



2006

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Recommended Citation

Jason A. Smith, *Setting the Stage for Public Health: The Role of Litigation in Controlling Obesity*, 28 U. ARK. LITTLE ROCK L. REV. 443 (2006).

Available at: <https://lawrepository.ualr.edu/lawreview/vol28/iss3/8>

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SETTING THE STAGE FOR PUBLIC HEALTH: THE ROLE OF LITIGATION IN CONTROLLING OBESITY

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I. INTRODUCTION

Litigation can be a central strategy in improving public health. It was instrumental in initiating a public health response to tobacco and to other chronic problems.¹ Just as litigation was successful in confronting these public health problems, so can it be with obesity. Litigation as a tool to improve public health is effective only when its strategic focus is environmental rather than discrete. It is effective not only when it eliminates one particular risk but when it alters the social context that shapes the behavior of entire populations.

Public health is a discipline that focuses on environments and populations. In doing so, public health scholarship recognizes that the health of an individual often has little to do with her own choices and everything to do with the environment she inhabits.² Its goal is to improve and to protect the health of the entire population.³ Throughout history, the law, and by implication the state, has been central to public health. In fact, a public health problem may, by its very definition, entail legal solutions.⁴ The key to using public health approaches is to understand the scope of the problem and its definition:

If a problem is confined to an identifiable minority and if it can be successfully controlled in isolation, then [an individual approach] is adequate (although it will need to be maintained for as long as its causes persist), but it is an inadequate response to a common disease or a widespread cause. Mass diseases and mass exposures require mass remedies.

* Adjunct Professor, Northeastern University School of Law; Associate Executive Director, Public Health Advocacy Institute. This discussion was originally presented as a brief talk at the University of Arkansas at Little Rock School of Law at a symposium on Law and Obesity in May 2005. I want to thank Diane Mackey for the opportunity to participate.

1. *See generally*, REGULATING TOBACCO (Robert L. Rabin & Stephen D. Sugarman eds., 2001) (collection describing the use of law in controlling tobacco); Jon S. Vernick, Julie Samnia Mair, Stephen P. Teret & Jason W. Sapsin, *Role of Litigation in Preventing Product-Related Injuries*, 25 EPIDEMIOLOGIC REV. 90 (2003) (Discussion of litigation in relation to historic product liability cases). While litigation played a role in a broader public health strategy focusing on tobacco, it should be noted that litigation was not entirely successful in controlling tobacco. Many individuals continue to smoke, and tobacco remains an ongoing public health problem.

2. THEODORE H. TULCHINSKY & ELENA A. VARAVIKOVA, *THE NEW PUBLIC HEALTH* 62, 63, 114, 146 (2000).

3. GEOFFREY ROSE, *THE STRATEGY OF PREVENTIVE MEDICINE* 95, 108 (1992).

4. GEORGE ROSEN, *A HISTORY OF PUBLIC HEALTH* (1993).

A targeted approach may assist but it cannot be sufficient. The population strategy of prevention starts with the recognition that the occurrence of common disease and exposures *reflects the behaviour and circumstances of society as a whole*.⁵

Is the cause of the problem systemic and environmental, or is it atomistic and unique? Should the solution be tailored to the individual or to the community? Is it defined as a public problem or as a problem caused by individual behavior? These are the important questions to ask in developing a public health approach to a problem. Simply, if a problem is one where the individual cannot effect change or protect himself, or if the problem requires large systemic interventions, then that problem is a public health problem.

