

## LITIGATION AS A TOOL IN FOOD ADVERTISING: CONSUMER PROTECTION STATUTES

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### I. INTRODUCTION

Much has been written about the threatened legal attack against “Big Food”, modeled after the lawsuits brought against “Big Tobacco.”<sup>1</sup> Critics charge that food manufacturers spend billions of dollars marketing their products to children who are young, impressionable, and unable to make their own informed consumer

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1. See generally Forrest Lee Andrews, *Small Bites: Obesity Lawsuits Prepare to Take on the Fast Food Industry*, 15 ALB. L.J. SCI. & TECH. 153 (2004) (charting legal arguments that could be used to hold the fast food industry accountable for deceptive pricing); Richard C. Ausness, *Tell Me What to Eat, and I Will Tell You Whom to Sue: Big Problems Ahead for “Big Food”?*, 39 GA. L. REV. 839 (2005) (asserting that litigation modeled after lawsuits against “Big Tobacco” should be curtailed in favor of legislation); Alyse Meislik, *Weighing In on the Scales of Justice: The Obesity Epidemic and Litigation Against the Food Industry*, 46 ARIZ. L. REV. 781 (2004) (discussing the similarities between the tobacco and food industries, and the need for the food industry to follow tobacco companies’ lead to curtail exposure to litigation); Marguerite Higgins, *Advocates Meet to Plan Big Mac Attack on Fat*, WASH. TIMES, June 22, 2003, at A1 (citing Boston obesity litigation strategy conference based on successful lawsuits against tobacco companies); Laura Parker, *Legal Experts Predict New Round in Food Fight*, USA TODAY, May 7–9, 2004, at 3A (predicting the imminent filing of additional lawsuits against the food industry, alleging that they had mislead consumers about the nutritional value of food); Kate Zernike, *Lawyers Shift Focus From Big Tobacco to Big Food*, N.Y. TIMES, Apr. 9, 2004, at A15 (reporting on litigation against the food industry using deceptive marketing arguments utilized against the tobacco industry).

decisions.<sup>2</sup> Citing, among other things, obesity rates among children,<sup>3</sup> plaintiffs and advocacy groups have challenged this child-targeted advertising under both traditional tort law and state consumer protection statutes.<sup>4</sup> Plaintiffs bringing such lawsuits have alleged that advertisers do the following: market an inherently dangerous product;<sup>5</sup> fail to warn of the unhealthy attributes of food products;<sup>6</sup> deceptively sell fatty addictive foods;<sup>7</sup> create false impressions that the product is nutritious and part of a healthy lifestyle;<sup>8</sup> fail to disclose the use of additives;<sup>9</sup> fail to disclose that the manner of processing food renders it less healthy than represented;<sup>10</sup> deceptively represent that the company will provide nutritional information;<sup>11</sup> and fail to disclose that consumption of the product causes obesity, among other health conditions.<sup>12</sup>

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2. Andrews, *supra* note 1, at 164–66; Meislik, *supra* note 1, at 804.

3. See, e.g., Amended Verified Complaint at 2–3, *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 519–520 (S.D.N.Y. 2003) (No. 02 CV 7821 (RWS)).

4. See discussion *infra* Part II.

5. See Amended Verified Complaint, *supra*, note 3, at 24 (alleging negligence claim that McDonald's products are inherently dangerous because of high levels of cholesterol, fat, sugar and salt).

6. See *id.* at 28.

7. See *Pelman v. McDonald's Corp. (Pelman I)*, 237 F. Supp. 2d 512, 542 (S.D.N.Y. 2003), *vacated in part by* 396 F.3d 508 (2d Cir. 2005).

8. Amended Verified Complaint, *supra* note 3, at 26 (suit brought under the New York Consumer Protection Act); *Tylka v. Gerber Prod. Co.*, No. 96 C 1647, 1999 WL 495126, at \*4 (N.D. Ill. July 1, 1999) (suit brought under the Illinois Consumer Fraud and Deceptive Business Practices Act), *vacated*, 211 F.3d 445 (7th Cir. 2000); see also *Cohen v. McDonald's Corp.*, 808 N.E.2d 1, 4 (Ill. App. Ct. 2004) (alleging that McDonald's violated the Illinois Consumer Fraud and Deceptive Business Practices Act by:

(1) misrepresenting that its food products have a nutritional value that they do not have, (2) misrepresenting that its food products are of a particular standard quality or grade, (3) misrepresenting nutrient content values for foods targeted for consumption by children ages one to three, and (4) failing to adhere to the National Labeling and Education Act of 1990.).

