

# 25

## Advocacy

### *Capping Soda Portion Sizes*

In December 2011, New York City mayor Michael Bloomberg announced some excellent news. After years of city interventions to improve diet and physical activity patterns, the prevalence of obesity among New York children had started to decline. With this evidence that the city's public health measures were having the desired effect, Bloomberg appointed a task force to recommend further actions.

The task force released its report in May 2012. One of its twenty-six recommendations was to “establish a maximum size for sugary drinks in food service establishments.” The task force noted that “sugary drink portion sizes have exploded over recent years.... Setting a maximum size for sugary drinks offered and sold in restaurants and other Food Service Establishments is a way we can change the default and help reacquaint New Yorkers with ‘human size’ portions to reduce excessive consumption of sugary drinks.”<sup>1</sup>

On this basis, the mayor proposed what he—and advocates—formally named the “Sugary Drink Portion Cap Rule,” a 16-ounce limit on the size of sugary drinks that can be offered in restaurants or retail stores overseen by the city. Opponents of the measure, however, immediately called it a “soda ban,” a framing term far more likely to evoke public dismay, if not outrage.<sup>2</sup> The term “ban” took hold so quickly that even city officials sometimes slipped and used it. In this chapter, I review the rationale for public health initiatives to control portion sizes, and recount the fate of New York City's Portion Cap Rule, here abbreviated as “portion cap” or “rule.”

## THE SODA SIZE PROBLEM

Sodas were not always served in supersized containers. Coca-Cola's original 1916 contour bottle contained 6.5 ounces. Pepsi, as noted earlier, introduced the 12-ounce bottle in the 1930s. As late as 1954, 61 percent of bottled sodas contained less than 7 ounces and only 8 percent were larger than 20 ounces. Coca-Cola did not introduce sizes larger than 6.5 ounces until 1955.<sup>3</sup> Today's soda bottles range from 7.5 ounces to 2 liters (64 ounces), and the standard size in vending machines is 20 ounces—three times larger than the original.

Fountain drinks followed a similar trend. In the 1950s, McDonald's served 7-ounce drinks, but it added larger sizes throughout the 1960s and 1970s. As Lisa Young describes in her book *The Portion Teller*, Burger King's sodas in the 1950s contained 12 or 16 ounces, but by the early 2000s, the chain offered 12-ounce kiddie, 16-ounce small, 22-ounce medium, 32-ounce large, and 42-ounce king sizes. McDonald's did the same but called them child, small, medium, large, and supersize, respectively.<sup>4</sup> The 6.5-ounce soda, the industry standard for decades, is roughly half the size of a portion now considered suitable for a child.

Soda manufacturers encourage big sizes; the cost of the drink ingredients is trivial in comparison to that of the bottles, advertising, labor, and service. Restaurants and fast-food chains also encourage large portions. Customers like bargains, have come to expect large containers, and in places like Texas complain when they are not available.<sup>5</sup> Most of all, as I explained in Chapter 9, large sodas are wonderfully profitable for their makers and sellers.

## PRICING STRATEGIES: EFFECT ON CALORIES

Soda companies have long marketed larger sizes as bargains. Pepsi's 1939 "twice as much for a nickel" demonstrably encouraged sales.<sup>6</sup> Soda companies continue to use this strategy. Doing the math at Walmart in 2013, for example, I could buy a 64-ounce bottle of Pepsi for 2 cents per ounce, but a 24-ounce bottle cost 3 cents per ounce. A 7.5-ounce can cost 6 cents per ounce, and I was obliged to buy more than one, as they only came in packs of eight, twelve, or twenty-four. As a supermarket retailer once explained to me, if customers want smaller portions, they ought to be willing to pay for

them. This pricing strategy encourages everyone, and especially those who do not have much money, to buy sodas in larger sizes.

The higher price for a smaller amount would just be an amusing marketing technique except for its effect: larger portions have more calories. If an 8-ounce soda provides 100 calories, then a 16-ounce drink has 200 and a 64-ounce drink has 800 calories. On the basis of calories alone, larger portions are a sufficient explanation for rising rates of obesity. As noted earlier, the relationship of portion size to calories may seem self-evident but is not. Larger portions induce people to eat more and also to be fooled into underestimating how much they have eaten.<sup>7</sup> Most people cannot imagine that a soda of any size could contain 800 calories. Sugars in liquid form do not make people feel full, and food labels in 2015 still referred to the 100 calories in an 8-ounce serving.

