The Hamburglar, Friend or Foe: What is the Best Solution for Lawsuits Alleging Obesity Caused by Fast Food Outlets When No Causal Link Between Consumption and Obesity Can Be Found?

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Recommended Citation
Hodges, M. H. (2020). The Hamburglar, Friend or Foe: What is the Best Solution for Lawsuits Alleging Obesity Caused by Fast Food Outlets When No Causal Link Between Consumption and Obesity Can Be Found?. Journal of Food Law & Policy, 10(2). Retrieved from https://scholarworks.uark.edu/jflp/vol10/iss2/9

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THE HAMBURGLAR, FRIEND OR FOE: WHAT IS THE BEST SOLUTION FOR LAWSUITS ALLEGING OBESITY CAUSED BY FAST FOOD OUTLETS WHEN NO CAUSAL LINK BETWEEN CONSUMPTION AND OBESITY CAN BE FOUND?

Mary Hoshall Hodges*

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I. INTRODUCTION

When is the last time you ventured through the drive-thru of a fast food establishment? Maybe last night when it was just easier than taking the time to cook dinner, or maybe last weekend on your way home from vacation, or maybe when you were running low on funds and needed a cheap meal? Given the busy, fast-paced lives Americans lead, it is no wonder that many rely on the fast food industry, even though most would not care to admit it.

In 2013, 64 percent of U.S. consumers did, in fact, admit to eating at a fast food restaurant within the past month.\(^1\) Needless to say, fast food is something upon which this consumer nation relies, and is both a luxury and convenience to the people who take advantage of this service. The hamburger segment of the fast food industry was found to be the most popular.\(^2\) Specifically, McDonald’s was determined the most popular brand in the business as of 2013 in a survey by Judith Karbstein.\(^3\)

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2. *Id.*
3. *Id.*
People may not think about how frequently they take advantage of these outlets, but what if suddenly fast food restaurants were gone? The effects of litigation such as Pelman v. McDonald's could mean higher prices and other barriers, making this a possibility for some consumers. Such lawsuits are lengthy, expensive, and could have a significant impact on the fast food industry as a whole. The allegation in Pelman was that McDonald's had caused the plaintiffs' obesity, together with associated health related problems. More specifically, plaintiffs alleged McDonald's advertising was false and misleading in that it failed to warn of the consequences of consuming its food and led consumers to believe the food was actually healthy. Reliance on these representations led to over-consumption, and thus weight oriented health issues. After nine years of litigation, the suit was finally voluntarily dismissed by the plaintiffs. Whether the parties settled remains unknown to the general public. The main obstacle to the plaintiffs' success appears to have been proving the necessary causation. Plaintiffs were not able to prove the direct relation between the food consumed and resulting health problems; mainly because each individual is unique and a number of different considerations can affect one's health.

These types of lawsuits threaten the food industry as a whole, not just the fast food segment, and it is likely that courts will see more of such obesity suits in the future. Causation is one of the necessary elements of the plaintiffs' cause of action, and without hard evidence, it is unlikely that future suits will be successful. As a result of the litigation threat, beginning with Pelman in 2003, members of Congress attempted to stop such frivolous suits by means of a bill introduced in the Senate in 2003. The bill, known as the Commonsense Consumption Act ("CCA"), will be examined in depth later in this article. In general, the bill prohibited civil litigation against all food outlets, manufacturers, distributors, marketers, etc. based on a claim of weight-gain, obesity, or any other health condition related to obesity or

6. Id. at 520.
7. Id. at 522.
9. Id.
10. Id.
12. Id.
weight gain.\textsuperscript{13} The bill was introduced again in 2005, 2007, and once more in 2009.\textsuperscript{14} However, it has yet to pass.\textsuperscript{15}

This article will analyze the claims, arguments, relief, and consequences of the \textit{Pelman} case. Based on that analysis, a strong argument can be made in favor of passing the Commonsense Consumption Act on the federal level. However, its passage may raise some concerns that Congress should first resolve. This article will first analyze the stages of \textit{Pelman} in detail, to serve as an example of what such litigation is like, and then proceed to examine the effects of such lawsuits. Next, the article will take a look not only at the federal government's efforts to address such litigation, but also what individual states have done in response to obesity-related fast food litigation. After a look at both litigation and legislative alternatives, this article will summarize the pros and cons of each of these methods, along with suggesting which option may be the best alternative.

\section*{II. Statement of Facts}

\subsection*{A. The Original Suit: Pelman I}

This case was originally filed by two minors, Ashley Pelman by her mother Roberta Pelman, and Jazlyn Bradley by her father, Israel Bradley.\textsuperscript{16} Both parents also made individual claims.\textsuperscript{17} The named defendants were McDonald's of New York, a New York corporation with its principal place of business in New York, and McDonald's Corporation, a Delaware corporation with its principal place of business in Illinois.\textsuperscript{18} Plaintiffs claimed to have consumed food from the Bruckner Boulevard outlet and the Jerome Avenue outlet, both of which are entities controlled by both McDonald's of New York and McDonald's Corporation.\textsuperscript{19} This is because the two entities work together in dictating ingredients and the quality and quantity of the food provided to make sure that the product sold in a given location is identical to the product sold throughout the rest of the country,

\begin{itemize}
\item \textsuperscript{13} \textit{Id.}
\item \textsuperscript{15} \textit{Id.}
\item \textsuperscript{16} Pelman I, 237 F.Supp.2d 512, 519 (S.D.N.Y. 2003).
\item \textsuperscript{17} \textit{Id.}
\item \textsuperscript{18} \textit{Id.}
\item \textsuperscript{19} \textit{Id.}
\end{itemize}
and also because all advertisements and promotions are authorized by both entities.\textsuperscript{20}

All of the plaintiffs had previously purchased and consumed McDonald's food and claimed that this consumption caused them to suffer health problems, namely weight gain and other negative health effects such as diabetes, heart disease, high blood pressure, and high cholesterol.\textsuperscript{21} The gist of their allegations was that had it not been for McDonald's conduct and business practices they would not have consumed the food in such large quantities and would not have been injured.\textsuperscript{22}