9. Amended Verified Complaint, *supra* note 3, at 30.

10. See *id.*

11. *Id.*

12. See *id.*; see also Press Release, Center for Science in the Public Interest, Food Watchdog Group Announces Litigation Initiative (May 3, 2005), available at <http://www.cspinet.org/new/200505031.html> (announcing intention to “increasingly . . . turn to the courts to stop deceptive labeling, fraudulent advertising, and the use of dangerous food additives.”).

This Article addresses the use of consumer protection laws in bringing claims against companies that advertise food products to children and argues that there are avenues to reform, other than litigation, that are better suited to address the issue of food advertising to children. Part II examines the broad scope of state consumer protection statutes which tend to eliminate elements of traditional tort claims, thus making them an attractive tool for plaintiffs suing food advertisers. Part III sets out the problems associated with using litigation as a tool to address food advertising to children. Part IV suggests that federal regulation and public pressure are better suited to address the problem. Finally, Part V concludes that consumer protection statutes are ill equipped to deal with the medical, scientific, economic, and social issues associated with food advertising to children.

## II. CONSUMER PROTECTION STATUTES AS A TOOL TO ADDRESS FOOD ADVERTISING TO CHILDREN

### A. *The Expansive Scope of Consumer Protection Statutes*

Consumer protection statutes are increasingly popular vehicles for bringing claims against companies marketing their food products to children. Today, every state has some version of a consumer protection statute.<sup>13</sup> Consumer protection statutes vary widely, but generally prohibit “unfair,” “deceptive,” or “unconscionable” acts or practices.<sup>14</sup> These statutes are usually very broadly drafted and,

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13. See NATIONAL SURVEY OF STATE LAWS 23–35 (Richard A. Leiter ed., 2d ed. 1997).

14. E.g., CAL. BUS. & PROF. CODE § 17200 (West 2005) (defining “unfair competition” as “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising”); Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILL. COMP. STAT. ANN. 505/2 (West 1999) (prohibiting “unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the ‘Uniform Deceptive Trade Practices Act’”); N.J. STAT. ANN. § 56:8-2 (West 2001) (prohibiting “any unconscionable commercial practice . . . or the knowing concealment, suppression, or omission of any material fact”); N.Y. GEN. BUS. LAW § 349 (McKinney 2004) (making unlawful “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service

consistent with legislative intent, courts give expansive meaning to these statutory terms by applying them to prohibit a wide array of conduct that is deemed “unfair,” “immoral,” or “unconscionable.”<sup>15</sup>

Consumer protection laws are remarkable in that they tend to dilute, or even eliminate, some of the key requirements of traditional tort law.<sup>16</sup> They go well beyond traditional common law fraud and often do not require proof of scienter or reliance.<sup>17</sup> State consumer protection statutes have thus “eased the requirements for stating a claim and have limited the defenses that are characteristic of common law actions.”<sup>18</sup>

Prior to being amended by voters in 2004, California’s consumer protection statute did not require plaintiffs to show injury.<sup>19</sup> In an important early case applying California’s Business and Professions Code section 17200 to children’s advertisements, plaintiffs in

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in this state”). Several states, such as Illinois, have adopted the Uniform Deceptive Trade Practices Act. For the full text of the Uniform Deceptive Trade Practices Act, see UNIF. DECEPTIVE TRADE PRACTICES ACT (1966), available at [http://www.lawupenn.edu/bll/ulc/fnact99/1920\\_69/rudtpa66.pdf](http://www.lawupenn.edu/bll/ulc/fnact99/1920_69/rudtpa66.pdf).

