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NOTE

THE LINK BETWEEN FAST FOOD AND THE OBESITY EPIDEMIC

Dustin A. Frazier†

Obesity: Over thirty percent of adults are obese and over fifteen percent of children are considered obese.¹

Research Study: Fat, sugar, and cholesterol have addictive qualities similar to the drug nicotine.²

INTRODUCTION

Obesity is a pandemic disease that is reaching shocking proportions.³ “Several trends” contribute to the obesity epidemic including:

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¹ See NAT’L CTR. FOR HEALTH STATISTICS, HEALTH, UNITED STATES, 2005 42 (2005), http://www.cdc.gov/nchs/data/hus/hus05.pdf#summary (documenting a study between 1998-2002 that found individuals between 20-59 were over 30 percent obese, and children between the ages of 6-19 were over 15 percent overweight); see also Marguerite Higgins, Advocates Meet to Plan Big Mac Attack on Fat, WASH. TIMES, June 22, 2003, at A1; Jonathan D. Salant, U.S. Opposes U.N. Obesity Report, CBS NEWS, Jan. 16, 2004, http://www.cbsnews.com/stories/2004/01/16/health/printable593707.shtml (“[t]he International Obesity Task Force estimates that 300 million people worldwide are obese and 750 million more are overweight, including 22 million children under age 5). But see Rob Stein, CDC Study Overestimated Deaths From Obesity, WASH. POST, Nov. 24, 2004, at A11 (noting that the CDC’s estimates for obesity-related deaths may be as much as 20% overstated, but still recognizing that obesity would still be the number two preventable cause of death next to smoking).


³ See Harry L. Greene et al., Foods, Health Claims, and the Law: Compa-
genetics, "greater caloric intake, insufficient physical activity, and increasing sedentary behaviors due to...technology." Additionally, some scientists speculate that a sizeable contributor is fast food.

A recent study indicates that most Americans (seventy-eight percent) do not believe their weight is a serious health concern. One-third of those surveyed were obese and two-thirds were overweight, indicating a misunderstanding of obesity-related health problems. Furthermore, of those surveyed, fifteen percent of their children were overweight. Obesity is responsible for approximately three hundred thousand U.S. deaths per year as the rate of obesity continues to increase.

This Note establishes that obesity-related health problems are burdensome to society because of health care costs and lost productivity in the workforce, advocates that fast food may contain unknown risks that substantially link it to obesity, compares the public sentiment of the link between Big Tobacco and cigarette-related health issues to that of the fast food industry and obesity-related health issues, and explains how the pursuit of litigation can increase public awareness about the obesity epidemic.

The purpose of this Note is to increase public awareness of the obesity epidemic in the hopes for improved public health by making the point that obesity is detrimental to public health, and the possibility that fast food is a major contributor should not be disregarded.

sons of the United States and Europe, 9 OBESITY RESEARCH, 276S, 276S (2001) (emphasizing the importance of increasing public awareness of the "obesity epidemic").


5 Barbara J. Moore, Supersized America: Help Your Patients Regain Control of Their Weight, 70 CLEVELAND CLINIC J. MED. 237, 237 (2003) (identifying fast food as a contributor to overeating); see also Overweight and Obesity: Contributing Factors, supra note 4.

6 See Moore, supra note 5, at 237-38 (linking growing portion sizes to obesity); see also Newcombe, supra note 2.


8 Weisberg, supra note 7, at 2176.

9 Id.

10 Id.

11 Other scholars have noted that litigation is one strategy used to protect public health. See Greene et al., supra note 3, at 276S (emphasizing the importance of increasing public awareness of the "epidemic of obesity").

12 See Moore, supra note 5, at 238 (identifying fast food as a contributor to
however, this Note is not intended to prove that fast food is the cause of obesity. Throughout this Note, "success" is intended to mean: positive case decisions, monetary settlements, increased public awareness, and improved public health.\textsuperscript{13}

Arguably, money that is exhausted for litigation, legislation, and lobbying to prematurely blame the fast food industry for the Nation’s obesity epidemic could be more wisely spent to research the core contributors of obesity. However, the public does not recognize the economic incentive for identifying potential contributors. Therefore, little funding is being allocated to this effort. Big Tobacco paved the way for litigation to be used as a tool to influence the public.\textsuperscript{14} That tool may be necessary to raise awareness that fast food is a legitimate concern for public health.