There is no doubt that obesity is a public health problem with mass exposures requiring mass remedies. Since 1985, the prevalence of overweight and obesity has increased drastically across the population.⁶ In 2002, 65% percent of adults in the United States were overweight or obese.⁷ Today, overweight and obesity are leading causes of death and illness in the United States and are poised to be a significant burden on the public health.⁸

Two reports illustrate the public health burden. In 2001, the Surgeon General outlined the scope of the problem. The Surgeon General's Report outlined some of the environmental factors that contribute to obesity and emphasized that obesity is a public health problem because of its scope, complexity, and environmental nature.⁹ The Surgeon General's Report also emphasized that overweight and obesity are poised to wipe out the public health gains of the twentieth century.¹⁰ In 2004, the Institute of Medicine's (IOM) report on childhood obesity reinforced the conclusions of the Surgeon General's Report on the environmental and population factors that characterize the obesity epidemic.¹¹ In its report, the IOM focused on envi-

5. ROSE, *supra* note 3, at 95 (emphasis added).

6. CENTERS FOR DISEASE CONTROL AND PREVENTION, Obesity Trends, <http://www.cdc.gov/nccdphp/dnpa/obesity/trend/maps/index.htm> (last visited Oct. 31, 2005).

7. NATIONAL CENTER FOR HEALTH STATISTICS, *available at* <http://www.cdc.gov/nchs/products/pubs/pubd/hestats/obese/obse99.htm> (last visited Oct. 30, 2005).

8. Allison Morril & Christopher Chinn, *The Obesity Epidemic in the United States*, 25 J. PUB. HEALTH. POL'Y 353 (2004).

9. UNITED STATES DEP'T OF HEALTH & HUMAN SERVS., THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY (2001), *available at* <http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf> (last visited May 9, 2006). The Surgeon General's Report makes clear that overweight and obesity are not problems that can be solved by individual action alone. They are not merely problems of "personal responsibility." *Id.*

10. *Id.*

11. INSTITUTE OF MEDICINE, PREVENTING CHILDHOOD OBESITY: HEALTH IN THE

ronmental determinants of obesity and targeted them as areas for future public health action.¹² These reports, taken together, reveal the complexity of the environmental factors that create the burgeoning obesity epidemic. Yet, even though research indicates that obesity is a public health problem, both the debate and much of popular culture tends to focus exclusively on the individual, emphasizing the role of “personal responsibility.”¹³ It is necessary to transform the public’s perception of the problem. Advocates must set the stage for obesity as a public health problem.

Current obesity-related litigation can be viewed as an initial attempt to define the situation, to set the stage, and to control the debate.¹⁴ Jon Hanson and David Yosifon have worked extensively to bring the insights of social psychology to legal analysis and have sought to express the centrality of situation, or environment, to the way people behave as individuals and as groups.¹⁵ This is one of many useful theories that can be of use in social epidemiology and in a public health approach to litigation. Relying on social psychology, they describe how individuals’ behavior is very much a product of their situation.¹⁶ There is a belief that people act as autonomous individuals, that they have a personal disposition, and that they can act as they choose given a situation.¹⁷ Really, a human’s behavior is almost entirely defined by her situation or environment.¹⁸ In their work, Hanson and

BALANCE 7–20 (2004), available at <http://www.iom.edu/CMS/378815867/22.596.aspx> (last visited May 9, 2006).

12. *Id.* The Institute of Medicine focused on marketplace and media environments, physical environments, school environments, and home environments. *Id.*

13. NBC’s show “The Biggest Loser” is a prime example. In it, contestants are pitted against each other in a “personal” battle of wills to lose weight. The problem is framed entirely as one of the individual and his or her moral failure. No mention is made of the context even when NBC provides trainers, dieticians, and equipment to make this “personal” transformation possible. *The Biggest Loser*, available at http://www.nbc.com/The_Biggest_Loser/ (last visited May 9, 2006). Recent polls also suggest that the majority of citizens oppose civil liability for food companies for obesity. Michael Blanding, *Hard on Soda Drinks*, *GLOBE*, Oct. 30, 2005, at 24.

14. This discussion will not focus on tactical discussions of obesity lawsuits or their use as tools for *direct* policy change. My colleagues at the Public Health Advocacy Institute have recently published on this topic. See Jess Alderman & Richard Daynard, *Applying Lessons from Tobacco Litigation to Obesity Lawsuits*, 30 AM. J. PREVENTIVE MED. 82 (2006).

