

# WEIGHING IN ON THE SCALES OF JUSTICE: THE OBESITY EPIDEMIC AND LITIGATION AGAINST THE FOOD INDUSTRY

Alyse Meislik\*

## I. INTRODUCTION

On Seattle's Queen Ann Hill, a popular restaurant called the 5 Spot features a dessert called "The Bulge," a gooey sugar-coated fried banana with ice cream, macadamia nuts, whipped cream, and two kinds of syrup.<sup>1</sup> Before consuming this decadent concoction, customers must first sign a liability waiver that states in part, "I release the 5 Spot from all liability of any weight gain that may result from ordering and devouring this sinfully fattening treat."<sup>2</sup> This waiver is a spoof of the obesity lawsuits that have suddenly appeared on the landscapes of court dockets across the nation.<sup>3</sup> Although the waiver makes light of the situation, it also reveals the serious nature of the fears confronting the food industry as lawyers begin fighting "Big Food."<sup>4</sup>

As obesity litigation appears in courts around the country, critics issue scores of complaints and ridicule.<sup>5</sup> Some critics say it is "ludicrous" to blame food companies instead of people for their own "nutritional ignorance, lack of will power, genetic predispositions, failure to exercise or whatever else may play a

---

\* J.D. Candidate 2005, University of Arizona James E. Rogers College of Law. First and foremost, a special thanks to my parents, Stuart and Joan Meislik, my biggest supporters and inspiration. I would also like to thank Chris Goodman, Thomas Stack, Andy Stevenson, Tom Collins, Jessica Post, Becky Nittle, John Horwitz, Marisa Pavlik, and Sophia Varma for their comments on the evolution of this Note.

1. Sandy Coleman, *Drafting Manager's Duties*, BOSTON GLOBE, Sept. 25, 2003, at 2; Shirleen Holt, *Go Ahead, Splurge on the Bulge, But Any Resulting Fat Is on You*, SEATTLE TIMES, Sept. 6, 2003, at A1.

2. Holt, *supra* note 1.

3. See Blaine Harden, *Eatery Joins Battle with 'The Bulge'; Obesity Lawsuits Spur Dessert Protest*, WASH. POST, September 20, 2003, at A03.

4. *Pelman v. McDonald's Corp.*, 215 F.R.D. 96, 97 (S.D.N.Y. 2003).

5. Andrew Martin, *FDA Imposes New Fat Labels on Food*, CHI. TRIB., July 10, 2003, at 1.

role” in the problem of obesity.<sup>6</sup> Critics also attack the lawsuits as “just another example of a runaway litigation system where litigation attempts to take the place of individual conduct.”<sup>7</sup>

Despite the opposition and mockery, and the minimal success in the courtroom, the food industry and the government behave as though the obesity suits are not frivolous.<sup>8</sup> As of August 2003, state lawmakers had filed more than 140 bills aimed at obesity, a figure which has nearly doubled the seventy-two lawsuits that were filed in all of 2002.<sup>9</sup> Moreover, the Food and Drug Administration (“FDA”) announced on July 11, 2003, that by January 1, 2006, labels of packaged foods must list the amount of trans fats<sup>10</sup> in foods.<sup>11</sup> Many new studies confirm that trans fats raise blood-cholesterol levels and lower high-density lipoprotein (“HDL”), the “good cholesterol,” thus increasing the risk of heart disease and type-2 diabetes.<sup>12</sup> According to FDA estimates, providing information about trans fats on food labels could prevent 7,600 to 17,100 cases of coronary heart disease and 2,500 to 5,600 deaths every year.<sup>13</sup> The outdated labeling requirements enabled food products to be called “low fat” and “saturated-fat free” while still containing trans fats.<sup>14</sup> The agency intends the new mandatory disclosure to “promote consumer awareness and an understanding of the health effects of *trans* fat as part of an educational program.”<sup>15</sup>

---

6. ‘Big Food’ Gets the Obesity Message, N.Y. TIMES, July 10, 2003, at A22.

7. Meg Green, *Food Fright: Potentially Faced with a High Tab for Fast-Food Lawsuits, Insurers Crave Information About Current Litigation*, 104 BEST’S REV. 24 (Aug. 1, 2003) (quoting Ken Scholman, Washington counsel for the Alliance of American Insurers).

8. See Sarah Avery, *Is Big Fat the Next Big Tobacco?*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 18, 2002, at A25 (detailing government and industry responses to threatened litigation).

9. Ceci Connolly, *Public Policy Targeting Obesity*, WASH. POST, August 10, 2003, at A1.

10. Trans fats are a category of vegetable fats that act like artery-clogging saturated fats in the body. Lyrissa Smith, *Revealing Trans Fats: Get the Facts About the Artery-Clogging Fat That Isn’t on Your Food Label*, TIMES UNION, Oct. 28, 2003, at D1. “Trans fat is produced by ‘hydrogenation’—bubbling unsaturated vegetable oil with hydrogen gas to make it solid at room temperature (like stick margarine), and much more durable. *Id.* A manufacturer’s dream, trans fat is inexpensive and extends the shelf-life of foods.” *Id.*

11. 21 C.F.R. § 101.36(b)(2)(i) (2003).

12. Smith, *supra* note 10.

13. Kim Severson, *Lawsuit Seeks to Ban Sale of Oreos to Children in California; Nabisco Taken to Task over Trans Fat’s Effects*, S.F. CHRON., May 12, 2003, at A3. These figures are “not only because people would be able to choose healthier foods but because manufacturers could choose to reduce trans fat amounts rather than list high levels on nutrition panels . . .” *Id.*

14. Smith, *supra* note 10. See also, David Barboza, *McDonald’s New Recipe Lowers Goo for Arteries*, N.Y. TIMES, Sept. 4, 2002, at A16.

15. Food Labeling: Trans Fatty Acids in Nutrition Labeling, Nutrient Content Claims, and Health Claims, 68 Fed. Reg. 41,434, 41,437 (July 11, 2003) (to be codified at 21 C.F.R. pt. 101).

The food industry also is taking precautions to avoid a potential outbreak of litigation.<sup>16</sup> Several fast food chains, including Kentucky Fried Chicken, Burger King, Jack in the Box, Subway, and McDonald's altered their menus or advertising to emphasize healthy foods.<sup>17</sup> For example, McDonald's is attempting to "recast itself as a purveyor of healthy food. . . ."<sup>18</sup> The company set up a global health advisory council<sup>19</sup> and added a new line of foods to its menu.<sup>20</sup> The company hired Bob Greene, Oprah Winfrey's personal trainer, to help Americans get in shape and promote the "Go Active Meal,"<sup>21</sup> an adult version of the "Happy Meal."<sup>22</sup>

This Note examines the obesity epidemic and the lawsuits filed against the food industry. It considers the potential success of the obesity lawsuits and the degree to which the government can regulate the food industry. Section II explores the obesity epidemic and explains why obesity is an important issue. Section III discusses the lawsuits that have been brought against the food industry. Section IV examines the effects of the lawsuits on the government and the food industry and the changes that each has made in response. Section V evaluates the likelihood of future successes in obesity lawsuits and compares them to the tobacco lawsuits. Section VI recommends actions the food industry could pursue to protect itself from the obesity lawsuits.

16. 'Big Food' Gets the Obesity Message, *supra* note 6.

17. Pat Ives, *With Obesity on Many Minds KFC Pushes a Theme That Its Fried Chicken Has a Place in a Healthy Diet*, N.Y. TIMES, Oct. 28, 2003, at C6.

18. Sherri Day, *McDonald's Enlists Trainer to Help Sell Its New Meal*, N.Y. TIMES, Sept. 16, 2003, at 4C.

19. Marguerite Higgins, *Food Fight; Obesity Epidemic Is Providing Food for Lawyers, Advocates*, WASH. TIMES, Oct. 19, 2003, at A01.

20. Richard A. Marini, *Fitness King Promoting McD's New Menu Items: Unlikely Pairing of Bob Greene, McDonald's Reflects Concern on Obesity*, SAN ANTONIO EXPRESS-NEWS, Oct. 27, 2003, at 1C; Laura Bradford, *Fat Foods: Back in Court: Novel Theories Revive the Case Against McDonald's—and Spur Other Big Food Firms to Slim Down Their Menus*, TIME ONLINE EDITION (Aug. 3, 2003), at <http://www.time.com/time/insidebiz/article/0,9171,1101030811-472858,00.html>.

21. Day, *supra* note 18. Instead of a hamburger and a toy, the "Go Active Meal" includes a salad, a drink, a clip-on pedometer to encourage customers to increase daily walking, and a booklet with exercise tips from Mr. Greene. Marini, *supra* note 20.

22. *McDonald's Adult Happy Meal Arrives: The Go Active! Package for Grown-Ups Includes Salad, Water and Even Exercise Tips*, CNN.COM, May 11, 2004, at [http://money.cnn.com/2004/05/11/news/fortune500/mcdonalds\\_happymeal/?cnn=yes](http://money.cnn.com/2004/05/11/news/fortune500/mcdonalds_happymeal/?cnn=yes).

## II. THE OBESITY EPIDEMIC

Obesity<sup>23</sup> is an enormous public health problem that currently ranks second to tobacco as the “largest contributor to mortality rates in the United States,”<sup>24</sup> and is on track to eclipse tobacco as the leading cause of death in America.<sup>25</sup> For this reason, experts call the obesity problem a “public health epidemic.”<sup>26</sup> This epidemic affects all ages, genders, ethnicities, and racial groups throughout the United States (“U.S.”).<sup>27</sup> U.S. Surgeon General, Richard H. Carmona, stated that the epidemic is caused by a “lack of physical activity, a diet that is not well-balanced and [a] sedentary workplace and lifestyle . . . .”<sup>28</sup> According to the U.S. Department of Health and Human Services (“HHS”) Secretary, Tommy G. Thompson, the problem of obesity “keeps getting worse,” and the number of obese people has almost doubled over the past two decades.<sup>29</sup> The 1999–2000 results of the National Health and Nutrition Examination Survey (“NHANES”) indicate that an estimated sixty-five percent of U.S. adults are either overweight or obese.<sup>30</sup> The NHANES study also showed that thirty-one percent of adults ages twenty and over, almost fifty-nine million adults, are considered

23. Obesity is defined by the National Center for Chronic Disease Prevention and Health Promotion (CDC) as “an excessively high amount of body fat or adipose tissue in relation to lean body mass.” CDC, OVERWEIGHT AND OBESITY: DEFINING OVERWEIGHT AND OBESITY, <http://www.cdc.gov/nccdphp/dnpa/obesity/defining.htm> (last visited Oct. 1, 2004) [hereinafter DEFINING OVERWEIGHT AND OBESITY]. The “amount of body fat,” or adiposity, relates to “both the distribution of fat throughout the body and the size of the adipose tissue deposits.” *Id.* A common measure for determining whether a person is obese or overweight is the Body Mass Index (BMI), a measure that indicates a person’s ratio of weight-to-height. *Id.* BMI is a mathematical formula in which a person’s body weight in kilograms is divided by the square of a person’s height in meters (i.e.,  $\text{weight}/(\text{height})^2$ ). *Id.* According to the CDC, individuals with a BMI of twenty-five to 29.9 are considered overweight, while individuals with a BMI of thirty or more are considered obese. *Id.* To use a BMI calculator, visit Body Mass Index Calculator at <http://www.cdc.gov/nccdphp/dnpa/bmi/calc-bmi.htm> (last visited Oct. 1, 2004).

24. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 587 (2001) (Thomas, J., concurring) (citing Koplan & Dietz, *Caloric Imbalance and Public Health Policy*, 282 JAMA 1579 (1999)).

25. *Death Rate From Obesity Gains Fast on Smoking*, N.Y. TIMES, Mar. 10, 2004, at A16.

26. Marie Suszynski, *A Weighty Issue: Health Insurers Are Helping Policyholders Lose Weight to Help Trim Claims Costs*, 1 BEST’S REV. 99 (2002).

27. See John A. Cohan, *Obesity, Public Policy, and Tort Claims Against Fast-Food Companies*, 12 WIDENER L. J. 103, 104 (2003).

