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NEW YORK CITY'S PUBLIC HEALTH INITIATIVES:  
OBESITY AND THE NANNY STATE

by

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INTRODUCTION

In light of the obesity epidemic and associated chronic diseases that are driving up health care costs, federal, state and local governments are attempting to regulate food-industry practices in the interest of public health. This paper will provide a case study of New York's initiatives to ban trans-fats, require menu labeling, and, most recently, limit portion size. The legal, scientific, health and financial justifications for such controls will be examined. Policy recommendations will focus on the optimal balance between government regulation and the free marketplace, the costs imposed on business versus the benefits anticipated, the use of mandates versus incentives to change behavior, and the role of personal responsibility in health-related decisions.

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## HISTORICAL BACKGROUND

“Those who watch with anxiety the upward movement of the weighing machine indicator will follow with interest the progress of the fat-reducing contest which began yesterday and will continue for one month. One hundred fat men and women who are to be restored to lines of grace were gathered on the roof of Madison Square Garden and addressed by Dr. Royal S. Copeland, (New York City) Health Commissioner. For a month, he said, the contestants would follow a program of diet and exercise and the winners would be awarded prizes on Nov. 23, at the Health Convention in Grand Central Plaza.”<sup>1</sup>

While the above news item reads like a synopsis of the pilot for the popular television show “The Biggest Loser,” it’s actually an excerpt from *The New York Times*’ close coverage of New York City’s 1921 diet contest. The Health Department set the rules and even created the menus for the contestants. The portion-controlled daily bill of fare was published and looks remarkably like many of today’s popular diets. Contestants were weighed and examined by a Board of Health physician and an exercise regimen was prescribed.<sup>2</sup> Weekly weights, successes, and confessions of “unauthorized meals” were duly reported to the public.<sup>3</sup> The Health Commissioner even questioned the spouses of contestants to determine whether “fat reducing” made for more harmonious home life.<sup>4</sup>

Perhaps New York City’s current approach to diet and health stems from this early tradition, but history is replete with human struggles over weight and body image. In medieval times, religious and moral views of gluttony as a sin predominated, while later in the European romantic era, the focus was less on the act of overeating and more on the shape of the glutton. Though our own Ben Franklin led a notably profligate life during his time in France, he preached simplicity

and eating only for necessity in his *Poor Richard's Almanac*. Indeed, dieting rituals and promising reducing cures are an integral part of our cultural history, ranging from the ascetic health reformer, Reverend Sylvester Graham's first weight watchers in the 1830's, to the Jane Fonda Workout of the 1980's.<sup>5</sup>

What is different now is that the issue of obesity has shifted from a personal problem to an alarming matter of public health. Two-thirds of American adults are classified as overweight, and 36% of adults and 17% of children are obese. If current trends continue, by 2030 nearly half of American adults may be obese, and globally, the statistics are equally dire. Since 1990, obesity has grown faster than any other cause of disease.<sup>6</sup> It is commonly understood that increasing rates of obesity impose higher health care costs on society for the treatment of chronic illnesses such as Type II diabetes, hypertension, heart disease, and damage to weight-bearing joints. The Institute of Medicine estimates a \$150-\$190 billion per year price tag for obesity-related illnesses. Health-care costs for obese patients are roughly 40% higher than for those of normal weight.<sup>7</sup> If the government ultimately is going to pick up a significant portion of that tab, it has a strong stake in policies to fight obesity.

First Lady Michelle Obama's "Let's Move!" campaign and focus on childhood obesity helped garner support for the 2010 improvements to the school-lunch program adopting new dietary guidelines.<sup>8</sup> She also has focused attention on both urban and rural "food deserts," low-income communities where individuals cannot improve their eating habits and lose weight because they reside a significant distance from full-fledged grocery stores. Some of the \$373 million of the 2010 federal stimulus package earmarked for health and wellness efforts has been used to bring healthy, affordable foods to economically

disadvantaged communities.<sup>9</sup> Such behavioral “nudges,” or “soft paternalism,” are designed to make healthy choices desirable, without annoying people.<sup>10</sup> The question is, do they work?

In light of the national health imperative, New York City’s Health Department has gone well beyond diet contest incentives and subtle nudges. During his long tenure, Mayor Michael Bloomberg aggressively pushed multiple health-based measures to change consumer behavior. In 2002, New York City banned public smoking in the city’s bars and restaurants. At the mayor’s urging, in 2005, New York was the first city to force restaurants and other food vendors to phase out the use of artificial trans-fats, which have been linked to obesity and heart disease.<sup>11</sup> Then in 2008, New York became the first city to pass a law requiring food service providers to post calorie counts on menus.<sup>12</sup> New York successfully defended the ensuing legal challenge, and many cities followed New York’s lead. In 2012 a federal law requiring any restaurant chain with more than 20 locations to publish calorie counts on their menus went into effect. In 2011, the mayor banned smoking in outdoor public venues, including public parks, plazas and beaches. He repeatedly attempted to regulate consumption of sugary sodas, and salt was also on the mayor’s hit list. He wanted packaged food makers and restaurants to reduce sodium by 25% to lower high blood pressure and heart disease.<sup>13</sup>