15. See Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003) (hereinafter *The Situation*); Adam Benforado, Jon Hanson, & David Yosifon, *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645 (2004) (hereinafter *Broken Scales*).

16. Hanson & Yosifon, *The Situation*, *supra* note 15, at 155.

17. *Id.* at 157.

18. *Id.* at 165.

Yosifon have begun to create a critical realist jurisprudence that can help to describe the role of litigation in confronting overweight and obesity.¹⁹

Three themes from Hanson and Yosifon's work provide a context for this discussion of obesity-related litigation and the response to it. First, as this paper has stated, situation, not disposition, accounts for individual behavior.²⁰ Individuals are influenced far more by their environment than their beliefs about why they act in a particular fashion.²¹ Second, once one sees the situation, its effect on behavior often becomes clear.²² When the environmental influences are clearly identified, people have no difficulty understanding their influence.²³ Finally, the food industry has an interest in promoting and maintaining a dispositionist worldview.²⁴

The final theme requires a bit of explanation. Simply, the food industry has the interest and resources necessary to reinforce a dispositionist conception of human behavior. This is the "personal responsibility" argument.²⁵ The food industry makes money by manipulating populations through changes in the social environment. This is the very basis of marketing and lobbying. There is a serious interest in continuing to emphasize a dispositionist perspective on obesity and overweight.²⁶ A focus on dispositionism is a focus away from public health and from state intervention; it reinforces individuals' "natural" biases.²⁷ This reinforcement of dispositionism hopes to take advantage of a peculiar facet of human behavior: the fundamental attribution error.²⁸ In simple terms, human beings tend to deemphasize situations and instead attribute behavior to a person's disposition, or autonomy.²⁹ By reinforcing a view of individual personal responsibility, corporations maintain a focus away from the institutions that manipulate and define the situation.³⁰ Controlling the situation—for example, the way the problem

19. *Id.* at 149.

20. *Id.* at 154.

21. *Id.* at 219.

22. Hanson & Yosifon, *The Situation*, *supra* note 15, at 219.

23. *Id.* at 175.

24. *Id.* at 220.

25. *Id.* at 333. The Center for Consumer Freedom, a front for the food industry, provides an excellent example of the personal responsibility argument and the industry's effort to promote it. THE CENTER FOR CONSUMER FREEDOM, WHAT IS THE CENTER FOR CONSUMER FREEDOM, available at <http://www.consumerfreedom.com/about.cfm> (last visited Apr. 28, 2006).

26. See generally, Benforado, Hanson & Yosifon, *Broken Scales*, *supra* note 15.

27. Hanson & Yosifon, *The Situation*, *supra* note 15, at 136.

28. *Id.*

29. *Id.* Simply, human beings see people's actions as a result of their free choices, free will, or "disposition." Humans possess a fundamental bias that resists seeing the situation present and instead focuses on human behavior. As part of this bias, humans tend also to view the situation where there is a "bad" actor and not otherwise.

30. See *id.*, *supra* note 15.

is understood—is central in determining the approach to solving the problem.

Litigation can be an effective tool to reveal the effect of situation and environment. When used, litigation allows public health practitioners to shape the obesity epidemic as a public health problem and counter industry efforts to frame it as a problem of personal responsibility.

This brief discussion will explore a public health approach to litigation and will focus on the ongoing *Pelman* case as a new locus for a public health focus on environment and populations. Then it will discuss industry attempts to focus on “personal responsibility” and a dispositionist worldview with special emphasis placed on the experience in Arkansas.

