html.

133. *See* Romero, *supra* note 5, at 265-68.

134. *See id.* at 266.

135. *See Pelman*, 237 F. Supp. 2d at 538-39.

136. *Id.* (quoting NAT'L INST. OF HEALTH, CLINICAL GUIDELINES ON THE IDENTIFICATION, EVALUATION, AND TREATMENT OF OVERWEIGHT AND OBESITY IN ADULTS, at xi, 27 (1998)).

137. *Pelman v. McDonald's*, No. 02 CV 7821, 2003 U.S. Dist. LEXIS 15202, at *31-32 (S.D.N.Y. Sept. 3, 2003), *vacated in part and remanded* by 396 F.3d 508 (2d Cir. 2005).

138. *See* Romero, *supra* note 5, at 265-68.

B. *Negligent Misrepresentation*

Negligent misrepresentation is an additional method for holding the food industry liable.¹³⁹ Negligent misrepresentation occurs when a party gives “false information to another,” and the recipient suffers harm “in reasonable reliance upon such information.”¹⁴⁰ Thus, where a food industry marketed nutritional information and failed “in ascertaining the accuracy of the information,” a court could find liability where injury results.¹⁴¹ But not all jurisdictions have adopted negligent misrepresentation, and most that have limit such claims exclusively to situations involving pecuniary harm.¹⁴² Furthermore, many jurisdictions have imposed a duty of reasonable care in making representations only where there is privity of contract or a “privity-like” relationship between the parties, which requires the party making the misrepresentation be aware that the *specific* defendant would rely on their statement.¹⁴³ While the RESTATEMENT (SECOND) OF TORTS section 311 imposes a duty based on the foreseeability of a consumer relying on advertising, even in a jurisdiction adopting this broader view, the same issues of causation would likely bar recovery.¹⁴⁴

C. *Negligent Marketing*

Finally, some courts have recognized another type of “negligent marketing,” finding liability where gun manufacturers marketed their products in a way that increased the risk of harm.¹⁴⁵ For instance, a gun manufacturer that promoted a weapon popular with criminals as “fingerprint resistant,” could be found to have increased the risk of

139. See RESTATEMENT (SECOND) OF TORTS § 311 (1965).

140. *Id.*

141. *Id.*

142. *Id.* This more limited theory of negligent misrepresentation is embodied in the RESTATEMENT (SECOND) OF TORTS section 552 (1965). *Id.*

143. See Philip Steven Horne, *Onita Pacific Corp. v. Trustees of Bronson: The Oregon Supreme Court Recognizes the Negligent Misrepresentation Tort*, 72 OR. L. REV. 753, 756-62 (1993) (giving the history of and approaches to the negligent misrepresentation tort). Examples of jurisdictions that use this privity-based approach include New York, Pennsylvania, and Indiana. *Id.* at 757 n.37.

144. See Romero, *supra* note 5, at 265-68.

145. See *id.* at 268-69.

harm, constituting negligence.¹⁴⁶ In an obesity lawsuit, one could argue “that the risk of childhood obesity is affirmatively enhanced by the marketing and advertising campaigns of the fast-food industry.”¹⁴⁷ However, because this theory opens the door to increased litigation, by relaxing traditional negligence standards, appellate courts have overruled most cases finding liability at trial.¹⁴⁸ In *Merrill v. Navegar*, for instance, the California Court of Appeals found that a weapons manufacturer was liable under a negligent marketing theory for publicly marketing an assault handgun with “no legitimate civilian use.”¹⁴⁹ Reversing the appellate court’s decision, the Supreme Court of California found the negligent marketing theory relied on by the plaintiffs was “essentially [a] design defect claim [] in disguise” and required traditional proof of negligence.¹⁵⁰

IV. ALLOWING NEGLIGENCE CLAIMS IN OBESITY LAWSUITS

Because of the difficulties in bringing negligent marketing claims against the food industry, they pose a limited threat; therefore, it arguably makes little sense to prohibit them.¹⁵¹ Furthermore, at least in some small part, the threat of negligence claims in obesity lawsuits encourages the food industry to take greater care in the way they market their products.¹⁵² The food industry responded to increased media attention about their role in our nation’s obesity epidemic: McDonald’s is no longer “super-sizing” meals, Kraft Foods introduced a healthier version of its high-fat and highly criticized “Lunchables” kids meals, and even candy kingpin Hershey has

146. See, e.g., *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999), *vacated*, *Hamilton v. Beretta USA Corp.*, 264 F.3d 21 (2d Cir. 2001).

147. Romero, *supra* note 5, at 268.

148. See, e.g., *Hamilton*, 264 F.3d 21 (vacating *Hamilton*, 62 F. Supp. 2d 802).

149. 28 P.3d 116, 122 (Cal. 2001). The case was filed after a licensed purchaser of several Navegar handguns entered an office building in 1993 and opened fire, wounding six people and killing nine, including himself, with the weapons. *Id.* at 470.

150. *Id.* at 127 (quoting Timothy D. Lytton, Halberstam v. Daniel and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers, 64 BROOK. L. REV. 681, 684 (1998)).