The mayor’s identification of soda as a chief culprit in the obesity epidemic is well supported. Noted nutritionist, Marian Nestle, calls soda “liquid candy,”<sup>14</sup> and a recent study from the University of California attributed 20% of America’s weight gain between 1977 and 2007 to sugary drinks.<sup>15</sup> In 2010, Mayor Bloomberg proposed barring people from using food stamps to purchase carbonated and non-carbonated beverages

sweetened with sugar or high-fructose corn syrup. City officials estimated that residents spent \$75-\$135 million in food stamp benefits on such beverages annually. Arguing that the initiative would give New York families more money to spend on healthy food and beverage alternatives, Mr. Bloomberg sought permission from the Department of Agriculture to test its proposal in a two-year project. Fearing that any restrictions on soft drinks would set a precedent for the government to distinguish between good and bad foods (rather than bad diets), the food industry united in a fierce lobbying effort to defeat the request. Allies included anti-hunger groups and members of the Congressional Black Caucus who worried that the measure would stigmatize food stamp recipients.<sup>16</sup> The Department of Agriculture ultimately rejected the proposal as too difficult to enforce.<sup>17</sup>

Concurrent efforts included the city's graphic anti-soda advertising campaign and the mayor's endorsement of the state legislature's 2010 attempt to pass a penny-per-ounce tax on soda to generate revenue for education and health care.<sup>18</sup> That measure also failed to pass.<sup>19</sup> Then in May of 2012, the mayor proposed a "Portion Cap Rule" on the sale of sweetened drinks in containers larger than sixteen ounces at restaurants, delis, theatres, stadiums, and food courts. The New York City Board of Health approved the ban in September of 2012, and it was scheduled to go into effect March 12, 2013.<sup>20</sup> The American Beverage Association immediately responded with a vivid advertisement depicting Mayor Bloomberg as a nanny, and late night talk show hosts had a field day.<sup>21</sup> Opponents filed suit contending that such regulations were properly within City Council's purview. Industry groups called the limits unfair and argued that they would disproportionately affect small-business owners who would lose sales to nearby drug and grocery stores that were not affected. City attorneys asserted the Board of Health's authority to enact regulations to protect public health,

citing statistics that 58% of New York City adults and nearly 40% of city public school students in eighth grade or below are obese or overweight.<sup>22</sup> Mayor Bloomberg urged the state to remove any inconsistencies by extending the city's new law to those establishments not within the city's jurisdiction, and thus not covered by the ban.<sup>23</sup> Table 1 below delineates the beverages covered by the ban and the affected vendors.

One day before the Portion Cap Rule was to go into effect, State Supreme Court Judge Milton Tingling invalidated the law on the grounds that the city Board of Health lacked the jurisdiction to enforce it. He further held that the rule was "arbitrary and capricious" because it would not accomplish what it set out to do.<sup>24</sup> In July, 2013, New York's Appellate Division, First Department upheld Justice Milton Tingling's decision and reasoning. It found that the limit on sodas and other sugary drinks arbitrarily applied to only some sugary beverages and some places that sell them. Additionally, the court held that the Board of Health exceeded the bounds of its lawfully delegated authority as an administrative agency when it promulgated the ban.<sup>25</sup> Mayor Bloomberg vowed to continue the fight and appealed the decision to the New York State Court of Appeals, which agreed to hear the case.<sup>26</sup>

Meanwhile, the three big soft-drink companies are taking note. In a move aimed at stopping other cities from adopting similar rules, Coca-Cola, PepsiCo and Dr. Pepper Snapple Group voluntarily began displaying their products' calorie information on vending machines. A national campaign including messages intended to push consumers toward less sugary drinks is expected. The New York ban on large-sized sodas already has inspired serving-size and soda-tax proposals in other cities,<sup>27</sup> and many New York City establishments are voluntarily enacting restrictions on super-sized beverages.<sup>28</sup> Yet on a contrary note, Mississippi, which has the nation's

highest rate of obesity, recently passed an “Anti-Bloomberg” bill. The new law declares that only the state legislature has the authority to regulate the sale and marketing of food on a statewide basis, thus preventing counties, districts and towns from enacting portion size controls. Signing the new measure into law, Mississippi Governor Phil Bryant asserted that the government should not “...micro-regulate citizens’ dietary decisions...The responsibility for one’s personal health depends on individual choices about a proper diet and appropriate exercise.”<sup>29</sup>