Litigation may be a public health strategy when lawsuits lead to higher prices, decrease consumption, educate the public about the dangers of products, and compel an industry to stop deceptive marketing and misleading public statements. From a public health standpoint, successful litigation does not always require a victory in court; the goal of litigation can be to change public perception of an industry and ultimately to induce a change in industry practices. At times the mere threat of litigation is enough to induce an industry to change its ways. Even though the tobacco industry only occasionally loses in court, it suffered much damage to its public image after internal industry documents became available.\textsuperscript{15}

Public recognition that fast food is a potential contributor to the obesity epidemic may result in successful litigation against the fast food industry and, thus, improve public health.

\textsuperscript{13} See Jess Alderman & Richard A. Daynard, Applying Lessons from Tobacco Litigation to Obesity Lawsuits, 30 AM. J. PREV. MED. 82, 83 (2006) (discussing the use of litigation as a strategy to protect the public health).

\textsuperscript{14} The shift in public sentiment during the Big Tobacco cases was very powerful in the resulting Big Tobacco settlements. See Bryce A. Jensen, Note, From Tobacco to Health Care and Beyond – A Critique of Lawsuits Targeting Unpopular Industries, 86 CORNELL L. REV. 1334, 1342, 1345-1347 (Sept. 2001) (discussing the dispersion of powers between the legislature and the judicial law-making bodies, and noting the shift in public sentiment during the Big Tobacco lawsuits); see also Jonathan S. Goldman, Comment, Take that Tobacco Settlement and Super-Size It!: The Deep-Frying of the Fast Food Industry, 13 TEMP. POL. & CIV. RTS. L. REV. 113, 121 (2003) (comparing the public skepticism of Big Tobacco and fast food lawsuits).

\textsuperscript{15} See Alderman & Daynard, supra note 13, 84-85.
I. OBESITY IS COSTLY TO SOCIETY

Avoiding responsibility for obesity is illusory. Yet, society is not interested in assuming financial responsibility for the obesity problem that affects over one-third of Americans. Moreover, the health care expenditure on obese and overweight individuals was estimated to have been $117 billion in 2000 and accountable for nearly ten percent of the U.S. health care total expenditure. Health care costs are generated from “[e]xcessive weight gain[, which] interferes with metabolic processes, increases lipids in the blood and cholesterol[,] . . . increases risk for heart disease and diabetes,” and can “aggravate mechanical problems in the arms and legs, [cause or aggravate] arthritis[,] and increase chances of sleep apnea.”

More recently, a $54 million research project has been underway that may link obesity to various cancers. The $117 billion (or four hundred dollar per U.S. citizen) of annual obesity-related health costs are made up of health expenditures and lost productivity. Regardless of blame, obesity-related health costs will continue to escalate if action is not taken.

Of course, obesity-related health issues alone are not enough to establish blame on fast food. The simple fact that fast food is fattening is not enough to link it to the obesity-related health issues or enough to require fast food companies to internalize any of the health-related costs of obesity. However, overall research studies have shown that fast food is less healthy than food prepared in the home. In addition, fast food contains a significant amount of fat and empty calories with little nutrients. This indicates that increased fast food consumption is likely to act as a catalyst for the obesity epidemic. One study shows that food companies began increasing portion sizes in the early 1990s,

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16 Id.
17 Id.
19 See Harlan Spector, Cleveland Researchers to Study Cancer, Fat, PLAIN DEALER, at B1 (Oct. 12, 2005) (discussing the grants given by the National Cancer Institute to study the link between obesity and cancer, including a grant given to Case Western Reserve University).
21 See Elsa A. Spencer et al., Potential Effects of the Next 100 Billion Hamburgers Sold by McDonald’s, 28 AM. J. PREV. MED. 379, 380 (2005).
and, when food is served in larger portion sizes, "both lean and overweight adults increase their food and energy intakes."^{22}

An increasing number of Americans are eating out each day.\textsuperscript{23} As a percentage of total food spending, money spent away outside the home was twenty-five percent in 1970, forty percent in 1995, forty-seven and a half percent in 1999, and estimated to reach fifty-three percent in 2010.\textsuperscript{24} As this spending increased from 1970 to 1995, fast food\textsuperscript{25} sales increased two hundred percent, whereas other restaurants only increased one hundred and fifty percent.\textsuperscript{26} The fast food industry was forecasted to gross an annual $134 billion for the 2005 calendar year.\textsuperscript{27} Adolescents have been a large factor in the increased fast food sales.\textsuperscript{28} The average adolescent visits a fast food restaurant twice a week.\textsuperscript{29} The patterns for increased fast food consumption should not single-handedly establish a basis for tort action against the industry because these numbers might simply indicate good marketing and a change in the public lifestyle. However, what is difficult to understand is that the power of good marketing could be a mechanism to facilitate the dependence on a potentially dangerous product.