151. See PCRM, *supra* note 14.

152. *Id.*

launched a sugar-free chocolate with \$5 million in advertising behind it.¹⁵³ Many believe the publicity surrounding *Pelman* and the perceived threat of future lawsuits motivated these decisions.¹⁵⁴ While the financial costs of litigation and the determination of where to place responsibility in our society are debatable issues, it is undoubtedly a benefit to our society to encourage the food industry to offer healthier alternatives to their unhealthy products.¹⁵⁵

Furthermore, if food industry defendants were only liable for intentionally misleading marketing, the law would “bar lawsuits that would hold food producers accountable for their negligent and reckless actions,” even actions in violation of state or federal law.¹⁵⁶ This actually makes the food industry less responsible to consumers than ordinary citizens are legally required to be towards each other.¹⁵⁷ Conceivably, negligently misleading the public about food could contribute to obesity and its related illnesses; consequently, negligent marketing claims should require the greatest responsibility by the food industry.¹⁵⁸ Otherwise, it is likely that even claims showing blatant disregard for traditional marketing standards would fail because of immunity legislation.¹⁵⁹

153. See *McSupersizes to Be Phased Out*, CNN, Mar. 3, 2004, <http://www.cnn.com/2004/US/03/02/mcdonalds.supersize.ap>; Sarah Ellison & Brian Steinberg, *To Eat, or Not to Eat: Food Marketers Are Torn Between Consumers' Two Mind-Sets*, WALL ST. J., June 20, 2003, at B1.

154. See Ellison & Steinberg, *supra* note 153.

155. See “*Burger Bill*,” *supra* note 19.

156. John Conyers, Jr. et al., *Dissenting views to H.R. 339, the “Personal Responsibility in Food Consumption Act of 2003,”* http://www.house.gov/judiciary_democrats/hr339dissenting108cong.pdf (last visited Mar. 17, 2006). The Personal Responsibility in Food Consumption Act was the House version of the Senate’s Commonsense Consumption Act. Compare H.R. 339, 108th Cong. (2004), with S. 1428, 108th Cong. (2003).

157. Conyers et al., *supra* note 156.

158. See *id.*

159. See *id.* In the wake of the FTC’s claims against KFC, members of the marketing community commented that the campaign “knocked the ‘credibility not just of KFC but of the entire marketing industry’” and “‘merits special derision.’” *Id.* (quoting *KFC Blunder in “Health Ads,”* ADVERTISING AGE, Nov. 3, 2003, at 22).

CONCLUSION

State and federal lawmakers trying to protect the food industry from obesity lawsuits have the support of the general public, as indicated by a recent poll showing “89 percent of Americans opposed holding fast food restaurants legally liable for diet-related health problems.”¹⁶⁰ Perhaps this is because these lawmakers seek to accomplish laudable goals.¹⁶¹ Socially, it is important to encourage people to take responsibility for their eating choices, as ultimately, they are individual decisions.¹⁶² Furthermore, limiting truly unnecessary litigation against businesses is important to the food industry, and to the economy as a whole.¹⁶³ Unfortunately, there are lawyers who seek to bring “obesity lawsuits” purely for personal financial gain, rather than in the interests of justice.¹⁶⁴

But eliminating the threat of litigation against the food industry also eliminates one point of pressure that encourages the industry to take responsibility for its role in this problem.¹⁶⁵ Today, as personal fitness and health become more important and concerns over obesity grow, consumers increasingly make nutrition a primary consideration in product purchases.¹⁶⁶ As a result, the food industry has two choices: offer healthier products, or market their products in a way that highlights their nutritional value and obscures their unhealthy effects.¹⁶⁷ Because the latter option opens the door for deceptive marketing, leaving room for claims of intentional violations of state consumer protection laws will help encourage thoughtful and accurate marketing of products.¹⁶⁸ However, the policy behind allowing for laws that limit liability against fast food restaurants will

160. Bruce Bartlett, *Tricks of the Litigious Trade*, WASH. TIMES, Sept. 23, 2003, <http://www.washtimes.com/commentary/20030923-093051-3062r.htm>.

161. See *supra* notes 16-17 and accompanying text.

162. *Id.*

163. *Id.*

164. See *Perspective on Cheeseburger Bill*, *supra* note 17, at 3.

165. See discussion *supra* Part III.

166. See Sloan, *supra* note 6.

167. Cf. Press Release, *supra* note 7 (discussing KFC's settlement with the Federal Trade Commission over charges that it made false claims about the nutritional value of its food).

168. See discussion *supra* Part II.

only be furthered by also allowing negligent marketing claims.¹⁶⁹ As these claims will be very difficult for consumers to bring successfully, the potential for economic harm to the food industry is limited.¹⁷⁰ But the threat of litigation based on improper or deceptive marketing, however small, would only encourage food manufacturers to market their products in the most informative and candid manner possible.¹⁷¹

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169. *See* discussion *supra* Part III.

170. *See id.*

171. *See id.*