15. See *Pelman v. McDonald’s Corp. (Pelman III)*, 396 F.3d 508, 511 (2d Cir. 2005) (stating that New York’s Consumer Protection Statute goes “well beyond common-law fraud to cover a broad range of deceptive practices”); *State Farm Fire & Cas. Co. v. Superior Court*, 53 Cal. Rptr. 2d 229, 234–35 (1996) (noting that an unfair business practice occurs when that practice “offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers” (quoting *People v. Casa Blanca Convalescent Homes, Inc.*, 159 Cal. App. 3d 509, 530 (1984))); *Tylka v. Gerber Prod. Co.*, No. 96 C 1647, 1999 WL 495126, at \*4 (N.D. Ill. July 1, 1999) (noting that because the terms of the Illinois consumer protection act “are not subject to a precise definition, whether a particular set of circumstances is ‘unfair’ or ‘deceptive’ is determined on a case-by-case basis”).

16. See *infra* note 17 and accompanying text.

17. See *Murry’s v. America’s Mortgage Bank Inc.*, No. 03 C 2811, 2004 U.S. Dist. LEXIS 12045, at \*19 (N.D. Ill. June 29, 2004) (actual reliance not an element of statutory consumer fraud); *Blue Cross & Blue Shield of N.J., Inc. v. Phillip Morris, Inc.*, 178 F. Supp. 2d 198, 231 (E.D.N.Y. 2001) (scienter not required); *Stutman v. Chem. Bank*, 95 N.Y.2d 24, 29 (2000) (section 349 of New York’s Consumer Protection Statute does not require proof of actual reliance).

18. See 1 BUSINESS TORTS § 7.06 (Joseph D. Zamore et al. eds., 2001).

19. BILL ANALYSIS, ASSEMB. B. 102, 2003–2004 Reg. Sess., at 3 (Cal. 2004), available at [http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab\\_0101-0150/ab\\_102\\_cfa\\_20040112\\_141203\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0101-0150/ab_102_cfa_20040112_141203_asm_comm.html) (citing the fact that “a court may order restitution for violations of section 17500 without individualized proof of deception, reliance, and, injury”).

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*Committee on Children's Television, Inc. v. General Foods Corp.*<sup>20</sup> brought claims on behalf of California residents who claimed they were misled or deceived in connection with defendants' marketing of sugared cereals.<sup>21</sup> Relying in part on California Business and Professions Code section 17200,<sup>22</sup> plaintiffs alleged that the defendants "engaged in a sophisticated advertising and marketing program which is designed to capitalize on the unique susceptibilities of children and preschoolers in order to induce them to consume products which, although promoted and labelled [sic] as 'cereals,' are in fact more accurately described as sugar products, or candies."<sup>23</sup>

Noting that "[a]llegations of actual deception, reasonable reliance, and damage are unnecessary,"<sup>24</sup> the court determined that plaintiffs "need not plead the exact language of every deceptive statement; it is sufficient for plaintiff to describe a scheme to mislead customers, and allege that each misrepresentation to each customer conforms to that scheme."<sup>25</sup> Thus, the court concluded that the allegations were sufficient to overcome defendants' general demurrer.<sup>26</sup>

More recent cases further illustrate the potentially expansive use of consumer protection statutes in this area. For example, in *Tylka v. Gerber Products Co.*,<sup>27</sup> plaintiffs brought claims of common law fraud against Gerber for advertising baby food<sup>28</sup> in violation of the

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20. 673 P.2d 660 (Cal. 1983).

21. *Id.* at 663–64.

22. Until the California voters enacted Proposition 64 in 2004, California's Unfair Competition Law, CAL. BUS. & PROF. CODE § 17200 (West 2005), was "arguably the broadest statutory scheme in the nation" and did not require actual deception, reasonable reliance or damages. See Mathieu Blackston, *California's Unfair Competition Law—Making Sure the Avenger Is Not Guilty of the Greater Crime*, 41 SAN DIEGO L. REV. 1833, 1845 (2004) (detailing the problems and abuses of section 17200). Proposition 64 enacted several reforms, including requiring that a private plaintiff "suffer[] [an] injury in fact and . . . los[s] [of] money or property" See CAL. BUS. & PROF. CODE §§ 17204, 17535.

23. *Comm. on Children's Television, Inc.*, 673 P.2d at 664.

24. *Id.* at 668.

25. *Id.* at 669.

26. *Id.* at 671.

27. No. 96 C 1647, 1999 WL 495126, at \*1 (N.D. Ill. July 1, 1999).

28. *Tylka v. Gerber Prod. Co.*, No. 96 C 1647, 1999 WL 495126, at \*1 (N.D. Ill. July 1, 1999).