1. Federal Court

Plaintiffs originally filed suit in August of 2002 in the state supreme court of New York, Bronx County.\textsuperscript{23} However, the defendants then moved to remove the case to federal court in the Southern District of New York in September 2002, on the basis of diversity, alleging that the plaintiffs had fraudulently joined parties to destroy diversity jurisdiction—meaning that their intention for joining McDonald's of New York was to destroy diversity and any hope for removal to federal court.\textsuperscript{24} Defendants further moved to dismiss the complaint, while the plaintiffs cross-moved to remand back to state court.\textsuperscript{25}

The defendants McDonald's Corporation and McDonald's of New York alleged that there was diversity jurisdiction pursuant to 28 U.S.C. § 1332, which in sum says that to constitute diversity jurisdiction, the matter in controversy must exceed $75,000 and the parties must be citizens of different states.\textsuperscript{26} In Pelman I, complete diversity did not exist because one of the defendants, McDonald's of New York, shared citizenship with the plaintiffs, also from New York, unless the plaintiffs had fraudulently joined the defendants to overcome diversity jurisdiction.\textsuperscript{27} To prove fraud in joining a non-diverse party, the burden is on the alleging defendant to show that by clear and convincing evidence, there was fraud in the plaintiffs' pleadings or there is no reasonable basis for liability against the non-diverse party in light of the alleged claims.\textsuperscript{28}

\textsuperscript{20} Id.
\textsuperscript{21} Pelman I, 237 F.Supp.2d at 519.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
The court ultimately found that the central issue was over-consumption of products created, produced, distributed, and advertised at a national level.\textsuperscript{29} The court concluded that the food would be the same at one outlet as at another.\textsuperscript{30} Therefore, plaintiffs' cause of action is based on the national menu and policies of McDonald's.\textsuperscript{31} As the court described it, "the plaintiffs' real beef is with McDonald's Corporation."\textsuperscript{32} Therefore, McDonald's of New York was released from the lawsuit, the plaintiffs' motion to remand was denied, and the case remained in federal court.\textsuperscript{33}

2. Analyzing the Plaintiffs' Claims

The court was then required to address the defendant's motion to dismiss.\textsuperscript{34} In doing so, the court considered each of the five counts alleged in the plaintiffs' complaint.\textsuperscript{35} Ultimately, the court dismissed all counts.\textsuperscript{36}

a. Count I

Count I of the complaint alleged a violation of the New York Consumer Protection Act by "deceptively advertising their food as not unhealthful and failing to provide consumers with nutritional information."\textsuperscript{37} Section 349 of the New York statute specifically makes it unlawful to use "deceptive acts or practices in the conduct of any business, trade, or commerce, or in the furnishing of any service in this state."\textsuperscript{38} Section 350 of the statute makes illegal "any false advertising in the conduct of any business."\textsuperscript{39} In order to properly state a claim under either section, precedent required the plaintiffs to show that: 1) the act was consumer oriented, 2) the act was misleading in a material aspect, and 3) that plaintiff was injured as a result.\textsuperscript{40}

Count I specifically alleged that the New York Consumer Protection Act was violated by both acts of commission, e.g., claiming the food was healthy, encouraging larger "supersize" meals without revealing the negative

\textsuperscript{29} Id. at 523.
\textsuperscript{30} Id.
\textsuperscript{31} Pelman I, 237 F.Supp.2d at 523.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Id. at 524.
\textsuperscript{36} Id. at 512.
\textsuperscript{37} Id. at 524.
\textsuperscript{38} N.Y. GEN. BUS. LAW §349(a) (McKinney 2012); Pelman I, 237 F.Supp.2d at 524.
\textsuperscript{39} N.Y. GEN. BUS. LAW §350 (McKinney 2012); Pelman I, 237 F.Supp.2d at 524-525.
\textsuperscript{40} Pelman I, 237 F.Supp.2d at 525.
hazards, and by acts of omission, e.g., by not providing nutritional information to consumers.41 Count I relating to both commission and omission was dismissed because the plaintiffs failed to plead a particular deceptive act.42 The court found that an omission in failing to provide nutritional information was clearly pled, but held that the plaintiffs had failed to show why it was deceptive.43

b. Count II

The second claim again alleged violations of the New York Consumer Protection Act, particularly by inducing minors to eat at McDonald’s establishments through utilizing deceptive marketing tactics.44 This claim was dismissed for the same reasons as Count I—namely a lack of specificity.45 The court held that the plaintiffs had failed to show any one deceptive advertisement directed specifically at minors, and thus dismissal was the appropriate action.46

c. Count III

The court characterized the next three counts, Counts III, IV, and V, as based on common law negligence.47 The elements of a negligence claim consist of: a duty to conform to a standard of conduct for the protection of others, a breach of that duty, a causal connection between the conduct and the alleged injury, generally referred to as legal cause or proximate cause, and a resulting actual injury.48 Count III specifically alleged that the foods provided by McDonald’s were inherently dangerous because they contained ingredients such as cholesterol, fat, salt, and sugar in large levels.49

To properly state a claim for negligence, the plaintiffs must be able to show that the food consumed was so unhealthy that it would be outside the reasonable contemplation of consumers, or so unhealthy that it was dangerous for its intended purpose.50 The court reasoned that it was common knowledge that fast food contains such ingredients and that those ingredients

41. Id. at 527.
42. Id.
43. Id. at 529.
44. Id. at 524.
46. Id.
47. Id. at 530.
50. Id. at 532.
are not necessarily good for the consumer. The court also noted that if a person knows or should know of the probable consequence, it is not up to the law to protect that person from that freely made choice.

The court further stated that it would be nearly impossible to find the required causal connection here without "wild speculation." The causal connection referred to by the court was that McDonald's conduct in using such ingredients substantially caused the plaintiffs' injury of weight gain and related health problems. The court's decision to dismiss was based on the lack of specificity in the plaintiffs' complaint, particularly in failing to address such factors as the frequency of consumption and other health considerations besides diet.