## THE DEFAULT ISSUE

The effects of larger servings are reasons to be concerned about the default—the automatic food choice when no easier alternative is available. People tend to eat what they buy or are served regardless of whether food comes in a container or is presented at the table. If a Happy Meal comes with a soda, kids drink soda; if it comes with milk, they drink milk. With milk or juice as the default, parents can always order a soda, but many will not. Changing the default to foods and drinks that are smaller and less sugary is the most effective way to promote healthier choices. Setting a 16-ounce cap on soda sizes does some of that. Customers can still drink as much soda as they want; they just have to ask for additional 16-ounce servings.<sup>8</sup> Hence cap rule, not ban.

## CALLS TO REDUCE PORTION SIZES

I can think of at least six reasons why sodas are best consumed in small amounts. Because larger food portions (1) have more calories, (2) induce people to consume more calories, and (3) fool people into underestimating the calories they are consuming, reducing portion sizes ought to be a prime goal of obesity intervention. But sodas provide three additional reasons for avoiding large sizes: (4) their calories are empty, (5) their sugars are in

liquid form, and (6) larger sizes are usually less expensive per volume than smaller sizes. And, I might add, sodas are heavily advertised to everyone, but especially to those most vulnerable—youth and minorities.

In 2001, the U.S. surgeon general issued a “call to action” to prevent obesity. This, among other recommendations, urged the food industry to produce foods and drinks in smaller portions. Aimed at changing the behavior of food companies rather than individuals, this message was largely ignored by federal agencies. Instead, government dietary advice continued to focus on improving personal food choices. The 2005 Dietary Guidelines said, “Special attention should be given to portion sizes which have increased significantly over the past two decades.” The 2010 guidelines included a similar personal-choice message: “When eating out, choose smaller portions. . . . Prepare, serve, and consume smaller portions of foods and beverages.” The MyPlate food guide in 2011 advised, “Avoid oversized portions.”<sup>9</sup>

Inducing the food industry to reduce portion sizes, however, is far more controversial. In 2010, to provide an evidence base for the First Lady’s Let’s Move! campaign, President Obama appointed a task force to review evidence and make recommendations. With respect to portion sizes, the task force made two: “Restaurants should *consider* their portion sizes” and “Restaurants should be . . . *attentive* to the effects of plate and portion size” (my emphasis). The 2010 Dietary Guidelines were similarly tentative: “Initiate partnerships with food producers, suppliers, and retailers to promote the development and availability of appropriate portions.” The Partnership for a Healthier America, the food industry group that works with Let’s Move!, says nothing about its member companies’ responsibility to reduce portion sizes as a means to address childhood obesity. While the cap rule was under consideration, Coca-Cola was lobbying Congress to “oppose policies that restrict the sale of certain beverages in packages larger than 16 fluid ounces.”<sup>10</sup> Neither the federal government nor Congress seemed likely to take on portion sizes as a means to prevent obesity.

To the food industry, portion size is a matter of simple economics. If large portions cost little to produce and increase sales, companies need them. No wonder fast-food companies have done little to respond to “reduce portion size” messages. If anything, they have increased their serving sizes. McDonald’s, for example, dropped the term “supersize” but continues to sell such portions in special promotions. European fast-food outlets, however, manage to sell smaller portions and stay in business. In 2012, the largest Coca-Cola served in the British Burger King was 12 ounces smaller (and provided nearly 150 fewer calories) than the largest U.S. size, and that in the

British McDonald's was 8 ounces smaller (100 fewer calories) than its American counterpart.<sup>11</sup> But because Americans expect to be served large amounts of food and drink when eating out, restaurants and food producers are reluctant to do anything to risk alienating customers. Given these observations, it is easy to understand why New York City's sensible proposal to cap the sizes of sugary drinks at 16 ounces elicited a firestorm of protest.

## ADVOCACY: NEW YORK CITY'S "SUGARY DRINK PORTION CAP RULE"

On May 30, 2012, Mayor Michael Bloomberg called a press conference to announce a limit on the sale of sugary drinks larger than 16 ounces in restaurants, movie theaters, street carts, bodegas, and all other retail locations over which the city holds jurisdiction. The portion rule would apply to sugar-added drinks containing more than 25 calories in 8 ounces.<sup>12</sup>

Bloomberg is a billionaire who paid for his own election campaigns, took no city salary, and appeared impervious to public criticism. Under his administration, health commissioner Dr. Thomas Frieden and his successor, Dr. Thomas Farley—both deeply committed to improving the health of city residents—led the nation by developing a series of interventions to improve the environment of food choice. The city banned the use of trans fats in restaurants in 2006, and required calorie labeling on restaurant menus in 2007. Although some critics complained, the trans fat ban was quickly adopted by city restaurants.<sup>13</sup> Congress passed national menu labeling in 2010.