Children have impressionable minds, and marketing techniques used by the fast food industry have a significant impact on the way they think.\textsuperscript{30} "Current food and beverage marketing practices put kids' long-term health at risk," warned Dr. J. Michael McGinnis, senior scholar at the Institute of Medicine.\textsuperscript{31} Researchers at the Institute of

\begin{footnotesize}
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  \item Fast food has been defined as food purchased in self-service or carry-out eating places without waiter service. Lin et al., \textit{supra} note 24, at 216-17.
  \item See French, \textit{supra} note 23, at 1823-1825.
  \item Id.
  \item Id.
  \item Id.
\end{itemize}
\end{footnotesize}
Medicine also found "strong evidence" that advertising influenced the diet of "children between the ages of 2 and 11."\(^{32}\) Despite this evidence, critics disregard the potential link between food marketing and child obesity because the problems are not significant compared to the "leading nutritional problems of socialist Third World countries," including "famine and blindness caused by nutritional deficiencies."\(^{33}\) Comparing "famine and blindness" from nutritional deficiencies does diminish the relative importance of child obesity. However, the comparative urgencies of child obesity and "famine" should not discourage corrective measures. Critics also worry that regulation would take away too much personal "freedom."\(^{34}\) This concern is persuasive because individuals should remain in control of their lifestyle. However, lifestyle choices are being guided by misinformation due to the deceptive "puffery" involved in fast food marketing.

### II. FAST FOOD MAY BE MORE HARMFUL THAN IS CURRENTLY UNDERSTOOD

Fast food may be more harmful than is currently understood because of fast food's addictive qualities. There are several definitions and levels of addiction.\(^{35}\) Psychiatrist Michael Brody, M.D., defines

\(^{32}\) Id. (citing to the research performed by the Institute of Medicine); see also Anna Chalmers, *McDonald's Cuts TV Ads During Children's Shows*, DOMINION POST, Feb. 11, 2006, at 8 (referencing "overseas studies [that] have linked fast food advertising with growing obesity rates in children"); Anna Chalmers, *The McEmpire Strikes Back; The Weighty Questions; Around McGlobe*, DOMINION POST, Feb. 11, 2006, at 1 (quoting McDonald’s global chief marketing officer Mary Dillon, in response to a question about the link between junk food advertising and obesity: “We are proud about the quality of food we offer . . . We believe we can talk to children in a responsible and fun way.” (emphasis added)).


\(^{34}\) See Watch out, Ronald McDonald: Health Nazis Want More Federal Advertising Regulation, supra note 33, at 10B; see also de Coster, supra note 33.

addiction as "[a] person [who] needs more and more of a substance or behavior to keep him or her going," and, "[i]f the person does not get more of the substance or behavior, she or he becomes miserable and irritable." Dr. Michael Brody also listed the following characteristics of an addicted person: "[g]reater sense of isolation, [d]iminished social interaction, [r]educed attention to personal hygiene, [m]ore legal difficulties, [c]hange in eating and sleeping patterns, [i]ncreased irritability, and [r]eluctance to change the compulsive behavior." 

_The Cigarette Papers_ notes that virtually all tobacco use begins during adolescence. More than one-third of all smokers try to quit each year, with less than ten percent succeeding. Unfortunately, because "addiction develops insidiously," those plagued with addiction often do not realize they are addicted until they are at such a state that it becomes nearly impossible to stop.

Nicotine addiction was deemed to result in an addiction that chemically caused the consumer to be unable to restrain himself from smoking, despite the knowledge of its health hazards. Further, the Big Tobacco companies knew that nicotine was addictive and went as far as to alter the levels of nicotine delivered in the cigarettes in order to enhance the addictiveness. Nicotine was narrowed down as the independent substance that was addictive. In addition, it was proven that Big Tobacco altered the levels of nicotine in cigarettes to hook consumers.

There is no research that conclusively proves that fast food is addictive. However, Wisconsin University has performed studies of rats' diets that suggest fast food may contain addictive qualities. One study found that a high-fat diet appears to alter the brain biochemistry in a similar way to drugs, such as morphine. This was said to be

Adolescent Psychiatry).

