More than 10 years have passed since a pair of teenagers sued McDonald’s for allegedly making them obese, but the jury is still out on whether these cases will ever be successful, attorneys Saul Wilensky and Kerry C. O’Dell say in this BNA Insight. Noting the plaintiffs’ experts were unable to isolate McDonald’s food as the substantial cause of the teenagers’ alleged injuries, the authors say the heightened federal pleading standards in *Iqbal*/ *Twombly* further protect food and beverage manufacturers from putative class actions with the same deficiencies.

**Where’s the Beef? The Challenges of Obesity Suits**

It has been over 10 years since teenagers Ashley Pelman and Jazlyn Bradley ignited a media firestorm by suing McDonald’s for allegedly making them obese. Many predicted that a proliferation of obesity lawsuits would follow, similar to litigation against tobacco companies. *Fortune* magazine went so far as to ask, “Is Fat the Next Tobacco?” on the cover of its Feb. 3, 2003, issue.

Apparently not. Like that famous Wendy’s commercial, courts have been asking, “Where’s the beef?” and not allowing obesity lawsuits to proceed. Citing personal choice and personal responsibility as grounds, nearly half of the states enacted “cheeseburger bills” to immunize food and beverage companies from liability arising from obesity and related injuries. Similar federal legislation was supported by the Bush administration, but failed to pass both houses of Congress.

Initiatives such as First Lady Michelle Obama’s “Let’s Move” campaign, reality TV shows such as “Food Revolution,” and industry “tell-all” books such as Michael Moss’s *Salt, Sugar, And Fat: How The Food Giants Hooked Us*, have reinvigorated national discussion about what we eat. Consumer advocates and legislators have targeted school lunch programs, sugary beverages, products sold in vending machines, and marketing directed at children. Bans on trans fats, calorie dis-
The food and beverage industries have responded by introducing more healthful items, promoting these items through advertising and enhanced labeling, and improving public access to nutritional information on websites and menus. Today, consumers have more information about their food than ever before. The heightened awareness about the food we eat has led to more class actions. But whether these class actions will succeed is yet to be seen.

**Pelman v. McDonald's Corporation**

The first obesity lawsuit was filed on behalf of a class of adults represented by Caesar Barber, a 56-year-old maintenance worker who allegedly ate fast food seven times a week for more than 25 years, and named McDonald’s and several other fast-food chains as defendants. Barber’s attorney withdrew the case to pursue *Pelman v. McDonald’s Corporation*, a class action with greater potential since, arguably, child plaintiffs would not be accountable for their choices of food. *Pelman* was expected to be ground-breaking litigation that would purportedly expose industry documents, which, in turn, could be used to bring a flood of litigation against “Big Food.”

The *Pelman* plaintiffs alleged that they consumed McDonald’s food several times a week because they believed the food was healthier than it actually was. They alleged that they developed obesity, diabetes, coronary heart disease, high blood pressure, elevated cholesterol intake, and other medical conditions as a result. The complaint alleged that McDonald’s had produced food that was unreasonably unsafe; failed to warn consumers of the dangers of its products; and, engaged in deceptive advertising, sales, and marketing. The *Pelman* plaintiffs further alleged that McDonald’s knew or should have known that its actions would cause obesity and related health problems in millions of American children.

In dismissing the first *Pelman* complaint without prejudice, Judge Robert Sweet pointed out deficiencies in the complaint and even suggested evidence for a better one:

> [In order to state a claim, the Complaint must allege either that the attributes of McDonald’s products are so extraordinarily unhealthy that they are outside the reasonable contention of the consuming public or that the products are so extraordinarily unhealthy as to be dangerous in their intended use. The Complaint—which merely alleges that the food contains high levels of cholesterol, fat, salt and sugar, and that the food are therefore unhealthy—fails to reach this bar. . . . If plaintiffs were able to flesh out this argument [that McDonald’s products have been so altered that their unhealthy attributes are now outside the ken of the average reasonable consumer] in an amended complaint, it may establish that the dangers of McDonald’s products were not commonly well known and thus that McDonald’s had a duty towards its customers.]

Believing, erroneously, that Judge Sweet’s detailed advice only applied to products liability claims, the *Pelman* plaintiffs filed an amended complaint and proceeded on the deceptive advertising claims only, which Judge Sweet dismissed with prejudice. The Second Circuit vacated part of Judge Sweet’s dismissal and remanded the case back to the district court.

In 2010, eight years after the suit was initially filed, Judge Donald Pogue of the U.S. Court of International Trade, sitting by designation, denied certification as a class action. The court held that the putative class failed to satisfy Federal Rule 24(b)(3)’s predominance requirement. Specifically, the possibility of a causal link between the alleged injuries and consumption of McDonald’s food “depend[ed] heavily on a range of factors unique to each individual,” such as the extent of each plaintiff’s consumption, activity levels, medical history, genetic background, and the extent of reliance placed on McDonald’s labeling and advertising.