28. Higgins, *supra* note 19 (quoting Surgeon General Carmona).

29. Press Release, Center for Disease Control (CDC)/National Center for Health Statistics (NCHS), *Obesity Still on the Rise*, New Data Show (Oct. 8, 2002), <http://www.os.hhs.gov/news/press/2002pres/20021008b.html> (last visited Oct. 24, 1998) [hereinafter *Obesity Still on the Rise*].

30. CDC, PREVALENCE OF OVERWEIGHT AND OBESITY AMONG ADULTS: UNITED STATES, 1999–2000, <http://www.cdc.gov/nchs/products/pubs/pubd/hestats/obese/obse99.htm> (last visited Oct. 1, 2004).

obese.<sup>31</sup> This figure reflects an increase of about eight percent from the NHANES study in 1994.<sup>32</sup> The incidence of overweight children and adolescents has more than doubled and may have even tripled in the past two decades.<sup>33</sup> The 1999–2000 NHANES indicates that an estimated fifteen percent of children and adolescents ages six to nineteen years are overweight.<sup>34</sup>

#### A. Health Risks Associated with Obesity

The U.S. Surgeon General's 2001 Report on Overweight and Obesity predicts that "[l]eft unabated, overweight and obesity may soon cause as much preventable disease and death as cigarette smoking."<sup>35</sup> Overweight and obesity are associated with many health problems, such as an increased risk for coronary heart disease; type 2 diabetes; endometrial, colon, postmenopausal breast and other cancers; and certain musculoskeletal disorders, such as knee osteoarthritis.<sup>36</sup> It is also associated with sleep apnea, urinary incontinence, gallbladder disease, and non-alcohol related fatty liver disease.<sup>37</sup> According to the National Heart and Lung Blood Institute, all adults (aged eighteen years or older) who have a Body Mass Index ("BMI") of twenty-five or more are considered to be at risk for premature death and disability.<sup>38</sup> These health risks increase as individuals become more obese.<sup>39</sup> In fact, obese individuals have a fifty to one-hundred percent increased risk of premature death.<sup>40</sup> According to a recent report by the Surgeon General, approximately 300,000 deaths per year in the United States may be attributable to

31. Obesity Still on the Rise, *supra* note 29.

32. *Id.*

33. See OFFICE OF THE SURGEON GENERAL, OVERWEIGHT AND OBESITY: AT A GLANCE, [http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact\\_glance.htm](http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact_glance.htm) (last visited Oct. 1, 2004) [hereinafter AT A GLANCE] (stating that in 1999, approximately thirteen percent of children aged six to eleven years, and fourteen percent of adolescents aged twelve to nineteen years were overweight, whereas, these figures were seven percent for children aged six to eleven years, and five percent for adolescents aged twelve to nineteen in 1980); Obesity Still on the Rise, *supra* note 29.

34. CDC, PREVALENCE OF OVERWEIGHT AMONG CHILDREN AND ADOLESCENTS: UNITED STATES, 1999–2000, <http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overwght99.htm> (last visited Sept. 18, 2004).

35. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY (2001), <http://www.surgeongeneral.gov/topics/obesity/calltoaction/toc.htm>.

36. Cohan, *supra* note 27, at 105.

37. Roni Rabin, *Breast Cancer Linked to Childhood Weight*, NEWSDAY (N.Y.), Oct. 21, 2003, at A49.

38. NAT'L INSTITUTES OF HEALTH, CLINICAL GUIDELINES ON THE IDENTIFICATION, EVALUATION, AND TREATMENT OF OVERWEIGHT AND OBESITY IN ADULTS, NIH Publication No. 98-4083 NHLBI (Sept. 1998) at 12, [http://www.nhlbi.nih.gov/guidelines/obesity/ob\\_gdlns.pdf](http://www.nhlbi.nih.gov/guidelines/obesity/ob_gdlns.pdf) [hereinafter CLINICAL GUIDELINES]; DEFINING OVERWEIGHT AND OBESITY, *supra* note 23.

39. CLINICAL GUIDELINES, *supra* note 38, at 12; See also DEFINING OVERWEIGHT AND OBESITY, *supra* note 23.

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

obesity,<sup>41</sup> a figure not far behind the annual death of 430,000 per year from tobacco.<sup>42</sup>

Childhood obesity is a serious health problem in itself.<sup>43</sup> In most cases, people who eat poorly when they are children continue to eat poorly as adults since “[e]ating preferences formed in childhood tend to persist in adulthood.”<sup>44</sup> Overweight adolescents have a seventy percent chance of becoming overweight or obese adults.<sup>45</sup> The chance of becoming overweight or obese adult increases to eighty percent if a child has at least one parent who is overweight or obese.<sup>46</sup> Obese children face more immediate consequences as well. The most immediate—and often most devastating—consequence of being overweight as a child is social discrimination.<sup>47</sup> These children can develop low self-esteem and depression.<sup>48</sup> Moreover, risk factors for heart disease, such as high cholesterol and high blood pressure, occur with greater frequency in overweight children and adolescents than among children with a healthy weight.<sup>49</sup>

### *B. The High Economic Implications of Obesity*

Obesity and health-related obesity problems have an enormous effect on the health care system and the U.S. economy.<sup>50</sup> The total annual estimated economic cost of obesity has risen in the U.S. from an estimated \$99.2 billion in 1995<sup>51</sup> to approximately \$117 billion in 2000,<sup>52</sup> an increase of \$17.8 billion in five years. These totals reflect both direct and indirect costs.<sup>53</sup> Direct costs consist of

41. Office of the Surgeon General, *Overweight and Obesity: Health Consequences*, at [http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact\\_consequences.htm](http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact_consequences.htm) (last visited Sept. 18, 2004).

42. Melissa Healy, *War on Fat Gets Serious*, L.A. TIMES, Jan. 3, 2004, at 1.

43. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 588 (2001) (Thomas, J., concurring) (citing Richard P. Troiano & Katherine M. Flegal, *Overweight Children and Adolescents*, 101 PEDIATRICS 497 (1998)).

44. *Id.*

45. OFFICE OF THE SURGEON GENERAL, *OVERWEIGHT IN CHILDREN AND ADOLESCENTS*, [http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact\\_adolescents.htm](http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact_adolescents.htm) (last visited Feb. 28, 2004) [hereinafter OFFICE OF SURGEON GENERAL].

46. *Id.*

47. *Id.* See also Carol Torgan, Ph.D., *Childhood Obesity on the Rise*, THE NIH WORD ON HEALTH (June 2002), at <http://www.nih.gov/news/WordonHealth/jun2002/childhoodobesity.htm>.

48. Torgan, *supra* note 47; see also OFFICE OF SURGEON GENERAL, *supra* note 45.

49. Torgan, *supra* note 47.

50. Emily J. Schaffer, *Is the Fox Guarding the Hen House? Who Makes the Rules in American Nutritional Policy?*, 57 FOOD & DRUG L.J. 371, 375 (2002). See also Cohan, *supra* note 27, at 106.

51. CLINICAL GUIDELINES, *supra* note 38, at 41; Cohan, *supra* note 27, at 106 (citing Anne M. Wolf & Graham A. Colditz, *Current Estimates of the Economic Cost of Obesity in the United States*, 6 OBESITY RESEARCH 97, 98 (1998)).

52. AT A GLANCE, *supra* note 33; Cohan, *supra* note 27, at 106.

53. Cohan, *supra* note 27, at 106.

health care costs in the prevention, diagnosis, hospitalization, treatment, and nursing home care of conditions commonly associated with obesity.<sup>54</sup> Of the 1995 costs, approximately \$51.6 billion of these dollars were direct medical expenses associated with diseases attributable to obesity.<sup>55</sup> These direct costs represent 5.7% of the national health expenditure within the U.S.<sup>56</sup> Indirect costs refer to both lost wages by people “who are unable to work because of illness and disability”<sup>57</sup> and the costs representing the “value of lost output” caused by morbidity and mortality.<sup>58</sup> In 1995, these indirect costs totaled \$47.6 billion dollars.<sup>59</sup> By 2000, the total cost of obesity reached an estimated \$117 billion, \$61 billion in direct costs and \$56 billion in indirect costs.<sup>60</sup> A RAND Corporation study released on March 9, 2004 declared that if obesity continues rising in the U.S. at its current rate, by 2020 almost twenty percent of health care dollars spent on people ages fifty to sixty-nine could be consumed by obesity-related medical problems, fifty percent more than was spent in 2000.<sup>61</sup>

***C. Addressing Obesity: The Debate Between Personal Responsibility and the Government’s Role in Addressing the Problem of Obesity***

The medical and economic implications of obesity make it evident that individual food choices have vast public consequences. The figures above indicate that the U.S. has a compelling interest in reversing the current trend of obesity. Despite the alarming statistics on the prevalence and ramifications of obesity, the government has done little to address the unhealthy eating habits at the core of the problem.<sup>62</sup>

Regardless of the vast public consequences of obesity, many people argue that individual food choices should be a matter of personal responsibility.<sup>63</sup> Others

54. *Id.*

55. CLINICAL GUIDELINES, *supra* note 38, at 41.

56. *Id.*

57. Cohan, *supra* note 27, at 106 (quoting Anne M. Wolf & Graham A. Colditz, *Current Estimates of the Economic Cost of Obesity in the United States*, 6 OBESITY RESEARCH 97, 98 (1998)).

58. CLINICAL GUIDELINES, *supra* note 38, at 9.

59. *Id.*

60. Pl.’s. Compl. ¶ 28, *Pelman v. McDonald’s Corp.*, No. 24809/02 (N.Y. Sup. Ct. Aug. 22, 2002), [www.banzhaf.net/docs/nyckids.html](http://www.banzhaf.net/docs/nyckids.html) (last visited Sept. 18, 2004).

61. Press Release, RAND, *Cost of Treatment for Obesity-Related Medical Problems Growing Dramatically* (Mar. 9, 2004) at <http://www.rand.org/news/press.04/03.09.html>.

62. Note, *The Elephant in the Room: Evolution, Behavioralism, and Counteradvertising in the Coming War Against Obesity*, 116 HARV. L. REV. 1161, 1161 (2003).

63. Shelly Branch, *Obese America: Is Food the Next Tobacco*, WALL ST. J., June 13, 2002, at B1 (detailing a 2002 survey of 1,000 consumers finding fifty-seven percent blamed individuals rather than food producers and other causes for obesity). See also Jenny Deam, *Hooked on Fast Food? While Law Professor Wants Warnings by Chains, Experts Say Burgers, Fries Aren’t Addictive*, DENVER POST, June 25, 2003, at F1.

say that people cannot have personal responsibility if they are uninformed.<sup>64</sup> As mentioned by Judge Sweet in *Pelman v. McDonald's*, a line should “be drawn between an individual’s own responsibility to take care of herself, and society’s responsibility to ensure that others shield” that person.<sup>65</sup> With this in mind, laws should be created in situations where “society needs to provide a buffer between the individual and some other entity.”<sup>66</sup> An example of a buffer is Congress’s creation of the Fair Packaging and Labeling Act to protect the individual from manufacturers that attempt to deceive consumers.<sup>67</sup> The Act requires packages and labels to include accurate information.<sup>68</sup> Yet, as Judge Sweet stated, it is “not the place of the law to protect them from their own excesses.”<sup>69</sup> He further stated that, “as long as a consumer exercises free choice with appropriate knowledge, liability for negligence will not attach to a manufacturer. . . . [W]hen that free choice becomes but a chimera” manufacturers should be held accountable for consumer’s decisions.<sup>70</sup> Thus, when manufacturers deprive consumers of the opportunity to make informed choices, they may be able to haul manufacturers into court and hold them accountable.