36 See id.
37 See id.
39 Id., at 4.
40 Id., at 4.
42 See GLANTZ ET AL., supra note 38, at 58-60.
43 See id. at 8.
44 See id.
46 Newcombe, supra note 2.
47 See Neal D. Barnard, _Big Food About to Lose Its Biggest Defense: Food
caused by the release of opioids, which are chemicals in the brain that reduce the feeling of being full.\(^{48}\) Thus, when introduced to fatty foods, the rats would continuously eat.\(^{49}\) Additionally, when the rats were deprived of the fatty food, they exhibited addiction-like behaviors such as "chattering teeth, anxiety and shaking."\(^{50}\) However, these tests are inconclusive because there were several substances and certain words that caused similar reactions.\(^{51}\) One author is claiming the fast food industry promoted its products despite knowing the inherent dangers.\(^{52}\) This same scholar is also positing that the fast food industry altered its products to enhance the food's addictive qualities.\(^{53}\) If this is true, then consumers are exposed to a much higher health risk than was originally thought.

Fast food clearly contains more fat, sugar, and cholesterol than homemade foods.\(^{54}\) However, fast food companies do not necessarily add more fat, sugar, and cholesterol for addictive purposes, as these substances are probably added for taste purposes. Moreover, fast food has not been proven to be unhealthy when consumed in moderation. Nicotine, however, is colorless and does not have a desirable taste;\(^{55}\) therefore, nicotine is more easily identified as a substance added solely to cause addiction.\(^{56}\) In addition, smoking has been scientifically proven to be harmful, regardless of the quantity of intake, whereas fast food does not appear as such when consumed in moderation.\(^{57}\) If a plaintiff can demonstrate that fat, sugar, and cholesterol have mildly addictive qualities, the plaintiff will still have to defeat the presumption that those substances were simply added for taste purposes.

### III. COMPARING BIG TOBACCO TO FAST FOOD

This section focuses on the similarities between the phases of Big Tobacco litigation and the progress of fast food obesity litigation. This
section is divided into three sub-parts: (A) a brief overview of Big Tobacco claims; (B) a comparison of the history of Big Tobacco litigation to the developments of fast food litigation; and (C) a simple examination of the litigation tactics that might be most effectively employed by fast food plaintiffs.

A. Overview of Big Tobacco Claims

Big Tobacco plaintiffs have provided a variety of legal theories throughout the history of tobacco litigation: implied warranty of merchantability, "[s]trict products liability, failure to warn, simple negligence, conspiracy, RICO [the Racketeer Influenced and Corrupt Organizations Act], unjust enrichment, and Medicaid subrogation."\(^{58}\) The Federal Cigarette Labeling and Advertising Act (1969 Act),\(^ {59}\) later discussed, effectively preempts all claims with the exception of those that relate to the implied warranty of merchantability and consumer protection laws.\(^ {60}\) The Uniform Commercial Code (UCC) provides a contract liability theory for a breach of implied warranty in all goods sold.\(^ {61}\) This implied warranty was founded on the principal that products should be fit for their ordinary purpose.\(^ {62}\) Even though cigarettes were understood to be unhealthy, cigarettes were not defective and were, thus, fit for their ordinary purpose.\(^ {63}\) Similarly, the Federal Nutritional Labeling and Education Act and the Common-Sense Consumption Act have preempted almost all fast food claims, except those arising from consumer protection laws.\(^ {64}\)

B. Comparison of Big Tobacco Litigation to Fast Food Litigation

Some have categorized Big Tobacco litigation into three chronological phases that are helpful in understanding the evolution of the


\(^{60}\) See Crawford, *supra* note 58, at 1167-70.

\(^{61}\) U.C.C. § 2-314 (broadly defining the meaning of "merchantable" by not exhaustively listing all merchantable attributes).

\(^{62}\) Id.


