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## **Hard on Soft Drinks**

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**Michael Blanding**

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On the list of things parents warn their children about, soft drinks never ranked very high. Cigarettes, booze, heavy petting, sure. But a Coke at the ballpark was as innocent as the game itself.

That was then. Anyone who's been to a mall lately has probably noticed a certain, shall we say, broadening of today's youth. The Centers for Disease Control reported last fall that the average weight of an American 10-year-old has gone up 11 pounds since the 1960s, and parents and health advocates have in recent years begun to see a boogeyman in the sugary drinks and junk food that kids eat. Across the country, the 10 largest school systems - including Boston Public Schools last year - have banned soda sales in schools. In this new campaign against Big Macs and Big Gulps, a veteran of the tobacco wars is leading the charge against what he calls Big Soda.

"There is something just wrong with continuing to thrust calorie-dense, zero-nutrition sodas into the hands and mouths of schoolchildren," says Richard Daynard, an associate dean at Northeastern University and director of the Public Health Advocacy Institute, which receives support from both Northeastern University School of Law and Tufts University School of Medicine. "The evidence is crystal clear that this is making a substantial contribution to the obesity epidemic and the likelihood of developing chronic illness." But Daynard's group, which studies public health problems and goes after the corporations it blames for them, is about to take the fight a step further. They plan to put soda on trial.

For the past year, Daynard's group has been quietly soliciting parents and teenagers across the state to serve as plaintiffs in a lawsuit it hopes to file as soon as next month. The effort is part of a national campaign, coordinated by the Center for Science in the Public Interest, a nutrition watchdog group based in Washington, D.C. Lawyers plan to ask a judge to certify the suit as a class action, which will serve as a model for similar lawsuits around the country. Daynard and his fellow lawyers will argue that soft drink companies are selling soda to kids in schools even though they know it is harmful to their health. If successful, Daynard says, the effort could strike a blow against the soft-drink industry as damaging to sales and public perception as the settlements against Big Tobacco 10 years ago.

The soft drink industry disputes any association between its products and a decline in children's health. "We've been selling soda for 125 years, and, gee, all of a sudden we're the reason for childhood obesity," says Ralph Crowley, chief executive of Polar Beverages in Worcester and chairman of the American Beverage Association, an industry group. He blames the trend on kids exercising less. "What's changed? Television and Game Boy." Nevertheless, in August, the trade group announced a new set of voluntary guidelines asking members to restrict soda sales to high schools, among other curbs.

Daynard and child health advocates say that that's not enough. Even high school students, they contend, aren't ready to make wise choices about soda. "Paternalism is a dirty word when applied to adults, but it's not a dirty word when it is applied to children," he says.

The associate dean looks every inch the academic with his rimless glasses and Mephistophelean beard. Before taking on the soft drink industry, he spent 20 years helping plaintiff lawyers plan cases against tobacco companies. (While he won't say how much he made for his services, he has demanded 5 percent of fees collected by several of the biggest firms - a share that could run to eight or even nine figures. He settled with some, and he calls his undisclosed take "very modest.") The lettering on his office window still says Tobacco Control Research Project, and the decor includes antique tin cigarette advertisements and a painting of a skeleton lighting up a little girl's smoke. A stuffed Joe Camel sits atop shelves of Tobacco Products Litigation Reporter, which Daynard has edited since 1985.

There are considerable parallels between the tobacco fight and the one brewing over soda. While he and his allies are keeping details of their strategy secret, it hinges, they say, on the contention that manufacturers knew the damage their products could do and sold them anyway. They will cite medical studies tying consumption of soda to a host of childhood ills besides obesity, including tooth decay and Type 2 diabetes - known as adult-onset until the 1980s, when it started to become commonplace in children. Daynard also argues that kids in schools are a captive audience, one that's particularly susceptible to soda's harmless image and that soda makers have used false advertising to paint their products as benign. As a result, he says, the soda companies can be sued under the state's strong consumer protection statute, which outlaws "unfair or deceptive acts or practices." Last, plaintiffs may also claim that soda is an "attractive nuisance," a dangerous item put within children's reach without adequate safeguards - like an unfenced pool.

