

FOOD AND DRUG LAW JOURNAL

*Analyzing the Laws, Regulations, and Policies
Affecting FDA-Regulated Products*

Beyond Cheeseburgers: The Impact of Commonsense Consumption Acts on Future Obesity-Related Lawsuits

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I. INTRODUCTION

Affirmative litigation is an important tool in the public health legal toolkit to recover healthcare costs stemming from harmful commercial practices and to prevent future health harms.¹ After years of failed state and federal legislative attempts at meaningful regulation of the tobacco industry, affirmative litigation by state attorneys general (AGs) and private attorneys was a game changer in the fight against tobacco-related chronic disease. In the late 1990's, four states individually negotiated settlements to recover smoking-related Medicaid costs,² and 46 states and territories negotiated the Master Settlement Agreement securing annual payments of several billion dollars in perpetuity as repayment for smoking-related healthcare costs.³ Increases in obesity-related chronic disease have spawned a public health movement to protect children and adults from becoming overweight or obese. Alerted by headlines like "Is FAT the Next Tobacco?" the food industry decided that it needed to proactively avoid a similar fate.⁴ The National Restaurant Association (NRA) took a leadership role and mounted federal and state campaigns to enact "tort reform" legislation immunizing the food industry from tobacco-like lawsuits.⁵ Currently, federal legislation has not been enacted.⁶

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¹ Wendy E. Parmet, *Tobacco, HIV, and the Courtroom: The Role of Affirmative Litigation in the Formation of Public Health Policy*, 36 Hous. L. Rev. 1663, 1712 (1999).

² Allen M. Brandt, *THE CIGARETTE CENTURY* 423 (2007).

³ National Association of Attorneys General, *Master Settlement Agreement*, http://web.archive.org/web/20080625084126/http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724_1032468605_cigmsa.pdf.

⁴ Roger Parloff, *Is FAT the Next Tobacco?* *Fortune*, February 3, 2003, at 50-54.

⁵ National Restaurant Association, *State Action: Nutrition and Healthy Lifestyles*, <http://www.restaurant.org/advocacy/state/nutrition/resources/index.cfm>; National Restaurant Association, *Personal Responsibility / Frivolous Lawsuit Talking Points*, http://www.restaurant.org/advocacy/state/nutrition/resources/nra_20040208_talkingpoints_lawsuits.pdf; Melanie Warner, *The Food Industry Empire Strikes Back*, N.Y. Times, July 7, 2005, at C1.

⁶ See, e.g., Personal Responsibility in Food Consumption Act, H.R. 544, 109th Cong. (1st Sess. 2005).

However, “Commonsense Consumption Acts” (CCAs) shielding the food industry from civil liability were enacted in 25 states between 2004 and 2012.⁷

Dubbed “cheeseburger bills” by the media, CCAs bar certain civil lawsuits seeking recovery for obesity-related health harms. This article describes how CCAs have shaped the legal landscape for future obesity-related litigation through an analysis of the 25 enacted CCAs, focusing on the scope of civil immunity, the imposition of heightened procedural requirements and stays of discovery, and the applicability of CCAs to claims brought by governmental entities. Protections against genuinely frivolous litigation pre-dating CCAs are also discussed.

II. OBESITY RELATED HEALTH HARMS AND HEALTHCARE COSTS

Two-thirds of U.S. adults and nearly one-third of children and adolescents are overweight or obese.⁸ Obesity creates an increased risk of more than 20 major diseases, including type 2 diabetes, heart disease and stroke.⁹ CCAs have been enacted in fifteen of the 25 U.S. states with the highest rates of obesity. In particular, the CCA states of Alabama, Louisiana and Tennessee are among the top five states with the highest rates of obesity, diabetes and hypertension.¹⁰ Between 2008 and 2010, adult obesity rates increased in a total of 16 U.S. states, 11 of which are CCA states.¹¹ The current medical cost of adult obesity in the U.S. is estimated at \$147-\$210 billion per year, \$61.8 billion of which is paid for by Medicare and Medicaid.¹² Medical costs associated with treating obesity-related disease are conservatively estimated to increase by an additional \$22 billion per year by 2020 and \$48 billion per year by 2030.¹³

III. ANALYSIS OF COMMONSENSE CONSUMPTION ACTS

Media coverage of CCAs was dominated by the themes of personal responsibility and the need for tort reform to protect businesses from frivolous litigation.¹⁴ This