II. PUBLIC HEALTH LITIGATION

A population-based approach to litigation not only seeks a public health approach to litigation on a case-by-case basis but also attempts to understand cases as part of a broader public health strategy. While there has been significant work done in public health law in areas focusing on infectious disease and perceived threats from terrorism,³¹ a public health approach to judicial decision-making and litigation is still needed to address many pressing chronic public health problems.³² There has been relatively little work done in applying public health to legal analysis or in using legal approaches to solve ongoing chronic health problems and problems of product-related injuries. A public health, or population-based, approach to legal analysis would differ from the traditional focus on individuals and would, instead, look to the methodologies and concepts employed in public health. This approach would emphasize three areas: the public health context of the case, the role and use of populations, and the use of epidemiological tools in legal analysis.³³

Understanding that litigation has often involved explicit public health problems and understanding the public health implications of litigation are crucial elements in a population-based or public health approach to the use of litigation.³⁴ Public health has been a prominent focus of much litigation,

31. See e.g., Lawrence O. Gostin, *When Terrorism Threatens Health: How Far are Limitations on Human Rights Justified*, 31 J.L. MED. & ETHICS 524 (2003); and e.g., Wendy E. Parmet, *Informed Consent and Public Health: Are They Compatible When it Comes to Public Health?*, 8 J. HEALTH CARE L. & POL'Y 71 (2005).

32. Richard Daynard, *Regulating Tobacco: The Need for a Public Health Judicial Decision-Making Canon*, 30 J.L. MED. & ETHICS 281 (2002).

33. Wendy E. Parmet & Anthony Robbins, *Preparedness, Practice, and Teaching: Public Health Literacy for Lawyers*, 31 J.L. Med & Ethics 701 (2003); Wendy E. Parmet & Jason A. Smith, *Free Speech and Public Health: A Population-Based Approach to the First Amendment*, 39 Loy. L.A. L. Rev. (forthcoming 2006).

34. See Parmet & Robbins, *supra* note 33.

and litigation has shaped and directed a great deal of public policy.³⁵ Additionally, a central component of public health is the environment.³⁶ A public health approach will recognize that environmental factors are a powerful influence on individual behavior. The use of litigation has been and remains fundamental in much effective public health policy, as it focuses attention on the environmental, situational, or public character of the problem and suggests public or population-based solutions. Yet, litigation cannot stand as a public health intervention on its own. It must be part of a broader public health strategy.³⁷

Population-based approaches to litigation also emphasize the role of populations. Simply, these approaches emphasize that a population is not merely a group of individuals but a discrete unit that will behave as a whole.³⁸ It is possible to both understand the behavior of a population and to change the behavior as a population *without* focusing on the individuals who constitute the population.³⁹

Quantitative analysis, especially the field of epidemiology, is the final important tool that can be applied in legal analysis.⁴⁰ Epidemiology allows legal practitioners and policymakers to make statements about the relationships between events and results in a population.⁴¹ It allows for sophisticated analyses that explore the association of different factors with particular results in a group, and sometimes it is able to suggest causal relationships between events.⁴² This powerful tool can be an important part of public health litigation.

Just as litigation can play a part in a more comprehensive public health strategy and can incorporate population-based methods, it also has a strong individualist focus that resists the population approach. Litigation is driven by, and must primarily respond to, the needs of the individuals who bring the claims. It is a client-focused enterprise, and tort law's focus on individual causation and particularized damages are very much inapposite for public health. Litigation is also driven by private attorneys with obligations to their clients. Even so, I suggest that the key is to incorporate litigation into a broader public health strategy that relies upon litigation's ability to frame the debate *rather* than the particularized remedy sought.

35. *Id.*

36. TULCHINSKY & VARAVIKOVA, *supra* note 2, at 62.

37. Litigation is also not a *necessary* component of successful public health. Many successes in public health have been achieved without litigation.

38. Parmet & Robbins, *supra* note 33, at 706–08.

39. ROSE, *supra* note 5, at 108.

40. Parmet & Robbins, *supra* note 33, at 705.

41. TULCHINSKY & VARAVIKOVA, *supra* note 2, at 146.

42. *See generally*, THOMAS D. KOESELL & NOEL S. WEISS, EPIDEMIOLOGIC METHODS: STUDYING THE OCCURRENCE OF ILLNESS (2003).