### III. OBESITY LITIGATION

As obesity lawsuits sprang up on the court dockets, many people complained about the “frivolous” nature of the lawsuits and debated about whether the courtroom is the proper place to address the obesity epidemic.<sup>71</sup> Sherman Joyce, President of the American Tort Reform Association, argues that legislation and regulation are more appropriate than using the courts as a means of addressing the problem of obesity.<sup>72</sup> Although Joyce’s arguments may be true, recourse to the courts is frequently the only way to create social change in the U.S. because Congress is often “beholden to powerful industry lobbies.”<sup>73</sup> According to John Banzhaf III,<sup>74</sup> a professor of public interest law at George Washington University, legislation and regulation are preferable to litigation; however, litigation is often necessary to prompt change.<sup>75</sup> Banzhaf believes that lawsuits may be effective for

- 
64. Deam, *supra* note 63.  
 65. *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 516 (S.D.N.Y. 2003).  
 66. *Id.*  
 67. Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451–1461 (2004).  
 68. *Id.*  
 69. *Pelman*, 237 F. Supp. 2d at 533.  
 70. *Id.*  
 71. Deam, *supra* note 63; See Debra Goldman, *Common Sense May Not be McDonald's Ally for Long*, ADWEEK, Dec. 2, 2002.  
 72. Green, *supra* note 7 (“The problem of obesity is better addressed through legislation and regulation, not litigation.”).  
 73. Andrew Gumbel, *The Man Who is Taking Fat to Court*, SUN HERALD (Sydney), July 14, 2002, at 16.  
 74. Banzhaf “was a pioneer in taking the tobacco industry to task—and to court . . . [and] has now turned his attentions to the food industry. Banzhaf was not the attorney of record in any tobacco case or fast food case, but has helped the plaintiffs with legal theories.” Green, *supra* note 7.  
 75. *Id.*



making helpful social changes, following the mantra: "If you can't regulate, litigate."<sup>76</sup> He maintains that the mere threat of future lawsuits may be enough to persuade restaurants to reveal the potential dangers of the high fat and calorie content in their foods.<sup>77</sup> Overall, Banzhaf's objectives are to apply legal pressures compelling the food industry to change its practices and to generate enough publicity on the issue of obesity to cause social reform.<sup>78</sup>

Recently, several lawsuits against fast food companies and food manufacturers have been filed and many more may be on the way.<sup>79</sup> For the purposes of this Note, the litigation against the food industry will be placed into two categories: (1) actions against food companies for explicit, false misrepresentations of information; and (2) actions accusing the food industry of misleading consumers through a lack of disclosure. The first category includes lawsuits against DeConna Ice Cream of Orange Lake Florida (the maker of Big Daddy Ice Cream)<sup>80</sup> and Robert's Gourmet Food Inc. (the maker of Pirate Booty)<sup>81</sup> for misrepresenting products with inaccurate labels. The second category includes court actions against Kraft Foods, McDonald's, Wendy's, Burger King, and Kentucky Fried Chicken for failing to disclose information about its products. Both categories of lawsuits are significant to the war on obesity since they endeavor to make food companies more accountable for the obesity epidemic in America. The focus of this Note, however, is on the second category of lawsuits. At this time, lawsuits falling within the first category have been successful, while those in the second category have been repeatedly defeated.

76. Gumbel, *supra* note 73.

77. Deam, *supra* note 63 ("Banzhaf says he does not have to prove the claim that fast food is addictive for consumers to ultimately win. . . . the threat of future suits may be enough to push restaurants to be more open about the potential dangers of high fat and calorie content in their food.").

78. Stephen Clapp, *Anti-Smoking Lawyer Trains His Guns on the Food Industry*, 44 FOOD CHEMICAL NEWS 23 (2002).

79. Green, *supra* note 7.

80. In 2001, a class action was filed in a Florida Circuit Court against DeConna Ice Cream, the maker of "Big Daddy" ice cream. The suit, which accused the company of understating the ice cream's fat and calorie content and sought to hold DeConna responsible for misleading customers, resulted in a \$1.2 million settlement. The label stated that the product was 100 calories, two grams of fat, and nineteen carbohydrates per serving, when in fact, Big Daddy was 300 calories per serving and contained seven and a half grams of fat and fifty carbohydrates per serving. Patrick Danner, *Class Members in Suit Against Florida Ice Cream Maker to Get Free Dessert*, MIAMI HERALD, Sept. 27, 2003; *Frozen Dessert Year in Review*, 15 ICE CREAM REP. 1, Jan. 20, 2002.

81. In 2002, several class actions were filed charging that Robert's American Gourmet Food Inc. mislabeled its Pirate Booty snack products to make them seem healthier. Prior to the discovery of the false label, *Vanity Fair* had dubbed Pirate Booty products the "in" healthy junk food. Subsequently, a Good Housekeeping Institute test discovered that Pirate Booty contains 340% more fat than stated on the nutrition label. Robert's American Gourmet Food Inc. agreed to a settlement that would pay \$790,000 in attorney's fees and issue \$3.5 million in coupons. Claude Solnik, *Robert's American Gourmet Food Inc. to Agree to Settlement in Class Action Suit*, LONG ISLAND BUS. NEWS (N.Y.), Dec. 6, 2002; Green, *supra* note 7; Gumbel, *supra* note 73.

Suits in the second category, actions accusing the food industry of misleading consumers through a lack of disclosure, involve a novel theory, and their prospects for success are uncertain.<sup>82</sup> These suits, which are deemed “frivolous” by many critics,<sup>83</sup> have several legal obstacles to overcome, such as failure to establish legal causation,<sup>84</sup> a lack of foreseeability of harm,<sup>85</sup> contributory negligence, and assumption of risk.<sup>86</sup> Although these court actions may face an “uphill battle,” they have succeeded in catching the attention of the food industry, the government, and American consumers.<sup>87</sup> As of 2004, none of these suits have reached a jury; however, these lawsuits have raised public awareness about the risks of obesity, heart disease, and other health concerns.<sup>88</sup> The suits have also been catalysts for “Big Food” to change its practices to benefit consumers.<sup>89</sup> The uncertainty and public relations nightmares associated with this type of lawsuit make it the more feared category of the two.<sup>90</sup> These lawsuits are especially menacing to the food industry because of the possibility that they harbor the potential to evolve into litigation similar in scale to that faced by the tobacco industry.

---

82. Avery, *supra* note 8 (quoting Donald H. Beskind, a Raleigh personal injury lawyer and senior lecturer at the Duke University School of Law, who stated that because obesity lawsuits are still in their “infancy, so their legal merits are difficult to gauge”).

83. Higgins, *supra* note 19 (stating people have “dismissed the claims as frivolous and emphasized personal choice and responsibility”).

84. *Pelman v. McDonald’s Corp.*, 237 F. Supp. 2d 512, 538–39 (S.D.N.Y. 2003). Judge Sweet explains that causation is difficult to prove since “any number of other factors then potentially could have affected the plaintiffs’ weight and health.” *Id.* He states that “[i]n order to survive a motion to dismiss, the Complaint at a minimum must establish that the plaintiffs ate at McDonalds on a sufficient number of occasions such that a question of fact is raised as to whether McDonalds products played a significant role in the plaintiffs’ health problems.” *Id.*

85. *Pelman v. McDonald’s Corp.*, No. 02 Civ. 7821(RWS), 2003 WL 22052778, at \*12 (S.D.N.Y. Sept. 3, 2003) (noting that the doctrine is “one of foreseeability of the scope or extent of injury” and the defendant is “liable only for the extent to which the defendant’s conduct” causes the harm).

86. *Cohan*, *supra* note 27, at 114 (stating both tobacco and obesity types of cases must overcome the “defenses of contributory negligence, assumption of risk, and the defense that plaintiffs’ own lifestyles contributed to their ill health”). In this manner, the cases become difficult because “even if fast-food consumption does cause obesity, the defense may prevail based on evidence that other factors brought about or complicated plaintiffs’ illness.” *Id.*

87. *Green*, *supra* note 7.

88. Marian Burros, *A Suit Seeks to Bar Oreos as a Health Risk*, N.Y. TIMES, May 14, 2003, at F5; Dahlia Lithwick, *My Big Fattening Greek Salad*, SLATE MAG. (Aug. 13, 2003).

89. *Lithwick*, *supra* note 88.

90. *See Avery*, *supra* note 8 (quoting Beskind stating that ignoring these lawsuits is a mistake because “[w]hat looks frivolous today may turn out to be very serious tomorrow”).

### A. BanTransFats.com v. Oreos

In 2003, Stephen Joseph filed a lawsuit on behalf of a nonprofit group called BanTransFats.com, Inc. against Kraft, the maker of Nabisco Oreos.<sup>91</sup> The California lawsuit alleged that Oreos contain trans fats, or hydrogenated and partially hydrogenated oils, which are not safe for consumption.<sup>92</sup> The nonprofit group sought to block Kraft from marketing and selling the “trans fat-laden Oreo cookies” to children.<sup>93</sup> The cause of action was based upon a California civil code provision that only protects manufacturers for common consumer products if the products are both “inherently unsafe and . . . known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community.”<sup>94</sup>

According to Joseph’s website, trans fats are “unsafe and unfit for human consumption.”<sup>95</sup> He contends that trans fats “cause serious lowering of HDL (good) cholesterol and a significant and serious increase in LDL (bad) cholesterol; make the arteries more rigid; cause major clogging of arteries; cause or contribute to type 2 diabetes; and cause or contribute to other serious health problems.”<sup>96</sup> Joseph’s website also cites a 1999 study by Harvard University’s Department of Nutrition which estimated that, in the U.S. diet, replacing trans fats with unhydrogenated vegetable oils would prevent approximately 30,000 to 100,000 premature coronary deaths a year.<sup>97</sup>

As soon as the Oreo litigation became public, the case received massive national and international coverage.<sup>98</sup> After the *New York Times* featured Joseph’s story and picture,<sup>99</sup> his suit quickly gained public attention.<sup>100</sup> His website, BanTransFats.com, went from fewer than 500 hits before the story broke to over 75,000 hits two days later.<sup>101</sup> Kraft headquarters received 277 calls and e-mails about Oreos within two days of the release of the lawsuit’s details<sup>102</sup>—essentially, a public relations nightmare.

91. Green, *supra* note 7; Sharon Dowell, *Cookie Lawsuit Addresses Dangers of Trans Fatty Acid*, DAILY OKLAHOMAN (Oklahoma City), May 21, 2003, at 1D.

92. Green, *supra* note 7.

93. *How the Cookie Crumbles (Goodnews)*, 65 BETTER NUTRITION 10 (2003) [hereinafter *Cookie Crumbles*]; Green, *supra* note 7.

94. CAL. CIV. CODE § 1714.45 (West 2004); see also *Lawyer Puts Bite on Oreos: Suit Says Ingredient ‘Inedible’*, NEWSDAY (N.Y.), May 14, 2003, at A06.

95. *Ban Trans Fats*, BanTransFat.com, at <http://bantransfats.com> (last visited Oct. 1, 2004) [hereinafter BanTransFats.com]; see also Dowell, *supra* note 91.

96. BanTransFats.com, *supra* note 95; see also Dowell, *supra* note 91.

97. Green, *supra* note 7; BanTransFats.com, *supra* note 95; see also *supra* notes 10–15 and accompanying text.

98. Green, *supra* note 7.

99. Burros, *supra* note 88.

100. Kim Severson, *S.F. Lawyer Plans to Drop Oreo Suit; All the National Publicity About Trans Fat Made His Point, He Says*, S.F. CHRON., May 15, 2003, at A3.