⁷ ALA. CODE §§ 6-5-730 to 6-5-736 (2012); ARIZ. REV. STAT. ANN. §§ 12-683, 12-688 (2012); COLO. REV. STAT. §§ 13-21-1101 to 13-21-1106 (West 2012); FLA. STAT. ANN. § 768.37 (West 2012); GA. CODE ANN. §§ 26-2-430 to 26-2-436 (West 2012); IDAHO CODE ANN. §§ 39-8701 to 39-8706 (2012); 745 ILL. COMP. STAT. ANN. 43/1 to 43/20 (West 2012); IND. CODE ANN. §§ 34-30-23-1 to 34-30-23-3 (West 2012); KAN. STAT. ANN. § 60-4801 (2012); KY. REV. STAT. ANN. §§ 411.600 to 411.640 (West 2012); LA. REV. STAT. ANN. § 9:2799.6 (2012); ME. REV. STAT. ANN. tit. 14, § 170 (2012); MICH. COMP. LAWS ANN. § 600.2974 (West 2012); MO. ANN. STAT. § 537.595 (West 2012); N.D. CENT. CODE §§ 19-23-01 to 19-23-03 (2012); OHIO REV. CODE ANN. § 2305.36 (West 2012); OKLA. STAT. ANN. tit. 76, §§ 34 to 37 (West 2012); OR. REV. STAT. ANN. § 30.961 (West 2012); S.D. CODIFIED LAWS §§ 21-61-1 to 21-61-4 (2012); TENN. CODE ANN. § 29-34-205 (West 2012); TEX. CIV. PRAC. & REM. CODE ANN. §§ 138.001 to 138.004 (Vernon 2012); UTAH CODE ANN. §§ 78B-4-301 to 78B-4-306 (West 2012); WASH. REV. CODE ANN. § 7.72.070 (West 2012); WIS. STAT. ANN. § 895.506 (West 2012); WYO. STAT. ANN. §§ 11-47-101 to 11-47-103 (2012).

⁸ JEFFREY LEVI ET AL., TRUST FOR AMERICA’S HEALTH, F AS IN FAT: HOW OBESITY THREATENS AMERICA’S FUTURE 2011 (2011), <http://www.healthyamericans.org/assets/files/TFAH2011FasInFat10.pdf>.

⁹ *Id.* at 101.

¹⁰ *Id.* at 12.

¹¹ *Id.*

¹² JEFFREY LEVI ET AL., TRUST FOR AMERICA’S HEALTH, F AS IN FAT: HOW OBESITY THREATENS AMERICA’S FUTURE 2012 32 (2012), <http://healthyamericans.org/assets/files/TFAH2012FasInFatFnlRv.pdf>.

¹³ Y Claire Yang et al., *Health and Economic Burden of the Projected Obesity Trends in the USA and UK*, 378 *The Lancet* 815, 818 (2011).

¹⁴ See, e.g., *Don’t Blame the Burgers*, USA Today, Jan. 31, 2005, at 10A; Donna Goodison, *Dyin’ for a Burger? It’s On You; Many States Enact Laws Forbidding Health Suits Against Food Marketers*, Boston Herald, July 18, 2005, at 23; Judy Holland, *Legislation Says to Keep Mouth Shut While You Eat: ‘Cheeseburger Bill’ Aims to Discourage Lawsuits*, Milwaukee Journal Sentinel, Mar. 7, 2004, at 15; Elizabeth

sentiment is embodied in CCAs that place the responsibility for obesity-related health harms squarely on the shoulders of individuals. For example, Colorado codified the rationale for enacting its CCA as follows:

- a. Obesity and many other conditions that are detrimental to the health and well-being of individuals are frequently long-term manifestations of poor choices that are habitually made by those individuals;
- b. Despite commercial influences, individuals remain ultimately responsible for the choices they make regarding their body; and
- c. Excessive litigation restricts the wide range of choices otherwise available to individuals who consume products responsibly.¹⁵

Consistent with Colorado's rationale, CCAs generally center on preventing the filing of lawsuits where liability is premised upon an individual's weight gain, obesity, or health conditions associated with obesity, and resulting from the long-term consumption of food.¹⁶

Long-term consumption of food is typically defined as "the cumulative effect of the consumption of food or nonalcoholic beverages, and not the effect of a single instance of consumption."¹⁷ Plaintiffs seeking to recover for obesity-related damages stemming from repeated consumption of food might otherwise file suit for personal injury or wrongful death. Or plaintiffs might file suit alleging a violation of a specific statutory provision contained in a state consumer protection law prohibiting unfair and deceptive acts and practices (UDAP) or other laws regulating food manufacturing and marketing.