III. *PELMAN V. MCDONALD'S CORPORATION*

*Pelman v. McDonald's Corp.*⁴³ is perhaps the best-known example of obesity-related litigation; it provides a good vehicle to explore the differences between a public-health-focused litigation and a more individualist litigation. In 2003, the parents of minors Ashley Pelman and Jazlyn Bradley filed a complaint against McDonald's, alleging both negligence and violations of state consumer protection laws.⁴⁴ The court dismissed this original complaint but permitted the plaintiffs to file an amended complaint at a later date.⁴⁵ In their amended complaint, the plaintiffs alleged only violations of New York consumer protection laws.⁴⁶ Again, the court dismissed the complaint. The plaintiffs appealed the dismissal and won.⁴⁷ The Court of Appeals vacated the lower court's dismissal and remanded the case.⁴⁸

On the return to district court, McDonald's filed a motion for a more definite statement.⁴⁹ Judge Sweet's opinion granting the motion lays the groundwork for the application of public health approaches to the litigation.⁵⁰

In the amended complaint, the plaintiffs alleged that McDonald's engaged in deceptive practices in violation of New York's consumer protection law.⁵¹ Specifically, the complaint alleged the following:

that the combined effect of McDonald's various promotional representations was to create the false impression that its food products were nutritionally beneficial [Count I]⁵² . . . that McDonald's failed adequately to disclose that its use of certain additives and the manner of its food processing rendered certain of its foods substantially less healthy than represented [Count II]⁵³ . . . that McDonald's deceptively represented that it would provide nutritional information to its New York consumers when in reality such information was not readily available [Count III].⁵⁴

As will be seen, McDonald's motion for a more definite statement in response to these allegations and the court's opinion reflect the tensions that

43. 396 F. Supp. 2d 439 (S.D.N.Y. 2005) ("*Pelman III*").

44. *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 520 (S.D.N.Y. 2003) ("*Pelman I*").

45. *Id.*

46. Amended Complaint ¶ 58, *Pelman I*, 237 F. Supp. 2d 512 (No. 02-CV-7821).

47. *Pelman III*, 396 F. Supp. 2d at 442.

48. *Id.* at 512.

49. *Id.* at 439.

50. *See id.*

51. *Id.* at 442.

52. Amended Complaint ¶ 58, *Pelman I* (No. 02-CV-7821).

53. *Id.* ¶¶ 65-66.

54. *Id.* ¶¶ 69-73.

are often present between a individualist focus in litigation and a population focus. Judge Sweet seems responsive to the public health goals and population focus of the complaint.⁵⁵

Focusing rigidly on the individual, McDonald's asked that the plaintiff be required to "identify each advertisement or statement" that is the focus of the complaint; explain "why it is materially deceptive;" verify that the plaintiff saw the advertisement or statement; and "describe briefly how it injured the plaintiff."⁵⁶ McDonald's motion zeroed in on a dispositionist view of the plaintiffs and sought to frame the complaint in individual terms by focusing on proximate causation and individual injury. In ruling on the motion, the court shifted the emphasis to a perspective that focused more on the population and environment.⁵⁷ The basis for the court's ruling is not explicitly one of public health. However, the ruling does make it easier to make population-based arguments.⁵⁸

The court granted McDonald's first two requests: that the plaintiff identify the advertisements or statements and identify how they are deceptive.⁵⁹ Ruling on the third request, that the plaintiffs verify that they had seen or heard each statement, the court held that, "[P]laintiffs need not confirm that each plaintiff saw or heard each advertisement . . . [but] plaintiffs must provide a brief explanation of how plaintiffs were aware of the nutritional schemes they allege to have been deceptive."⁶⁰

Ruling on the fourth request, that the plaintiff describe how the advertisement or statement injured the plaintiff, the court refused to require the plaintiff to plead more specific causation.⁶¹ Instead, the court set aside a showing of injury: "[P]laintiffs need not provide information as to how each advertisement injured each plaintiff. Plaintiffs must, however, outline the injuries that were suffered by each plaintiff 'by reason of' defendant's alleged deceptive nutritional scheme."⁶²

55. *Pelman III*, 396 F. Supp. 2d at 443-46.

56. *Id.* at 443.