101. *Id.*

102. *Id.*

By creating publicity about the dangers of trans fats present in Oreo cookies, Joseph successfully attracted Kraft's attention.<sup>103</sup> During the height of publicity, Kraft responded to the lawsuit by declaring that the company has been "exploring ways to reduce trans fat in Oreos, and those efforts are continuing."<sup>104</sup> On July 1, 2003, Kraft announced that it would conduct an overhaul of its products.<sup>105</sup>

Within a few weeks of filing, and within three days of public disclosure of the lawsuit's subject matter, Joseph voluntarily withdrew the action against Kraft.<sup>106</sup> According to Joseph, "as a result of the publicity, the legal premise for the lawsuit disappeared."<sup>107</sup> The lawyer's legal basis was that the "existence and danger of trans fat was not common knowledge."<sup>108</sup> Once a flood of publicity from the lawsuit informed the public about the dangers of trans fats, Joseph believed he had "scored [his] home run," so he dismissed the suit.<sup>109</sup>

### ***B. Caesar Barber Files Suit Against McDonald's, Wendy's, Burger King, and Kentucky Fried Chicken***

In July 2002, Caesar Barber, a fifty-seven-year-old, 270-pound Bronx janitor, filed a class action in a New York court against McDonald's, Wendy's, Burger King, and Kentucky Fried Chicken, claiming that eating regularly at those restaurants made him obese.<sup>110</sup> He also claimed that the restaurants failed to adequately warn him that his steady diet of fast food would lead to health problems, including heart attacks and diabetes.<sup>111</sup> Barber contended that, as a result of the fast food chains' actions, Barber had two heart attacks and is a diabetic.<sup>112</sup>

This lawsuit was the first broad-based legal action filed accusing the fast food industry of contributing to obesity.<sup>113</sup> Samuel Hirsch, Barber's lawyer, argued that the multibillion dollar fast food industry has an obligation to inform consumers about the dangers of eating food from their restaurants.<sup>114</sup> Hirsch maintained that companies profited enormously from consumers who regularly eat

103. *Id.* (quoting Joseph) ("Kraft is already under the gun. Kraft is going to have to deal with the fact that the public is now aware of what it puts in Oreos.").

104. Dowell, *supra* note 91.

105. *Cookie Crumbles*, *supra* note 93.

106. Dowell, *supra* note 91; Green, *supra* note 7.

107. Green, *supra* note 7.

108. *Id.*

109. Severson, *supra* note 100.

110. Complaint, *Barber v. McDonald's Corp.*, (N.Y. Sup. Ct. 2002) (No. 23145/2002), <http://news.findlaw.com/hdocs/docs/mcdonalds/barbermcdds72302cmp.pdf> [hereinafter *Barber Complaint*].

111. Barber Complaint, *supra* note 110, at 10.

112. Geraldine Sealey, *Whopper of a Lawsuit: Fast-Food Chains Blamed for Obesity Illnesses*, ABCNEWS.COM, July 26, 2002, at <http://abcnews.go.com/sections/us/DailyNews/fatsuit020725.html>.

113. *Id.*

114. *Id.*

their food.<sup>115</sup> He contended that the fast food chains were negligent in selling food high in fat, salt, sugar, and cholesterol despite studies showing a link between consumption of such foods and obesity, diabetes, and numerous other health problems.<sup>116</sup>

Early in 2003, Hirsch discontinued the *Barber* litigation because he believed he had a stronger case with a lawsuit that focused on children.<sup>117</sup> His apparent strategy was to attract the sympathies of the court through a plaintiff who was a defenseless child, rather than an adult who arguably should have known fast food was bad for him. A focus on children would leave the plaintiffs less vulnerable to claims of personal responsibility.<sup>118</sup> Hirsch also began concentrating his efforts on one company, rather than filing a broad-based action against several fast food restaurants. Consequently, Hirsch brought a suit against McDonald's.

### C. *Juveniles Take McDonald's to Court*

In *Pelman*, two juvenile customers of McDonald's, with their parents as guardians, sued McDonald's in August 2002, seeking a class action certification and alleging violations of the New York Consumer Protection Act.<sup>119</sup> McDonald's moved to dismiss the suit for failure to state a claim pursuant to Rule 12(b)(6).<sup>120</sup> The plaintiffs alleged that the practices McDonald's uses to make and sell its products are deceptive, and that this deception injured their health.<sup>121</sup> More specifically, they argued that McDonald's used false advertisements to mislead consumers into thinking that its foods are healthier than they are, failed to disclose the potential dangers of eating the food, and neglected to warn consumers that fatty foods can be addictive.<sup>122</sup> The juveniles further asserted that their purchase and consumption of the defendant's products was a significant or direct factor that led them to become overweight and develop other adverse health effects.<sup>123</sup> According to Judge Sweet, the case involved questions of "personal responsibility, common knowledge, and public health," and the "role of society and the courts in addressing such issues."<sup>124</sup>

Although Judge Sweet dismissed the case pursuant to a summary judgment motion, he granted the plaintiffs leave to amend the complaint, setting the stage for future litigation.<sup>125</sup> Before dismissing the matter, Judge Sweet made observations that practically created a roadmap for filing a case against the food

---

115. *Id.*

116. Barber Complaint, *supra* note 110, at 9–10.

117. Telephone Interview with Samuel Hirsch, Barber's attorney (Sept. 6, 2004) [hereinafter Hirsch interview].

118. *Id.*

119. *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 519–20 (S.D.N.Y. 2003).

120. *Id.* at 516.

121. *Id.* at 516.

122. *Id.* at 520.

123. *Id.* at 519; *Pelman v. McDonald's Corp.*, No. 02 Civ. 7821(RWS), 2003 WL 22052778, at \*1 (S.D.N.Y. Sept. 3, 2003).

124. *Pelman*, 237 F. Supp. 2d at 516.

125. *Id.* at 543; Bradford, *supra* note 20.

industry. His decision described Chicken McNuggets as a “McFrankenstein creation of various elements not utilized by the home cook” and said that it is “hardly common knowledge that McDonald’s french fries are comprised” of countless ingredients besides potatoes.<sup>126</sup> He then instructed the plaintiffs that “[i]t is at least a question of fact as to whether a reasonable consumer would know—without recourse to the McDonalds’ [sic] Web site—that a Chicken McNugget contained so many ingredients other than chicken and provided twice the fat of a hamburger.”<sup>127</sup> He even stated: “[T]his argument comes closest to overcoming the hurdle presented to plaintiffs. If plaintiffs were able to flesh out this argument in an amended complaint, it may establish that the dangers of McDonalds’ [sic] products were not commonly well known and thus that McDonald’s had a duty toward its customers.”<sup>128</sup>

The plaintiffs filed an amended complaint asserting four causes of action, but one count was dropped.<sup>129</sup> The allegations focused on the false advertising component of the original complaint. The first count alleged that McDonald’s misled the plaintiffs through advertising campaigns and other publicity by suggesting that its products were nutritious and could be a part of a healthy lifestyle even if consumed on a daily basis.<sup>130</sup> The second count provided that McDonald’s failed to adequately disclose the fact that some of its foods were substantially less healthy, as a result of processing and ingredient additives, than what was represented in advertising campaigns and other publicity.<sup>131</sup> The third count asserted that McDonald’s engaged in unfair and deceptive acts and practices by misrepresenting to the New York Attorney General and to consumers that nutritional information was conspicuously displayed at all of the stores, when, in fact, this information had not been adequately available at a significant number of McDonald’s outlets.<sup>132</sup> McDonald’s—once again—responded with a Rule 12(b)(6) motion to dismiss the complaint.<sup>133</sup>

Ultimately, in September 2003, Judge Sweet rejected the amended complaint and dismissed the cause of action with prejudice.<sup>134</sup> The court held that the plaintiffs “failed to allege both that McDonald’s caused the plaintiffs’ injuries or that McDonald’s representations to the public were deceptive.”<sup>135</sup> Judge Sweet further held that the plaintiffs made “no explicit allegations that they witnessed any particular deceptive advertisement,” and failed to provide the court with enough

---

126. *Pelman*, 237 F. Supp. 2d at 535.

127. *Id.*

128. *Id.* at 536.

129. *Pelman v. McDonald’s Corp.*, No. 02 Civ. 7821(RWS), 2003 WL 22052778, at \*2 (S.D.N.Y. Sept. 3, 2003).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at \*4.

134. *Id.* at \*14.

135. *Id.*

information to determine whether McDonald's products were the cause of the alleged injuries.<sup>136</sup> The case is currently being appealed.<sup>137</sup>

Despite *Pelman's* dismissal, in early October, McDonald's announced it would be reformulating its Chicken McNuggets recipe in all 13,600 of its U.S. restaurants to make the product leaner.<sup>138</sup> The new all-white-meat six-piece Chicken McNugget meal contains 260 calories, down from 310 calories, and sixteen grams of fat, a twenty percent reduction.<sup>139</sup> McDonald's claims that this change was contemplated for years;<sup>140</sup> however, it seems too coincidental that the change came shortly after the company faced harsh criticism for the unhealthiness of its food, and specifically, that Chicken McNuggets were attacked by Judge Sweet as a "McFrankenstein creation."<sup>141</sup> Thus, even though *Pelman* was unsuccessful in the courts, the lawsuit most likely was a significant motivating force for McDonald's to offer its customers healthier dietary choices.

#### IV. IMPACT OF THE OBESITY LITIGATION: HEIGHTENED PUBLIC AWARENESS AND CATALYST FOR CHANGE

Although the obesity related food litigation has been vastly criticized as frivolous and has achieved only minimal success in the courts, the food industry, lobbyists, politicians, and state and federal government are now responding as though the suits have some validity, or that they at least present public health concerns that cannot be ignored. The issue of obesity has "exploded onto the issue agenda," and a movement to make America healthier is being waged across the country.<sup>142</sup> The government is now banishing snack foods and sodas from some schools and writing legislation to protect the health of consumers.<sup>143</sup> Food companies, motivated by changing consumer sentiments and fears of class-action lawsuits, are also making changes such as cutting portion sizes and offering healthier menus to benefit the health of consumers.<sup>144</sup>

---

136. *Id.*

137. Hirsch interview, *supra* note 117.

138. Delroy Alexander, *McDonald's Chicken McNugget Slims Down: Meal Makeover Trims 50 Calories and One-Fifth of the Worrisome Fat*, VENTURA COUNTY STAR, Oct. 15, 2003, at E06; Healy, *supra* note 42.

139. Alexander, *supra* note 138.

140. *Id.* ("McDonald's said it has been contemplating a switch for years, denying that current concern over fast rising rates of obesity is driving the change.")

141. *See infra* note 126.

142. Robert Dodge, *Battle to Reduce Nation's Waistline Overwhelms Political Landscape*, CHATTANOOGA TIMES FREE PRESS, Jan. 1, 2004 (quoting Rogan Kersh, a political science professor at Syracuse University, who studies public health issues).

143. Healy, *supra* note 42; Dodge, *supra* note 142.

144. Dodge, *supra* note 142. "[T]he suits have nudged the targeted corporations to offer consumers more nutrition information and better dietary choices." Healy, *supra* note 42. "While none of these cases has yet found its way before a jury . . . Big Food is scared." *See* Lithwick, *supra* note 88.

### A. The Government's Responses to the Obesity Litigation

As obesity costs shoot upward, the issue of fat is "set[ting] off alarms in every quarter of government."<sup>145</sup> Although obesity litigation has been unsuccessful thus far, the lawsuits are a catalyst for legislative changes, as most of the food industry would prefer to take its chances with Congress and state legislatures—where the industry retains the power to lobby—than with an unpredictable judge and jury.<sup>146</sup> Consequently, policymakers throughout the nation are seeking legislative solutions modeled after the anti-smoking campaigns of the 1990s.<sup>147</sup>

State legislators across the country have been writing laws aimed at fighting obesity and fat.<sup>148</sup> In half a dozen states and the District of Columbia, lawmakers are debating bills requiring fast food and chain restaurants to display nutritional information such as calorie, fat, and sugar content on menus.<sup>149</sup> Currently, restaurants are not required to post nutritional information.<sup>150</sup> States such as Arkansas have enacted bills to study the problem of obesity.<sup>151</sup> In New York, six anti-obesity bills have been proposed, including one that would tax fatty foods and "modern icons of sedentary living"—such as movie tickets, video games and DVD rentals—and use the money for nutrition and exercise programs.<sup>152</sup> States have also considered allowing health insurance companies to offer discounts to people who are within their ideal weight range.<sup>153</sup>

Congress has also seen a plethora of bills dealing with the issue of obesity.<sup>154</sup> As mentioned earlier, Congress passed legislation requiring that food manufacturers display the trans fat content of their products on nutrition labels by

145. Healy, *supra* note 42.

146. *Grant Immunity to the Fatty Fries; Ban Lawsuits Blaming Restaurants for Obesity*, ROCKY MOUNTAIN NEWS, Jan. 15, 2004, at 41A. "In a courtroom, someone may say some ridiculous thing and a company could get in big trouble. There is much more control with lobbyists in terms of molding legislation." Telephone Interview with John Horwitz, Former Assistant General Counsel and Division Vice President, McDonald's Corporation (March 3, 2004).