Because the plaintiffs failed to plead that the hazards of consuming such ingredients in large quantities was not well-known, and failed to show some sort of proximate cause, Count III of the complaint was dismissed.

d. Count IV

Count IV alleged a failure to warn of the unhealthy attributes of the food McDonald's produced. A seller can be liable for negligence in failing to warn if the seller failed to warn in general, or failed to give an adequate warning of a risk inherent in the product's design that is related to the intended uses of the product or related to the foreseeable uses of the product.

The question of whether a proper warning was given focuses on whether the manufacturer, or producer, had a duty to warn in the first place. The court noted that New York law dictates that obviousness and a knowledgeable user will prohibit a finding of proximate cause, which is a necessary element in proving negligence in failure to warn cases. The court concluded that the plaintiffs failed to show that McDonald's food product was any more dangerous than what would be known to the typical, reasonable McDonald's food consumer. Because the possible dangers of

51. \textit{Id.}
52. \textit{Id.} at 533.
53. \textit{Id.} at 538.
55. \textit{Id.} at 538-39.
56. \textit{Id.} at 539-40.
57. \textit{Id.} at 540.
58. \textit{PROSSER AND KEETON, Supra} note 48 at 685.
60. \textit{Id.}
61. \textit{Id.} at 541.
consuming such food would be known to a reasonable consumer, the court found that there was no duty and Count IV was also dismissed. 62

e. Count V

The plaintiffs’ final claim alleged that McDonald’s sold addictive products. 63 However, the District Court concluded that the claim was unclear. 64 The court found the claim could be interpreted to allege that the addictive attributes of the food made it inherently dangerous, or that there was a failure to warn that the food was addictive in general. 65 The claim was categorized as vague because the plaintiffs failed to specify the characteristics that made the food addictive, i.e., whether it was it the combination of typical ingredients, or some other additive, and also whether McDonald’s intentionally produced addictive food. 66 In the absence of such specificity, Count V was also dismissed. 67 In summary, the entire complaint was dismissed with leave to amend. 68

B. The Amended Complaint: Pelman II

Within the year, plaintiffs filed an amended complaint listing McDonald’s Corporation alone as the defendant. 69 The plaintiffs narrowed their allegations to only three causes of action, all of which were based on violations of the New York Consumer Protection Act, as first raised in Pelman I. 70 The defendant again moved to dismiss, and the District Court was required to determine the merits of the amended counts. 71

1. Allegations in the Amended Complaint

a. Count I

The first claim alleged that McDonald’s violated the N.Y. Consumer Protection Act through misleading publicity and advertising, which indicated

62. Id.
63. Id. at 542.
65. Id.
66. Id.
67. Id.
68. Id. at 543.
70. Id. at 4.
71. Id. at 1.
that the food that it produced was consistent with a nutritional, healthy lifestyle if consumed daily.\(^7\)

b. **Count II**

Plaintiffs’ next claim alleged that McDonald’s violated the N.Y. Consumer Protection Act by failing to disclose the unhealthy attributes of its food.\(^7\)

c. **Count III**

The final claim alleged that McDonald’s practiced unfair and deceptive acts by representing to the public that it provided nutritional information at every outlet when in fact it did not.\(^7\)

2. **Statute of Limitations Defense**

McDonald’s, for the first time, raised a statute of limitations defense to the allegations, based on the fact that the advertisements specified as the basis for the complaint were the same advertisements used in the late 1980’s for which the New York State Attorney General had already taken action against McDonald’s.\(^7\) The plaintiffs were made aware that they could use these advertisements to assist in making a claim, but any claim based on these advertisements specifically would likely be barred by the three-year statute of limitations for deceptive act actions.\(^7\)

3. **Dismissal**

All three counts were dismissed for failure to state a claim.\(^7\) However, in regard to the claims of the minors, the court held that the statute of limitations does not begin to run until they reach the age of majority, eighteen years old.\(^7\) The court therefore found that the claims of the two minors were not barred by the statute of limitations, but the parent, adult claimants were barred.\(^7\)

\(^7\) Id. at 4.
\(^73\) Id.
\(^75\) Id. at 5.
\(^76\) Id.
\(^77\) Id. at 12.
\(^78\) Id. at 6-7.
Dismissal was again based on the failure to adequately plead causation. As stated previously, the plaintiffs must plead that the deceptive act allegedly caused their injury. The court in Pelman II indicated that the plaintiffs did sufficiently plead a causal connection between the deceptive advertisements and their decision to consume McDonald's food, but failed to show a connection between the consumption and their injuries. Although the plaintiffs' allegations were more specifically made in the amended complaint, which addressed how much and how often the plaintiffs ate at McDonald's, the complaint failed to consider many other factors that contribute to obesity and their other health related injuries.

The court further stated that regardless of causation, the plaintiffs also failed to show how the advertisements were objectively misleading, as required by the statute. Although the plaintiffs relied upon several advertisements, the complaint made no allegations as to the representations about the effects of the food. The court reasoned that the effects of food and types of food are different, and thus the advertisements could not be found to be deceptive, based on the allegations laid out in the complaint.

Because the plaintiffs failed to adequately allege causation and the objectively deceptive nature of the advertisements, the complaint was dismissed in its entirety. This time, the dismissal was with prejudice, so the plaintiffs had no leave to re-plead.

C. Appeal to the Second Circuit: Pelman III

The plaintiffs proceeded to appeal to the Second Circuit Court of Appeals. However, the plaintiffs did not appeal the dismissal of the claims under the Consumer Protection Act §350, so those claims were deemed to be abandoned. Plaintiffs only appealed the dismissal of the claims based on §349. The Second Circuit found that §349, as laid out in Pelman I, was broader than a typical common law fraud claim, and therefore, did not

80. Id. at 8.
81. Id.
82. Id. at 8-9.
83. Id. at 9-10.
85. Id. at 11.
86. Id. at 11-12.
87. Id. at 14.
88. Id.
89. Pelman III, 396 F.3d 508,508 (2nd Cir. 2005).
90. Id. at 511.
91. Id.
require proof of the exact elements of fraud, such as reliance.\(^92\) The statute specifically states that “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.”\(^93\) The court felt that the complaint alleged more than enough to meet the requirements of the statute at such an early time in the pleading process.\(^94\) Therefore, the District Court’s judgment was vacated and the case was remanded back to District Court.\(^95\)