### LEGAL ANALYSIS OF THE PORTION CAP RULE

In September of 2012, the New York City Board of Health passed §81.53 of the Health Code limiting the container size of sugary drinks to 16 ounces. The regulation specifically provides that “[a] food service establishment may not sell, offer, or provide a sugary drink in a cup or container that is able to contain more than 16 fluid ounces”<sup>30</sup> and that “[a] food service establishment may not sell, offer, or provide to any customer a self-service cup or container that is able to contain more than 16 fluid ounces.”<sup>31</sup>

Prior to implementation, multiple plaintiffs representing groceries, delicatessens and “small stores” that regularly sell soda in cups, brought an action in New York County Supreme Court challenging the enactment. Unlike previous challenges to Mayor Bloomberg’s public health regulations, the central issue in this case was based on a balance of powers argument. The soda advocates argued that the Board of Health had no power to pass legislation because such action is reserved to either the New York City Council or the New York State Legislature.

Agreeing with the basic tenets of this argument, Judge Tingling’s ruling was based on a technical balance of powers

argument. The court relied on the seminal New York case of *Boreali v. Axelrod*<sup>32</sup> in its decision. That case involved a 1980's law passed by the New York State legislature banning smoking in public places, specifically, libraries, museums, theaters and public transportation facilities.<sup>33</sup> When attempts by the legislature to expand the law to other venues failed, the Public Health and Planning Council, an administrative agency of New York State, "promulgated the final set of regulations prohibiting smoking in a wide variety of indoor areas that are open to the public, including schools, hospitals, auditoriums, food markets, stores, banks, taxicabs and limousines."<sup>34</sup> The Public Health and Health Planning Council is empowered via Public Health Law S225 "at the request of the commissioner, to consider any matter relating to the preservation and improvement of public health."<sup>35</sup> The question before the court in *Boreali* was whether "the challenged restrictions were properly adopted by an administrative agency acting under a general grant of authority and in the face of the Legislature's apparent inability to establish its own broad policy on the controversial problem of passive smoking."<sup>36</sup>

While a legislature may delegate to an administrative agency, the grant of power must be "within reason." The limitation of the delegation is set out in the New York State Constitution: "The legislative power of this state shall be vested in the senate and assembly."<sup>37</sup> To determine whether or not the delegation exceeds the scope of the New York Constitution, the *Boreali* court adopted a four-part test that is directly applicable to the soda case. The four factors to be considered are:

1. *Whether the administrative promulgation weighed different factors when writing the enactment; is it laden with economic and social concerns?*

In *Boreali*, the court found that “Striking the proper balance among health concerns, cost and privacy interests... is a uniquely legislative function...”<sup>38</sup> and proof that the administrative agency had exceeded its authority. Likewise, in the soda case, the court found that, “The regulation is laden with exceptions based on economic and political concerns.”<sup>39</sup> The court noted, for example, that the Big Gulp at a 7-11 is exempt as is soy-based milk; but other milk substitutes such as almond, hemp and rice milk are not exempt. The court interpreted the random nature of the exemptions, and the suspicions that the rules were applied based on political, social and economic concerns, as characteristics of legislative behavior.

2. *Was the regulation created on a clean slate, thereby creating its own comprehensive set of rules without the benefit of legislative guidance?*

The *Boreali* court stated this second factor without elaborating. In the soda case, however, the court engaged in an expansive review of the extent of the Board of Health's authority. The Board argued that it had an “extraordinary grant of authority” and could implement whatever rules necessary for the health of the citizens of New York City,<sup>40</sup> but the court disagreed with such sweeping powers. To determine the scope and limitations of the Board of Health's powers, the court conducted an exhaustive analysis of the City Charter. It then concluded that “the intention of the legislature with respect to the Board of Health is clear. It is to protect the citizens of the city by providing regulations that prevent and protect against communicable, infectious, and pestilent diseases.”<sup>41</sup> Given that obesity is a disease, albeit not communicable or infectious, one could argue that the City Charter allows its regulation and thus by implication the regulation of soda cup sizes. The court

found, however, that “one thing not seen in any of the Board of Health’s powers is the authority to limit or ban a legal item under the guise of ‘controlling chronic disease’ as the Board attempts to do herein.”<sup>42</sup> Thus the power to pass regulations such as the Portion Cap Rule lies with the New York City Council, the legislative body of the City of New York, and not the Board of Health.

3. *Did the agency act in an area in which the Legislature had repeatedly tried--and failed--to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions?*

In *Boreali* the state legislature had banned smoking in some public places. The administrative agency then tried to expand the legislature’s ban to various indoor areas. It is significant that the state legislature had already acted in the smoking cases, because here the City argued that no legislation on cup size was ever passed and therefore, this prong of the test was not violated. The court disagreed, however, noting that “[a]ddressing the obesity issue as it relates to sugar-sweetened drinks, or sugary drinks, is the subject of past and ongoing debate within the City and State legislatures.”<sup>43</sup> According to the court, no specific legislation enactments are needed to meet this prong, as long as discussions have occurred in a legislative body.