57. *Id.* at 445-46.

58. *See id.* The court's opinion is based on two primary factors. First, it made it clear that McDonald's request would have had the effect of transforming a 12(e) motion into a heightened pleading requirement. *Id.* at 444. Second, New York consumer protection law does not require showing reliance to make a claim. *Id.* at 445. Based on these factors, the court made its determination. It should also be noted that this motion and opinion are very early in the litigation, preceding discovery, and the plaintiff's will likely have to survive a motion for summary judgment.

59. *Id.* at 446.

60. *Id.*

61. *Pelman III*, 396 F. Supp. 2d at 446.

62. *Id.* (citations omitted).

IV. APPLYING A POPULATION PERSPECTIVE TO THE COMPLAINT

Plaintiffs must now provide a more definite statement to their claims. The court's ruling in *Pellman* opens the door for plaintiffs to use the tools of public health to make a broader argument about the ubiquity of advertising and its effect on obesity. The broader scope will also move the case from an individualist focus to a broader public-interest focus. There is a substantial and growing literature on the effects of advertising on the consumption behaviors of populations upon which plaintiffs can rely.

The Institute of Medicine (IOM) report on childhood obesity relies on some of the research on advertising and obesity.⁶³ In its summary of the research, the IOM sees a relationship and relies on the tools and methods of public health to make the connection:

The quantity and nature of advertisements to which children are exposed to daily, reinforced through multiple media channels, appear to contribute to food, beverage, and sedentary-pursuit choices that can adversely affect energy balance. It is estimated that the average child currently views more than 40,000 commercials on television each year, a sharp increase from 20,000 commercials in the 1970's....Dietary and other choices influenced by exposure to these advertisement may likely contribute to energy imbalance and weight gain, resulting in obesity...[B]ased on children's commercial recall and product preferences, it is evident that advertising achieves its intended effects...[A]n extensive systematic literature review concludes that food advertisements promote food purchase requests by children to parents, have an impact on children's product and brand preferences, and affect consumption behavior.⁶⁴

By focusing on data similar to those found in the IOM report that describes the number of commercials and the percentage of children who watch them, plaintiffs can move forward in showing the effect of the ads. Using current research, the plaintiffs can make an initial description of how and when the plaintiffs were "aware" of the ads. Applying basic epidemiology, they can make an initial description of their injury.

Epidemiology is the primary tool used in public health.⁶⁵ It is the study of "health events in a population...to understand disease process and outcome, [and] to determine factors in causation."⁶⁶ Epidemiologic tools allow researchers to make associations between a particular environmental factor

63. INSTITUTE OF MEDICINE, PREVENTING CHILDHOOD OBESITY: HEALTH IN THE BALANCE 173 (2004), available at <http://www.iom.edu/CMS/378815867/22596.aspx> (last visited May 9, 2006).

64. *Id.*

65. See KOEPEL & WEISS, *supra* note 42.

66. TULCHINSKY & VARVIKOVA, *supra* note 2, at 114.

and the health event.⁶⁷ With sufficient data, researchers can also attribute causation to these associations. One can apply these tools to explore how McDonald's marketing behavior and nutritional schemes injure the population of which the plaintiffs are members. Epidemiology can show the nature of the injury and can express the plaintiffs' risk for the injury.

These public health tools can be applied to provide the more definite statement required and, at the same time, begin to reframe the complaint and the litigation as focused on public health. This focus on the environment and the marketing situation the *Pellman* plaintiffs find themselves in will shift focus away from the dispositionist framework upon which the industry relies. It will be met with a strong industry response.