\(^{64}\) See Federal Nutritional Labeling and Education Act, 21 U.S.C. § 343(q) (2007); *see also* Courtney, *supra* note 45, 75-77.
cases.\textsuperscript{65} It is useful to classify fast food litigation with a similar structure. During the first phase of Big Tobacco litigation, plaintiffs' claims were repeatedly defeated by the "assumption of risk" defense.\textsuperscript{66} At that time, the public believed the risks of using tobacco products, such as cigarettes, were common knowledge and that disclaimers adequately stated the health risks associated with the use of tobacco.\textsuperscript{67} The second phase continued the usage of assumption of risk, as well as defeated claims of strict liability because cigarettes were deemed not to be defective.\textsuperscript{68} The second phase also included reports of nicotine's addictive qualities that began to shift America's opinion of Big Tobacco from no-fault to predator.\textsuperscript{69} The third and current phase is best known for internal reports proving Big Tobacco executives altered the levels of nicotine to increase consumer addiction.\textsuperscript{70}

1. Big Tobacco Phase I: Surgeon General's Report, Restatement (Second) of Torts, 1969 Act

Big Tobacco litigation began in 1956 with the filing of \textit{Cooper v. R.J. Reynolds Tobacco Co.}\textsuperscript{71} The plaintiff, Mrs. Cooper, sought damages for Mr. Cooper's pain, suffering, and death from lung cancer, allegedly caused by smoking R.J. Reynolds Tobacco Co's (the defendant) cigarettes.\textsuperscript{72} The plaintiff alleged deceitful advertising because the defendant claimed that twenty thousand doctors believed cigarettes were good for one's health.\textsuperscript{73} The defendants filed a motion to dismiss due to the plaintiff's "flagrant disregard" of Rule 8 of the Federal Rules of Civil Procedure\textsuperscript{74} and the failure to comply with the complaint filing instructions.\textsuperscript{75} The trial court granted the motion to


\textsuperscript{66} See Crawford, \textit{supra} note 58, at 1167-70.

\textsuperscript{67} See \textit{id.}, at 1167-70.

\textsuperscript{68} See \textit{id.}.

\textsuperscript{69} See \textit{id.} at 1167-70.

\textsuperscript{70} See \textit{id.}.

\textsuperscript{71} 234 F.2d 170 (1st Cir. 1956).

\textsuperscript{72} \textit{Id.} at 170-71.

\textsuperscript{73} \textit{Id.} at 173 n.1.

\textsuperscript{74} FED. R. CIV. P. 8(a) (requiring a "short and plain" statement of the jurisdiction, the reasons the pleader is entitled to relief, and a demand for judgment).

\textsuperscript{75} See \textit{Cooper}, 234 F.2d at 172.
dismiss; however, the dismissal was reversed on appeal. The appellate decision held that the complaint was sufficient to set forth a cause of action in deceit and was remanded for further review. The plaintiff re-filed, but the court held that the facts were insufficient to establish that the defendant deceitfully advertised. The plaintiff appealed, and the lower court's decision was upheld in favor of the defendant, as the plaintiff was unable to produce the advertisements in dispute.

Cooper was followed shortly by the first major implied warranty case, Green v. American Tobacco Companies. Green was factually similar to Cooper in that the plaintiff was filing on behalf of her deceased husband, although Mrs. Green's complaint focused on the tobacco company's breach of implied warranty. The district court and the Fifth Circuit Court of Appeals denied Green's claim based on the defendant's lack of foreseeable harm from smoking. The Fifth Circuit Court of Appeals certified the question of whether the ability to foresee was necessary for a breach of implied warranty claim to the Florida Supreme Court. The Florida Supreme Court eventually determined that this was not a required element for establishing a breach of implied warranty. What would have been a breakthrough for plaintiffs in Big Tobacco litigation was hindered when the Fifth Circuit followed this opinion with a ruling that cigarettes were in fact merchantable.

A common litigation tactic by the Big Tobacco industry that continues to somewhat survive today is the scorched earth strategy. The scorched earth strategy means that the defendants never settle and

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76 Id. at 174.
77 Id.
79 Cooper v. R.J. Reynolds Tobacco Co., 256 F.2d 464, 467 (1st Cir. 1958).
80 Id.
81 Green v. American Tobacco Companies, 304 F.2d 70 (5th Cir. 1962).
82 U.C.C. § 2-314.
83 Green, 304 F.2d 70.
84 Id., at 71-73; see Green v. American Tobacco Co. Ltd, 154 So.2d 169 (Fla. 1963) (denying the relevance of foreseeability but holding that cigarettes are merchantable).
85 See Green v. Am. Tobacco Co, 154 So. 2d at 170 (deciding that foreseeability is irrelevant for a liability theory based on an implied warranty).
86 See Green v. Am. Tobacco Co, 391 F.2d 97, 110 (5th Cir. 1968) (holding that cigarettes do not breach any warranties of merchantability and are not defective).
87 See Rabin, supra note 65, at 857-58; see also Tucker S. Player, Note, After the Fall: The Cigarette Papers, the Global Settlement, and the Future of Tobacco Litigation, 49 S.C. L. REV. 311, 312.
litigate every issue, thereby threatening each potential plaintiff (and the plaintiff's attorney) with litigation costs. The first phase of Big Tobacco litigation concluded with three events that, in conjunction, provided an impenetrable shield for the tobacco industry for the next twenty years (into mid-1980).