4. *Does the regulation require the exercise of expertise or technical competence on behalf of the body passing the legislation?*

Of the four factors in *Boreali*, this was the only one that the court found in favor of the City because hearings had been held and some modicum of expertise was evident in the

development of the Portion Cap Rule. Nevertheless, the other three prongs of *Boreali*, when taken in their totality, evidenced that the rule exceeded the scope of the Board of Health's powers.

If the *Boreali* analysis failed to convince, the court further held that the rule was laden with arbitrary and capricious consequences. The Board was entitled to judicial deference and had acted reasonably pursuant to the standards of an Article 78 proceeding when it enacted a rule on the stated premise of addressing rising obesity rates. Nonetheless, an administrative regulation is upheld only if it has a rational basis.<sup>44</sup> The court went on to explain that "It is arbitrary and capricious because it applies to some but not all food establishments in the City, it excludes other beverages that have significantly higher concentrations of sugar sweeteners and/or calories on suspect grounds, and the loopholes inherent in the Rule, including but not limited to no limitations on refills, defeat and/or serve to gut the purpose of the Rule."<sup>45</sup>

Judge Tingling ended his unusually critical opinion with disdain: "The Portion Cap Rule, if upheld, would create an administrative Leviathan and violate the separation of powers doctrine. The Rule would not only violate the separation of powers doctrine, it would eviscerate it. Such an evisceration has the potential to be more troubling than sugar sweetened beverages."<sup>46</sup>

#### COST/BENEFIT ANALYSIS AND FINANCIAL IMPLICATIONS

It is not easy to determine the extent of the economic harm asserted by the various trade organizations that brought this proceeding. The large beverage companies such as Coca Cola have operations in more than two hundred countries.

According to analyst Thomas Mullarkey, Coca-Cola “generate(s) roughly 70% of its revenue and about 80% of its operating profit from outside of the United States.”<sup>47</sup> Unless the Portion Cap Rule became a common practice in every city and town around the world, analysts are not expecting any significant adverse effects on revenue. For locations in New York City, clearly there would be some slippage in profit due to the fact that large size sodas generate very high profit margins. It is not clear if this loss of profit would be made up by an increase in sales of other equally profitable but not banned beverages such as smoothies. Mullarkey noted that while the super-sized ban is “on the margin bad” for Coca-Cola and Pepsi Co, it’s not “...bad enough to move the needle on their stock prices”.<sup>48</sup> In addition, while describing his valuation of Coca-Cola in his report, under the list entitled “Bears Say,” the only regulatory related concern he expressed was that “Governments may look to increase taxes on sugary drinks, thereby, stunting Coke’s volume growth trajectory.”<sup>49</sup>

More immediately impacted would be the National Association of Theatre Owners of New York State. Executive Director Robert Sunshine said that beverages contribute more than 20% to their bottom line and 98% of soda sales are in containers greater than 16 ounces.<sup>50</sup> Plaintiffs also argued that the ban would disproportionately hurt small mom-and-pop stores and minority-owned small businesses, which would face greater competition from larger convenience stores like 7-Eleven and other exempt establishments under the city’s patchwork of covered and non-covered establishments.<sup>51</sup> It is worth noting that Coca-Cola maintains significant ties to the African American community through its contributions to the N.A.A.C.P.’s Project Help, a program with a health education focus.<sup>52</sup> Likewise, Coca-Cola is closely connected with the Hispanic Federation, and last year hired their former president.<sup>53</sup>

As far as the suppliers of cups are concerned, The Food Service Packaging Institute President Lynn Dyer said in court documents that reconfiguring 16 ounce cups that are actually made slightly bigger to leave room at the top, is expected to take cup manufacturers three months to a year and cost them between \$100,000 to several million dollars.<sup>54</sup> Though this organization did not join the suit, their concerns raise the environmental issue whether the proposed ban would lead to higher consumption and the disposal of far more small cups. Another packaging problem is illustrated by Honest Tea, whose parent company is Coca-Cola. They sell sweetened tea in a bottle containing 16.9 ounces. This could pose a major problem for them as they would need to shift manufacturing to adjust for the extra .9 ounces.<sup>55</sup> In the short run, vendors may have to stock more inventory (replace few large cups with more small cups), take up more space for the storage, and pay more to acquire small cups.

While it appears that The American Beverage Association and The National Restaurant Association bankrolled the litigation, it is fair to say that they brought together a diverse coalition with legitimate gripes. Indeed, though not a party to the suit, a group consisting of 3,000 organizations, called “New Yorkers for Beverage Choices,” has expressed its concern about the size ban.<sup>56</sup> Although many of the 25,000 food service venues in the five boroughs combined are taking a wait and watch approach, others are taking preemptive steps to avoid paying the \$200 fine.<sup>57</sup> For example, Dallas BBQ, which owns 10 restaurants in New York City, has placed an order for new 16 ounce size glasses.<sup>58</sup> Beverage companies like Coca-Cola have been taking steps to diversify their operations geographically through their presence in many countries around the world as well as by the type of beverages they sell, ranging from NOS energy drink, to plain and vitamin water.<sup>59</sup> It has also printed flyers to explain the new rules.<sup>60</sup> As

noted earlier, the big three soft drink companies have taken some voluntary steps to head off additional regulation.