V. SEEKING SPECIAL PROTECTION

Just as a suit like *Pelman* is beginning to focus on the broader public health issues, the food industry has aggressively lobbied state governments to bestow special protection and ensure that the focus remains upon "personal responsibility." This campaign has radically altered the field for litigation in many states across the country. The National Restaurant Association (NRA) is the primary force behind this effort.⁶⁸ In 2002 and 2004, "the food and restaurant industry gave a total of \$5.5 million to politicians in . . . states that have passed laws shielding companies from obesity liability."⁶⁹ Currently, twenty-one states have passed laws providing special protection to the food industry.⁷⁰ There are twenty-six states where such bans on lawsuits are currently pending.⁷¹ A federal version of the legislation was approved by the House of Representatives again this year.⁷²

These bills are generally alike in their provisions. The Personal Responsibility in Food Consumption Act of 2005 ("H.R. 554") is illustrative for purposes of this discussion and is generally similar to the various state bills.⁷³ H.R. 554 does not permit any "qualified civil liability action" in state

67. See KOEPEL & WEISS, *supra* note 42, at 179.

68. Melanie Warner, *The Food Industry Empire Strikes Back*, N.Y. TIMES, July 7, 2005, at C1.

69. *Id.*

70. NATIONAL RESTAURANT ASSOCIATION, STATE ACTION: FRIVOLOUS OBESITY LAWSUITS/MENU LABELING, available at <http://www.restaurant.org/government/state/nutrition/index.cfm> (last visited October 30, 2005).

71. *Id.* Pending includes both bills that have been filed and pre-filed. *Id.*

72. Jeremy Grant, *Cheeseburger Bill Stirs Controversy Over Blame for Obesity*, FIN. TIMES, Oct. 22, 2005, at 8.

73. Personal Responsibility in Food Consumption Act, H.R. 554, 109th Cong. (2005). It is not possible to provide a detailed summary of all the varying state statutes that have been passed and the bills that are pending. The bills generally fit the pattern of H.R. 554 with

or federal courts and, remarkably, dismisses pending suits that would be defined as “qualified civil liability actions.”⁷⁴ The bill then provides an expansive definition of what constitutes a forbidden lawsuit:

a civil action brought by any person against a manufacturer, seller, marketer, distributor, advertiser, or a trade association, for damages, penalties, declaratory judgment, injunctive or declaratory relief, restitution, or other relief arising out of, related to or resulting in injury or potential injury resulting from a person’s consumption of a qualified product and weight gain, obesity, or health condition that is associated with a person’s weight gain or obesity⁷⁵

The bill does not forbid suits based on a claim of breach of express or implied warranty⁷⁶ nor those brought under a statute applicable to “marketing, distributing, advertisement, labeling, or sale of the products.”⁷⁷ However, the bill does qualify suits brought under such a statute. H.R. 554 stays discovery⁷⁸ and would seem to impose heightened pleading requirements upon the plaintiff.⁷⁹ The effect of these laws on private litigation would be profound. Yet, on close inspection, the strategic goal of this type of legislation becomes clear. That strategic goal is not merely to limit liability in individual lawsuits.

H.R. 554, and various state bills like it, are designed simply to focus attention back upon the individual and to reinforce a dispositionist perspective. The goal is to reaffirm the individual’s responsibility and continually de-emphasize the environmental and public character of the problem. H.R. 554 makes this purpose explicit:

a person’s weight gain, obesity, or a health condition associated with a person’s weight gain or obesity is based on a multitude of factors, including genetic factors and the lifestyle and physical fitness decisions of individuals, such that a person’s weight gain or obesity cannot be attributed to the consumption of any specific food or beverage; and . . . because fostering a culture of acceptance of personal responsibility is one of the most important ways to promote a healthier society, lawsuits seeking to

some local variation. The Public Health Advocacy Institute has provided some materials on various states *available at* <http://www.phaionline.org> (last visited May 9, 2006). The best source of information on legislation in each state is the National Restaurant Association’s website at <http://www.restaurant.org/> (last visited May 9, 2006).

74. Personal Responsibility in Food Consumption Act, H.R. 554, 109th Cong. § 3 (2005).

75. *Id.* § 4(5A).

76. *Id.* § 4(5)(B)(i), as long as this claim is also not related to obesity.

77. *Id.* § 4(5)(B)(ii).

78. *Id.* § 3(c).