Illinois Consumer Fraud and Deceptive Business Practices Act,<sup>29</sup> and the Uniform Deceptive Trade Practices Act.<sup>30</sup>

Although the court granted summary judgment to Gerber because plaintiffs could not show proximate cause,<sup>31</sup> it noted that “the [Illinois Consumer Fraud and Deceptive Business Practices Act or “ICFA”] affords consumers broader protection than a common law fraud action because it eliminates the element of scienter or the necessity of proof of actual reliance.”<sup>32</sup> The court ultimately rejected the plaintiffs’ argument<sup>33</sup> that, under the reasoning in *Children’s Television*, specific evidence of reliance was not required to show fraud because of “the pervasiveness of the false advertising gives rise to a presumption of reliance.”<sup>34</sup> The court noted that this argument would “inject a new legal theory or presumption into the state’s jurisprudence and essentially modify the state’s action at common law.”<sup>35</sup>

In the well known *Pelman*<sup>36</sup> case, the Second Circuit held that the district court erred in dismissing the plaintiffs’ claims under New York’s Consumer Protection Act.<sup>37</sup> After the district court dismissed the plaintiffs’ original complaint,<sup>38</sup> the plaintiffs filed an amended complaint based on violations of New York’s Consumer Protection Statute sections 349 and 350.<sup>39</sup> Plaintiffs alleged that McDonald’s

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29. 815 ILL. COMP. STAT. ANN. 505/2 (West 1999).

30. UNIF. DECEPTIVE TRADE PRACTICES ACT (1966), available at [http://www.law.upenn.edu/bll/ulc/fnact99/1920\\_69/rudtpa66.pdf](http://www.law.upenn.edu/bll/ulc/fnact99/1920_69/rudtpa66.pdf).

31. *Tylka*, at \*12–15.

32. *Id.* at \*4.

33. *See id.* at \*13.

34. *Id.* at \*12 (citing *Comm. on Children’s Television, Inc. v. Gen. Foods Corp.*, 673 P.2d 660 (Cal. 1983)).

35. *Id.* at \*13. While “individual issues of reliance and causation do not thwart class actions of common law fraud or actions under the ICFA” at the certification stage, on summary judgment plaintiffs “are expected to present at least some proof to support each element of their claims.” *Id.* at \*10.

36. *Pelman III*, 396 F.3d 508 (2d Cir. 2005). The district court’s opinion is instructive for plaintiffs seeking to file similar lawsuits, as it “laid out in some detail the elements that a properly pleaded complaint would need to contain.” *Pelman v. McDonald’s Corp. (Pelman II)*, No. 02 Cir. 7821 (RWS), 2003 U.S. Dist. LEXIS 15202, at \*40 (S.D.N.Y. Sept. 4, 2003).

37. N.Y. GEN. BUS. LAW § 349 (McKinney 2004).

38. *Pelman II*, 2003 U.S. Dist. LEXIS 15202, at \*42.

39. N.Y. GEN. BUS. LAW §§ 349, 350. Plaintiffs dropped their failure-to-warn claim before oral argument. *Pelman II*, 2003 U.S. Dist. LEXIS 15202, at \*5.

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advertising misled plaintiffs to believe that its food was nutritious, failed to adequately disclose that its processing and additives made certain foods less healthy, and failed to provide nutritional information as advertised.<sup>40</sup>

While acknowledging that section 349 does not require reliance on a deceptive practice,<sup>41</sup> the lower court again dismissed the plaintiffs' complaint.<sup>42</sup> This was in large part because in failing to "address the role that 'a number of other factors other than diet may come to play in obesity and the health problems of which the plaintiffs complain,'"<sup>43</sup> they failed "to draw an adequate causal connection between their consumption of McDonald's food and their alleged injur[y]."<sup>44</sup>

The Second Circuit, addressing only the section 349 deceptive acts claims, reversed the district court.<sup>45</sup> The court concluded that questions such as plaintiffs' diets and exercise habits, and family health history were appropriate for discovery.<sup>46</sup> Moreover, the complaint's failure to answer these questions was not fatal.<sup>47</sup> *Pelman*<sup>48</sup> is a significant decision because it will likely encourage plaintiff's lawyers to use consumer protection statutes to challenge food advertising aimed at children.