D. Remand to District Court: Pelman IV

After the Second Circuit held that the plaintiffs’ complaint sufficiently alleged deceptive and misleading acts pursuant to §349, the District Court was left with two issues to decide: i) whether the complaint was too unintelligible for McDonald’s to properly respond, and ii) if that was found to be true, what additions to the complaint were necessary for McDonald’s to adequately respond.\(^96\) The court was required to address these issues as a consequence of McDonald’s motion requesting a more definite statement.\(^97\)

Once again, the court recognized that in order to state a claim under §349, the plaintiffs must show: i) the act was consumer oriented, ii) the alleged act was materially misleading, and iii) the plaintiff was injured as a result.\(^98\) The court recognized that the complaint sufficiently laid out these elements, but went on to say that sometimes one may lay out an adequate legal theory, which may still not be sufficient to enable a defendant to reasonably respond.\(^99\) The court found such to be the case in Pelman IV.\(^100\)

Before getting to the merits of the motion for a more definite statement, the court noted that since the case was still at the pleading stage, the motion would only be granted as to the portions where required information was not provided, making the complaint unintelligible.\(^101\)

\(^{92}\) Id.
\(^{93}\) N.Y. GEN. BUS. LAW §349(a) (McKinney 2012).
\(^{94}\) Pelman III, 396 F.3d at 512.
\(^{95}\) Id.
\(^{97}\) Id. at 439.
\(^{98}\) Id. at 444.
\(^{99}\) Id.
\(^{100}\) Id.
\(^{101}\) Pelman IV, 396 F.Supp.2d at 445.
1. McDonald’s First Request

The court first addressed McDonald’s request for a specific identification of each of the allegedly deceptive advertisements.\textsuperscript{102} The court reasoned that although under §349 a general statement of deception is enough, without knowing which representations allegedly injured the plaintiffs, McDonald’s could not in good faith admit or deny a violation.\textsuperscript{103} McDonald’s motion was thus granted with respect to this detail.\textsuperscript{104}

2. McDonald’s Second Request

The second detail requested was a description of why the advertisements were materially deceptive, and as to this request, the motion was also granted.\textsuperscript{105} The court felt that a general allegation that advertisements are objectively deceptive was vague.\textsuperscript{106} The court further stated that McDonald’s could not admit or deny the allegations without knowing what made them objectively deceptive.\textsuperscript{107}

3. McDonald’s Third Request

The third detail McDonald’s requested was a confirmation that the plaintiffs saw or heard each advertisement in New York, but this was not so easily granted.\textsuperscript{108} The court believed that the plaintiffs sufficiently alleged causation under §349.\textsuperscript{109} Plaintiffs need not show reliance here, only that the representation was objectively misleading and that they suffered an injury because of being so misled.\textsuperscript{110} In order to show injury “by reason of” a defendant’s deceptive act, the plaintiffs must only briefly explain how they were aware of the acts.\textsuperscript{111} Therefore, the Court ordered the plaintiffs to only provide a brief explanation of how they were made aware of these alleged deceptive schemes, and they were not required to go into such extensive detail as requested.\textsuperscript{112}

\begin{itemize}
\item \textsuperscript{102} Id.
\item \textsuperscript{103} Id.
\item \textsuperscript{104} Id.
\item \textsuperscript{105} Id.
\item \textsuperscript{106} Pelman IV, 396 F.Supp.2d 439, 445 (S.D.N.Y. 2005).
\item \textsuperscript{107} Id.
\item \textsuperscript{108} Id.
\item \textsuperscript{109} Id.
\item \textsuperscript{110} Id.
\item \textsuperscript{111} Pelman IV, 396 F.Supp.2d at 446.
\item \textsuperscript{112} Id.
\end{itemize}
4. McDonald’s Final Request

McDonald’s lastly requested a description of how exactly the advertisements allegedly injured the plaintiffs. Because the Second Circuit held that the complaint sufficiently stated a claim, the court ruled that the plaintiffs need not provide an explanation of how the advertisements injured them, plaintiffs must only outline the injuries suffered “by reason of” McDonald’s conduct. In summary, McDonald’s motion was granted, giving the plaintiffs the opportunity to provide these explanations.

E. The Second Amended Complaint: Pelman V

Plaintiffs next filed an amended complaint and McDonald’s moved to strike and dismiss. In response to the order for a more definite statement, the court found that the plaintiffs properly identified several allegedly deceptive advertisements, and explained why those advertisements were objectively deceptive. The plaintiffs alleged that they became aware of the alleged deceptive schemes from exposure to mass media outlets, such as television, radio, magazines, posters, etc. in New York from 1985-2002. In addition, the plaintiffs alleged that their beliefs about the nutritional value of the food were also influenced by other misled third parties. The complaint went on to provide a list of injuries the plaintiffs suffered, including obesity, high cholesterol, increased factors of coronary heart disease, pediatric diabetes, high blood pressure, and other adverse health effects or diseases causally connected to long-term consumption of McDonald’s food products.

The District Court found that the plaintiffs had sufficiently detailed how they were made aware of the alleged deceptive schemes. The court noted that the plaintiffs need not have seen or heard each advertisement, but just plead that they were exposed to them in some form or fashion.

Also, contrary to McDonald’s beliefs, the second amended complaint’s (“2dAC”) outline of the injuries was found to be sufficiently detailed enough

113. Id.
114. Id.
115. Id.
117. Id. at 323.
118. Id.
119. Id.
120. Id.
121. Pelman V, 452 F.Supp.2d at 324.
122. Id.
for McDonald’s to respond. The 2dAC went on to outline portions of the food consumed, frequency of consumption of specific food items, and the time frame of the consumption of the food. The 2dAC also included allegations that the plaintiffs’ body weight exceeded the Body Mass Index, which would classify them as obese. The court deemed this to be a sufficient outline of the injuries suffered.