147. Connolly, *supra* note 9.

148. Healy, *supra* note 42.

149. Connolly, *supra* note 9; Anna W. Mathews & Shirley Leung, *FDA Considers Nutrition Labels in Restaurants*, WALL ST. J., Oct. 23, 2003, at B1.

150. 21 C.F.R. § 101.9(j)(2)(i-iii) (2004).

151. *State Study Suggests National Child Obesity Problem*, CNN.COM, June 4, 2004, at <http://www.cnn.com/2004/HEALTH/diet.fitness/06/04/obese.children.ap> (detailing state study finding forty percent of Arkansas school children are obese).

152. See, e.g., A. 09145, 2003-04 Reg. Sess. (N.Y. 2004).

153. Healy, *supra* note 42.

154. A search of the word or phrase "obesity" in proposed legislation for the 108th Congress through the congressional website <http://thomas.loc.gov> resulted in fifty proposed bills that contained the term obesity. See *Government Action and Advocacy: Health and Fitness Legislation Reflects the Obesity Epidemic*, 22 IDEA HEALTH & FITNESS SOURCE 28 (2004) [hereinafter *Health and Fitness Legislation*].



2006.<sup>155</sup> Congress is also debating other proposed legislation to stem the obesity epidemic. One such measure is the Obesity Prevention Act, a bill proposing the formation of a commission on obesity treatment and prevention to encourage school and community-based activities to help reduce weight gain among children.<sup>156</sup> This commission would create a federal nutrition and fitness program and provide grants of up to thirty million dollars a year to be awarded at state and local levels.<sup>157</sup> Congress is likewise considering the Workforce Health Improvement Program (“WHIP”) Act, a bill which would allow employers to deduct the cost of health club memberships for their employees.<sup>158</sup> Another proposed measure is the Improved Nutrition and Physical Activity (“IMPACT”) Act, a bill that provides for the funding of health services to improve nutrition, increase physical activity, and prevent obesity.<sup>159</sup> Also, the Eating Disorders Awareness, Prevention, and Education Act of 2003, if enacted, would raise awareness and create educational programs about eating disorders.<sup>160</sup>

Much of the government’s early attention towards countering the obesity epidemic has focused on children.<sup>161</sup> Across the nation, school boards began eliminating snack foods that are high in sugar and fat from vending machines, altering the nutritional content of lunches offered at schools, and strengthening physical education programs.<sup>162</sup> Several states oppose the in-school television station, Channel One, for broadcasting candy and soda commercials.<sup>163</sup> Arkansas passed a law requiring health report cards, which include a measure of a child’s BMI, for all public school children.<sup>164</sup> Maine and New York require all chain restaurants with kids’ menus to offer at least one children’s meal with fewer than twenty-two grams of fat.<sup>165</sup>

In California, former Governor Gray Davis signed the California Childhood Obesity Prevention Act, a new law that bans the sale of sugar-filled sodas in elementary and middle schools throughout California.<sup>166</sup> Effective in July of 2004, the law permits the sale of only healthy beverages such as water, milk, one-hundred percent fruit juices, and fruit-based drinks with no less than fifty

---

155. Food Labeling: Trans Fatty Acids in Nutrition Labeling, Nutrient Content Claims, and Health Claims, 68 Fed. Reg. 41434-01 (2003).

156. Obesity Prevention Act, H.R. Res. 2227, 108th Cong. (2003), <http://thomas.loc.gov>.

157. *Id.*

158. Workforce Health Improvement Program Act of 2003, H.R. Res. 1818 & S. Res. 1491, 108th Cong. (2003), <http://thomas.loc.gov>.

159. Improved Nutrition and Physical Activity Act, H.R. Res. 716 & S. Res. 1172, 108th Cong. (2003), <http://thomas.loc.gov>.

160. Eating Disorders Awareness, Prevention, and Education Act of 2003, H.R. Res. 873, 108th Cong. (2003), <http://thomas.loc.gov>.

161. See *Health and Fitness Legislation*, *supra* note 154.

162. Healy, *supra* note 42.

163. Connolly, *supra* note 9.

164. 2003 Ark. Acts 1220.

165. Healy, *supra* note 42.

166. CAL. EDUC. CODE §§ 49431, 49431.5 (West 2004); see also *Soda Ban Becomes Law*, S.F. CHRON., Oct. 13, 2003, at A20 [hereinafter *Soda Ban*].

percent fruit juice and no added sweeteners.<sup>167</sup> Public elementary and middle schools will be barred from selling soda during school hours; however, sales will still be permitted outside school hours at fundraisers and other events.<sup>168</sup> These legislative acts send a consistent message that the legislature is willing to help children make healthy, nutritional choices.

Other government agencies, such as the Internal Revenue Service (“IRS”), have also begun recognizing obesity as a serious health problem.<sup>169</sup> In April 2002, the IRS designated obesity as a disease and allowed a tax deduction for treatment of this disease.<sup>170</sup> The IRS now allows taxpayers to deduct expenses for participation in weight loss programs as treatment for obesity diagnosed by a physician.<sup>171</sup> This medical care deduction for obesity includes “amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body.”<sup>172</sup> According to the rule, an individual, in filing his or her federal tax returns, is permitted to take an itemized deduction for medical expenses for treatment to the extent that these expenses exceed seven-and-a-half percent of adjusted gross income.<sup>173</sup> Amounts paid to lose weight for purposes of improving appearance, general health, and sense of well-being, however, may not be deducted as a medical expense.<sup>174</sup>

The FDA also instituted actions to curb the epidemic of obesity.<sup>175</sup> As mentioned earlier, by 2006 the FDA will require companies to list the amount of trans fats in their packaged food products.<sup>176</sup> On August 11, 2003, Mark B. McClellan, the FDA Commissioner, created an Obesity Working Group (“OWG”) to prepare a report outlining an action plan to examine aspects of the obesity problem.<sup>177</sup> Then, on March 12, 2004, the OWG’s report was released outlining a strategy for combating obesity.<sup>178</sup> The OWG recommended rules that give more prominence to calories on food labels, encouraged manufacturers to label foods as

167. CAL. EDUC. CODE § 49431.5 (West 2004); see also *Health and Fitness Legislation*, *supra* note 154.

168. CAL. EDUC. CODE § 49431.5 (2004); see also *Soda Ban*, *supra* note 166.

169. Rev. Rul. 2002-19, 2002-1 C.B. 778; See Connie Farrow, *A Taxing Loss*, CHATTANOOGA TIMES FREE PRESS, Mar. 2, 2004, at A1. Morgan Downey, executive director of American Obesity Association, stated that the IRS ruling designating obesity as a disease “takes a different approach from the normal kind of urging everyone to diet and exercise as a lifestyle recommendation because it recognizes obesity as a major medical problem.” *Id.*

170. Rev. Rul. 2002-19, 2002-1 C.B. 778.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. Press Release, U.S. Department of Health & Human Services, HHS Unveils FDA Strategy to Help Reduce Obesity: New “Calories Count” Approach Builds on HHS’ Education, Research Efforts (Mar. 12, 2004), available at [http://www.fda.gov/bbs/topics/news/2004/hhs\\_031204.html](http://www.fda.gov/bbs/topics/news/2004/hhs_031204.html). [hereinafter HHS Press Release].

176. 21 C.F.R. § 101.36 (2003).

177. FDA, *Calories Count: Report of the Working Group on Obesity*, at <http://www.cfsan.fda.gov/~dms/owg-toc.html> (Mar. 12, 2004) [hereinafter FDA Report].

178. HHS Press Release, *supra* note 175.

a single-serving where the entire package can reasonably be eaten on a single occasion, recommended using appropriate comparative statements that help consumers find healthier food substitutes,<sup>179</sup> and advocated increased enforcement against weight loss products with false or misleading claims.<sup>180</sup> The OWG also promoted the idea of establishing relationships with other groups such as youth-oriented organizations to educate Americans about obesity and how to lead healthier lives.<sup>181</sup> The OWG encouraged the restaurant industry to “initiate a nation-wide, voluntary, and point-of-sale nutrition information campaign for consumers.”<sup>182</sup>

### *B. Changes in Response to the Obesity Lawsuits Within the Food Industry*

In 2003, almost every large company in the fast food industry began making voluntary moves, such as testing lower-calorie options and healthier meals, in an effort to avoid negative publicity.<sup>183</sup> Thus, while arguing that the obesity lawsuits are frivolous, most popular chains also are changing their menus to avoid being viewed as a contributor to America’s obesity problem.<sup>184</sup> According to Jane Hurley, a registered dietitian, “[it is] amazing what the threat of a lawsuit can do,” and fear of the idea of a “tobacco-style legal quagmire” has pushed fast food producers towards disclosing nutritional information and expanding healthy offerings on menus.<sup>185</sup> Many of the larger companies are taking the threats seriously and voluntarily setting up public health programs and modifying their marketing.<sup>186</sup> Also, companies are offering healthier products in order to remain competitive in a marketplace with an increasing demand for healthier foods.<sup>187</sup>

Food and beverage companies, realizing that it may be in their best interest for people to use their products in healthy ways, are discussing and implementing a myriad of “social-marketing measures,” such as airing public-service announcements about health and eating in moderation, and funding new in-school physical-fitness programs.<sup>188</sup> For example, in 2002, as part of a test program, Coca-Cola Co. gave middle-school students in Atlanta, Houston, and

179. FDA Report, *supra* note 177 (for example, “instead of cherry pie, try our delicious low fat cherry yogurt—29% fewer calories and 86% less fat”).

180. *Id.*

181. *Id.*

182. *Id.*

183. Kenneth Hein, *Outlook 2004: Restaurants—Salad Days to Continue for Flexible Fast Feeders*, BRANDWEEK, Jan. 5, 2004; Mathews & Leung, *supra* note 149 (“Already, several restaurant companies have been making voluntary moves.”).

184. Hein, *supra* note 183.

185. Erica Marcus, *On the Fast Track to Health*, NEWSDAY (N.Y.), Jan. 7, 2004, at B16.

186. Green, *supra* note 7; Higgins, *supra* note 19.

187. Higgins, *supra* note 19; *see also* Telephone Interview with Michael Goldblatt, Former Vice President of Nutrition and Product Development, McDonald’s (May 27, 2004) [hereinafter Goldblatt interview] (“Economics drives the food industry. The [fast food] industry as a whole believes that they follow people’s eating habits.”).

188. Branch, *supra* note 63. Michael Mudd, head of Kraft corporate affairs stated: “It is in [the company’s] best interest for people to use our products in a healthful way.” *Id.*

Philadelphia pedometers to promote competitive exercise games among non-athletic kids.<sup>189</sup> Kraft expanded its website to include health and wellness information and, as of July 2003, ended all of its in-school marketing.<sup>190</sup>

Another example, PepsiCo, whose brands include Frito-Lay snacks and Quaker cereals, teamed up with fitness expert Kenneth Cooper<sup>191</sup> to form the PepsiCo/Cooper Aerobics Center partnership that will work to develop healthier food products.<sup>192</sup> The new alliance resulted in a "Smart Snack" ribbon label, a label placed on the front of bags of baked chips if the snacks meet certain nutritional guidelines set by Dr. Cooper.<sup>193</sup> The backs of the chip bags will contain slogans such as "[e]at well, exercise more, FEEL GREAT!" and "[a] wellness program including exercise, good nutrition, and stress management is the key to a healthy life."<sup>194</sup>

Food companies are also working to remake their images as good corporate citizens by offering healthier food products. Frito-Lay has removed trans fats from several of its brands, including Doritos, Tostitos, and Cheetos.<sup>195</sup> Kraft promised to reduce the portion sizes of some of its foods and to develop more nutritious products.<sup>196</sup> For example, the company has begun removing trans fats from Triscuits, Oreos, Chips Ahoy, Cheese Nips, and Wheat Thins.<sup>197</sup>

Many fast-food companies are appealing to health conscious consumers by adding healthier selections to their menus.<sup>198</sup> For instance, early in 2002, Wendy's introduced four Garden Sensations entrée salads.<sup>199</sup> Wendy's introduced new kids' meal options with milk and a fresh fruit cup instead of french fries.<sup>200</sup> In August 2002, Taco Bell, responding to competition, introduced the Fresco Style option enabling customers to order any menu item with a five-calorie mix of diced

189. Branch, *supra* note 63; The Coca-Cola Company, "Step With It!" Program *is Racing Across the U.S.*, (Nov. 1, 2002) [http://www2.coca-cola.com/ourcompany/wn20021101\\_step.html](http://www2.coca-cola.com/ourcompany/wn20021101_step.html).