### B. Use of Consumer Protection Statutes in Recent Litigation

A recent example of the expansive use of consumer protection statutes in the area of food advertising is the lawsuit filed by Jennifer Hardee in San Diego County, California against Kraft Foods, General Mills, Kellogg and others on behalf of a purported class of consumers who purchased the defendants' breakfast cereals.<sup>49</sup> The

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40. *Pelman II*, 2003 U.S. Dist. LEXIS 15202, at \*6.

41. *Id.* at \*19–20.

42. *Id.* at \*42.

43. *Id.* at \*31 (quoting *Pelman I*, 237 F. Supp. 2d 512, 538–39 (S.D.N.Y. 2003)).

44. *Id.* at \*30.

45. See *Pelman III*, 396 F.3d 508, 512 (2d Cir. 2005).

46. *Id.* at 511–12.

47. *Id.* at 512 (remanding only portions of the district court's dismissal).

48. 396 F.3d 508 (2d Cir. 2005).

49. See Complaint, *Hardee v. Del Mission Liquor*, No. 844745, 2005 WL 770589 (Cal. Super. Ct. Mar. 24, 2005) [hereinafter *Hardee Complaint*]. In addition, advocacy groups and parents announced in January of 2006 that they were bringing a lawsuit in Massachusetts against Nickelodeon and Kellogg Co.

complaint alleges that the defendants' characterization of their breakfast cereals as "low sugar" falsely represents that they have a nutritional advantage over other cereals, "when in fact, the removed sugar is replaced by other carbohydrates, thus offering no significant nutritional advantage."<sup>50</sup> The complaint asserts causes of action under California Business and Professions Code section 17500, California's False Advertising Law, and common law tort.<sup>51</sup> The complaint alleges that the damage to each plaintiff is the purchase price of the product—"generally less than \$10.00 . . . ."<sup>52</sup>

The *Hardee* lawsuit represents another legal evolution: a traditional tort-style lawsuit in which the plaintiff claims no personal injury.<sup>53</sup> The benefits to plaintiffs and their lawyers are obvious: defining the injury as purely economic allows a plaintiff to escape the complicated and difficult burden of proving that the product caused their obesity or other physical harm.<sup>54</sup> Whether this type of suit is useful in addressing the larger social and scientific issues raised by food advertising to children, however, is much less certain.<sup>55</sup>

### III. PROBLEMS WITH LITIGATION AS A TOOL TO ADDRESS FOOD ADVERTISING TO CHILDREN

As the cases discussed in Part II illustrate, plaintiffs' lawyers are increasingly using state consumer protection statutes as a tool to address a myriad of political, scientific, and public health issues raised by food marketing to children.<sup>56</sup> There are, however, serious

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to stop the companies from marketing junk food to children when 15% or more of the audience is eight years old or younger. *Junk-food Suit Targets Nickelodeon, Kellogg*, CNN, Jan. 18, 2006, <http://www.cnn.com/2006/LAW/01/kids.lawsuit.ap/index.html>.

50. Complaint, *supra* note 49, at 2.

51. *Id.* at 4–7 (citing CAL. BUS. & PROF. CODE § 17500 (West 2005)).

52. *Id.* (alleging that as a result of acts violating sections 17200 and 17500, "[d]efendants received and continue to hold money belonging to Plaintiff and members of the general public who were led to purchase the above-described 'low sugar' products . . .").

53. *See id.*

54. See Scott A. Elder & Anna Aven Sumner, *State Consumer Protection Laws Elevate Food Company Liability Risks*, LEGAL BACKGROUNDER (Wash., D.C.), July 29, 2005, at 2.

55. *Id.* at 3–4.

56. See discussion *supra* Part II.

problems with using adversarial litigation as a means to confront these “unique and challenging issues” in which “[q]uestions of personal responsibility, common knowledge and public health are presented.”<sup>57</sup> These questions implicate “the role of society and the courts in addressing such issues.”<sup>58</sup>

First, litigation is always uncertain. In this area, liability is particularly unpredictable. As noted above, consumer protection statutes—not to mention common law causes of action—vary widely by state.<sup>59</sup> Advertising that is lawful in one state may be unfair in another, making it difficult for companies to have “a clear idea of what they must do to avoid economic penalties.”<sup>60</sup> These lawsuits raise complicated questions about the applicability of causation and the role of traditional tort defenses such as comparative fault or assumption of risk.<sup>61</sup> Piecemeal and unpredictable litigation will impede a consistent approach and imperil uniform results to the important societal issues raised by food advertising to children.