The 2dAC identified forty specific, allegedly deceptive advertisements, along with a statement of intention to include other advertisements at a later date. However, this inclusion of the possibility of other unidentified advertisements to be later introduced, would lead McDonald’s unable to fully respond to the complaint. Therefore, the complaint was limited to those forty advertisements with leave to amend other advertisements only with good cause shown. The 2dAC also mentioned a french fry advertisement in which McDonald’s claimed that its french fries were “cholesterol free” or contained no cholesterol; however the court deemed this specific advertisement to be objectively non-deceptive. The court reasoned that this was similar to its former ruling that a McDonald’s Mighty Kids Meal is merely puffery and cannot constitute a claim that it makes children mightier, therefore this representation was stricken from the 2dAC.

McDonald’s motion to dismiss was denied and McDonald’s was ordered to respond.

F. An Attempt at Class Certification: Pelman VI

The plaintiffs next filed a motion for class certification. Class certification under Federal Rule of Civil Procedure 23(b)(3) was found to be inapplicable to this case because questions of law and fact, which would be common to class members, would not predominate over questions as to individual class members. Certification under Federal Rule of Civil Procedure 23(c)(4) was also deemed inappropriate because the pleadings did
not sufficiently identify a class of persons with identical claims and identical injuries, as those claimed by the plaintiffs.\textsuperscript{135}

Additionally, the court found that because counts I, II, and III claimed identical injuries resulting from the exact same allegedly deceptive marketing scheme, the three counts amounted to a single cause of action under §349.\textsuperscript{136}

1. Failing to Meet the Predominance Requirement of FRCP 23(b)(3)

Under §349 deception itself cannot be the injury.\textsuperscript{137} The only injuries the plaintiffs may claim under the statute are those related to the development of the named medical conditions.\textsuperscript{138} However, proving the necessary causal connection between consumption and injury would depend largely on factors or characteristics unique to the individual.\textsuperscript{139} Predominate inquiries as to consumption and energy expenditure requires particular and individualized inquiries into each individual’s lifestyle.\textsuperscript{140} Although there may be common issues as to the allegedly deceptive marketing scheme, individual causation issues would overwhelm those common issues and ultimately take priority.\textsuperscript{141}

2. Class Certification under FRCP 23(c)(4) is also Not Available

The question of material deception is evaluated by an objective standard.\textsuperscript{142} Such allegations may be common to the class who claim exposure and injury.\textsuperscript{143} Although this may seem to apply to the case at bar, the plaintiffs failed to provide the identities of other persons of the same age, exposure, and consumption regimens that suffered the same medical conditions in the pleadings.\textsuperscript{144} The court must at least be able to infer that a class does exist.\textsuperscript{145} Because the plaintiffs failed to adequately plead the existence of other persons fitting into this category, the court could not draw such an inference.\textsuperscript{146}

\textsuperscript{135} Id.
\textsuperscript{136} Id. at 89-90.
\textsuperscript{137} Id. at 92.
\textsuperscript{138} Pelman VI, 272 F.R.D. at 93.
\textsuperscript{139} Id.
\textsuperscript{140} Id. at 94.
\textsuperscript{141} Id. at 95.
\textsuperscript{142} Id. at 96.
\textsuperscript{143} Pelman VI, 272 F.R.D. 82, 96 (S.D.N.Y. 2010).
\textsuperscript{144} Id. at 99.
\textsuperscript{145} Id.
\textsuperscript{146} Id. 99-100.
Therefore, the court denied the plaintiffs’ motion for class certification because the plaintiffs failed to establish the existence of a class satisfying the requirements of FRCP 23.\textsuperscript{147} Shortly afterwards, in February 2011, the plaintiffs moved to voluntarily dismiss the action, which was granted by the court—but with prejudice.\textsuperscript{148}

III. THE EFFECTS OF PELMAN

Now that the stages of Pelman have been examined, it is important to take note of some of the effects of the suit. First, this section will identify similar cases, and indicate how possible plaintiffs might be chosen. Next, there will be a discussion of the obstacles to success that obesity-related fast food litigation must overcome. A somewhat controversial litigation alternative will also be mentioned in this section. Finally, there will be an examination of Pelman as a defense strategy.

A. Similar Cases

During the same time frame as Pelman, a few similar lawsuits were brought which alleged deceptive nutritional marketing schemes; some also claimed obesity or weight gain to be the injury.


In 2002, in the case of Klein v. Robert’s American Gourmet Food, Inc., plaintiffs sued a producer of snack foods alleging fraud and violations of New York Consumer Protection Act, §349 and §350.\textsuperscript{149} One of the injuries for which the plaintiffs sought damages was weight gain.\textsuperscript{150} The case was settled for $3.5 million in discount coupons and $790,000 in attorney fees, but the settlement was rejected on appeal in 2006 because the appellate court found that the trial court failed to consider whether class certification was

\textsuperscript{147} Id. at 100.
\textsuperscript{148} Pelman v. McDonald’s Corp., No. 02-7821 (S.D.N.Y. stipulation filed Feb. 25, 2011).
\textsuperscript{150} Holly E. Loiseau et al., Super-Size Lessons from the “Big Food” Lawsuits, 22 In-House Litigator 1 (2007).
The case was remanded back to the trial court, and there has been no further action to date.\textsuperscript{152}

2. Reyes v. McDonald’s Corp.

In 2006, the plaintiffs in \textit{Reyes v. McDonald’s Corp.} alleged violations of Illinois and New York Consumer Fraud Protection statutes.\textsuperscript{153} The court ultimately allowed the plaintiffs to move forward with the case, on the premise of seeking to enforce FDA regulations, but the plaintiffs were restricted from arguing for the imposition of stricter FDA regulations.\textsuperscript{154}

This case illustrates that the food industry has had some experience with these \textit{Pelman-type} lawsuits. However, it is important to note that a court has yet to rule on the causal connection of obesity or weight-gain being induced by a food distributor’s fraud or misrepresentation.