## POLICY IMPLICATIONS AND RECOMMENDATIONS

It is difficult to predict what will happen to the Portion Cap Rule on appeal. Countering the beverage industry's alliance with minority business interests, an impressive array of fifteen professional organizations and medical experts submitted a strong amicus brief in support of the city's appeal. Many of them represent minority groups and contend that the chronic diseases related to obesity are disproportionately borne by the city's poor who lack adequate access to healthy food choices. They offer ample evidence of the link between obesity and soda consumption, and they maintain that the rule is tailored to meet its objectives. All administrative agencies "draw lines" and the Board of Health met the rationality test by setting a rule that applied to all businesses within its jurisdiction.<sup>61</sup> Though Judge Tingling and the Appellate Division paid little credence to similar arguments, the city may fair better before the New York State Court of Appeals. It looks likely that the new mayor Bill de Blasio, who took office in January, 2014, will pursue the appeal. During his campaign, de Blasio confirmed his support for Bloomberg's approach: "...I believe the mayor is right on this issue," he said. "We are losing the war on obesity ... It's unacceptable. This is a case where we have to get aggressive."<sup>62</sup>

Even if the city prevails, enforcement and evaluation of the effectiveness of the restrictions will remain difficult. The rule discriminates based on venue as well as type of beverage served, and the numerous loopholes identified by the plaintiffs allow consumers ample opportunity to locate a super-sized sugary drink. While the economic harm the plaintiffs allege is

speculative at best, they are correct that a broad state-wide legislative approach would be preferable. As part of their separation of powers argument, plaintiffs enumerated a long list of failed proposals to limit and/or tax sugar-sweetened beverages.<sup>63</sup> Naturally, the beverage industry avoids any reference to their strenuous (and expensive) lobbying efforts to defeat such measures. The industry instead adopts the traditional personal responsibility and freedom of choice mantra reflected in the earlier quoted statement by Mississippi's Governor Bryant.

In the context of Mayor Bloomberg's long struggle to do something about the obesity epidemic and its resulting high costs to the city, the Portion Cap Rule makes some sense. Behavioral psychologists agree that portion size matters, and artificial barriers help people decide when to stop.<sup>64</sup> One could conclude that the real reason the soda industry is worried about any point of sale limitation is that it might work. Though this measure seems especially paternalistic and problematic because of its multiple exemptions, the case has highlighted the critical need to do something about the behaviors that lead to obesity. If the strong "nudge" approach will not pass judicial review, then it's time for state and federal governments to take more draconian, across the board action. High junk food "fat" taxes, the removal of farm subsidies for corn products, and a prohibition on the use of food stamps for high-calorie sweetened foods would all go a long way toward forcing people to take meaningful responsibility for their food choices.

**Table 1**

<b>Drinks Included in Soda Ban</b>	<b>Drinks Exempt from Soda Ban</b>
<ul style="list-style-type: none"> <li>• All high-sugar drinks over 16 ounces</li> <li>• Fountain drinks or prepackaged bottles or cans</li> <li>• Sweetened Teas</li> <li>• Energy Drinks</li> <li>• Fruit Drinks with more than 25 calories per 8 ounces</li> </ul>	<ul style="list-style-type: none"> <li>• Diet Sodas</li> <li>• Drinks that are at least 70% fruit or vegetable juice</li> <li>• Alcoholic Beverages</li> <li>• Dairy-based drinks like lattes and milkshakes that contain more than 50% milk</li> </ul>

<b>Businesses that Must Comply</b>	<b>Businesses Not Included</b>
<ul style="list-style-type: none"> <li>• Sit-down restaurants</li> <li>• Fast-food restaurants</li> <li>• Delis</li> <li>• Movie theatres</li> <li>• Stadiums</li> <li>• Mobile food carts and trucks</li> </ul>	<ul style="list-style-type: none"> <li>• Supermarkets</li> <li>• Convenience stores</li> <li>• 7-Eleven</li> <li>• Bodegas</li> <li>• Gas Stations</li> </ul>

- Any other establishment that receives a grade from the city health department.
  - Establishments governed by the New York State Health Department
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Source: Sommer Mathis, *Everything You Need to Know About the New York Soda Ban*, THE ATLANTIC CITIES (Sept. 13, 2012), <http://www.theatlanticcities.com/politics/2012/09/everything-you-need-know-about-new-york-soda-ban/3263/>.<sup>65</sup>

### Endnotes

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<sup>1</sup> *Dr. Copeland Starts Fat-Reducing Contest*, N.Y. TIMES (Oct. 19, 1921), <http://query.nytimes.com/mem/archive-free/pdf?res=9507E3D8103CE533A2575AC1A9669D946095D6CF>.