A. *What Claims Trigger CCAs?*

In order to trigger a CCA, a claim must: (1) arise from repeated consumption of food over time; and (2) seek to recover damages stemming from the long-term consumption of food such as healthcare costs associated with obesity-related health conditions. Obesity-related health conditions are typically defined as health conditions "generally known to result or likely to result from the cumulative effect of consumption and not from a single instance of consumption [of food]."¹⁸

CCAs do not apply to cases of non-obesity-related food poisoning that result from a single instance of food or beverage consumption.¹⁹ Most CCAs expressly exempt obesity-related claims alleging adulteration or misbranding of food.²⁰ CCAs are not

Lee & Andrew Mollison, *Food Fans Weigh In: Some Consumers Say Don't Blame the Food Industry for the Supersizing of America*, Atlanta Journal & Constitution, Mar. 11, 2004, at A1; Karen MacPherson, *House Votes to Prohibit Overweight Americans from Suing Food Firms for Making Them Fat: Paying for Obesity*, Pittsburg Post-Gazette, Mar. 11, 2004, at A1; Molly Selvin, *Supersize Fears Feed Push for Suit Shield: House OKs Protection for Restaurant Owners*, Chicago Tribune, Nov. 21, 2005; Robert J. McCarthy, *'Burger Bill' Targets Frivolous Lawsuits*, Buffalo News, Mar. 9, 2004, at C10.

¹⁵ COLO. REV. STAT. § 13-21-1102 (West 2012).

¹⁶ See, e.g., Wash. Rev. Code Ann. § 7.72.070(1) (West 2012).

¹⁷ See, e.g., *Id.* § 7.72.070(2).

¹⁸ GA. CODE ANN. § 26-2-431(3) (West 2012).

¹⁹ Colorado is one possible exception as it contains provisions that could be construed to apply a knowing and willful requirement to non-obesity-related claims related to food composition. COLO. REV. STAT. §§ 13-21-1104(2), 13-21-1105(2), (3) (West 2012) (stating that for claims "not related to weight gain, obesity, or a health condition associated with weight gain or obesity" brought under laws governing food "composition, branding, or labeling," plaintiffs must plead "facts sufficient to support a reasonable inference that the violation was knowing and willful.")

²⁰ See, e.g., Kan. Stat. Ann. § 60-4801(b)(1) (2012) ("Subsection (a) shall not preclude civil liability where the claim of weight gain, obesity, health condition associated with weight gain or obesity, or other generally known condition allegedly caused by or allegedly likely to result from long-term consumption

generally triggered by claims alleging an unlawful practice was employed to induce consumers to purchase a food product and seeking recovery for the economic loss equal to the purchase price of the product and/or available statutory damages because such claims do not arise from health harms related to the long-term consumption of food.²¹

B. *Immunity Conferred by CCAs*

CCAs have yet to be meaningfully tested in the courts and that is where their ultimate scope will be determined. CCAs were enacted using model statutory language that allows CCAs to be classified into two main categories: (1) a broad approach protecting the food industry from civil liability under any state law for claims arising from health harms related to the long-term consumption of food with certain exceptions (Table 1); and (2) a more tailored approach barring civil liability for obesity-related tort claims (Table 2). CCAs that use the terms “personal injury or wrongful death” or “injury or death” to describe covered claims are classified as tort-based CCAs.

1. *CCAs Conferring Broad Immunity with Certain Exceptions*

Sixteen states’ CCAs may be interpreted to confer broad civil immunity for claims stemming from long-term consumption of food (Table 1).²² For example, the Texas CCA states that with respect to claims alleging health harms arising out of weight gain or obesity, “a manufacturer, seller, trade association, livestock producer, or agricultural producer is not liable under any law of this state”²³ Another common statutory construction is to list possible food industry defendants and state that “such entities shall not be subject to civil liability from weight gain, obesity, a health condition associated with weight gain or obesity, or other injury caused by or likely to result from long-term consumption of food.”²⁴ Missouri’s CCA exemplifies a more detailed approach by shielding the food industry from “civil liability under any state law, including all statutes, regulations, rules, common law, public policies, court or administrative decisions or decrees, or other state actions having the effect of law, for any claim arising out of weight gain, obesity, or a health condition associated with weight gain or obesity.”²⁵

The majority of these states exempt claims seeking to recover for obesity-related health harms that allege knowing and willful violations of a state or federal laws governing manufacturing, marketing, distribution, advertising, labeling or sale of food.²⁶

of food is based on . . . [a] material violation of an adulteration or misbranding requirement prescribed by statute or rules and regulations of this state or of the United States”)