The first event was the Surgeon General's 1964 Report on Smoking (1964 Report). Before this report, all claims stating that smoking was bad for health were merely speculative or too general to aid in proving proximate cause of a smoker's injury. The 1964 Report provided a conclusive link between smoking and deteriorating health. However, the 1964 Report also acted as a mechanism that effectively put every consumer on notice as to the ill effects of smoking, thus supporting the assumed risk defense for Big Tobacco.

The second event was the adoption of the American Law Institute's (ALI) RESTATEMENT (SECOND) OF TORTS § 402(A) for strict products liability. Dean Prosser drafted § 402(A) to read that liability will follow "products that are in a 'defective condition unreasonably dangerous' to the user." Dean Prosser added Comment i to clarify any ambiguity that "defective" and "unreasonably dangerous" were synonymous and possibly to protect the economic vitality of the tobacco industry. The acceptance of this § 402(A) was detrimental to strict products liability claims because of Comment i. Comment i to § 402(A) clarified that, even though products like cigarettes and whisky are unreasonably dangerous, they are not defective.

The final event was the 1969 Act. The 1969 Act prevented the states from imposing labeling restrictions on tobacco manufacturers

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[88] See Rabin, supra note 65, at 857-58; see also Player, supra note 87, at 311-12.
[89] See Rabin, supra note 65, at 857.
[92] NAT'L CTR. FOR HEALTH STATISTICS, supra note 1, at 4.
[93] See Crawford, supra note 58, at 1181-83 and n.57, citing RESTATEMENT (SECOND) OF TORTS § 402A.
[97] See id.
[98] See Federal Cigarette Labeling and Advertising Act, Pub. L. 89-92, 79 STAT. 282 (1965). This act expired in 1969 but was contiguously followed by a seemingly broader statute that included pre-emptive language (i.e. preventing cigarette
because the federal standard was considered preemptive of any state standard. The 1969 Act prevented claims against Big Tobacco based on improper labeling given that the labeling was mandated by Congress.99

2. Fast Food Phase I: Nutritional Labeling Act, Pleading with Specificity

The first phase of obesity litigation began five years ago, in 2002, with Barber’s complaint against McDonald’s Corp.100 Barber, a fifty-six year-old, 272-pound New York resident, alleged that fast food caused his state of obesity, two heart attacks, and diabetes.101 Barber brought this suit against McDonald’s, Burger King, Wendy’s, and Kentucky Fried Chicken.102 The lawsuit did not involve any judicial proceedings and was ultimately set aside for a plaintiff that would be easier to sell and harder to blame. Although short-lived, this lawsuit provided a test case for the media and overall public reaction. Samuel Hirsch, Barber’s attorney, initiated a child obesity complaint shortly after this case was set aside.103

That complaint was filed on August 22, 2002 by the parents of two minor children on behalf of all minors in the state of New York who had consumed McDonald’s products (Pelman v. McDonald’s...
The original Pelman complaint (Pelman I) alleged: (1) deceptive practices, (2) deceptive advertising that was aimed at minors, (3) inherently dangerous food products, (4) failure to warn its consumers of the possible side-effects, and (5) addictive qualities. The New York Supreme Court dismissed the claims without prejudice, leading to the filing of an amended complaint on February 12, 2003.

The amended complaint contained only three of the counts mentioned above: (1) deceptive practices, (2) deceptive advertising that was aimed at minors, and (4) failure to warn its consumers of the possible side-effects. The defendant again filed a motion to dismiss, and, in an unreported opinion, the district court granted the motion to dismiss with prejudice. The court held that the plaintiff failed to show that any of the alleged misrepresentations caused injury to them. The court also seemed displeased with the specificity of the deceptive practices claims.