The court denied plaintiffs’ request to certify an issues class “for a determination of [McDonald’s] liability for its deceptive conduct on consumers,” because the plaintiffs had failed to show that the putative class was sufficiently numerous pursuant to Federal Rule 24(b)(4). The court also denied plaintiffs’ request for additional class discovery. In February 2011, the parties filed a stipulation of voluntary dismissal with prejudice.

**Causation, Causation, Causation**

It will be extraordinarily difficult for any plaintiff, individually or as part of a class, to hold a single food or beverage manufacturer liable for obesity-related injuries. In order to prevail on any theory of liability requiring proof of medical causation, a plaintiff must prove that the manufacturer’s product was the substantial cause of her injury, not just one of a number of contributing causes. “The problem of obesity in America has no single cause.”

The federal Food and Drug Administration (FDA) agrees that there are many non-food causes of obesity, such as genetic background and environmental factors. On top of ruling out the non-food causes of their obesity, Judge Pogue echoed Judge Sweet’s concern that the *Pelman* plaintiffs would face an additional hurdle: the need to isolate McDonald’s food as the substantial cause of their injuries, as opposed to “myriad other food products on the market high in fat, cholesterol, and salt, and containing beef and cheese,” given the widespread availability of such products from other sources. To date, no reliable study has concluded that any food or beverage manufacturer makes products that are “so altered that their unhealthy attributes are now outside the ken of the average reasonable consumer” or deliberately makes its products addictive, similar to successful allegations against tobacco manufacturers.

Judge Pogue observed that by 2010, plaintiffs’ experts were unable to isolate McDonald’s food as the substantial cause of their injuries (which Judge Sweet

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4 272 F.R.D. at 94 n.28.

5 *Pelman*, 237 F. Supp. 2d at 532.
hinted would be an issue in 2003 before the parties engaged in discovery). Had the individual Pelman lawsuits continued, they would have faced a significant Daubert challenge. Today, the heightened federal pleading standards announced in Iqbal/Twombly protect food and beverage manufacturers from putative class actions with the same deficiencies as Pelman. The Second Circuit might have upheld Judge Sweet’s 2003 dismissal of Pelman if Iqbal/Twombly had been the law at the time.

Due to the size and scope of the potential damages, obesity class action plaintiffs will have a difficult time avoiding Iqbal/Twombly and Daubert. The Class Action Fairness Act (CAFA) provides that federal district courts have original jurisdiction over putative class actions where the matter in controversy exceeds the sum or value of $5 million.7 The U.S. Supreme Court recently protected CAFA jurisdiction by closing a federal court evasion loophole.8

Time will tell whether new class action lawsuits will be filed based upon a theory of food addiction, due to processes that make food “irresistible” like the ones described in Mr. Moss’s book. Even if reliable studies someday establish the presence of “junk food withdrawal syndrome” or other proof that certain foods are addictive, food addiction lawsuits will face the same hurdles as Pelman.

Public Interest Obesity Suits

Consumer advocacy groups have used litigation, or the threat of litigation, to prompt some manufacturers to remove trans fat, lower sodium, or change the way products are labeled and marketed.9 As with Pelman, the underlying claims have been difficult to prosecute. The Center for Science in the Public Interest (CSPI) brought a state-level class action under the District of Columbia’s Consumer Protection Procedures Act to force Burger King to set a timeline for the removal of trans fats from its foods and enhance warnings about trans fats on its food packaging. Burger King removed the case to federal court, which held that the non-profit organization did not have standing to sue Burger King.10 After the case was remanded due to lack of subject matter jurisdiction, it was dismissed.

CSPI also represented the lead plaintiff in Monet Parham v. McDonald’s Corp.,11 another state-level class action brought in California. Plaintiff Monet Parham, a mother of young children, alleged that McDonald’s enticed children to eat unhealthy foods by including toys in Happy Meals. The case was dismissed on April 5, 2012. Could state attorneys general step in, due to the public costs of treating obesity-related illnesses, as they did with tobacco? After all, not everyone smokes, but everyone eats. These lawsuits would face the same problems with causation as any other obesity lawsuit. Further, governments would have to acknowledge potential complicity in the problem of obesity. Government-provided food stamps are often expended on “junk” or “fast” food, because it tends to be less expensive than “fresh” or “cooked-to-order” food. Governments subsidize producers of meat and dairy products to keep prices low. Government regulations also allow processing of food that arguably contributes to the obesity problem. For now, governments are taking a smarter, more effective approach through regulation, or the threat of regulation, and by working with manufacturers.

Mislabling Suits

Another way to target food manufacturers is through labeling and consumer fraud claims, seeking damages for economic loss from potential future injury and/or premium pricing attributable to “healthier” products, based upon the theory that plaintiffs would not have purchased the products had they known the truth about their ingredients. For example, a class action against Tyson Foods, Inc. for labeling certain brands of chicken as “Raised Without Antibiotics” was settled for approximately $5 million. These class actions do not allege that obesity is one of the injuries, even if reducing obesity is one of the goals.

Similar to Pelman, initial efforts at mislabeling class actions met with ridicule, such as the now infamous lawsuit against PepsiCo because Cap’n Crunch’s Crunch Berries cereal does not contain real berries.12 It was dismissed because a reasonable consumer would not have been deceived into believing that Crunch Berries are real fruit.