²¹ Georgia and Indiana are two possible exceptions. GA. CODE ANN. §§ 26-2-433(2), 26-2-434(b), (c) (West 2012) (amending the state’s Food, Drugs and Cosmetics code to require that when the “claimed injury does not arise out of . . . obesity . . . but is instead based on other cognizable injuries arising from . . . any other material violation of federal or state statutes applicable to the manufacturing, marketing, distribution, advertising, labeling, or sale of food” violations must be “knowing and willful”); IND. CODE ANN. § 34-30-23-1(2) (West 2012) (exempting non-obesity-related claims for “knowing and willful violation[s] of federal or state law applicable to manufacturing, marketing, distribution, labeling or sale of [a] food or a beverage.”)

²² ALA. CODE § 6-5-732 (2012); COLO. REV. STAT. § 13-21-1104(1) (West 2012); GA. CODE ANN. § 26-2-432 (West 2012); IDAHO CODE ANN. § 39-8702 (2012); 745 ILL. COMP. STAT. ANN. 43/10 (West 2012); IND. CODE ANN. § 34-30-23-3 (West 2012); KAN. STAT. ANN. § 60-4801(a) (2012); KY. REV. STAT. ANN. § 411.610 (West 2012); MO. ANN. STAT. § 537.595(3) (West 2012); N.D. CENT. CODE § 19-23-01(1) (2012); OHIO REV. CODE ANN. § 2305.36(B) (West 2012); OKLA. STAT. ANN. tit. 76, § 37(A) (West 2012); TENN. CODE ANN. § 29-34-205(a) (West 2012); TEX. CIV. PRAC. & REM. CODE ANN. § 138.002(a) (Vernon 2012); UTAH CODE ANN. § 78B-4-303(1) (West 2012); WIS. STAT. ANN. § 895.506(1) (West 2012).

²³ TEX. CIV. PRAC. & REM. CODE ANN. § 138.002(a) (Vernon 2012).

²⁴ COLO. REV. STAT. § 13-21-1104(1) (West 2012).

²⁵ MO. ANN. STAT. § 537.595(3) (West 2012); *see also* Okla. Stat. Ann. tit. 76, § 37(A) (West 2012).

²⁶ ALA. CODE § 6-5-732(2) (2012); IDAHO CODE ANN. § 39-8703(2) (2012); 745 ILL. COMP. STAT. ANN. 43/15(a) (West 2012); KAN. STAT. ANN. § 60-4801(b)(2) (2012); KY. REV. STAT. ANN. § 411.610(2) (West

“Knowing and willful” is typically defined to mean that the conduct was committed with the intent to deceive or with actual knowledge that the violation was injurious to consumers.²⁷ Ten of these states also impose a heightened pleading requirement for exempted claims whereby a plaintiff must plead the particular facts to support an inference that the alleged violation was committed knowingly and willfully, and grant a mandatory stay of discovery pending a motion to dismiss a claim filed pursuant to a CCA exemption.²⁸

Consumers commonly file UDAP claims. State UDAP statutes prohibit unfair and deceptive trade practices including marketing. The CCAs in states that take the broad immunity from civil liability approach have the potential to impact all statutory claims including those brought under state UDAP statutes. For example, these CCAs could be interpreted to require plaintiffs seeking recovery for obesity-related health harms to plead sufficient facts to establish the alleged conduct was done knowingly and willfully, while being denied any discovery until a court rules on whether or not the plaintiff has pled sufficient facts about the defendant’s intent to deceive.

Application of CCA requirements that obesity-related claims be committed knowingly and willfully would be a substantial departure from the policy goals originally accomplished by UDAP statutes. Historically civil remedies for consumers were limited to common law fraud claims requiring the plaintiff to prove the defendant’s intent to deceive.²⁹ UDAP statutes were designed to level the playing field by creating statutory claims without intent requirements.³⁰ Broad CCAs have the potential to reverse consumer protection legal reforms with respect to UDAP claims stemming from the long-term consumption of food.