Since the inception of these claims, the court's reaction has been unsuccessful. The reaction has not only been fruitless, but the Federal Nutritional Labeling and Education Act preempts claims based on improper labeling because restaurants are exempted from the Act's labeling standards. This is similar to the 1969 Act for labeling cigarettes. Additionally, state laws have been enacted in twenty states to...
prevent fast food litigation (known as the "Common-Sense Consumption Act"). Lastly, there is a congressional bill (the "Cheeseburger Bill"), which passed the House on October 19, 2005, to prevent "frivolous" lawsuits based on obesity. This law has yet to gain Senate approval. Generally, these statutes do not prevent lawsuits pertaining to claims of deceitful advertising or state consumer protection laws, e.g., N.Y. GEN. BUS. LAW § 349 (The Deceptive Practices Act). However, they narrow the allowable claims for fast food plaintiffs.

3. Big Tobacco Phase II: Cigarettes Are Not Defective, Plaintiffs Assumed the Risk

The second phase of Big Tobacco litigation focused on strict products liability and the assumption of risk defense for the breach of implied warranty claim. Plaintiffs’ strict products liability claims were trumped by the ALI’s prior report, including Comment i from Dean Prosser, which stated that cigarettes were not defective, despite the known health damages they caused. Further, Big Tobacco was successful in arguing the assumption of risk defense because the Surgeon General’s 1964 Report and the magazine articles that

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115 Id.

116 See Rabin, supra note 65, at 863-64; see also Crawford, supra note 58, at 1183-84, citing Marcia L. Stein, supra note 93, at 646, 653 (referencing Professor John Wade’s and Donald W. Garner’s contributions for developing the strict products liability theory); see also Player, supra note 87, at 311-12; see also U.C.C. § 2-314.

117 See Marcia L. Stein, supra note 91, at 642 (citing the 38th Annual Meeting, 1962 A.L.I. Proc. 87-89 (1961)).

118 See NAT’L CTR. FOR HEALTH STATISTICS, supra note 1, at 4.
repeatedly discussed the ill-effects of smoking established a public mentality that was unsympathetic to smokers due to the widely publicized inherent health dangers of smoking. Phase two of tobacco litigation ended with the Cipollone v. Liggett Group, Inc. ruling regarding the Third Circuit’s broad interpretation of preemptive effects of the 1969 Acts to apply to all of Cipollone’s claims.

Plaintiff’s claims for breach of express warranty, fraud, and tort were based on lung cancer, and later death, of the plaintiff’s wife due to smoking cigarettes for over forty years. The court dismissed the claims based on the preemptive effect of the 1969 Act. “Most circuits have adopted Justice Stevens’ plurality opinion,” which concluded that all claims were preempted with the exception of the state law conspiracy claim.

4. Fast Food Phase II: Pleading with Specificity, Increasing Public Awareness

Phase II of obesity litigation is underway. The Pelman plaintiffs appealed the New York Supreme Court’s decision to dismiss all of the plaintiffs’ claims, with prejudice. The U.S. Appellate Court held that the lower court properly dismissed the claims relating to “[f]alse advertising” (§ 350) because the plaintiff failed to plead their claims with particularity. However, the claims relating to “[d]eceptive acts and practices” (§ 349) were remanded for further review on the grounds that those claims are not subject to the traditional showings of reliance and scienter nor are they subject to the Federal Rules of Civil Procedure Rule 9(b) pleading requirement.

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119 See Rabin, supra note 65, at 857-858; Marcia L. Stein, supra note 91, at 643.
120 See Rabin, supra note 65, at 864.
121 893 F.2d 541, 581-83 (3d Cir. 1990).
122 Id. (dismissing the plaintiff’s claims for intentional tort, breach of express warranty, and failure to warn).
123 See id. at 546-50.
124 See id. at 582.
125 See Crawford, supra note 58, at 1187, citing Cipollone, 893 F.2d at 524-530.
126 N.Y. GEN. BUS. LAW § 350 (McKinney 2004) (“False advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful.”).
127 Id. § 349 (“Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.”).
128 “Claims subject to the stricter pleading standards of Rule 9(b) must specify: (1) those statements the plaintiff thinks were fraudulent; (2) the speaker; (3) where and when the statements were made; and (4) why plaintiff believes the state-
Section 349 of New York General Business Law makes unlawful "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." N.Y. Gen. Bus. L. § 349. To state a claim for deceptive practices under section 349, a plaintiff must show: (1) that the act, practice, or advertisement was consumer-oriented; (2) that the act, practice, or advertisement was misleading in a material respect; and (3) that the plaintiff was injured as a result of the deceptive act, practice, or advertisement. The standard for whether an act or practice is misleading is objective, requiring a showing that a reasonable consumer would have been misled by the defendant's conduct. Omissions, as well as acts, may form the basis of a deceptive practices claim.\footnote{129}

The \textit{Pelman} plaintiffs had amended their complaint as of December 15, 2005, and the case was continuing to proceed as of February 23, 2006.\footnote{130} Fast food is likely to use litigation tactics similar to Big Tobacco, e.g., scorched earth,\footnote{3} to keep the plaintiffs out of court as long as possible.