3. The Original Pelman Plaintiff, Cesar Barber

Prior to \textit{Pelman I}, in 2002, Cesar Barber brought what has been characterized as the first “tobacco-style” litigation lawsuit against the food industry in New York state court, in which he alleged that McDonald’s and other fast food outlets were responsible for his ill-health and that of the consumer population he represented.\textsuperscript{155} “Tobacco-style” lawsuits are designed to take losses early on in litigation in the hopes that more cases will lead to further discovery, and will ultimately result in a high-payout.\textsuperscript{156} Barber was a fifty-six year old maintenance worker, who ate fast food several times a week for over twenty-five years and weighed two hundred and seventy pounds.\textsuperscript{157} Since he was not the most sympathetic plaintiff, Barber’s attorney halted the proceedings, arguably because of the looming fear of a

\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{155} Id. at 2.
\textsuperscript{156} Id.
bad public reaction.\textsuperscript{158} Barber’s lawyer then went in search of a more sympathetic plaintiff.\textsuperscript{159} That same attorney thereafter filed \textit{Pelman v. McDonald’s Corp.}, making it the first real “tobacco-style” lawsuit against the food industry.\textsuperscript{160}

\textbf{B. Obstacles to Successful Litigation}

The central question of these lawsuits remains: is the fast food industry really a primary cause of the nation’s obesity epidemic? The fear that attorneys may bring these lawsuits with the goal of achieving a high payout for their individual benefit is a disturbing thought. Although these lawyers may be prepared for the struggle ahead, they may fail to take into consideration that the success of tobacco litigation was hard-won and did not come until scientific evidence established the causal connection between the effects of smoking and health damage.\textsuperscript{161} It is unlikely that success in litigation against the food industry would be much different than tobacco litigation, based on the cases that have been brought thus far.

Particularly, success with tobacco litigation did not occur until it was discovered that the tobacco industry had purposely concealed nicotine’s addictive components and harmful consequences.\textsuperscript{162} This is much like the difficulties plaintiffs currently face in suing the food industry—namely difficulty in establishing a causal connection between fast food’s advertising and production of unhealthy food items and their obesity or other related health problems.

The lack of evidence of harmful components of such food is just one hurdle plaintiffs must overcome. Another is proving that such advertising schemes employed by food outlets are objectively deceptive or misleading. One last issue plaintiffs must address, which is somewhat dissimilar to the legal issues, is the argument in favor of personal choice. Critics of fast food litigation argue that choosing to eat a particular meal, however many times a week, is a personal choice. For example, Representative John Schwarz, while supporting the bill in the U.S. House of Representatives, made the argument that obesity could only be controlled by taking personal responsibility and that being in control of one’s weight is a person’s

\textsuperscript{158} Loiseau, \textit{supra} note 154 at 2-3.
\textsuperscript{159} \textit{Id.}
\textsuperscript{160} \textit{Id.}

\textsuperscript{162} \textit{Id.}
individual responsibility.\textsuperscript{163} Such statements suggest that mass-marketed food is harmful to one's health only if one allows it to be. Plaintiffs must take into consideration that a jury might feel the same way.

C. An Alternative to Litigation

New York City Mayor Michael Bloomberg attempted to address the nation's rise in obesity by proposing a ban on sugary drinks, specifically a city-wide ban on sodas larger than sixteen ounces.\textsuperscript{164} The Manhattan Supreme Court and a four-judge panel of the appellate division rejected the soda ban, reasoning that this action encroached on the separation of powers, and that such a ban should be dealt with by the legislature.\textsuperscript{165} The panel further said that such a ban went beyond basic health concerns and manipulated the choices of consumers.\textsuperscript{166}

D. Defense Strategies

Opponents of fast food litigation view \textit{Pelman} and similar cases as a roadmap for defense. By looking at the flaws of previous cases, a defendant may be able to create a strategy not only for an ultimate defense, but perhaps for a favorable outcome early in the proceedings.

1. Divide and Conquer\textsuperscript{167}

The first of these defenses might be best described as the theory of "divide and conquer," which involves focusing on the unique issues of individual plaintiffs to avoid class certification.\textsuperscript{168} As noted previously, when dealing with the injury of obesity, common questions of law and fact typically will not predominate over individual inquiries into the health and


\textsuperscript{166} Id.

\textsuperscript{167} Loiseau, \textit{supra} note 154 at 4.

\textsuperscript{168} Id.
habits of each plaintiff. Therefore, this is often an effective strategy to get the case dismissed early in the proceedings.

2. Attacking Causation

A second defense theory is labeled "attacking causation." The major weakness of these cases seems to be the plaintiffs inability to prove that food consumption actually played a role, much less a significant one, in causing obesity or weight gain.

3. Exploiting Consumer Knowledge

"Exploiting consumer knowledge" has also been named as a defense strategy. In these types of fraud or deception-based lawsuits, the knowledge of the plaintiffs is a defense. Because deception is measured by an objectively reasonable consumer standard, the strategy is to prove that consumers were aware of the risk. Therefore, if such a consumer would have known of the risk, so should the plaintiff.

While each of these may seem to be strong defense tactics for defeating a plaintiff's case early in the proceedings, protectors of the fast food industry argue that a stronger, more effective defense strategy is necessary. As this time, the fast food litigation cases have apparent weaknesses, and are almost guaranteed to remain in litigation for years. Until scientific knowledge specifically links the consumption of certain food products to obesity, these lawsuits will continue to be lacking in evidentiary support of causation. Many commentators therefore believe these suits to be frivolous, and urge Congress and state legislatures to step in to prevent them. Such persons thus view the Commonsense Consumption Act as a possible solution.

169. Id.
170. Id.
171. Id.
172. Loiseau, supra note 154 at 4.
173. Id.
174. Id.
175. Id.
176. Id.
177. Loiseau, supra note 154 at 4.
IV. THE COMMONSENSE CONSUMPTION ACT

This section will next examine proposed federal legislation as an option to put an end to fast food litigation. The analysis will address each introduction of the bill, discuss the bills' strengths and weaknesses, and analyze the arguments for and against such legislation.