2. CCAs Conferring Limited Tort Immunity

Nine states (Arizona, Florida, Louisiana, Maine, Michigan, Oregon, South Dakota, Washington and Wyoming) shield the food industry from certain tort liability (Table 2).³¹ Tort claims seeking to recover damages stemming from long-term consumption of food include personal injury and wrongful death claims. For example, the Louisiana CCA, the first to be enacted, bars claims:

for personal injury or wrongful death based on an individual’s consumption of food or nonalcoholic beverages in cases where liability is premised upon

2012); MO. ANN. STAT. § 537.595(4)(2) (West 2012); N.D. CENT. CODE § 19-23-01(2)(b) (2012); OHIO REV. CODE ANN. § 2305.36(D)(2) (West 2012); OKLA. STAT. ANN. tit. 76, § 37(B)(2) (West 2012); TENN. CODE ANN. § 29-34-205(b)(2) (West 2012); TEX. CIV. PRAC. & REM. CODE ANN. § 138.002(b)(1) (Vernon 2012); UTAH CODE ANN. § 78B-4-303(2)(b) (West 2012); WIS. STAT. ANN. § 895.506(2)(a) (West 2012) (only requiring violations be committed “knowingly”).

²⁷ See, e.g., Idaho Code Ann. § 39-8704(4) (2012).

²⁸ ALA. CODE § 6-5-734 (2012); IDAHO CODE ANN. §§ 39-8705(2), 39-8706 (2012); KAN. STAT. ANN. § 60-4801(d), (e) (2012); KY. REV. STAT. ANN. §§ 411.620(2), 411.630 (West 2012); MO. ANN. STAT. § 537.595(5), (6) (West 2012); N.D. CENT. CODE §§ 19-23-02, 19-23-03 (2012); OKLA. STAT. ANN. tit. 76, § 37(C), (D) (West 2012); TENN. CODE ANN. § 29-34-205(d), (e) (West 2012); TEX. CIV. PRAC. & REM. CODE ANN. §§ 138.003, 138.004(a) (Vernon 2012); UTAH CODE ANN. §§ 78B-4-304, 78B-4-305(1) (West 2012).

²⁹ DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 1.1 (ed. 2011 2011-2012).

³⁰ *Id.*

³¹ ARIZ. REV. STAT. ANN. §§ 12-683(4), 12-688 (2012) (creating an affirmative defense and establishing that there is no duty to warn of health problems associated with excessive food consumption); FLA. STAT. ANN. § 768.37 (West 2012); LA. REV. STAT. ANN. § 9:2799.6(A) (2012); ME. REV. STAT. ANN. tit. 14, § 170(2) (2012); MICH. COMP. LAWS ANN. § 600.2974(1) (West 2012); OR. REV. STAT. ANN. § 30.961(2) (West 2012); S.D. CODIFIED LAWS § 21-61-2 (2012); WASH. REV. CODE ANN. § 7.72.070(1) (West 2012); WYO. STAT. ANN. § 11-47-103(a) (2012).

the individual's weight gain, obesity, or a health condition related to weight gain or obesity and resulting from his long-term consumption of a food or nonalcoholic beverage.³²

Tort-based CCAs like that of Louisiana should not impact claims filed by consumers or state AGs under state UDAP statutes or for violations of other food-related statutory provisions.

The CCAs in Florida, Maine, Michigan, Oregon and Wyoming also contain provisions allowing obesity-related tort claims where there has been some kind of misrepresentation to the public or a knowing and willful violation of laws governing food.³³ Michigan and Oregon, however, do impose heightened pleading requirements and stays of discovery pending a motion to dismiss to exempted claims.³⁴

C. *Stripping Government Attorney Authority*

State AGs play a crucial role in affirmative public health litigation to protect the public from false and deceptive food marketing and violations of food labeling laws.³⁵ The CCAs enacted in nine states (Alabama, Colorado, Georgia, Idaho, Illinois, Michigan, Missouri, Oklahoma and Tennessee) impose a limitation on the kinds of cases government attorneys can bring by specifically referencing governmental entities when defining the reach of the statute.³⁶ For example, Georgia's CCA confers blanket civil immunity for claims arising out of weight gain and obesity. The Georgia CCA defines a "claim" as "any claim by or of a natural person, as well as any derivative or other claim arising therefrom asserted by or on behalf of any other person," and defines "other person" as "any individual, corporation . . . or *other entity, including any governmental entity or private attorney general.*"³⁷ Governmental entities arguably include state AGs.

Of the nine CCAs with language limiting government attorneys, Michigan's is the only one that clearly does not apply to state AGs. Michigan's CCA shields the food industry from tort-based civil liability for "personal injury or death" claims only.³⁸ The statute states that "a political subdivision of this state shall not file, prosecute, or join,

³² LA. REV. STAT. ANN. § 9:2799.6(A) (2012) (emphasis added).