Several of the campaigns specifically aimed to reduce soda consumption. These began with subway posters illustrating the amount of sugar in sodas, how those sugars are converted to fat in the body, and the number of miles needed to walk off soda calories (Figure 17.1). The campaign used slogans such as "NYC! Go Sugary Drink Free." A 2012 poster campaign illustrated the link between large soda portions and amputations resulting from type 2 diabetes (Figure 25.1).<sup>14</sup> As noted in Chapter 16, the city also tried—but failed—to obtain permission from USDA to block sales of sodas to those receiving SNAP benefits (food stamps).

To public health advocates, the portion cap rule was another such intervention, this time aimed at changing the default soda size. A 16-ounce sugary drink is not exactly abstemious. It contains two of the old standard 8-ounce servings and provides nearly 50 grams of sugars and 200 empty, liquid calories. During the press conference, city officials displayed an

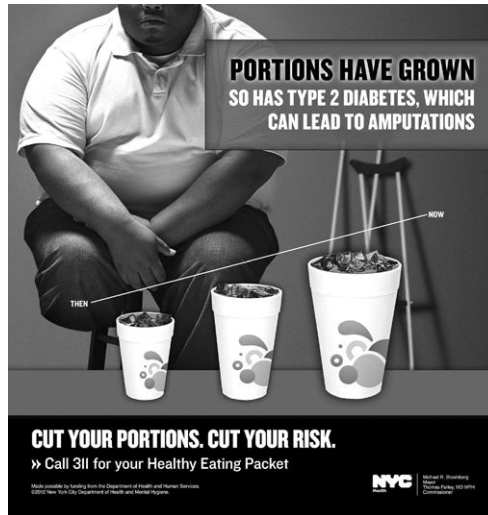


FIGURE 25.1 In 2012, the New York City Department of Health and Mental Hygiene placed this poster in subways. It illustrates the connection between larger soda sizes and amputations that result from type 2 diabetes. This campaign elicited particular criticism when the “amputee” turned out to be Photoshopped from a stock photo.



FIGURE 25.2 The change in views of 16-ounce sodas since the 1950s. In the 1950s, Coca-Cola advertised a 16-ounce bottle as “big” and capable of serving three. In 2013, shortly before the soda portion cap rule was to go into effect, the company advertised the same size as “small.” The 1950s ad is an early example of soda marketing targeted to African Americans. The more recent sign says, “Beginning March 12, 2013 this location will no longer be offering regular calorie beverages over 16 oz in New York City. The size restriction does not apply to low/no-calorie beverages served by crew members.” On March 11, however, a judge blocked the portion rule from going into effect.

advertisement from the 1950s when Coca-Cola viewed a 16-ounce bottle as big—enough to serve three over ice. The city’s idea was to return sodas to reasonable sizes.<sup>15</sup> “Reasonable,” of course, is a matter of perception. Shortly before the cap was to go into effect, retailers posted signs referring to the 16-ounce size as *small*. Figure 25.2 illustrates this comparison.

## THE SODA “BAN”: ABA-ORGANIZED OPPOSITION

The American Beverage Association (ABA) mounted an enormous public relations campaign to convince New Yorkers that the “ban” on large soda sizes infringed on freedom of choice.<sup>16</sup> It began by attacking the science in a full-page ad in the *New York Times* (June 1, 2012): “Are soda and sugar-sweetened beverages driving obesity? Not according to the facts.” The ABA explained: “The facts make it clear—beverage calories and added sugars have decreased for more than a decade, while the CDC reports obesity rates

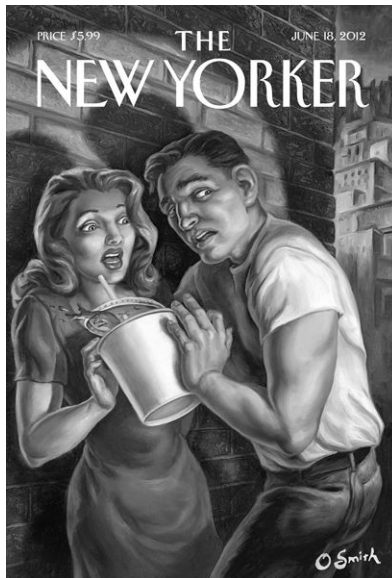


FIGURE 25.3 The *New Yorker* cover of June 18, 2012. Owen Smith’s illustration depicted the common but misleading interpretation of the portion cap rule as a “ban” that would force innocent consumers of oversize sodas into hiding from the food police. Owen Smith/*The New Yorker*/©Condé Nast.

continue to climb.” The ad did not mention the overall leveling off of obesity in parallel with the decline in soda sales (see Figure 5.1).