"You are dealing with an addictive product sold to kids, where, if not the addiction, at least the taste is acquired at a young age," Daynard says. "You are dealing with a product that, at least when initially produced, was not understood to be deleterious, yet as the evidence kept coming in, companies kept marketing it and stonewalling."

TO PUT SODA ON TRIAL, DAYNARD AND HIS ALLIES MUST WIN over a public skeptical about so-called frivolous lawsuits against food companies. In a 2005 Wall Street Journal poll, 84 percent of respondents favored limiting access to junk food in schools. But in a 2003 Gallup poll, 89 percent of respondents opposed legally punishing junk food companies for the country's obesity problem. Still, Daynard is undaunted. "People come up to me and say, 'I think it's a terrible idea to bring all these lawsuits, but someone should go after these Coke machines,'" he says. "I think there is a broad public consensus that this is an outrage and someone should do something about it."

Sales in schools actually account for a minuscule slice of annual worldwide soda sales. While the industry does not release the figures, analyst Robert van Brugge of Sanford C. Bernstein

& Co. estimates that schools account for less than 1 percent of soda companies' \$65.7 billion in sales last year. And even if soda were banned entirely from schools in the United States - as it will be in Britain next September - the companies could still make up some of the difference in sales of juice, water, and other products. It is when you consider the cutthroat competition among soft drink makers for lifetime customers, starting before they're old enough to drive, that school sales become valuable. Brand loyalty over decades is worth a lot more than the milk money of 50 million students.

"They have that kid from 8 o'clock to 3 o'clock," says Josh Golin, program manager for Campaign for a Commercial Free Childhood. "They get not just the sale that day, but they are hoping for a lifetime of sales." Though companies like Coca-Cola and Pepsi have policies that prohibit marketing to children, they advertise and place products in shows and movies that children watch, including American Idol, which commands one of the largest television audiences of children under 12, and the Harry Potter movies.

The advertising seems to be working. The average teenage boy, according to a report the Center for Science in the Public Interest released this summer, drinks two cans of soda a day, almost triple the consumption from 20 years ago. These two cans contain 15 teaspoons of refined sugar - more than the government-recommended limit for daily sugar consumption from all foods. According to government surveys, teenagers get 13 percent of their daily calories from soda and noncarbonated fruit drinks. Some doctors contend that the soda kids drink is more dangerous than the junk food they eat. "Kids often have a soft drink not because they are hungry but because they are thirsty or for social reasons," says Children's Hospital doctor and Harvard Medical School professor David Ludwig. They don't get filled up either, he says, so they don't trade the soda's calories for a meal or snack they might have eaten - they consume both. Ludwig runs a clinic for obese children, treating them with a mix of counseling, nutrition help, and - in extreme cases - surgery. "It's not the exceptional child who drinks a liter or even 2 liters a day," says Ludwig. "It's actually remarkably common among my patients." He and his colleagues followed 548 Massachusetts children who already were soda drinkers from 1995 to 1997. They found that for every serving of sugar-sweetened drinks they added to their daily diet, their chances of becoming obese increased by 60 percent.

CONSUMER CHOICE ADVOCATES ARE JOINING THE FIGHT. "There is a rush to blame soda companies that far outstrips any scientific evidence," says Dan Mindus, senior analyst with the Center for Consumer Freedom, an industry-funded group that decries lawsuits against food companies.

Mindus points to a 2004 study by Harvard Medical School researchers of 14,000 children in which calories from junk food had no more effect on weight than calories from "healthy" foods. He calls the lawyers, doctors, and politicians attacking soda in schools "food police" and says they hope to limit food choices for all consumers. His organization points to what it considers a frivolous suit: The Center for Science in the Public Interest helped two New York teenagers sue McDonald's for making them obese. A US district judge threw out the case in 2003, but an appeals court reinstated it this year. "Soda is a wedge issue," says Mindus. "If trial lawyers bring a lawsuit against soda in schools, they absolutely intend that to be the first step in many, many other lawsuits. They hope that by using kids as so-called victims, they'll find a more sympathetic audience."