³³ FLA. STAT. ANN. § 768.37 (West 2012) (allowing obesity-related tort claims where the defendant has failed to provide legally required nutritional information or provided materially false or misleading information to the public); ME. REV. STAT. ANN. tit. 14, § 170(3) (2012) (allowing obesity-related tort claims where the defendant has failed to provide legally required nutritional information or provided materially false or misleading information to the public); MICH. COMP. LAWS ANN. § 600.2974(2)(b) (West 2012) (allowing obesity-related tort claims based on knowing and willful violations of federal or state food laws); OR. REV. STAT. ANN. § 30.961(3)(d) (West 2012) (allowing obesity-related tort claims based on knowing and willful violations of federal or state food laws); WYO. STAT. ANN. § 11-47-103(b) (2012) (allowing an obesity-related tort claim if the claim of injury or death is based on a knowing and willful violation of a federal or state food "composition, branding or labeling standard").

³⁴ MICH. COMP. LAWS ANN. § 600.2974(3), (4) (West 2012); OR. REV. STAT. ANN. § 30.963(2), (3) (West 2012).

³⁵ National Policy & Legal Analysis Network to Prevent Childhood Obesity, *State AG Enforcement of Food Marketing Laws: A Brief History*, <http://publichealthlawcenter.org/sites/default/files/resources/phlc-fs-agstatefoodenforce-2010.pdf>.

³⁶ ALA. CODE § 6-5-731(4) (2012); COLO. REV. STAT. § 13-21-1103(4) (West 2012); GA. CODE ANN. § 26-2-431(5) (West 2012); IDAHO CODE ANN. § 39-8704(5) (2012); 745 ILL. COMP. STAT. ANN. 43/5 (West 2012); MICH. COMP. LAWS ANN. §§ 600.2974(5), 600.2974(7)(d) (West 2012) (barring claims by a "political subdivision" and defining political subdivision as a "county, city, township, or village."); MO. ANN. STAT. § 537.595(2)(4) (West 2012); OKLA. STAT. ANN. tit. 76, § 36(1) (West 2012); TENN. CODE ANN. § 29-34-205(e) (4) (West 2012).

³⁷ GA. CODE ANN. § 26-2-431(1), (5) (West 2012) (emphasis added).

³⁸ MICH. COMP. LAWS ANN. § 600.2974(1) (West 2012).

on its own behalf or on behalf of its citizens or another class of persons, a civil action described in this section for damages or other remedy against a person,”³⁹ and defines “political subdivision” as “a county, city township or village.”⁴⁰ Since “state” is not included in the definition of political subdivision, obesity-related cases brought by the state AG should not be limited by Michigan’s CCA.

Six other states (Alabama, Georgia, Kentucky, Texas, Oregon and Washington) explicitly protect the authority of governmental entities to enforce certain food-related laws. Washington’s CCA only applies to obesity-related product liability claims filed by a “private party.”⁴¹ Alabama, Georgia, Kentucky, Texas and Oregon explicitly preserve government authority to enforce laws related to food adulteration and misbranding,⁴² and the Texas CCA also explicitly exempts obesity-related consumer protection claims brought by the AG.⁴³

D. Potential Impact on State AG Enforcement of Food Labeling Laws

State AGs play an important role in maintaining the integrity of food labels. In order to ensure uniform food labeling nationwide, the federal Food Drug and Cosmetics Act preempts states from promulgating food labeling provisions except for ones identical to federal food labeling laws.⁴⁴ As discussed above, a number of CCAs limit obesity-related food labeling claims brought by governmental entities to knowing and willful violations, impose heightened pleading requirements, and grant stays of discovery pending a motion to dismiss. As a result, in some jurisdictions actions brought by state AGs to enforce food labeling laws and seeking to recover for obesity-related health harms may be subject to additional substantive and procedural burdens. This potential limitation of AG enforcement authority for food labeling violations that contribute to obesity-related chronic disease goes well beyond the scope of the stated goal of CCAs to prevent frivolous litigation.

IV. WAS THERE A NEED FOR CCA’S TO PREVENT FRIVOLOUS OBESITY-RELATED LITIGATION?

As a practical matter, bringing obesity-related tort litigation is extremely expensive, and only one lawyer has even attempted it. Attorney Samuel Hirsch brought two would-be class actions against McDonald’s Corporation—*Barber* and *Pelman*—under New York law.⁴⁵ *Pelman* was filed on behalf of a class of overweight children “seeking compensation for obesity-related health problems, improved nutritional labeling of McDonald’s products, and funding for a program to educate consumers about the dangers

³⁹ *Id.* § 600.2974(5).