Second, litigation is narrow and often case specific.<sup>62</sup> It may be driven by the narrow interests of the particular plaintiff and plaintiff’s counsel.<sup>63</sup> Thus, a plaintiff’s desired outcome in a particular lawsuit may not be to cause industry-wide reform or to establish educational programs aimed at nutritious eating, but rather to get monetary damages to compensate an individual injury.<sup>64</sup> Counsel are inevitably influenced by the availability of attorneys fees,<sup>65</sup> raising legitimate questions about whether profit-driven

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57. *Pelman I*, 237 F. Supp. 2d 512, 516 (S.D.N.Y. 2003).

58. *Id.*

59. *See supra* note 14 and accompanying text.

60. Ausness, *supra* note 1, at 885–86.

61. *Id.* at 870 (“Proof of causation can be particularly difficult when multiple potential causes are involved.”).

62. *Id.* at 886.

63. *Id.* (noting that in litigation “both judges and lay juries often have difficulty understanding technical or scientific data. In addition, access to information is limited because litigants have no incentive to provide courts with information unless it supports their position. Furthermore, the case-specific nature of the litigation process induces judges and juries to focus on narrow issues and directs their attention away from broader social or safety concerns.” (footnotes omitted)).

64. *See supra* note 63, and accompanying text.

65. Attorneys fees are recoverable in many states. For example, an award of attorney’s fees is possible in a California Unfair Competition Law action under the California Code of Civil Procedure, which allows a court to award

plaintiffs' lawyers are capable of, and should be responsible for, formulating public policy.<sup>66</sup> In essence, "[a] primary goal of litigation is to compensate an aggrieved party for past wrongs, and can cause a plaintiff's focus to shift from public policy objectives to monetary damages."<sup>67</sup>

As any practitioner knows, litigation can be expensive and time consuming, and it raises the prospect that an industry will be mired in potentially burdensome discovery and pretrial proceedings.<sup>68</sup> Industry-wide threats will be met with vigorous and costly defenses that can take vast resources and a very long time to resolve.<sup>69</sup> These resources could be better spent addressing the broader public policy implications.

The *Hardee*<sup>70</sup> case is a good example. On July 28, 2005, the parties filed a stipulation of dismissal,<sup>71</sup> stating that they had executed a settlement agreement obligating the defendants to make changes to their cereal labeling and pay Hardee's attorney's fees.<sup>72</sup> Moreover, the stipulation requested that Hardee's complaint be

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attorney's fees in "the enforcement of an important right affecting the public interest" to a successful party where "a significant benefit . . . has been conferred on the general public or a large class of persons . . ." CAL. CIV. PROC. CODE § 1021.5 (West 2005).

66. Professor John Banzhaf, well-known from the tobacco litigation observed, "I don't profit from these suits, but other attorneys will, and that may be the incentive they need to take on an organization." Higgins, *supra* note 1, at A1.

67. Bryce A. Jensen, *From Tobacco to Health Care and Beyond—A Critique of Lawsuits Targeting Unpopular Industries*, 86 CORNELL L. REV. 1334, 1379 (2001) (footnote omitted).

68. In response to the Second Circuit's decision in *Pelman III*, Professor Banzhaf observed that the decision "is going to scare the hell out of McDonald's and every other fast food company . . . . We can now demand a lot of their secret documents." Richard J. Keshian, *My Big Fat Lawsuit: Obesity Claims—The New Frontier?*, DEF. RES. INST., 20–21 (2005) (quotations omitted); see also Ausness, *supra* note 1, at 886–87 (complex nature of issues likely to incur high litigation costs); Samuel J. Romero, *Obesity: A Super-Sized Problem or a Small Fry in the Inevitable Development of Product Liability?*, 7 CHAPMAN L. REV. 239, 272–73 (2004) (pointing to increased insurance costs for the fast-food industry due to exposure to liability).

