

# News Alert

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## You Want Fries With That? New North Carolina Law Restricts Obesity Related Tort Claims

North Carolina House Bill 683, known as the Commonsense Consumption Act (“Act”), became effective on October 1, 2013. The Act contains two main provisions. First, it provides that no city or county ordinance may prohibit the sale of soft drinks above a certain size. For this reason, the Act has been jokingly referred to as the “Big Gulp” Act (in reference to the 7-Eleven® signature drink size). Second, and more importantly, the Act shields manufacturers, distributors, sellers, and advertisers from civil liability for claims arising from weight gain, obesity, and other health problems associated with the long-term consumption of food and beverages, provided that certain requirements are met.

The Act creates exceptions to the limitation of liability where the plaintiff’s claim is based on a material violation of an adulteration or misbranding requirement under North Carolina or federal law, or where the claim is based on knowing and willful misconduct in the manufacture, marketing, distribution, advertising, labeling, or sale of food. The Act also requires that the claimed injury was proximately caused by such violation or misconduct.

The Act was sought by the North Carolina Restaurant & Lodging Association in order to help combat the increasing

national trend of obesity litigation. The Act is also viewed as a responsive measure to New York City Mayor Michael Bloomberg’s efforts to limit the size of soft drinks and sodas which have received much publicity.

Mississippi passed a similar law earlier this year. According to the Trust for America’s Health (<http://healthyamericans.org>), that state has the highest percentage of children between the ages of ten and seventeen who are classified as overweight or obese (per 2011 data), and the second highest percentage of obese adults (per 2012 data). By comparison, North Carolina ranks eighteenth highest for childhood obesity and seventeenth highest for adult obesity.

Proponents of the Act applaud the fact that it preserves the freedom of choice for North Carolina consumers. Proponents may also view the Act as furthering our state’s recent tort reform efforts. On the other hand, critics of the Act cite the concerning health care data which shows North Carolina firmly ranked in the bottom half for both childhood and adult obesity rates. Critics may also lament our legislature’s endorsement of the continued sale of Big Gulps®, Baconaters®, and the like with impunity for the negative health consequences associated with the long-term consumption of such products.

However, despite a common misconception, the Act is not limited in application to fast food chains and quickie marts. In fact, the Act adopts the definition of “food” contained in section 201(f) of the federal Food, Drug, and Cosmetic Act, which encompasses “articles used for food or drink for man or other animals, chewing gum, and articles used for components of any such article.” 21 U.S.C. § 321(f). This expansive definition means that the Act may protect those entities involved in North Carolina’s flourishing beer and wine production industries from lawsuits alleging that the long-term consumption of alcohol contributes to obesity and other negative health consequences. *See generally, Abernathy v. Schenley Inds., Inc.*, 420 F. Supp. 1, 3 (W.D.N.C. 1976) (“Bourbon whiskey is obviously included among ‘articles used for food or drink for man’ within [21 U.S.C. § 321(f)].”). While a full analysis of the law in this area is beyond the scope of this article, it will be interesting to see how courts apply the Act to specific cases and controversies in the coming years.

In conclusion, despite one’s political or health care sentiments concerning the government’s role in reducing obesity and regulating consumer choice, the Act should serve to substantially limit the filing of obesity related lawsuits against entities in the North Carolina food and beverage industry, while simultaneously reducing the amount of legal fees those companies must devote to protecting and defending themselves against such actions.

For further information regarding this Alert, contact:

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