The ABA and its allies complained that the “ban” was a “nanny-state” move that would force people to sneak off to drink large sodas in secret, as Figure 25.3 suggests. Even the *New York Times* misinterpreted the cap as a ban: “Mr. Bloomberg, however, is overreaching with his new plan. . . . The administration should be focusing its energies on programs that educate and encourage people to make sound choices. . . . [T]oo much nannying with a ban might well cause people to tune out.”<sup>17</sup>

The soda and restaurant industries bought help from the Center for Consumer Freedom (CCF). Its full-page advertisement, shown in Figure 25.4,



FIGURE 25.4 The infamous “Bloomberg nanny” ad, *New York Times*, June 2, 2012.

The ad was placed by the Center for Consumer Freedom, the industry-funded public relations firm discussed in the previous chapter. “Bye Bye Venti. Nanny Bloomberg has taken his strange obsession with what you eat one step further. He now wants to make it illegal to serve “sugary drinks” bigger than 16 oz. What’s next? Limits on the width of a pizza slice, size of a hamburger or amount of cream cheese on your bagel?”



depicted Mayor Bloomberg wearing a dowdy blue dress: “The Nanny. You only thought you lived in the land of the free. Nanny Bloomberg has taken his strange obsession with what you eat one step further... New Yorkers need a mayor, not a nanny.” Bloomberg, fortunately, has a sense of humor: when asked about the ad at a press conference, he said, “Would I wear a dress like that? No! It was one of the more unflattering dresses.”<sup>18</sup>

As I explained in Chapter 24, the CCF does not reveal its funding sources, but both Coca-Cola and the National Restaurant Association have been identified as clients. The Restaurant Association’s interest is easily explained. According to *Advertising Age*, soft drinks account for about 10 percent of sales in fast-food and casual restaurants, and come with a profit margin of 90 percent.<sup>19</sup>

The ABA created a new astroturf organization, Let’s Clear It Up, and a website to “clarify myths” and give the industry’s spin on the science of sodas and health.<sup>20</sup> Coca-Cola used a different strategy: divert attention from sugars and calories. Its *New York Times* advertisement on June 10 said, “Everything in moderation. Except fun, try to have lots of that... By promoting balanced diets and active lifestyles, we can make a positive difference.” Coca-Cola’s president of sparkling beverages in North America, Katie Bayne, explained the company’s opposition to the cap rule to a reporter from *USA Today*:

Q: Is there any merit to limits being placed on the size of sugary drinks folks can buy?

A: Sugary drinks can be a part of any diet as long as your calories in balance with the calories out. Our responsibility is to provide drink in all the sizes that consumers might need....

Q: But critics call soft drinks “empty” calories.

A: A calorie is a calorie. What our drinks offer is hydration. That’s essential to the human body. We offer great taste and benefits whether it’s an uplift or carbohydrates or energy. We don’t believe in empty calories. We believe in hydration.<sup>21</sup>

The campaign against the cap rule appeared to be well orchestrated and lavishly funded, and it consistently invoked nanny states, intrusion on personal choice, and lack of patriotism. Groups of young people gathered at farmers’ markets and other crowded places to collect signatures on petitions to block



FIGURE 25.5 Coca-Cola delivery truck, New York City, 2012. During the debates about the portion cap, Pepsi and Coca-Cola delivery trucks carried signs telling customers, “Don’t let bureaucrats tell you what size beverage to buy.” The signs remained on the trucks well into 2014. Photo courtesy of Daniel Bowman Simon.

the cap. Paid \$30 an hour (or so they said) by another ABA-sponsored front group, New Yorkers for Beverage Choice, they wore T-shirts saying “I picked out my beverage all by myself” and handed out cards: “Don’t let bureaucrats tell you what size beverage to buy.” Soda delivery trucks were emblazoned with such slogans (Figure 25.5). Ads appeared on television, in movie theaters, and on airplane banners. As a resident of New York City, I received a home mailing from the ABA with instructions on how to protest the “ban.”<sup>22</sup>

It is impossible to know how much of the protest was spontaneous, as opposed to deliberately organized by the soda and restaurant industries, but the website of New Yorkers for Beverage Choice revealed that it was maintained by Goddard Clausen, the public relations firm recruited by the ABA to defeat soda tax initiatives. It is also difficult to know the extent to which these industries were behind federal and state initiatives to block similar attempts. Senator Ted Cruz (R-Tex.), for example, introduced an amendment to the congressional budget resolution intended to prevent federal regulation of the size of foods and beverages. The amendment failed to pass. But Mississippi, where nearly 35 percent of the population is obese and overall health ranks last among the fifty states, passed a bill preventing local communities from setting limits on soda size as well as on salt content, toys in fast-food children’s meals, calorie counts on menus, and genetically modified foods. By 2014, such bills had been introduced in at least eight other states.<sup>23</sup>

I wish I could tell you how much money the soda industry spent to defeat the cap rule, but this was not an election and expenditures did not

have to be disclosed. The amounts must have run into the millions in advertising, home mailings, payment of astroturf “volunteers,” and the not inconsiderable costs of the subsequent legal challenges.