190. Branch, *supra* note 63; Higgins, *supra* note 19.

191. Kenneth Cooper is a Dallas doctor credited as the "father of modern aerobics."

192. Branch, *supra* note 63.

193. Betsy McKay, *PepsiCo's Frito-Lay Gives Its Baked Chips 'Smart Snack' Label: Physicians Endorsement Will Be Displayed on Fronts of Packages*, WALL ST. J., Aug. 6, 2003, at D3 (detailing that in order to meet Dr. Cooper's guidelines, a one ounce-serving of a snack must contain 150 calories or less, have less than thirty percent of its calories from fat, less than seven percent of its calories from saturated fat, contain no trans fat, and have 240 milligrams or less of sodium).

194. *Id.*

195. *Id.*

196. Bradford, *supra* note 20; Martin, *supra* note 5.

197. Marian Burros, *Eating Well; Hold the Fries. Hey, Not All of Them!*, N.Y. TIMES, Mar. 10, 2004, at F1.

198. Barbara Rolek, *Healthful Fast Food? Low-Fat, Maybe, but Beware the Sodium and Carbohydrates*, CHI. TRIB., Dec. 10, 2003, at 4.

199. *Id.*

200. See *Kids Meal Food*, at [http://www.wendys.com/kids\\_meal/yesflash.shtml](http://www.wendys.com/kids_meal/yesflash.shtml) (last visited Nov. 15, 2004).

tomato, onion, and cilantro instead of sauce and cheese.<sup>201</sup> If ordered Fresco Style, the menu now offers fifteen items with ten grams of fat or less.<sup>202</sup> Through these changes, the fast food industry is acknowledging that it is in its best interest to voluntarily provide consumers healthier choices and disclose the fat content of meals.

After being subjected to two lawsuits, McDonald's, the nation's largest fast food chain, has been under an increasing amount of pressure to offer healthier options and to appeal to health-conscious consumers.<sup>203</sup> As mentioned earlier, McDonald's set up a global health advisory council<sup>204</sup> and has been test-marketing a new "Go-Active Meal."<sup>205</sup> In a dramatic step, McDonald's, in March 2004, announced the end of the "Super Size" options.<sup>206</sup> In a press release, McDonald's declared that this change was an effort to "include[] a consistent and relevant menu, with a range of choices that support a balanced lifestyle."<sup>207</sup> The discontinuation of "Super Sizing" represents a significant shift in the company's menu and a drastic move toward projecting a healthier image for the company.<sup>208</sup>

## V. DOES THE HISTORY OF THE TOBACCO LITIGATION FORESHADOW THE FUTURE OF OBESITY LAWSUITS' SUCCESS?

In evaluating the future prospects of the obesity lawsuits in achieving their objectives, obesity litigation should be compared and contrasted with the litigation that devastated Big Tobacco. In fact, some scholars have argued that "[t]he history of tobacco litigation is the future of the fast food industry."<sup>209</sup> Despite many Americans' belief that the obesity lawsuits are frivolous,<sup>210</sup> one lesson to be learned from the tobacco litigation is that "what looks frivolous today may turn out to be very serious tomorrow."<sup>211</sup> Tobacco litigation may have

201. Taco Bell Corp., at <http://www.tacobell.com/> (last visited Oct. 9, 2004).

202. *Id.*; see also Marcus, *supra* note 185 (stating that a chicken burrito supreme ordered Fresco Style, for example, has 350 calories and eight grams of fat as opposed to the original of 410 calories and fourteen grams of fat).

203. John Woestendiek & Arthur Hirsch, *McDonald's to Trim Super Size: Downsizing: The Nation's Biggest Purveyor of Fast Food Will Eliminate Its Biggest Portions*, BALT. SUN, Mar. 3, 2004, at 1A.

204. Higgins, *supra* note 19.

205. See *supra* note 21.

206. Press Release, McDonald's, McDonald's Media Response to Core Menu and Super Sizing (Mar. 2, 2004) (stating that the Super Size drink option will only be available as a promotional option), [http://www.mcdonalds.com/usa/news/current/conpr\\_03022004.html](http://www.mcdonalds.com/usa/news/current/conpr_03022004.html).

207. *Id.*

208. Woestendiek & Hirsch, *supra* note 203.

209. Franklin E. Crawford, *Fit for Its Ordinary Purpose? Tobacco, Fast Food, and the Implied Warranty of Merchantability*, 63 OHIO ST. L.J. 1165, 1169 (2002).

210. See *infra* note 272.

211. See *supra* note 82, 90.

expanded the field of products liability,<sup>212</sup> and similar to the tobacco cases, the odds of winning judgments against food companies could significantly increase if hidden manufacturing or marketing strategies are made public through company whistle-blowers or the legal disclosure process.<sup>213</sup> While it is difficult to predict at this time whether plaintiffs in obesity litigation will be victorious, it would be unwise for the food industry to underestimate the ever-expanding threat of this litigation<sup>214</sup> and to fail to take preventative measures.

### A. Comparing Big Tobacco and Big Food

#### 1. Obesity Litigation and Tobacco Litigation Share Many Similarities

Obesity litigation strikingly parallels tobacco litigation in many ways. The protagonists of the obesity suits are the same lawyers who successfully engineered the litigation against the tobacco companies, which settled for a total of more than \$240 billion.<sup>215</sup> The starting point for both movements is also the same: in 1964, the U.S. Surgeon General Luther L. Terry laid the foundation for what would become a national anti-smoking movement by calling cigarette smoking a "health hazard of sufficient importance in the United States to warrant appropriate remedial action."<sup>216</sup> Similarly, in December 2001, Surgeon General David Satcher issued a "call to action"<sup>217</sup> on obesity, and since his statement, the fat-fighting movement has continued to take hold throughout the U.S.<sup>218</sup> In his address, Satcher directly compared the current obesity situation in the U.S. to the health problems attributable to cigarette smoking and stated that obesity "may soon cause as much preventable disease and death as cigarette smoking."<sup>219</sup> Current statistics show that overweight and obesity contribute to the premature deaths of 300,000 Americans annually, a figure not far behind tobacco's yearly death rate of 430,000.<sup>220</sup> Both

212. Cohan, *supra* note 27, at 110 ("Experts originally said that the tort of products liability was a hopeless avenue in tobacco litigation, but eventually, cases made their way to juries with staggering awards.").

213. Avery, *supra* note 8.

214. Bradford, *supra* note 20. David Adelman, a consumer-food analyst at Morgan Stanley who covered tobacco, believes "[i]t would be a mistake to underestimate the creativity of plaintiffs' lawyers." *Id.*

215. Lithwick, *supra* note 88; Cohan, *supra* note 27, at 110 ("Lawyers who pioneered suits against tobacco companies have set their sights on [fast foods and other foods].").

216. Glenn Frankel, *Decades After Declaration, War on Smoking Begins; Both Sides Agree Regulations Are Just First Shot*, WASH. POST, Aug. 24, 1996, at A01; Healy, *supra* note 42.

217. FDA, *Overweight, Obesity Threaten U.S. Health Gains*, FDA CONSUMER MAGAZINE (Mar.-Apr. 2002), [http://www.fda.gov/fdac/features/2002/202\\_fat.html](http://www.fda.gov/fdac/features/2002/202_fat.html) [hereinafter *Obesity Threatens U.S. Health Gains*].

218. Healy, *supra* note 42.

219. *Obesity Threatens U.S. Health Gains*, *supra* note 217; Healy, *supra* note 42.

220. See Healy, *supra* note 42.

tobacco products and the foods responsible for causing obesity impose high economic costs on society.<sup>221</sup>

Even if a plaintiff states a cause of action, both types of legal actions face defenses of contributory negligence and assumption of risk. Under the theory of assumption of risk, “conduct implies consent” whenever the plaintiff “had specific knowledge of the risk posed by the defendant’s negligence, appreciates its nature, and proceeded voluntarily to encounter it nevertheless.”<sup>222</sup> Contributory negligence arises when the failure of the plaintiff to exercise care for himself or herself is one of the causes of the harm.<sup>223</sup> Even when the plaintiff’s conduct could be considered contributory negligence, there are three exceptions recognized by courts to the rule barring recovery.<sup>224</sup> These exceptions enable a contributorily negligent person to recover “against . . . a defendant who was guilty of intentional, wanton, or reckless harm, . . . a defendant who had the last clear chance to avoid injury, and . . . a defendant whose duty, under statute or otherwise, was to protect the plaintiff from her own risky conduct.”<sup>225</sup>

In both the tobacco and obesity litigation, plaintiffs voluntarily used the products, though it is uncertain whether the defenses of contributory negligence and assumption of risk would shield the food industry from liability. In the tobacco cases, juries evaluated the voluntary nature of the plaintiffs’ conduct and still assessed liability on Big Tobacco.<sup>226</sup>

The defense of assumption of risk would most likely not apply to the obesity litigation if children are too young to understand and “appreciate” the nature of the risks associated with eating fast food or junk foods. In addition, if the food industry failed to inform parties of risks associated with eating these foods, plaintiffs would not have the requisite knowledge of these risks. Assumption of risk and contributory negligence may also be unavailable if evidence reveals that the food industry intentionally concealed the risks associated with its products.<sup>227</sup> Contributory fault may be unavailable if it is determined that the food industry acted recklessly or intentionally in causing consumers harm.

221. Press Release, United States Department of Health & Human Services, *New Surgeon General’s Report Expands List of Diseases Caused by Smoking*, (May 27, 2004) (“The economic toll [of tobacco in 2004] exceeds \$157 billion each year in the United States—\$75 billion in direct medical costs and \$82 billion in lost productivity.”), <http://www.hhs.gov/news/press/2004pres/20040527a.html>); see also AT A GLANCE, *supra* note 33 (stating that in 2000, the cost of obesity was approximately \$117 billion a year).

222. DAN B. DOBBS, *THE LAW OF TORTS* § 211 (2000).

223. *Id.* at § 199.

224. *Id.* at § 200.

225. *Id.*

226. Cohan, *supra* note 27, at 113.

227. *Id.* at 127–28.

2. *The Food and Tobacco Industries' Similar Methods of Attracting Customers*

The advertising campaigns used by both industries share common features. One of the most damaging findings against tobacco companies, which helped to turn the tide of public opinion against this industry, was the targeting of their advertisements to vulnerable groups, especially children.<sup>228</sup> Similarly, the food industry spends billions of dollars a year in advertising, a large portion of which is aimed at children.<sup>229</sup> In 2001, McDonald's alone spent \$600.9 million for advertising, with children a major target.<sup>230</sup> Advocates worry that children are particularly receptive to advertising pitches for burgers and fries, sugary cereals that are "part of a nutritious breakfast," and soft drinks, since children are unconcerned about health factors and merely motivated by the idea that these foods taste good.<sup>231</sup> Advocates are also concerned that the industry is pouring billions of dollars into ads that target children, knowing in advance the effect that its advertisements and products will have on the "impressionable minds" of children.<sup>232</sup> Advertisers target children with heavy advertising on Saturday morning television programs when many children watch television, creating tie-ins with toys and Disney movies, and attracting parents with playground settings.<sup>233</sup> This targeting of children also includes marketing efforts within the public schools, where children are "a captive audience for marketers," and products are marketed through means such as conventional advertising campaigns, classroom teaching materials, and lunch room franchises.<sup>234</sup> By aggressively marketing unhealthy food products to children, the food industry becomes more vulnerable to obesity lawsuits since children create more compelling cases.