The soda industry, meanwhile, wants sympathy for its new guidelines, which call for selling only water and 100-percent-juice drinks in elementary schools, adding sports drinks and part-juice or no-juice flavored "fruit drinks" - such as Sunny Delight, Hi-C, and Fruitopia - in

middle school, and ensuring that no more than half of vending machine space in high schools be used for soda. "By high school, kids are learning to make choices, and we work with the local school systems to work on getting the choices they want," says Crowley. "I respect the clarion call that we are feeding empty calories to kids, but on a practical basis we are a responsible industry."

Critics dismiss the guidelines as little more than a publicity stunt. For starters, they say, the guidelines are voluntary and unenforced. And they also don't go as far as rules already set by many school districts - including Boston, Chicago, and Los Angeles - which ban soda completely. "Since they banned this in elementary schools and not middle or high schools, we have no reason to stop," says Stephen Gardner, litigation director for the Center for Science in the Public Interest. "The real market is high schools."

Obesity doctors, who tend to regard so-called fruit drinks as soda without the fizz, say that the guidelines won't help children, not even the all-juice rule for elementary schools. "If a kid comes to me drinking three cans of soda a day, and I beg and cajole them, and now the kid is drinking three 12-ounce servings of juice a day, I'm not happy," says Dr. Alan Meyers, a pediatrician at Boston Medical Center. "It's the same quantity of sugar."

"SEVERAL STATES HAVE PASSED LEGISLATION LIMITING SODA sales in schools, including a California law signed by Governor Schwarzenegger last month that banned soda and junk food in high schools. In the Massachusetts Legislature, Peter Koutoujian, chairman of the Public Health Committee, promoted legislation this year to mandate that all drinks sold in all schools contain at least 50 percent fruit juice. That would get rid of the soft drinks in schools altogether - if not the sugar. "I'm not saying that no one should drink soda," says Koutoujian, "but it's a matter of moderation, and in schools in particular where kids have unfettered access to these calories, we need to be acting as parents." The representative from Waltham says that since raising the issue last year, he has received more letters and calls of support than he expected. "People understand this problem. The only opposition has been from the beverage manufacturers."

That opposition can be formidable, however. Connecticut passed a similar bill last year, only to see the governor veto it - a result, say some observers, of heavy pressure from industry lobbyists. In Rhode Island, 11 elected officials including the leader of the state House of Representatives were censured for ethics violations after lobbyists for Coca-Cola treated them to a Celtics game last March. "Part of the reason that industry has to go behind closed doors is that the argument is almost indefensible," says Koutoujian. "It's difficult to say this isn't a problem for our children."

The measure has also met resistance from the schools themselves, where officials worry about losing lucrative contracts with soda companies. "States are withdrawing funding but increasing their presence every time we turn around," says Paul Schlichtman, former president of the Massachusetts Association of School Committees, which is lobbying against Koutoujian's bill. "We have enough problems with mandates and compliance audits." An average-sized school system can make \$10,000 to \$20,000 a year from school pouring contracts, with large systems making \$100,000 or more, according to Crowley, who says that extra cash can even provide money for athletic programs.

That idea doesn't fly with some parents. "Selling junk food to fight obesity is laughable," says Wayne Altman, a Wakefield parent and clinical professor at Tufts Medical School. Altman has a 7-year-old son in elementary school and has worked with other parents to try to limit the amount of junk food sold in the school system.

In the end, the case against soda might turn on finding frustrated parents like Wanda Otero of Holyoke, who works for a social-services referral organization called Nueva Esperanza. In her work, she sees countless teenagers who are overweight, have low self-esteem or diabetes, eat unhealthy food, and drink soda. But for her, the issue cuts even closer to home. "I have a 12-year-old daughter who is overweight herself," says Otero in Spanish, with obvious frustration in her voice. "I give my daughter money to buy juice for school, and she buys soda instead. I try to feed her nutritious food at home, but I have no control once she is at school." If the soda crusaders get their way, she will.