## THE ABA’S LEGAL CHALLENGE

The city argued that for reasons of history and necessity, the mayor had the authority to propose the cap rule if the Board of Health agreed.<sup>24</sup> That the board would agree was never in question—the mayor appoints its members—and it approved the rule on September 13, 2012. Because the portion cap would not go into effect until March 2013, the soda industry had six months to try to block it. The ABA quickly organized a coalition of community organizations to join in petitioning the state supreme court to stop the rule or declare it unconstitutional.<sup>25</sup>

On March 11, 2013, the day before the portion cap was to go into effect, New York State Supreme Court justice Milton Tingling issued an injunction against it. The rule, he said, was:

fraught with arbitrary and capricious consequences...uneven enforcement even within a particular City block, much less the City as a whole...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...no limitations on re-fills... The Portion Cap Rule, if upheld, would create an administrative Leviathan... 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>26</sup>

Justice Tingling was referring to some of the complications faced by the city in developing the cap rule, particularly that of jurisdiction. As his decision explained, the city health code applies to food service places such as fast-food restaurants and supermarkets, but because of an agreement between the city and the New York State Department of Agriculture and Markets, it does not apply to grocery stores, bodegas, or convenience stores like “7-Eleven market chains and their famous, or infamous, Big Gulp containers.”

Tingling's decision caused the ABA to react with a "sigh of relief." The mayor, however, said the city would appeal: "Being the first to do something is never easy.... Anytime you adopt a groundbreaking policy, special interests will sue. That's America. But we strongly believe that, in the end, the courts will recognize the Board of Health's authority to regulate the sale of beverages... leading to disease and death for thousands of people every year."<sup>27</sup>

In July 2013, the appellate court confirmed the injunction. Only the City Council, it said, had the authority to pass such rules. Mayor Bloomberg issued a ringing defense: "Since New York City's ground-breaking limit on the portion size of sugary beverages was prevented from going into effect on March 12th, more than 2,000 New Yorkers have died from the effects of diabetes.... Today's decision is a temporary setback, and we plan to appeal this decision as we continue the fight against the obesity epidemic."<sup>28</sup>

While the last appeal was under review, Dr. Tom Farley, who had been health commissioner in the Bloomberg administration, explained his surprise at the public reaction and the court rulings.

The portion cap rule isn't a ban, and it isn't about restricting freedom or choice. It's simply a regulation on the size of containers, not on the amount people drink.... The case is about whether the New York City Board of Health has the authority to regulate restaurants in ways that protect the health of the City's residents, over the fierce objections of some of the world's biggest corporations, the soda companies. And, more important, whether the Board can protect New Yorkers from many other current and future health hazards, from unsafe conditions on the city's beaches to toxic chemicals in food or water.<sup>29</sup>

What started out as a legal challenge to the portion cap had become a test of a much larger issue: whether city health departments had the authority to pass rules to protect and promote the health of citizens. In June 2014, the State Appeals Court ruled that they did not: "We hold that the New York City Board of Health, in adopting the 'Sugary Drinks Portion Cap Rule,' exceeded the scope of its regulatory authority. By choosing among competing policy goals, without any legislative delegation or guidance, the Board engaged in law-making and thus infringed upon the legislative jurisdiction of the City Council of New York."<sup>30</sup> Because the timing of these events can be confusing, Table 25.1 provides a summary.

TABLE 25.1 New York City’s Sugary Drink Portion Cap Rule: time line of events during the legal challenges