A. First Introduction – 2003

Over the years, the Commonsense Consumption Act (the "Act" or "CCA"), also known as the Personal Responsibility in Food Consumption Act, has been introduced in Congress multiple times. The bill was first introduced in the House of Representatives in 2003 by Congressman Keller of Florida. Its purpose was "to prevent frivolous lawsuits against manufacturers, distributors, or sellers of food or non-alcoholic beverage products that comply with applicable statutory and regulatory requirements." The bill was then introduced in the Senate by Senator McConnell of Kentucky. The Senate bill was similar to the House bill, except that it specifically prevented lawsuits against those entities when the relief or damages sought was related to obesity. Specifically the Senate bill excluded any: "damages or injunctive relief for claims of injury resulting from a person's weight gain, obesity, or any health condition related to weight gain or obesity." The House passed the bill with a vote of two-hundred and seventy-six "yeas" and one-hundred and thirty-nine "nays," and the bill was then placed on the Senate legislative calendar. In the Senate, the bill was referred to the Committee on the Judiciary who then referred it to the Subcommittee on Administrative Oversight and the Courts.

180. Id.
182. Id.
183. Id.
needless to say the bills remained tied up in the Senate and neither came into effect.\textsuperscript{186}

The bill’s sponsor, Senator McConnell, spoke of the proposed bill as a type of tort reform.\textsuperscript{187} Senator McConnell noted that most people take responsibility for the amount and kinds of food they eat, and thus the consequences that go along with those decisions.\textsuperscript{188} He also mentioned in his introduction that these sorts of lawsuits show “the erosion of personal responsibility in America.”\textsuperscript{189} Senator McConnell pointed out that the bill would not provide complete immunity for the food industry, but only granted immunity against “abusive lawsuits.”\textsuperscript{190} The bill would not bar suits alleging knowing or willful violations of federal or state statutes, breach of contract or express warranty, or claims relating to adulterated food.\textsuperscript{191} Senator McConnell further stated: “The lawyers are not really interested in consumers, they are looking for a settlement, a big settlement.”\textsuperscript{192} In a memorable closing Senator McConnell mentioned that: “Making your own decisions is what freedom is all about. And with freedom comes responsibility.”\textsuperscript{193}

\textbf{B. Second Introduction – 2005}

The fight for the passage of the bill was not over so easily. The Personal Responsibility in Food Consumption Act was introduced in the House of Representatives once again in 2005.\textsuperscript{194} The bill’s language was exactly the same as the Act introduced in the Senate in 2003.\textsuperscript{195} This time the bill passed by a vote of three-hundred and six “yeas” and one-hundred and twenty “nays,”\textsuperscript{196} and was once again placed on the Senate legislative calendar, where it remained un-enacted.\textsuperscript{197}

\begin{footnotesize}
\begin{enumerate}
\item[188.] \textit{Id}.
\item[189.] \textit{Id}.
\item[190.] \textit{Id} at S9596.
\item[191.] \textit{Id}.
\item[192.] \textit{Id}.
\item[193.] \textit{Id}.
\item[195.] \textit{Id}.
\item[197.] Bill Summary & Status, H.R. 554, 109th Cong. (2005-2006), http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR00554:@@L&summ2=m&.
\end{enumerate}
\end{footnotesize}
The Senate also saw the comeback of the bill in the form of the Commonsense Consumption Act of 2005. However, this time the bill addressed its purpose from a much different perspective. This seems somewhat odd, since the House had just reformed its bill to the same language as the Senate’s previous attempt. Senator McConnell introduced the bill once again, but this time the stated purpose was “to allow Congress, State legislatures, and regulatory agencies to determine appropriate laws, rules, and regulations to address the problems of weight gain, obesity, and health conditions associated with weight gain or obesity.”

In opposition to the bill, Senator Leahy of Vermont argued that the Act was “legislation to limit the rights of consumers.” Senator Leahy was concerned that the Act would result in a blanket ban on lawsuits against the food industry, and further expressed concern that a heightened burden on plaintiffs to prove intent, along with the conduct itself, went too far.

Although the Senate’s bill would perhaps have been a better alternative to address the rising incidence of obesity, rather than implementing a sort of tort reform, the Senate’s bill was referred to the Committee on the Judiciary upon introduction, and there was no further action on either proposed bill.

C. Third Introduction – 2007

The Commonsense Consumption Act was introduced in both the House and the Senate in May of 2007. This time both bills were introduced with the same title, and both used the same language as the original bill introduced in the Senate in 2003. However, once again, neither of these bills passed.

202. Id.
D. The Final Introduction – 2009

The bill was introduced in the House of Representatives a final time as the Commonsense Consumption Act of 2009. The bill included the same scope and language as the bill previously introduced in 2007. This bill also failed to be enacted.

V. OPPOSITION TO THE COMMONSENSE CONSUMPTION ACT

Why did the Act fail to pass? One reason is that several public interests groups expressed concern about the consequences of the Commonsense Consumption Act. Some of these concerns were specifically expressed in a letter signed in opposition to the Act by several public interest group leaders. Those leaders were concerned that the bill provided blanket coverage against liability to the food industry, and that too high a standard of proof would be placed on plaintiffs. However, the letter went on to say that “suits like the McDonald’s obesity case do not exist.” While some of their concerns may be legitimate, these leaders seem to have been misinformed about the existence of such lawsuits, since at least a few of these lawsuits were already active at the time of this letter.

VI. STATE LAWS AND REGULATIONS

Besides federal legislation, there is another alternative to putting an end to fast food lawsuits—state legislation. State legislatures are taking matters into their own hands by finding a way to address the problems at the heart of the fast food litigation.

http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN01323:@@@L&summ2=m&, (in the Senate the bill was read twice and referred to the Committee on the Judiciary, where there has been no further action).
208. Id.
209. There was no roll call vote in the House, and the bill was last referred to the Subcommittee on Commercial & Administrative Law, where there has been no further action. See Bill & Summary Status, H.R. 812, 111th Cong. (2003-2004), http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR00812:@@@X.
211. Id.
212. Id.
Thus far twenty-six states have enacted Commonsense Consumption Acts of their own. Each state has tailored the Act to fit the states' individual interests, although for the most part, the state bills still accomplish the same goals as a federal Act, if ever enacted. The majority of the state enacted Acts offer civil immunity to almost every division of the food industry against claims of obesity or other health related injuries from long-term consumption of certain food products. Some states go further in their Acts in order to protect government authority when enforcing certain laws related to food. There are even some state Acts that impose hardline procedural barriers for filing such civil action suits.