69. See *supra* note 68 and accompanying text.

70. *Hardee v. Del Mission Liquor*, No. GIC 844745, 2005 WL 770589 (Cal. Super. Ct. Aug. 3, 2005).

71. Stipulation for the Plaintiffs, *Hardee*, 2005 WL 770589.

72. *Id.* at 1.

dismissed with prejudice, and that the putative class' claims be dismissed without prejudice.<sup>73</sup> However, the court issued a Notice of Tentative Disapproval of the proposed settlement and dismissal, finding that California Rule of Court 1859(a)<sup>74</sup> applied and required a noticed hearing before dismissal of the putative classes' claims.<sup>75</sup> The court noted that the proposal before it was a settlement, not merely a dismissal that did not require a hearing,<sup>76</sup> because Hardee would receive the relief she had prayed for in her complaint as consideration for the dismissal: changes to product labeling, as well as attorney's fees that "exceed[ed] \$1,000,000."<sup>77</sup> The court refused to find that settlement and dismissal without prejudice of the putative class' claims would not prejudice the class.<sup>78</sup>

As *Hardee* shows, litigation is not always a quick fix. Using the court system to enact industry change is not as easy as reaching a settlement after filing a putative class action.<sup>79</sup> In particular, class action litigation is governed by rules and procedures that courts enforce. This can lead to lengthy, complicated, and expensive proceedings.<sup>80</sup>

Thus, litigation may not expedite broad public benefits to consumers the way that government and industry-sponsored education campaigns would. As the Center for Science in the Public Interest has observed:

[M]odest corporate restraints on the advertising of processed foods will not increase the marketing of truly healthful foods—like fruits, vegetables, and fat-free dairy products—that should form the bulk of children's diets. That's where government needs to step in and sponsor major healthy-eating campaigns, ensure that processed

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73. *Id.*

74. CAL. R. CT. 1859(a).

75. See Notice of Tentative Disapproval at 2, *Hardee*, 2005 WL 770589 ("A settlement or compromise of an entire class action, or of a cause of action, or as to a party, requires the approval of the court after hearing." (quoting CAL. R. CT. 1859(a))).

76. *Id.*; see CAL. R. CT. 1860(a) ("A dismissal of an entire class action, or of any party or cause of action in a class action, requires court approval.")

77. Notice of Tentative Disapproval, *supra* note 75, at 2.

78. *Id.*

79. See Jensen, *supra* note 67, at 1379 (citing ineffectiveness of litigation against tobacco companies in achieving public policy goals).

80. Ausness, *supra* note 1, at 886.

foods are more healthful, and strengthen nutrition education in schools.<sup>81</sup>

Finally, the legislative and executive branches are better equipped to meaningfully address issues raised by advertising to children.<sup>82</sup> Courts generally adjudicate a single dispute based on the arguments and evidence presented by the parties to that dispute.<sup>83</sup> Whereas courts make decisions based on the facts of a particular individual's case, the legislative branch is equipped to enact broad prospective policy goals based on input from a wide range of viewpoints.<sup>84</sup> Moreover, unlike litigation, the legislative and regulatory processes include hearings and expert testimony, and may include the commission of studies.<sup>85</sup>

Thus, litigation may not promote better nutrition or deal with broader issues such as advertising in schools or the availability of soft drink machines to students. The legislative and regulatory processes are better equipped to consider the medical, scientific, social, and ethical questions raised by food marketing to children.<sup>86</sup> Legislatures can take into account the expertise and opinions of communities, health professionals, parents and schools.<sup>87</sup>

There are no easy answers to the issues raised by food advertising to children—particularly the question of what causes obesity

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81. Press Release, Center for Science in the Public Interest, Kraft Advertising-to-Kids Policy Applauded (Jan. 12, 2005), *available at* <http://cspinet.org/new/200501125.html>.

82. Ausness, *supra* note 1, at 885. Regarding the judiciary, Jensen notes: The often unelected nature of the judiciary undercuts the idea of allowing judges to formulate policy affecting the nation as a whole. Although judges may be objective, without their own constituencies there is no guarantee that judges will hear or even consider a diverse range of opinions and alternatives. The structure of the judiciary also does not allow it to serve as an appropriate forum for the resolution of policy disputes. Without investigatory and research resources, a court's opinion is likely less informed than that of a legislature or an executive agency. Devising a regulatory regime also requires the analysis of complex data and conflicting theories, tasks that regulatory agencies with their specialized expertise are better suited to perform. Jensen, *supra* note 67, at 1381 (footnotes omitted).