DATE	EVENTS IN THE LEGAL CHALLENGES
<b>2012</b>	
May	Obesity Task Force issues report recommending limits on the sizes of sugary drinks sold in New York City. Mayor Michael Bloomberg proposes Portion Size Rule to limit sales of sugary drinks (> 25 calories per 8 ounces) to containers of 16 ounces or less by retail establishments under city jurisdiction.
June	Fourteen of 51 New York City Council members write mayor insisting that the rule be put to the council for a vote. It is not.
July	Board of Health holds public hearing on the rule. Several City Council members testify against the rule.
September	Board of Health adopts rule to take effect March 12, 2013.
October	The ABA organizes coalition of groups (Hispanic Chambers of Commerce et al.) to jointly petition New York State Supreme Court (New York County) to block rule.
November	Five members of the City Council file an <i>amici</i> brief in support of the soda industry’s petition.
December	The New York State Conference of the National Association for the Advancement of Colored People (NAACP) and the Hispanic Federation file brief supporting the soda industry’s position.
<b>2013</b>	
January	State Supreme Court holds hearing, presided over by Justice Milton Tingling.
February	Mayor Bloomberg asks New York State governor Andrew Cuomo to extend rule to convenience stores regulated by state. Cuomo denies request.
March	Supreme Court issues injunction; blocks the “ban” as “arbitrary and capricious.” Bloomberg administration appeals. National minority, community, public health, and medical groups file <i>amici</i> briefs supporting the rule. City officials (including then public advocate but soon to be mayor Bill de Blasio) and representatives of minority and health community groups speak out in favor of rule.
June	New York State Appellate Division (First Department) holds hearings.
July	Appellate Division upholds lower court ruling; says mayor lacks authority to adopt health policy without vote of City Council. Bloomberg administration appeals.
August	Polls say 60 percent of New Yorkers oppose the rule.
October	New York State Court of Appeals agrees to review case.
November	Public advocate Bill de Blasio, who favors rule, is elected mayor. City Council member Letitia James, who opposes rule, is elected public advocate.
<b>2014</b>	
January	Bill de Blasio replaces Bloomberg as mayor; appoints Dr. Mary Bassett, who supports rule, as health commissioner. City Council member Melissa Mark-Viverito, who opposes rule, is elected its Speaker.
April	National Alliance for Hispanic Health and other prominent minority groups file <i>amici</i> brief in support of rule.

(continued)

TABLE 25.1 Continued

DATE	EVENTS IN THE LEGAL CHALLENGES
May	The majority (32 of 51) of members of the New York City Council, along with the public advocate, file <i>amici</i> brief opposing the rule.
June	Appeals Court holds hearing. National public health leaders issue statements in support of rule. Appeals Court decides that the rule exceeded the authority of the New York City Board of Health and infringed on power reserved for the New York City Council.
October	Mayor de Blasio says his administration is meeting with health advocates and lobbyists to consider alternative ways to cap the size of sugary drinks.

The ABA’s Strange Bedfellows

It is understandable why groups whose sales might be threatened by the soda “ban,” such as the National Restaurant Association and the New York State Association of Theater Owners, would oppose it. The soda industry’s allies also included unions representing workers in bottling plants and those who transport sodas, such as the International Brotherhood of Teamsters and the Soft Drink and Brewery Workers Union Local 812, along with minority business associations such as the Hispanic Chambers of Commerce and the New York Korean-American Grocers Association.<sup>31</sup>

But the New York City Council also weighed in: five members signed an *amicus curiae* brief arguing that they, not the Board of Health, had the authority to set such a policy. And to the surprise of many city officials and public health advocates, the New York State chapter of the National Association for the Advancement of Colored People (NAACP) and the Hispanic Federation also filed a brief opposing the cap rule. Their concern: damage to small and minority-owned businesses by “discriminatorily preventing them from selling large ‘sugary beverages’ while allowing their large competitors such as 7-Eleven and grocery stores to carry the banned sugary beverages.”<sup>32</sup>

Why would minority groups, whose health would most benefit from drinking less soda, support the industry’s opposition to the rule? The NAACP and the Hispanic Federation argued from principle that it was discriminatory, paternalistic, and damaging to minority-owned small businesses. But they shared one other relevant characteristic: for years, Coca-Cola and PepsiCo have generously supported their programs.<sup>33</sup>

The same question must be asked of the City Council, many of whose members represent communities where obesity and type 2 diabetes are rampant. City Council member Dan Halloran, for example, who took the

lead in City Council protests against the rule, viewed it as challenging “nothing less than the principles on which our country was founded.” He was the recipient of a \$2,000 contribution from PepsiCo’s Concerned Citizens Fund. Executives of Coca-Cola and PepsiCo contributed to other council candidates as well as those running for public advocate, borough president, and mayor. For the most part, soda company employees’ donations to candidates were tiny, ranging from \$25 to \$1,500; most were under \$200. Among the City Council members who accepted donations from soda company officials, some spoke out against the rule, but others did not. This was also true of elected officials who accepted such donations.<sup>34</sup>