79. *Id.* § 3(d). It is assumed that this provision would impose pleading requirements greater than those required under FED. R. CIV. P. 8.

blame individual food and beverage providers for a person's weight gain, obesity...are not only legally frivolous, but also harmful to a healthy America.⁸⁰

These laws represent industry capture at its full extent. The bills are intended to protect the industry, to reinforce a discourse focused on personal responsibility, and to shape the public landscape such that effective public health policy is no longer possible. The National Restaurant Association worked closely with Representative Keller, the sponsor of H.R. 554, to construct and pass the bill in the House and with Senator McConnell to attempt the same in the Senate.⁸¹ The National Restaurant Association's activity is not merely to support pending legislation. Often, the National Restaurant Association is the impetus for and author of the legislation.⁸²

The experience of legislators in Arkansas further supports the thesis that these bills are merely industry protection rather than acts for the public benefit, or even acts to promote individual responsibility. In February 2005, Rep. Sam Ledbetter introduced H.B. 1823 in the Arkansas General Assembly.⁸³ The Arkansas Commonsense Consumption Act was almost the same as other bills shielding the food industry from liability in other states. There was one significant difference, however. The Arkansas bill added provisions requiring "chain restaurants,"⁸⁴ defined as having ten or more locations nationally, to provide limited menu labeling in order to receive the protection from liability.⁸⁵ The proposed statute would have required the chain restaurants to place nutritional information on their menu boards and/or menus that included, at a minimum, the number of calories, the "grams of saturated fat plus trans fat," and the amount of sodium for each item sold.⁸⁶

The Arkansas Commonsense Consumption Act was opposed by the National Restaurant Association and died in committee.⁸⁷ The National Restaurant Association does not classify the failed Arkansas legislation as "State Frivolous-Lawsuit Legislation."⁸⁸ Instead, it classifies it as a "Menu-Labeling Bill" which it opposes.⁸⁹ The Arkansas bill brought together two

80. *Id.* § 2(a)(3)-(4).

81. Warner, *supra* note 68;

82. *Id.* In Colorado, the National Restaurant Association was the impetus for the bill, wrote it, and also "solicited the views of companies like Outback Steakhouse and Texas Roadhouse, which gave their approval." *Id.*

83. Michael Wickline & Jake Bleed, *Bill Filed to Shield Food Sellers From Suits. Proposal Aimed at Weight-gain, Obesity Claims, Requires Menu Data*, ARK. DEMOCRAT-GAZETTE, Feb. 19, 2005, at 2; H.B. 1823, 85th Gen. Assem. Reg. Sess. (Ark. 2005).

84. H.B. 1823, § 16-127-103(1), 85th Gen. Assemb. (Ark. 2005).

85. *Id.* § 16-127-105.

86. *Id.* § 16-127-105(a)(1)(A).

87. NATIONAL RESTAURANT ASSOCIATION, *supra* note 70.

88. *Id.*

89. *Id.*

themes that should have been complementary. First, it emphasized “personal responsibility” by prohibiting lawsuits.⁹⁰ Second, it provided a means for individuals to get the information they need to make responsible choices by requiring menu labels.⁹¹ Regardless of the compatibility of the provisions, the National Restaurant Association opposed the legislation. The industry’s goal is not to foster personal responsibility nor to protect consumers from paternalism by the public health community. Its goal is to avoid regulation and state intervention.

VI. CONCLUSION

Public health problems require solutions that no individual could implement on her own. Just as the actual contours of a particular problem define it as being a public health problem, so does the paradigm or situation in which the problem is located. Obesity and overweight are clearly public health problems given their scope and complexity. But there are strong institutional interests whose sole goal is to focus on defining the situation as one around “personal responsibility” and dispositionist views of human agency. *Pelman v. McDonald’s* is positioned to become a powerful tool to help counter the environment of dispositionism. Doing so opens the field of discussion to the possibility of a population-based solution to the problem. As long as the focus is on personal responsibility, there can be no public, and, thus, no real solution to the problem of obesity.

90. *Id.*

91. *Id.*