⁴⁰ *Id.* § 600.2974(7)(d).

⁴¹ WASH. REV. CODE ANN. § 7.72.070(1) (West 2004).

⁴² ALA. CODE § 6-5-735(b) (2012); GA. CODE ANN. § 26-2-433(1) (West 2012); KY. REV. STAT. ANN. § 411.610(1) (West 2012); OR. REV. STAT. ANN. § 30.961(5) (West 2012); TEX. CIV. PRAC. & REM. CODE ANN. § 138.002(b)(2)(A) (Vernon 2012).

⁴³ TEX. CIV. PRAC. & REM. CODE ANN. § 138.002(b)(2)(B) (Vernon 2012).

⁴⁴ 21 U.S.C.A. § 343-1 (West 2012).

⁴⁵ Complaint, *Barber v. McDonald’s Corp. et al.*, No. 23145/2002 (N.Y. Sup. Ct. filed July 24, 2002); *Pelman v. McDonald’s Corp.*, No. 02-7821, 2011 WL 1230712 (S.D.N.Y. Feb. 25, 2011), stipulation of voluntary dismissal with prejudice, 237 F. Supp. 2d 512 (S.D.N.Y. 2003), dismissed by partial summary judgment, No. 02 Civ. 7821, 2003 WL 22052778 (S.D.N.Y. Sept. 3, 2003), vacated in part, 396 F.3d 508 (2d Cir. 2005), on remand motion granted by 396 F. Supp. 2d 439 (S.D.N.Y. 2005), motion to strike granted in part by 452 F. Supp. 2d 320 (S.D.N.Y. 2006), class certification denied by 272 F.R.D. 82 (S.D.N.Y. 2010).

of fast food.”⁴⁶ Despite the absence of a CCA, *Barber* was voluntarily dismissed, and the *Pelman* case ended after 9 years, 6 federal district court opinions, and 1 US Court of Appeals decision.⁴⁷ While the food industry might argue that the protracted litigation in *Pelman* exemplifies why CCAs are necessary, Hirsch’s experience in and of itself is not likely to inspire other attorneys to pursue similar litigation. In addition, prior to the enactment of CCAs there existed state law civil damage schemes empowering judges and juries to apportion fault between individual parties to civil litigation as well as other legal protections from frivolous litigation.

A. Civil Damage Provisions

In cases brought by individual plaintiffs (as opposed to class actions), the vast majority of states follow a civil damage scheme whereby fault is apportioned between the parties and damages are awarded accordingly. Referred to as “comparative negligence,” the doctrine aims to determine to what extent the plaintiff’s own negligence was the legal cause of an injury, and “reduces the plaintiff’s recovery in proportion to the share of responsibility the factfinder assigns to the plaintiff.”⁴⁸

There are two subsets of comparative negligence: “pure” and “modified.” Under pure comparative negligence, the plaintiff’s damages are reduced directly in proportion to the amount of negligence attributed to plaintiff.⁴⁹ Thus, a defendant found to be 1% responsible for the plaintiff’s injury will be ordered to pay 1% of the plaintiff’s damages (because the plaintiff was found to be 99% responsible). Modified comparative negligence states bar recovery for plaintiffs found to be responsible over a certain specified percentage. Comparative negligence emerged in response to the harsh “contributory negligence” doctrine whereby any attribution of fault to the plaintiff bars recovery.⁵⁰ In other words, if a plaintiff is found to have contributed in any way to his injury, he is completely barred from recovery. Twenty four of the 25 CCA states had a pre-existing civil damage provision applicable to cases brought by individual plaintiffs that either limited recovery purely to the amount attributable to the defendant, or barred recovery altogether if the plaintiff was held more than 50% or 51% responsible for the damages alleged.⁵¹ Alabama is the one CCA state with contributory negligence: there, any level of responsibility attributed to the plaintiff bars recovery.

B. Frivolous Lawsuit Provisions

State laws and rules governing court filings, professional responsibility and the award of attorney’s fees also were in place to deter frivolous individual and class action lawsuits prior to the enactment of CCAs. Rule 11 of the Federal Rules of Civil Procedure requires attorneys to conduct a reasonable inquiry prior to filing a complaint or motion with the court and imposes sanctions for violations,⁵² and states have adopted laws modeled after the federal rule.⁵³ The Model Code of Professional Responsibility prohibits an attorney from acting on a client’s behalf if she knows the suit is frivolous or that it is

⁴⁶ Michele Mello et al., *The McLawsuit: The Fast-Food Industry and Legal Accountability for Obesity*, 22 Health Affairs 207 (2003).