Unlike tobacco, the food industry is not widely recognized as having preyed on unknowing consumers, so it may lack the "diabolical reputation associated with tobacco manufacturers."<sup>235</sup> Even so, opponents of the food industry are slowly working to eliminate this difference.<sup>236</sup> In the tobacco cases, plaintiffs discovered documents revealing that the tobacco industry "had prior knowledge of the dangers of tobacco [and there had been] a long pattern of

---

228. *Id.* at 112; Crawford, *supra* note 209, at 1221–22.

229. Avery, *supra* note 8.

230. *Id.*

231. *Id.*

232. Lithwick, *supra* note 88.

233. Avery, *supra* note 8; Cohan, *supra* note 27, at 112; Crawford, *supra* note 209, at 1221–22; *see* ERIC SCHLOSSER, FAST FOOD NATION 47 (2002) ("Every month about 90% of American children between the ages of three and nine visit a McDonald's. The [playground settings] have proven to be an effective lure . . . 'the key to attracting kids is toys, toys, toys.'").

234. SCHLOSSER, *supra* note 233, at 52 (stating opponents of in-school marketing "contend that schoolchildren are becoming a captive audience for marketers, compelled by law to attend school and then forced to look at ads as a means of paying for their own education").

235. Crawford, *supra* note 209, at 1219.

236. *Id.*



concealment, denial, and even manipulation of the addictive component of tobacco.<sup>237</sup> This discovery was fatal to the tobacco companies and resulted in previously unimaginable judgments.<sup>238</sup> Likewise, opponents of the food industry hope to transform its public image into an evil, greedy enemy so that it may share a fate similar to Big Tobacco.<sup>239</sup> They have already begun vilifying the fast food and snack industry by engaging in a public information campaign identical to the campaign used against Big Tobacco.<sup>240</sup> Opponents of Big Food are attempting to create a public health scare about the risks involved with poor diets, particularly those high in fat, and create a negative public image of the industry.

Evidence in the tobacco litigation revealed that the tobacco industry intentionally sought to addict young consumers in order to ensure lifetime customers.<sup>241</sup> Even though opponents of the food industry are now arguing that it is doing the same,<sup>242</sup> as of this time, there is no evidence that any food companies knowingly increased the addictive nature of their products or lied about the dangers of their products to consumers.<sup>243</sup> Still, proponents of the obesity suits contend that it is impossible to know at this juncture exactly what the fast food companies know about their products or did to make them more dangerous until the completion of the discovery phase of trial.<sup>244</sup> Those who support the food industry contend that fast food is not addictive like nicotine, and even if fast food is discovered to be addictive, the addictive effects are not as severe as the addictive effect of nicotine.<sup>245</sup>

Researchers are now investigating whether large amounts of fat in combination with sugar can trigger cravings similar to drug addictions.<sup>246</sup> This type of finding could help explain why fast food sales have increased to more than \$100 billion a year, despite years of warnings to limit fats.<sup>247</sup> The Physicians Committee for Responsible Medicine ("PCRM") claims there is biochemical evidence that the obsession in America with certain unhealthy foods originates more from a physical addiction to these foods than from a lack of willpower.<sup>248</sup> Dr. Neal Barnard, president of PCRM asserts that researchers have found that certain

237. Jonathan Turley, *A Crisis of Faith: Tobacco and the Madisonian Democracy*, 37 HARV. J. ON LEGIS. 433, 447 (2000).

238. See Green, *supra* note 7 (quoting Brendan D. Cook, a product liability attorney with the Houston office of Baker & McKenzie, who said, "the tobacco companies successfully defended themselves until [the plaintiffs] found out information was concealed and companies lied. The companies have been hammered ever since" (alteration original)).

239. Crawford, *supra* note 209, at 1221–22.

240. *Id.*; see generally ERIC SCHLOSSER, FAST FOOD NATION (2002).

241. Crawford, *supra* note 209, at 1219.

242. *Id.*

243. Lithwick, *supra* note 88.

244. *Id.*

245. Crawford, *supra* note 209, at 1219–20.

246. *Id.*

247. *Id.*

248. Press Release, PCRM, Nutrition Expert Provides New Ammunition for Fast-Food Lawsuits (June 3, 2003), <http://www.pcrm.org/news/health030603.html> [hereinafter New Ammunition].

foods are “seductive foods”: foods that are “similar to drugs in that they cause the release of opiate-like compounds that stimulate the brain’s pleasure center.”<sup>249</sup> According to Dr. Barnard, the opiate-like substances in “seductive foods”—foods such as chocolate, cheese, meats, and sugar—seduce people into becoming “hooked” into eating those foods repeatedly.<sup>250</sup> Dr. Barnard also claims that the food industry “intentionally manipulate[s] the addictive qualities of its products” to maximize the addictive qualities of certain products.<sup>251</sup>

Food industry officials, on the other hand, strongly deny the existence of a conspiracy of this nature.<sup>252</sup> As of this time, no one has brought forward actual evidence that any company attempted to make food addictive—most likely, the manufacturers simply aimed to create a pleasing taste for their foods.<sup>253</sup>

### 3. *The Tobacco and Food Industries’ Potent Lobbying Powers*

Another similarity between the food and tobacco industries is the influential lobbying power of both groups in Washington. For the past century, the tobacco industry has had a “massive political presence in Washington.”<sup>254</sup> As the danger of cigarettes became apparent and public opinion turned against tobacco, tobacco companies sent out a force of powerful and resourceful lobbyists to reinforce their political positions by making enormous campaign contributions.<sup>255</sup> The tobacco industry’s powerful lobbying efforts enabled the tobacco industry to specifically exclude its products from the jurisdiction of the Consumer Products Safety Commission<sup>256</sup> and from the Environmental Protection Agency’s jurisdiction under the Toxic Substances Control Act.<sup>257</sup> Pressure was also often asserted against officials in the executive branch who considered initiating effective tobacco control measures.<sup>258</sup> In addition, tobacco lobbyists influenced state legislatures, such as the California legislature, where legislation was passed

249. Press Release, PCRM, Health Advocates Condemn Proposed Bill to Shield Junk Food Industry (June 16, 2003), <http://www.pcrm.org/news/health030616.html>; BARNARD, *BREAKING THE FOOD SEDUCTION* 6 (2003).

250. Press Release, PCRM, Evidence Mounts that Foods are Physically Addictive (July, 2003) <http://www.pcrm.org/news/health030529.html>; BARNARD, *supra* note 249.

251. New Ammunition, *supra* note 248; BARNARD, *supra* note 249, at 46, 59 (stating “[I]ndustry scientists have dedicated a great deal of effort to finding exactly the right ingredient balance [of fat and sugar in chocolate] to keep you coming back,” while the cheese industry created a marketing program intended to “trigger the cheese craving” in grocery chains, food services, and fast food restaurants).

252. Diane Evans, *Tasty, But Addictive?*, AKRON BEACON J., May 31, 2003.

253. *Id.*

254. Richard A. Daynard, *Regulating Tobacco: The Need for a Public Health Judicial Decision-Making Canon*, 30 J.L. MED. & ETHICS 281, 282 (2002).

255. *Id.*

256. 15 U.S.C.S. § 2052(a)(1)(B) (Law. Co-op. 2004); 15 U.S.C.S § 1261(f)(2) (Law. Co-op. 2004).

257. Daynard, *supra* note 254, at 282.

258. *Id.* (providing the example of “President Carter’s firing of his Secretary of Health, Education and Welfare, Joseph Califano, to appease tobacco interests in preparation for Carter’s nonetheless unsuccessful reelection bid”).

barring “personal injury suits involving tobacco, alcoholic beverages, sugar, butter, castor oil and other ‘inherently unsafe’ products.”<sup>259</sup> The California immunity statute protected tobacco companies from lawsuits in California from 1987 until 1998.<sup>260</sup> Overall, the tobacco industry successfully defeated unfavorable legislation through lobbying.<sup>261</sup>

Similarly, the U.S. food industry employs an army of lobbyists to create and protect a favorable marketplace for selling its products. These food lobbyists “lobby Congress [and state legislatures] for favorable laws, government agencies for favorable regulations, and the White House for favorable trade agreements.”<sup>262</sup> Consequently, as plaintiffs began filing obesity lawsuits against food companies, the food industry began acting in a manner similar to tobacco lobbyists and lobbied Congress and state legislatures to protect its industry. As a result, The Personal Responsibility in Food Consumption Act (H.R. 339), also known as the “Cheeseburger Bill” and The Common Sense Consumption Act (S. 1428), appeared in Congress.<sup>263</sup> Representative Ric Keller of Florida, a Republican whose district contains the headquarters for two national restaurant chains, introduced the Cheeseburger Bill.<sup>264</sup> The stated purpose of the bill is “to prevent frivolous lawsuits against the manufacturers, distributors, or sellers of food or non-alcoholic beverage products that comply with applicable statutory and regulatory requirements.”<sup>265</sup> Even though courts have consistently dismissed the obesity lawsuits, the food industry continues to lobby for additional liability protection. In addition, thirteen states passed legislation similar to the Cheeseburger Bill, twenty-six states introduced similar bills.<sup>266</sup>

---

259. CAL. CIV. CODE § 1714.45 (West 1987), amended by Stats.1997, ch. 25 § 2; James P. Sweeney, *Wilson Signs Repeal of Tobacco Industry's Legal Immunity*, COPLEY NEWS SERVICE, Sept. 29, 1997.

260. See CAL. CIV. CODE § 1714.45 (West 2004).

261. *Id.*

262. MARION NESTLE, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH* 93 (Univ. of Cal. Press 2002).

263. Personal Responsibility in Food Consumption Act, H.R. 339, 108th Cong. (2003); Common Sense Consumption Act of 2003, S. 1428, 108th Cong. (2003); *Congressional Legislation Details*, CONGRESS.ORG, at <http://www.congress.org/congressorg/issues/bills/?billnum=H.R.339&congress=108&size=full> [hereinafter *Legislation Details*].

264. David Phelps, *The Bottom Line; Legal Threats Haunt Fast-Food Industry; Few Rushing to Court Yet, but the Specter of Lawsuits Already is Changing the Menu*, STAR TRIBUNE (Minn.), Oct. 12, 2003, at 3A. Keller's district is the corporate home for Darden Restaurants, Inc., which operates Olive Garden and Red Lobster restaurants. *Id.*

265. Personal Responsibility in Food Consumption Act, H.R. 339, 108th Cong. (2003).

266. NAT'L REST. ASS'N, *STATE ACTION; NUTRITION AND HEALTHY LIFESTYLES*, <http://www.restaurant.org/government/state/nutrition> (last visited Oct. 12, 2004). The National Restaurant Association has a running tally of states which have enacted and introduced bills banning obesity lawsuits. *Id.*

### *B. Differences Between the Tobacco and Food Lawsuits*

While the obesity and tobacco litigation have many similarities, they also differ in several ways. A crucial difference is that “food is essential and we cannot live without it, but people can live without tobacco.”<sup>267</sup> Even more important, food does have health benefits, but “there is no such thing as a healthy diet of smoking or smoking in moderation.”<sup>268</sup> In addition, unlike tobacco users who tend to show loyalty to particular brands, it is hard to prove causation for liability purposes among junk food addicts since they tend to eat unhealthy products from a variety of different sources. Causation also becomes difficult because people who eat unhealthy foods at restaurants often eat poorly at home and live less active lives. Thus, even if fast food consumption does cause obesity, the food industry could prevail based upon evidence that other factors brought about or complicated the plaintiff’s illness.

### *C. The Food Industry Loses Public Support, Increasing Its Chances of a Future Negative Jury Verdict*

The negative publicity against the food industry and the movement against obesity appears to have affected public opinion. As a result of the *Pelman* litigation, supporters of the obesity suits believe there has been a shift in the public’s perception “from seeing obesity only as a personal or family responsibility to seeing it as a societal problem with societal solutions.”<sup>269</sup> In a 2002 survey by *The National Law Journal*, twenty-eight percent of potential jurors said they would decide in favor of a smoker who sued a tobacco company, while fifty-three percent said they would decide in favor of the company.<sup>270</sup> In March 2003, the litigation research firm Bowne DecisionQuest discovered that 24.4% of potential jurors would award damages to an obese plaintiff who sued a fast food chain, and 56.4% would side with the company.<sup>271</sup> These statistics present a mere 3.6% difference between jurors’ support of plaintiffs in tobacco litigation and their support of plaintiffs in obesity litigation. Thus, if an obesity suit makes it to a jury, it is not implausible that the food industry could be faced with a fate similar to tobacco.<sup>272</sup>

---

267. Goldblatt interview, *supra* note 187.

268. Bradford, *supra* note 20 (quoting Richard Daynard).

269. *Id.* (quoting Marion Nestle, chair of the Department of Nutrition and Food Studies at New York University).