VII. THE MOST RECENT STATE COMMONSENSE CONSUMPTION ACT

By way of example, let us examine the most recent state enactment. In 2013, North Carolina became the twenty-sixth state to enact a Commonsense Consumption Act ("NCCCA"), and these acts continue to be introduced in various state legislatures.

Those in favor of North Carolina's CCA argued that it would help protect the state's small businesses from frivolous and expensive lawsuits. The NCCCA's primary sponsor, State Representative Ramsey, stated "It's not their fault that I'm overweight," and further, "...we can't blame others for the choices we make." The NCCCA sponsors seemed to emphasize personal responsibility as grounds for passage of the NCCCA. For example, the bill's co-sponsor, State Representative Shepard stated that: "I think you're responsible and accountable for your own self.

Opponents of the NCCCA included a few statewide public interest groups. Such opponents argued that instead of protecting people, the bill...
protected companies, and further worried that the bill would not allow municipalities to adequately fight obesity.223

North Carolina’s CCA passed both Houses with an overwhelming majority.224 North Carolina’s version of the CCA protects the same entities as proposed by the federal CCA, against claims arising from obesity, weight-gain, and other related health conditions, but only on the condition that they “comply with applicable statutory and regulatory requirements.”225 The North Carolina CCA also included a specific provision relating to soft drinks; in order to “to clarify that local governments may not regulate the size of soft drinks offered for sale.”226

VIII. CONCLUSION

After considering the effects and consequences of both litigation and legislation as it relates to obesity-related lawsuits against the food industry, there is still no clear answer as to an effective solution—or even as to who is on the right side of the battle.

A. Litigation

At this time, litigation seems to be a lost cause. Without current scientific evidence linking long-term consumption of a food item or its attributes to obesity, an adequate legal claim is difficult to accomplish. Furthermore, a claimed injury of obesity requires such specific individual inquiry into all sorts of unique lifestyle factors, that it is unlikely that a class action lawsuit will ever be appropriate. Until plaintiffs have more concrete scientific evidence establishing the causal connection between a particular food and their individual weight gain or health problem, these types of lawsuits are not likely to be successful. As noted previously, cases such as Pelman outline a roadmap for a defense rather than victory.

In addition, if the concerns about settlement-hungry plaintiff attorneys are true, a plaintiff unaware of the realities of this type of obesity-related fast food litigation could be involved in a lawsuit for years with little chance of success. Protection of plaintiffs from this type of risk is another argument in favor of a legislative solution.

Due to the fact that these lawsuits currently lack a plausible legal theory, they will continue to be burdensome, rather than beneficial, to all parties involved. As Pelman illustrates, obesity-related fast food lawsuits are

223. Id.
224. The Commonsense Consumption Act, supra note 219.
226. Id.
expensive, time consuming, and exhaustive on resources, not only to the parties involved, but on the judiciary as well. From this perspective, some sort of legislative prohibition may seem like the answer; however, there are some important, albeit dissimilar, concerns that accompany such an approach.

B. Legislation

Now that the impacts of litigation have been discussed, it is necessary to examine the alternative—legislation. A federal CCA would effectively bar civil liability actions claiming obesity injuries against the fast food industry. Therefore, cases lacking a causal connection linking obesity to specific food consumption would no longer burden the court system, and what may appear to be innocent fast food defendants. A federally instated CCA would also provide uniformity. With a total of twenty-six states that have enacted their own versions of the CCA, it is only a matter of time before there is confusion about who can sue, where one can sue and what is prohibited. Such issues will undoubtedly be left up to the courts to decipher, which could be especially problematic for federal courts when having to interpret different state laws. But if Congress were to enact a federal CCA, the results would be uniform across the country.

The potential problem with such a definite ban is if at some future date scientific evidence is discovered proving the causal link, injured plaintiffs deserve their day in court. The current language of the most recently proposed CCA would bar plaintiffs from filing suit, even if they successfully established a causal link. Additionally, what if the food industry decides to take advantage of this protection in a negative way, like including addictive components to food products knowing there will be no consequences? While this may seem unlikely and somewhat reckless, it is a possibility. Furthermore, if such lawsuits are barred, there will not be much incentive to conduct research on fast food consumptions' relation to obesity. If in fact such a link ever comes into existence, it is possible that it may never be discovered. Namely, this is because no one would be at the forefront of litigation making such research and discovery relevant or even offering adequate compensation for conducting this type of research. For example, if tobacco had been protected by stringent, tort reform legislation the general public might not have ever known about the health consequences of smoking, and injured plaintiffs might never have been compensated.
C. Where is the Balance?

The fact is that neither litigation nor legislation provides a perfect means for dealing with obesity-related fast food lawsuits; currently litigation is to the point of being frivolous and the CCA might provide too much protection to the food industry. So where is the balance?

At this time the passage of a federal CCA provides the most efficient means for putting an end to such lawsuits. While implementing a complete bar on obesity lawsuits against the food industry may seem extreme, there are ways around the prohibition should a scientifically proven causal connection be found. For instance, the CCA may be repealed at any time. It seems that if a link was discovered Congress would have few qualms about repealing the Act to protect the public and compensate potential injured plaintiffs. Another option would be to include a “sunset clause” in the Act. Such a clause puts an expiration date on an Act and when the date arises, the law automatically terminates and must be voted on again to be reinstated. If the CCA was no longer appropriate, the expiration would provide a simple way for the Act to be set aside, thus allowing plaintiffs to file suit, or if the Act were still necessary it could easily be re-enacted. Not to mention, it is much less stringent than an indefinite bar on a specific type of lawsuit.

Based on these avenues allowing plaintiffs a possible outlet to the courts, the CCA does not seem as restrictive. Although there are concerns, most of these are answered when one considers the options for getting around the CCA. Therefore, at this time while it is not perfect, the CCA is the best solution to prevent obesity-related fast food litigation that lacks a valid cause of action.