⁴⁷ *Id.*

⁴⁸ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 7 (2000).

⁴⁹ *Id.*

⁵⁰ RESTATEMENT (SECOND) OF TORTS § 467 (1965).

⁵¹ 2 COMP. NEGL. MANUAL App. III (3d. ed. 2012).

⁵² FED. R. CIV. P. 11.

⁵³ Byron C. Keeling, *Toward a Balanced Approach to ‘Frivolous’ Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 Pepperdine Law Review 1067, 1094 (1994).

being brought for the purpose of harassing,⁵⁴ and instructs attorneys not to advance a claim or defense that is unwarranted under existing law.⁵⁵ In addition, many state UDAP statutes applicable to the marketing and sale of food directly address frivolous lawsuits by granting judges discretion to award a prevailing defendant attorney's fees and costs if the court finds that the case was frivolous, groundless or filed in bad faith.⁵⁶

V. CONCLUSION

Tackling a public health crisis as complex as the obesity epidemic requires the full range of public health interventions including affirmative litigation. If any legislator had sincerely believed that a CCA was necessary to prevent frivolous litigation, she was not fully informed of the existing protections against frivolous litigation. The point of the CCA proponents, of course, was not to prevent *frivolous* litigation, from which industry already had plentiful protection, but rather to limit legally and factually sound litigation, which might eventually have harmed industry's bottom line and forced it to change its practices. To the extent that any future claims are brought in CCA jurisdictions, plaintiffs will most likely craft claims to avoid triggering the CCA by limiting the alleged harms to simple restitution for the cost of the food products purchased as the result of the alleged illegal conduct and any available statutory damages. While cases structured in this way would be much too expensive to bring on an individual basis, class actions are possible and could be promising to protect citizens in CCA states from unlawful food industry conduct.

⁵⁴ MODEL CODE OF PROF'L RESP. EC 7-4 (1980), DR 7-102(A)(1) (1980).

⁵⁵ MODEL CODE OF PROF'L RESP. DR 7-102(A)(2) (1980).

⁵⁶ Dee Pridgen & Richard M. Alderman, *supra* note 29, App. 6A, at 545-548.

TABLE 1. STATES CONFERRING BROAD CIVIL IMMUNITY FROM OBESITY-RELATED (OR) CLAIMS

State	Exemption for OR Claims Alleging Knowing and Willful Violations of Food-Related Laws ¹	Heightened Pleading & Stay of Discovery Pending Motion to Dismiss for Exempted OR Claims	CCA Explicitly Applies to OR Claims Brought by “Governmental Entities”	CCA Explicitly Protects Gov. Agency Authority to Enforce Adulteration and Misbranding Laws	CCA Explicitly Does Not Apply to State AG Actions to Enforce Consumer Protection Laws
AL	√	√	√	√	
CO		√	√		
GA			√	√	
ID	√	√	√		
IL	√		√		
IN					
KS	√	√			
KY	√	√		√	
MO	√	√	√		
ND	√	√			
OH	√				
OK	√	√	√		
TN	√	√	√		
TX	√	√		√	√
UT	√	√			
WI	√ (knowing only)				

¹ Notes to Table 1: This column does not include exemptions for violations of adulteration and misbranding laws.

TABLE 2. STATES CONFERRING LIMITED TORT IMMUNITY FOR OBESITY-RELATED (OR) CIVIL CLAIMS

State	Exemptions for Certain OR Tort Claims ¹	Heightened Pleading & Stay of Discovery Pending Motion to Dismiss for Exempted OR Tort Claims	CCA Applies to OR Claims Brought by “Governmental Entities”	CCA Explicitly Protects Gov. Agency Authority to Enforce Adulteration and Misbranding Laws	CCA Explicitly Does Not Apply to State AG Actions to Enforce Consumer Protection Laws
AZ					
FL	√ (NI, F/M)				
LA					
ME	√ (NI, F/M)				
MI	√ (K/W)	√	√ (Does Not Apply to State AG)		
OR	√ (K/W)	√		√	
SD					
WA					√
WY	√ (K/W)				

¹. Notes to Table 2: The following abbreviations are used in this column: NI, F/M = tort claims premised upon failure to provide legally required nutritional information or providing materially false or misleading information to the public; K/W = tort claims premised upon knowing and/or willful violations of federal or state food-related laws.