83. Ausness, *supra* note 1, at 886.

84. *See supra* note 82 and accompanying text.

85. Ausness, *supra* note 1, at 885.

86. *See id.*

87. *See id.*

or obesity-related diseases. These are multifactor problems involving medical, scientific, social, psychological, and economic factors.<sup>88</sup> “No injury” lawsuits such as *Hardee*<sup>89</sup> underscore the scientific and legal difficulties of asking the court system to resolve these questions.<sup>90</sup>

Relying on adversarial litigation to resolve the issues raised by food advertising to children requires courts to regulate business and juries to decide complicated issues of health and science—tasks that are better suited to the other branches of government.

#### IV. NON-LITIGATION OPTIONS: A BETTER WAY

There are numerous ways, aside from resorting to litigation, for society to address the issues raised by food advertising to children. The industry’s self-regulating body, the Children’s Advertising Review Unit, could be strengthened.<sup>91</sup> Congress could pass legislation enabling the Federal Trade Commission to regulate marketing to children.<sup>92</sup> For example, in May 2005, Senator Thomas Harkin introduced legislation that would give the Federal Trade Commission and the Department of Agriculture authority to regulate the way food companies market food to children.<sup>93</sup> Industry-wide nutrition standards for marketing food to children could incorporate input from experts, academia, government, and industry.<sup>94</sup>

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88. U.S. DEP’T OF HEALTH & HUMAN SERVS., THE SURGEON GENERAL’S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 1 (2001), *available at* <https://www.surgeongeneral.gov/topics/obesity/calltoaction/calltoaction.pdf>.

89. See discussion *supra* Part III.

90. See Elder & Sumner, *supra* note 54, at 1.

91. The Children’s Advertising Review Unit is a division of the Council of Better Business Bureaus. Children’s Advertising Review Unit, <http://www.caru.org> (last visited Feb. 6, 2006).

92. See Press Release, Center for Science in the Public Interest, ‘Self-Regulation’ of Food Marketing Is More Like Self-Preservation, Says CPSI (July 14, 2005), *available at* <https://www.cspinet.org/new/200507141.html>.

93. See Press Release, Website of Senator Thomas Harkin, Harkin Calls on Food Industry to Limit Junk Food Advertising Aimed at Kids (Mar. 16, 2005), <http://harkin.senate.gov/news.cfm?id=233655>.

94. Such standards have been proposed by the Center for Science in the Public Interest. See CTR. FOR SCI. PUB. INTEREST, GUIDELINES FOR RESPONSIBLE FOOD MARKETING TO CHILDREN (2005), <https://www.cspinet.org/marketingguidelines.pdf>.

Public pressure can also bring change.<sup>95</sup> The food industry has, in fact, changed its practices in response to public pressure. For example, Kraft Foods halted its advertising of certain foods and drinks to children under twelve years old,<sup>96</sup> while General Mills announced that it would convert its cereals to whole grain.<sup>97</sup>

#### V. CONCLUSION

Food advertising to children raises important public policy and public health questions that should not be answered by a litigation system not designed to handle such broad public policy questions. General consumer protection statutes, while having social utility, are not equipped to answer the medical, scientific, economic, and social questions raised by the obesity epidemic among children.

Moreover, the topic of food advertising to children raises complex issues that need to be addressed comprehensively. For these reasons, regulation and reform of the food industry should be left to the legislative and executive branches which are better equipped than the courts to deal with the broad policy questions at issue.

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95. Andrews, *supra* note 1, at 180 (noting that “[i]t is not the voice of lawmakers or the courts reaching the fast food industry’s ears, but rather consumers themselves . . .”).

96. Thomas Lee, *Aiming at Kids: Pressure Builds on Foodmakers*, MINNEAPOLIS STAR TRIB., May 23, 2005, at 1D, available at <http://www.commercialfreechildhood.org/news/articles/pressurebuildsonfoodmakers.htm>.

97. *Id.*