Mislabling claims that second-guess the FDA by challenging expressly-approved labeling requirements or terms are preempted by the Nutritional Labeling and Education Act. On May 9, 2013, the Third Circuit upheld dismissal of a proposed class action alleging that Johnson & Johnson misrepresented that Benecol butter/margarine substitute had “zero grams” or “no” trans fat and was proven to reduce cholesterol.13 FDA regulations permit marketing food that contains less than half a gram of trans fat per serving as having “zero grams” per serving, plus a disclaimer on the package disclosed the presence of a small amount of partially hydrogenated oil. The FDA also permits manufacturers to claim that a product is proven to reduce cholesterol when the claim is based on the inclusion of plant stanols.

The Third Circuit relied heavily upon Carrea v. Dreyer’s Grand Ice Cream, Inc.,14 which upheld the dismissal of litigation alleging that ice cream was misleadingly marketed as containing zero grams of trans fat per serving. The Seventh Circuit found that FDA regulations preempted claims alleging that snack bars were...

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6 See Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (holding that civil complaints in antitrust cases must allege enough facts to be demonstrably plausible, not merely possible or conceivable); Ashcroft v. Iqbal, 556 U.S. 662 (2009) (extending Twombly to all federal civil complaints).
8 Standard Fire Insurance Co. v. Knowles, 568 U.S. (2013) (holding that until a class action is certified, a putative representative plaintiff cannot legally bind members of the class to pledge that the class would not seek damages greater than $5,000,000).
9 http://www.cspinet.org/about/accomplishments.html (last checked on May 7, 2013).
14 475 Fed. App’x 113 (9th Cir. 2012).
falsely marketed as high in dietary fiber when they actually used “non-natural” processed fiber, since the desired labeling would impose different standards than federal labeling requirements.\textsuperscript{15}

Success is more likely when FDA definitions and guidance are vague. Class actions that challenge terms such as “natural,” “all natural,” “nutritious,” “wholesome,” and “healthy” have been more popular since the Third Circuit held that certain claims based on “natural” marketing are not preempted by FDA regulations.\textsuperscript{16} FDA regulations do not define the term “natural,” and FDA guidance language provides that “natural” means that “nothing artificial or synthetic has been included in, or has been added to, a food that would not normally be expected to be in the food.”\textsuperscript{17} Unfortunately, there is even less FDA guidance for the terms “artificial” and “synthetic.” The products at issue in these lawsuits contain high fructose corn syrup, genetically modified organisms (GMOs), trans fat, artificial preservatives, or ingredients that either do not occur in “nature” or were processed synthetically.

Recently, some claims in a proposed class action against the manufacturers of Splenda were dismissed as preempted, while others were allowed to stand. In Bronson v. Johnson & Johnson, Inc.,\textsuperscript{18} claims that the labels for some Splenda products should have disclosed that fiber or antioxidants are synthetically derived were held preempted by the FDCA, which does not require manufacturers to disclose that these ingredients are synthetically derived. However, claims that labeling was misleading because it stated that the product’s antioxidants were “like those found in fruits and vegetables” next to a photo of berries, and that the product will “help support a healthy metabolism” were not preempted. However, demonstrating actual reliance upon the allegedly misleading labels, such as by demonstrating the premium paid for the “natural” product, has proven to be a challenge for both class actions and individual claims.\textsuperscript{19}

**Conclusion**

Food and beverage manufacturers will continue to be targeted with lawsuits based upon a number of legal theories in the hopes that one of them will turn up “smoking gun” documents. Unless that happens, courts, lawmakers, and public opinion will side with the food industry and against plaintiffs who simply claim that their food made them fat.

Alternatively, food and beverage manufacturers will be subject to lawsuits based upon their labeling practices, especially if there is no FDA guidance for the challenged term on the label. Food and beverage manufacturers should monitor labeling and how their ingredients are processed, and may want to avoid using blanket terms like “natural.” In the meantime, food and beverage manufacturers should work alongside governments, consumer advocacy groups, and the public in the fight against obesity.

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\textsuperscript{15} Turek v. General Mills, Inc., 662 F.3d 423 (7th Cir. 2011).

\textsuperscript{16} Holik v. Snapple Beverage Corp., 575 F.3d 329 (3d Cir. 2009).

\textsuperscript{17} 58 Fed. Reg. 2302, 2407 (Jan 6, 1993).


\textsuperscript{19} See Weiner v. Snapple Beverage Corp., No. 07 Civ. 8742 (DLC), 2011 BL 16388 (S.D.N.Y. Jan. 21, 2011) (granting summary judgment to beverage manufacturer because plaintiffs failed to prove they paid more for Snapple’s products than they would have for comparable beverages); Weiner v. Snapple Beverage Corp., No. 07 Civ. 8742 (DLC), 2010 BL 180541 (S.D.N.Y. Aug. 03, 2010) (denying class certification because plaintiff could not demonstrate that issues of causation and injury could be demonstrated on a classwide basis).