<sup>2</sup> *Id.*

<sup>3</sup> *481 3-4 Pounds Lost by Fifty Fat Women*, N.Y. TIMES (Nov. 1, 1921), <http://query.nytimes.com/mem/archive-free/pdf?res=9504E6DB103EEE3ABC4953DFB767838A639EDE>.

<sup>4</sup> *Finds Fat Reducing Makes Happy Homes*, N.Y. TIMES (Nov. 3, 1921), <http://query.nytimes.com/mem/archive-free/pdf?res=9E03E7D9103EEE3ABC4B53DFB767838A639EDE>.

<sup>5</sup> HILLEL SCHWARTZ, *NEVER SATISFIED: A CULTURAL HISTORY OF DIETS, FANTASIES AND FAT* 3-24 (Doubleday 1990) (1986).

<sup>6</sup> *The Big Picture*, ECONOMIST, Dec. 15, 2012, at 3. The definitions of overweight and obesity are based on measures of body mass index.

<sup>7</sup> *Id.* See also *The Nanny State's Biggest Test*, ECONOMIST, Dec. 15, 2012, at 13.

<sup>8</sup> *The Nanny State's Biggest Test*, *supra* note 7.

<sup>9</sup> Jennifer Couzin-Frankel, *Tackling America's Eating Habits, One Store at a Time*, SCIENCE, Sept. 21, 2012, at 1473- 75.

<sup>10</sup> *The Nanny State's Biggest Test*, *supra* note 7.

<sup>11</sup> Unlike the Portion Cap Rule, the New York City Council enacted ratifying legislation to expressly incorporate the ban on artificial trans-fat into the Administrative Code. See N.Y.C. LOCAL LAW No. 012 (Mar. 28, 2007), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=446729&GUID=02C54DF5-DE14-4E6B-A98B-3CFECEA20274&Search=&Options=>.

<sup>12</sup> New York City Board of Health Regulation §81.50 required that all restaurant chains with fifteen or more restaurants post nutritional information on their menus. Unlike the trans-fat ban, this mandate was challenged in court, by *New York State Restaurant Association v. New York City Board of Health*, No. 08 Civ. 1000 (RJH), 2008 WL 1752455 (S.D.N.Y Apr. 16, 2008). The plaintiffs raised two challenges. First, the Restaurant Association argued that the Board of Health mandate was preempted by the federal Nutrition Labeling and Education Act (the "NLEA"), Pub. L. No. 101- 535, § 104 Stat. 2353 (1990); and second, that the mandatory disclosure violated First Amendment rights. The Court rejected the preemption doctrine argument on the grounds that the federal law explicitly left such regulation to local entities; and that under traditional preemption analysis, a health and safety argument is within the purview of the States. With regard to the First Amendment claim, since Regulation 81.50 "compels only the disclosure of 'purely factual and uncontroversial commercial information-the calorie content of restaurant menu items' and such disclosure 'attempts to address a state policy interest by making information available to consumers,' the Regulation passes constitutional muster as long as there is a rational connection between the disclosure requirement and the City's purpose in imposing it." The district court

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denied the preliminary injunction and stay. The appellate court affirmed, finding that Regulation §81.50's calorie disclosure rules are reasonably related to its goal of reducing obesity##. N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 136 (2d Cir. 2009).

<sup>13</sup> Alice Park, *The New York City Soda Ban, and a Brief History of Bloomberg's Nudges*, TIME, May 31, 2012.

<sup>14</sup> MARION NESTLE, FOOD POLITICS 198 (2007) (citing nutritional analysis by the Center for Science in the Public Interest).

<sup>15</sup> *Food for Thought*, ECONOMIST, Dec. 15, 2012, at 10.

<sup>16</sup> Robert Pear, *Soft Drink Industry Fights Proposed Food Stamp Ban*, N.Y. TIMES, Apr. 29, 2011, [http://www.nytimes.com/2011/04/30/us/politics/30food.html?\\_r=0](http://www.nytimes.com/2011/04/30/us/politics/30food.html?_r=0).

<sup>17</sup> N.Y.C. LOCAL LAW No. 012 (Mar. 28, 2007), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=446729&GUID=02C54DF5-DE14-4E6B-A98B-3CFECEA20274&Search=&Options=>.

<sup>18</sup> A.G. Sulzberger, *Bloomberg Says a Soda Tax 'Makes Sense,'* N.Y. TIMES, Mar. 7, 2010, <http://www.nytimes.com/2010/03/08/nyregion/08soda.html>.

<sup>19</sup> N.Y.C. LOCAL LAW No. 012 (Mar. 28, 2007), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=446729&GUID=02C54DF5-DE14-4E6B-A98B-3CFECEA20274&Search=&Options=>.