But even such small donations or less direct ties to soda companies raise questions, not least because the larger donations track closely with viewpoint. For example, Coca-Cola executives gave about \$10,000 to Christine Quinn, the Speaker of the City Council, who was then the leading candidate for mayor. Quinn said the “ban” was punitive, unlikely to be effective, and something that should be reconsidered once Bloomberg was out of office.<sup>35</sup> Some of the members who spoke out against the rule—Melissa Mark-Viverito and Letitia James, for example—received higher campaign contributions and were also most active in seeking grants from the Coca-Cola Foundation to community groups in their districts. But at least one beneficiary of such grants, the Children’s Aid Society, joined a brief in support of the rule. Although such financial connections invariably appear as conflicts of interest—and track closely with outcome—exceptions do exist. But in this instance, soda companies’ donations to City Council members’ campaigns and districts, no matter how small, paid off: the majority of council members opposed the rule.

Late in 2014, I attended a lecture on the cap rule given by Dr. Andrew Goodman, who had recently retired from the City Health Department. He talked about the extensive soda industry lobbying that had occurred while the rule was under consideration. Executives of soda companies and the ABA wrote the mayor and met with health officials. Coca-Cola even offered to fund a city-wide physical education program (the city turned it down). Former health commissioner Tom Farley also talked about the lobbying. He told the *Wall Street Journal*, “The soda companies hated [the cap rule]. They lobbied hard against it, and they reached a lot of council members. So, it would not be an easy thing to pass.”<sup>36</sup> Soda lobbyists visited every City Council member. Health Department officials doubted they could get the rule through the City Council and thought it would have a better chance of passing if they worked through the Board of Health.

## SUPPORT FOR THE CAP RULE: BETTER LATE THAN NEVER

Perhaps surprised by the breadth and intensity of the opposition, the city was late in organizing support. Public health advocates only learned about the cap rule when it was announced publicly; they had to scramble to catch up. Some Health Department staff members told me they too heard about it at the last minute. Although Dr. Goodman said that health officials had spent a year discussing how best to develop the cap rule before releasing it, the announcement appeared spontaneous and unplanned. Perhaps they and the mayor assumed that most people would agree that their public health initiatives had done a great deal of good. If so, they were wrong. Early polls found the majority of residents to be opposed to the rule, often to the point of ridicule. On this basis, *The Onion* observed satirically that the portion size issue had achieved a miracle: it had roused Americans out of political apathy.<sup>37</sup>

If the city was doing anything to organize support for the cap rule, its efforts did not become visible until February 2013. In response to complaints about the 7-Eleven exemption, Bloomberg appealed to Governor Andrew Cuomo to extend coverage to places operating under state jurisdiction. According to press accounts, the governor denied the appeal, saying, "It is not something we are considering at this time.... Haven't really studied it."<sup>38</sup>

In March—at long last—an impressive collection of medical, public health, and minority community groups filed *amici* briefs in support of the cap. The National Alliance for Hispanic Health led one group of *amici*. It was joined by groups such as the Harlem Health Promotion Center, National Congress of Black Women, Inc., the New York Chapter of the National Association of Hispanic Nurses, the Association of Black Cardiologists, and the United Puerto Rican Organization of Sunset Park, along with an equally impressive coalition of medical centers, physicians' organizations, and public health institutes. Another brief came from the Association of Local Boards of Healthcare, public health advocacy organizations, and university legal groups.<sup>39</sup>

A year later, the National Alliance for Hispanic Health filed a second brief in support of the rule, joined by additional minority community groups. The brief said: "For the one of every three children born in 2000 who will develop type 2 diabetes, and for the one of every two African-American and Hispanic girls who will get the disease, the question is not whether the Rule was justified but rather 'What else is being done?' It is for their sake that the Rule was adopted.... It is for their sake that *amici* urge this Court to uphold the Rule." In a statement, the alliance's president, Dr. Jane L. Delgado, succinctly summarized the underlying issue: "The beverage



industry has pursued a strategy of legal obstruction and put profits over the health of its customers.” Soon after, many other proponents of the rule came forward with supporting statements.<sup>40</sup>

Would the portion cap have encountered less public opposition if the city had engaged in coalition building right from the start? I think so. In his lecture, Dr. Goodman agreed. Health Department officials did not try to get support for the initiative because they did not want to tip their hand to the soda industry. But organizing support before taking action is essential to effective advocacy. Ben Jealous, the president of the NAACP chapter responsible for the *amici* brief opposing the “ban,” emphasized this point when he later commented that his organization

would support the idea of a ban but you have to do it well...it's not the details about the policy. This is about organizing. This is about come talk to us, right? Let's figure out how to do this together...Rather than pitting each other against each other, let's just be good organizers and do it the right way... [The Mayor's] got to come clean and actually humble himself to listen to his constituents and say let's solve this together. Our folks at the NAACP here in New York want to help him push through a comprehensive policy.<sup>41</sup>