270. Green, *supra* note 7.

271. *Id.*

272. One caveat: A Gallup Poll that was conducted July 7–9, 2003, found that nearly 9 in 10 Americans (89%) oppose holding the fast-food industry legally responsible for the diet-related health problems of people who eat that kind of food on a regular basis. Just 9% are in favor. Those who describe themselves as overweight are no more likely than others to blame the fast-food industry for obesity-related health problems, or to favor lawsuits against the industry.

Lydia Saad, *Public Balks at Obesity Lawsuits: Most Say Food Industry Should Not be Held Responsible for Consumers’ Weight Problems*, GALLUP NEWS SERVICE, July 21, 2003,

*D. Weighing the Likelihood of the Success of Food Lawsuits following on the Heels of Tobacco*

It is difficult to predict whether members of the food industry will one day face the same devastation as the tobacco industry with a large verdict in an obesity lawsuit. The tobacco and food litigation share strikingly similar histories: both suits feature plaintiffs who voluntarily used the products, and the methods of attracting consumers are almost the same. After the expansion of tort liability in the tobacco suits, the similar trends among the two industries could foreshadow what may later ensue in obesity litigation. At the same time, the food industry's sheer lobbying power may be enough to shelter the industry from future lawsuits. Additionally, the differences between the industries may be significant enough to preclude a lawsuit from ever achieving success. For example, the fact that food is a necessity and tobacco is purely a luxury with no health benefits may be enough to distinguish them.

Despite the possible merits of the obesity lawsuits, they may cease to exist if bills similar to the Cheeseburger Bill are enacted into law.<sup>273</sup> On March 10, 2004, the Cheeseburger Bill passed in the House of Representatives by a vote of 276 to 139.<sup>274</sup> The approved version of the Cheeseburger Bill is an effort by President Bush and congressional Republicans to curb the new trend of suing restaurants for causing obesity.<sup>275</sup> The bill now waits in the Senate where its chances for success are uncertain.

Supporters of the bill, such as the National Restaurant Association, believe that obesity should be addressed through "education, personal responsibility, moderation, and healthier lifestyles," not litigation.<sup>276</sup> Supporters also argue that the proposals prevent businesses from being forced to spend large sums of money defending themselves against frivolous suits.<sup>277</sup> Republicans supporting the bill contend that "exposing the food industry to suits similar to those used against the tobacco industry could wreck the economy and make it more expensive to eat out."<sup>278</sup>

---

<http://www.gallup.com/poll/content/default.aspx?ci=8869>. This poll took place merely two months after the Bowne DecisionQuest poll and it is difficult to say which poll is more reflective of how a jury would actually vote in an obesity lawsuit. *Id.*

273. See *supra* text accompanying notes 264–70.

274. *Legislation Details, supra* note 263.

275. Richard Simon, *The Nation: House Tightens Belt on Fatty Food Suits*, L.A. TIMES, Mar. 11, 2004, at A13.

276. NAT'L REST. ASS'N, PUBLIC POLICY ISSUE BRIEFS, <http://www.restaurant.org/government/issues/issue.cfm?Issue=lawsuits> (last visited Sept. 19, 2004).

277. Ira Dreyfuss, *While a Nationwide Ban on Lawsuits Claiming That Restaurants Should Be Held Responsible for Obesity Problems is Unlikely, a Dozen States This Year Have Enacted Such Laws*, MIAMI HERALD, Aug. 29, 2004, <http://www.miami.com/ml/miamiherald/2004/08/29/news/9526149.htm>.

278. *House Moves to Ban Obesity Lawsuits Blaming Fast Food*, USA TODAY, Mar. 10, 2004.

Opponents of the Cheeseburger Bill believe that the bill is an inappropriate response designed to protect an industry that does not need protection.<sup>279</sup> In fact, critics have accused the House of Representatives of passing the bill as “an exercise in special-interest pandering.”<sup>280</sup> Some critics contend that legislatures should not tamper with the nation’s tort system to protect individual industries.<sup>281</sup> They argue that the judiciary is responsible enough to dismiss frivolous suits, and it is “not the role of Congress to do what the courts themselves are already doing.”<sup>282</sup> Moreover, critics believe that if tort reform is needed, it should not benefit any single class of defendants. Other critics of the bill, such as the Consumers Union, argue that the threat of litigation helped the nation by encouraging the food industry to think healthier.<sup>283</sup> Overall, critics question whether the threat of obesity lawsuits is serious enough to justify congressional intervention.<sup>284</sup>

It is uncertain whether the bill will become law. Some experts, such as Professor Banzhaf, expect the bill to die in the Senate.<sup>285</sup> Similar tort-reform legislation has passed the Republican-controlled House in recent years, barring suits against the gun industry for gun crimes and against businesses for asbestos-related health problems.<sup>286</sup> Nevertheless, none of these bills have made it out of the Senate, which is closely divided between Republicans and Democrats.<sup>287</sup> Thus, it seems unlikely that the Cheeseburger Bill will become law; however, if enacted the bill would effectively end the debate over the merits of obesity lawsuits.

## VI. STEPS TO BE TAKEN BY FOOD COMPANIES TO SHIELD THEMSELVES FROM THE EXPOSURE OF LAWSUITS

Although Professor Banzhaf argues that “[a]fter tobacco, you can never say never,” there clearly are many obstacles confronting plaintiffs suing the food industry, which still has the ability to protect itself from costly verdicts.<sup>288</sup> As the tobacco industry learned, this could rapidly change.<sup>289</sup> For this reason, the food industry would be wise to heed the ever-increasing threats of litigation and to take

279. *Id.* Democratic Representative James McGovern of Massachusetts stated that the bill “protects an industry that doesn’t need to be protected at this particular point and [deals] with a problem that doesn’t exist.” *Id.* Democratic Representative of Hayward, Pete Stark, believes “[t]his legislation is an unnecessary response to a completely imagined problem.” Simon, *supra* note 275.

280. *Political Hot-Dogging in the House*, N.Y. TIMES, Mar 12, 2004, at 20A [hereinafter *Political Hot-Dogging*].

281. *Id.*

282. Simon, *supra* note 275 (quoting David S. Casey, Jr., the president of the Association of Trial Lawyers of America); *Political Hot-Dogging*, *supra* note 280.

283. Simon, *supra* note 275.

284. *Id.*

285. *Id.*

286. *House Passes ‘Cheeseburger Bill’*, CBSNEWS.com, Mar. 10, 2004, at <http://www.cbsnews.com/stories/2004/03/10/health/main605157.shtml>.

287. *Id.*

288. Green, *infra* note 7.

289. *See supra* note 238.

appropriate precautions to disclose nutritional information about its products to consumers. Americans are intolerant of fraud, and companies seem to have the greatest exposure to liability when they misrepresent or intentionally conceal information because these actions deny consumers the opportunity to make informed decisions.<sup>290</sup> In fact, some lawyers believe that “[t]he more information you provide, even if [it is] obvious, the less likely you are to face suits.”<sup>291</sup> As seen in the onslaught of obesity litigation, information that may seem obvious to many is not obvious to some. For instance, most people know that living sedentary lifestyles while consuming high levels of fat cause people to become unhealthy and overweight; nevertheless, a portion of the population may not realize the existence of this trend.

The obesity lawsuits have not yet been successful in the courtrooms, but they have motivated both the public and private sectors to bring about changes to address the growing trend of obesity. Currently, a plaintiff’s chance of prevailing in obesity lawsuits is questionable, but the food industry would be prudent, from an economic and civic responsibility perspective, to protect itself by keeping its customers nutritionally informed. Judge Sweet provided the food industry with advice as to how it may avoid ending up in court while also providing lawyers with a framework for how to bring food companies into court.<sup>292</sup> Food companies should know the risks associated with their products and should comply with their duty to warn consumers of known, foreseeable risks that are not appreciated by their consumers.

Judge Sweet’s road map to successful litigation provides that food companies should be held liable under simple product liability and consumer protection theories if they fail to warn consumers that their products are dangerous.<sup>293</sup> For this reason, food companies should include warnings to consumers to eat their products in moderation. This is exactly what is taking place overseas: McDonald’s in France already warns its consumers to eat its food in moderation. In an ad campaign in France that promoted McDonald’s meals as a part of a balanced weekly diet, a nutritionist was quoted as saying, “there’s no reason to abuse fast food or visit a McDonald’s more than once a week.”<sup>294</sup> Although this type of warning may seem extreme, it is a sound policy for companies to fully disclose nutritional and food-related health information about their products to maximize the consumer’s knowledge of the products and any associated risks.

Some critics believe that the threat of litigation will subside as more food companies go “the healthful route” and provide consumers with more informative

290. Green, *supra* note 7 (citing Brendan D. Cook, a product liability attorney with the Houston office of Baker & McKenzie).

291. *Id.* (citing New Jersey attorney Diane Sullivan).

292. See *Pelman v. McDonald’s Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003).

293. See Lithwick, *supra* note 88 (comparing alcohol companies’ efforts to warn consumers that their products can be dangerous with fast food companies’ resistance to such efforts).

294. *Pelman*, 237 F. Supp. 2d at 539.

nutritional labeling.<sup>295</sup> To reduce liability, and as a simple matter of good public relations, restaurants should consider as a prudent measure adding healthier food options to menus and cutting excessive portion sizes. The food industry should also work to devise healthier versions of foods with less trans fats and less fat in general. Along these lines, food companies should continue to modify their marketing strategies and make health information more readily available in a format that the general public can truly understand. Although many food companies make nutritional information available to consumers on the internet, it is advisable and more meaningful to the general public for the food industry to conspicuously post nutritional information near menu boards in restaurants and on packaging of items.

## VII. CONCLUSION: THE OBESITY EPIDEMIC IN AMERICA CANNOT BE IGNORED

Although the onslaught of obesity litigation has been criticized as frivolous, obesity remains a public health threat that has grown to epidemic proportions in the U.S. The social, health, and economic implications of obesity are difficult to ignore, and both the public and private sectors must immediately develop sensible policies and programs to address this serious problem. Whether or not the food industry voluntarily confronts this problem, the issue will not quickly disappear in the legislature, courtrooms, or media.

The food industry, a major player in this epidemic, has a responsibility to confront the obesity problem. It should keep consumers nutritionally informed, create healthier options for consumers, cut portion sizes, modify marketing, and develop health programs that should include making nutrition and food-related health information readily available. The food industry has already begun taking many of these actions and should continue to do so in the future.

The government also has a responsibility to monitor continuously the food industry to ensure that the public is truly informed about healthy nutritional choices and that it is not misled by deceptive practices. It also must continue to police the marketplace so as to eliminate deceptive practices. Recognizing this duty, various government agencies, such as the FDA and IRS, have already taken action. Various state legislatures, likewise, are in the process of enacting bills to stem the tide of obesity. There are many other avenues available to the government for addressing this epidemic, such as increasing nutritional educational programs; advocating and promoting healthier lifestyles; and providing for, and encouraging programs related to, physical fitness.

Segments of the food industry should take careful note of the serious lessons learned from the course of events that brought the tobacco industry to its knees. Considering obesity's current status as one of America's most serious health issues, the striking similarities to the tobacco litigation and associated public outcry related to health concerns cannot be ignored. That so many members of the food industry have voluntarily initiated changes to improve the quality of their

---

295. Phelps, *supra* note 264.



food choices is a testament to the fact that some of the lessons hit home. These changes must continue. As medical science advances to uncover the secrets of how our bodies process food, Big Food should learn from Big Tobacco's experiences and make responsible changes, which will, in the end, be in everyone's best interest.

\* \* \*