<sup>20</sup> N.Y.C. HEALTH CODE § 81.53. *See also* Michael Howard Saul, *NYC Board of Health Passes 'Soda Ban,'* WALL ST. J., Sept. 13, 2012, <http://blogs.wsj.com/metropolis/2012/09/13/nyc-board-of-health-passes-soda-ban/>.

<sup>21</sup> Cass R. Sunstein, *It's For Your Own Good!*, NEW YORK REVIEW OF BOOKS (Mar. 7, 2013), <http://www.nybooks.com/articles/archives/2013/mar/07/its-your-own->

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<sup>22</sup> Michael Howard Saul, *Beverage Leaders, Businesses File Suit Against 'Soda Ban'*, WALL ST. J., Oct. 12, 2012, <http://blogs.wsj.com/metropolis/2012/10/12/beverage-leaders-businesses-to-file-suit-against-soda-ban/>.

<sup>23</sup> David Seifman, *Bloomberg Tells State to Follow City's Ban on Sodas Larger than 16 oz.*, N.Y. POST, Feb. 25, 2013, [http://www.nypost.com/p/news/local/bloomberg\\_tells\\_state\\_than\\_follow\\_645DXS92v5Gqzi4CyXy4XK](http://www.nypost.com/p/news/local/bloomberg_tells_state_than_follow_645DXS92v5Gqzi4CyXy4XK).

<sup>24</sup> N.Y. Statewide Coalition v. N.Y.C. Dept' of Health, No. 653584/12 (N.Y. Sup. Ct. March 11, 2013). *See also* Meredith Melnick, *New York City Soda Ban Health Fallout: Bloomberg's Legislation Struck Down... Now What?* HUFFINGTON POST, Mar. 12, 2013, [http://www.huffingtonpost.com/2013/03/12/new-york-city-soda-ban-bloomberg-loses-judge\\_n\\_2856642.html](http://www.huffingtonpost.com/2013/03/12/new-york-city-soda-ban-bloomberg-loses-judge_n_2856642.html).

<sup>25</sup> *Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dept. of Health & Mental Hygiene*, 110 A.D.3d 1, 970 N.Y.S.2d 200 (1st Dept. 2013).

<sup>26</sup> *Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dept. of Health & Mental Hygiene*, 22 NY 3d 853, 998 NE 2d 1972, 976 NYS2d 447, Unpublished Disposition, 2013 WL 5658229, 2013 NY Slip Op. 88505, (Oct. 17, 2013).

<sup>27</sup> *NYC Soda Rules Spur Calorie Counts on Vending Machines*, WALL ST. J., Oct. 10, 2012, <http://blogs.wsj.com/metropolis/2012/10/10/nyc-soda-rules-spur-calorie-counts-on-vending-machines/>.

<sup>28</sup> Saul, *supra* note 22.

<sup>29</sup> Holly Yan, *No Soda Ban Here: Mississippi Passes 'Anti-Bloomberg' Bill*, CNN (Mar. 21, 2013), <http://www.cnn.com/2013/03/21/us/mississippi->

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anti-bloomberg-bill.

30 N.Y.C. HEALTH CODE § 81.53.

31 *Id.*

32 *Boreali v. Axelrod*, 71 N.Y.2d 1, 523 N.Y.S.2d 464, 517 N.E.2d 1350 (1987).

33 N.Y. PUB. HEALTH LAW, art. 13-E, § 1399-N–1399-X (1975).

34 *Boreali*, 71 N.Y.2d at 7.

35 *Id.* at 17.

36 *Id.* at 9.

37 N.Y. Const. art. III, § 1.

38 *Boreali*, 71 N.Y.2d at 12.

39 *Id.*

40 “Respondents state Charter SS 556 (c) (2) & (9), which specifies areas which the DOH may regulate, including control of communicable and chronic diseases and the oversight of the food and drug supply of the city, as specifically granting authority for the promulgation of the Portion Cap Rule.” *N.Y. Statewide Coalition v. N.Y.C. Dept’ of Health*, No. 653584/12 at 16 (N.Y. Sup. Ct. March 11, 2013).

41 *Id.* at 27.

42 *Id.*

<sup>43</sup> The court noted numerous attempts by the New York City Council to pass resolutions dealing with sugar sweetened beverages, including warning labels for such beverages and prohibiting food stamp use for such beverages. *Id.* at 29- 30.

<sup>44</sup> *Id.* at 34 (citing *N.Y. State Ass'n of Counties v. Axelrod*, 78 N.Y.2d 158 (1991); *Matter of Consolation Nursing Home v. Comm'r of N.Y. State Dept. of Health*, 85 N.Y.2d 326 (1995)).

<sup>45</sup> *N.Y. Statewide Coalition*, at 34.