Like Mr. Jealous, others criticized Mayor Bloomberg for proposing the soda cap with so little consultation, and for not understanding that such measures are likely to be received more favorably “within the context of a more consistent and compassionate message about the city's commitment to the underserved.”<sup>42</sup>

This interpretation is borne out by public polls. Although a Gallup poll found that only 30 percent of Americans said they were for soda cap regulations, the percentage was *higher* among low-income and minority respondents. A Pew Research poll found that 67 percent of African and Hispanic American respondents agreed that government has a role in public health, as compared to just 33 percent of whites. Results like these suggest that the very groups most at risk of obesity and type 2 diabetes would be willing to support such interventions if approached with greater sensitivity to issues that concern them.<sup>43</sup>

The Hispanic Institute wants its constituency to understand the issues at stake. It compares the tactics of the soda industry to those of the tobacco industry.

In the case of tobacco companies, minority community organizations walked away when they found themselves condemned by their constituents and were able to find other sources of revenue to replace the lost donations. It is critical, therefore, for the Hispanic organizations that are not tied by financial strings to big sugary drinks to speak out. . . . The Hispanic organizations that have thrown in their lot with big sugary drinks can make a choice to break the ties and to support the health needs of their constituents. . . . In doing so, they will also serve the health needs of the entire country.<sup>44</sup>

In June 2014, the appeals court handed down its verdict. The portion size rule, it said, infringed on power reserved for the New York City Council. If the city wanted to cap soda sizes, it would have to obtain approval from a majority of City Council members. Regardless of this disappointing decision, advocacy for size caps is unlikely to disappear. Even the European president of Coca-Cola, James Quincey, conceded that “serving sizes had to be reduced.” Coca-Cola’s CEO, Muhtar Kent, informed investors that the “romance of the smaller package” had become the most important driver of soda sales in North America. Health-conscious consumers were flocking to the 7.5-ounce cans, the very ones that cost more and provide higher profit margins to the company and retailers.<sup>45</sup>

Eventually, we will learn whether people who choose the 7.5-ounce cans drink less soda and gain less weight, or whether they follow generally healthier diets to begin with. But for now, it’s worth pondering whether the portion cap initiative failed in part because the 16-ounce limit was set too high.

## ADVOCATE: CAP SODA SERVING SIZES

### Understand the Issue

#### Larger soda portions:

- Provide more calories
- Provide more sugars
- Induce greater consumption of sugars and calories
- Induce underestimation of sugar and calorie intake
- Cost less per ounce
- Are heavily promoted

## Engage in the Debate

TABLE 25.2 Topic for debate: soda sizes should be capped at 16 ounces\*

THE SODA INDUSTRY AND ITS SUPPORTERS SAY	ADVOCATES SAY
Cities have no right to impose size limits on foods.	Cities have a responsibility to ensure the health of their residents.
Soda caps are an infringement of personal freedom.	Large sodas limit parents' freedom to raise healthy children.
The cap rule is a ban on soda consumption.	The cap rule sets a maximum size per serving.
The cap rule restricts customers' choice.	The cap rule restricts the soda industry's choice.
People have the right to drink as much soda as they wish.	People may order as many drinks as they wish; free refills are also permitted.
Caps on soda sizes unfairly affect the poor.	Soda-related obesity and type 2 diabetes unfairly affect the poor.
The ban discriminates against minorities.	Minorities bear the discriminatory burden of higher levels of obesity and type 2 diabetes.
The ban will not improve health.	The default size affects consumption; soda consumption is strongly linked to obesity, type 2 diabetes, and other health conditions.
Soda caps are unfair to small businesses.	The health care burden from obesity and type 2 diabetes is unfair to small businesses.
Only the New York City Council has the authority to set a cap on soda sizes.	The New York City Board of Health has the responsibility to ensure the health of residents.

\* Adapted in part from New York City Department of Health and Mental Hygiene, "Sugary Drink Portion Cap Rule: Fact vs. Fiction."

## Take Action

- Build coalitions to support portion size limits.
- Frame caps on portion sizes as part of a broad commitment to address the health and economic needs of the underserved.
- Ask city councils to set maximum limits on soda sizes.
- Ask city agencies to stop selling and serving sodas on city property or to set maximum limits on their sizes.
- Be prepared to address concerns about nanny-state infringement on personal choice.
- Pressure soda companies to reduce the price differential between large and small serving sizes.
- Ask the FDA to require the full number of calories in a container—not just calories per serving—on the front of soda cans or bottles of all sizes.