<sup>46</sup> *Id.* at 35

<sup>47</sup> Thomas Mullarkey, *Coke's Global Brands and Distribution Network are Unmatched*, MORNINGSTAR (Feb.12, 2013), [http://www.alacrastore.com/storecontent/Morningstar\\_Credit\\_Research-Coke\\_s\\_global\\_brands\\_and\\_distribution\\_network\\_are\\_unmatched\\_Updated\\_Forecasts\\_and\\_Estimates\\_from\\_12\\_Feb\\_2013-2137-12927](http://www.alacrastore.com/storecontent/Morningstar_Credit_Research-Coke_s_global_brands_and_distribution_network_are_unmatched_Updated_Forecasts_and_Estimates_from_12_Feb_2013-2137-12927).

<sup>48</sup> Henry Goldman & Leslie Patton, *NYC Health Panel Backs Bloomberg Ban on Super-Size Sodas*, BLOOMBERG (Sept. 13, 2012), <http://www.bloomberg.com/news/2012-09-13/nyc-health-panel-backs-bloomberg-ban-on-super-size-sugar-drinks.html>.

<sup>49</sup> *Id.*

<sup>50</sup> Joseph Ax, *New York City's Soda Ban Raising Big Concerns for Soda Companies, Restaurants*, HUFFINGTON POST, Dec. 5, 2012, [http://www.huffingtonpost.com/2012/12/05/new-york-city-soda-ban\\_n\\_2245805.html](http://www.huffingtonpost.com/2012/12/05/new-york-city-soda-ban_n_2245805.html).

<sup>51</sup> Michael M. Grynbaum, *In N.A.A.C.P., Industry Gets Ally Against Soda Ban*, N.Y. TIMES, Jan. 23, 2013, [http://www.nytimes.com/2013/01/24/nyregion/fight-over-bloombergs-soda-ban-reaches-courtroom.html?\\_r=0](http://www.nytimes.com/2013/01/24/nyregion/fight-over-bloombergs-soda-ban-reaches-courtroom.html?_r=0); *See also* Table 1.

<sup>52</sup> Grynbaum, *supra* note 51.

<sup>53</sup> *Id.* In February 2012, after a seven year tenure with the Hispanic Federation, President Lillian Rodriguez Lopez took a position with Coca-Cola.

<sup>54</sup> *Critics Aim to Delay NYC Sugary Drink Limits*, CBS NEWS (Feb. 6, 2013), [http://www.cbsnews.com/8301-204\\_162-57568064/critics-aim-to-delay-nyc-sugary-drink-limits/](http://www.cbsnews.com/8301-204_162-57568064/critics-aim-to-delay-nyc-sugary-drink-limits/).

<sup>55</sup> Ax, *supra* note 50.

<sup>56</sup> Bruce Kennedy, *NYC Soda Ban: Who is Affected and How They Are Preparing for It*, COCA-COLA CO. (Oct. 30, 2012), <http://www.coca-colacompany.com/stories/nyc-soda-ban-who-is-affected-and-how-are-they-preparing-for-it>.

<sup>57</sup> Paul Frumkin, *Bloomberg's Soda Siphon*. NATION'S RESTAURANT NEWS (June 25, 2012), <http://nrr.com/government/bloombergs-soda-siphon>.

<sup>58</sup> Jennifer Peltz, *NYC Soda Size Rule Eyed from Coffee Shops to Clubs*, ASSOCIATED PRESS (Mar. 9, 2013), <http://news.yahoo.com/nyc-soda-size-rule-eyed-163708522.html>.

<sup>59</sup> *See* COCA-COLA CO., <http://www.coca-colacompany.com/?topic=brands>.

<sup>60</sup> Peltz, *supra* note 58.

<sup>61</sup> Brief for The Nat'l Alliance for Hispanic Health et al. as Amici Curiae, *N.Y. Statewide Coalition v. N.Y.C. Dept. of Health*, No. 653584/12 (N.Y. Sup. Ct. March 11, 2013).

<sup>62</sup> Annie Karni, Mara Gay & Jennifer Fermino, *Bill de Blasio Vows to*

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*Make Mayor Bloomberg's Big Soda Ban a Reality*, New York Daily News (Oct. 19, 2013), <http://www.nydailynews.com/news/politics/de-blasio-bloomberg-soda-article-1.1490333#ixzz2qOAIggwQ>

<sup>63</sup> Plaintiff's Memorandum of Law In Support of Verified Article 78 & Declaratory Judgment Petition, N.Y. Statewide Coalition v. N.Y.C. Dept. of Health, No. 653584/12 (N.Y. Sup. Ct. March 11, 2013).

<sup>64</sup> Sarah Nassauer, *The Psychology of Small Packages*, WALL ST. J., Apr. 15, 2013, <http://online.wsj.com/article/SB10001424127887324485004578424650545311848.html>.

<sup>65</sup> <http://www.theatlanticcities.com/politics/2012/09/everything-you-need-know-about-new-york-soda-ban/3263/>