Fast food litigation is, however, far from being considered parallel to Phase II of the Big Tobacco litigation. Fast food plaintiffs will struggle to prove causation, as obesity has not been scientifically linked to any one cause. Fast food plaintiffs must prove that misleading actions or omissions caused an identifiable harm. Applying the standard noted in \textit{Pelman}, the plaintiff may prove these deceptive actions or omissions by showing that the fast food industry's actions are consumer-oriented, materially misleading, and that those misleading actions are linked to obesity and ill-health.\footnote{132} Specifically, plaintiffs must show that the advertisements at issue are materially misleading and provide a direct link to the plaintiff's obesity.\footnote{133} The court's opinion also indicates that deceptive practices could result from an omission of material information; thus, had the fast food industry provided proper warnings, the public could have avoided the associated health problems.\footnote{134} Causation is most easily traceable if the...
tortfeasor committed fraud or deceptive practices. The most recent example of this is *Price v. Phillip Morris*, where the court provided a $10.1 billion verdict to the plaintiffs because Phillip Morris had deceptively advertised light cigarettes in a way that indicated less harmful effects.

5. Big Tobacco Phase III: Multi-Billion Dollar Settlements

Phase III, the current phase, is defined by the continuous battle over the preemptive effects of the 1969 Act and the document disclosures provided by Merrell Williams. Most claims have been preempted by the 1969 Act, though the state law conspiracy claim is still valid as a potential cause of action. The conspiracy claim is ultimately what provided plaintiffs the billion dollar settlements, as the tobacco papers furnished by Mr. Williams along with other documents presented significant evidence that the tobacco industry not only knew of the addictive effect of nicotine in cigarettes, but altered the level of nicotine to make cigarettes as addictive as possible.

The plaintiffs' success in Big Tobacco litigation was not achieved until insider leaks revealed that cigarette content was manipulated to deliver the maximum amount of nicotine (a substance that was known by the industry executives since the 1960s to be highly addictive). After proving the Big Tobacco conspiracy, the States' Attorneys General filed claims for damages based on public health care costs related to smoking. These claims were founded on the theory that Big Tobacco was the cause of increased health care spending. Big Tobacco finally entered into a Master Settlement Agreement, worth over $200 billion, with the States' Attorneys General for forty-six states.

The public completely shifted responsibility for cigarette-related health problems to Big Tobacco when the public learned of the addictive traits of nicotine in cigarettes and the manufacturers' knowledge

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139 Id.
140 See GLANTZ ET AL., supra note 38, at 58-60.
141 See Courtney, supra note 45, at 84.
142 See id.
143 See id.
of such traits. The public support along with the strength of these claims encouraged the States’ Attorneys General to initiate a lawsuit against Big Tobacco. The States’ Attorneys General provided a plaintiff with the necessary funding, a plaintiff who was fault free (yet still suffering the damages of increased health care costs), and a plaintiff who could be settled with one agreement.

6. Fast Food Phase III: Next Steps

Legislation is perhaps the most favored remedy for battling the obesity epidemic, however, several scholars and practitioners believe that litigation may be the most effective remedy for battling the obesity epidemic. Plaintiffs have indeed been successful in a few cases when arguing deception by food companies. However, fast food plaintiffs will continue to have dismal success in pursuing claims based on personal injuries because the claims lack public support. Responsibility for obesity-related health problems will continue to be placed on obese individuals until society recognizes that obesity might need to be a treated disease and not just as a self-inflicted problem.

Common-Sense Consumption Acts in several states have proceeded to generally ban obesity-related lawsuits. The Consumption

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144 See Crawford, supra note 58, at 1167-70.
145 See id.
146 See generally id.
148 See Richard C. Ausness, Tell Me What You Eat, and I Will Tell You Whom to Sue: Big Problems Ahead for “Big Food”? , 39 Ga. L. Rev. 839, 843 (2005) (while the paper is contra to this point, the author cites to several scholars and lawyers who have threatened litigation in order to convince food companies to change their policies).
Acts vary by state; two common exemptions to the general ban are: "(1) when a fast food company violates local or federal food adulteration or branding laws, [and] (2) when a fast food company violates state or federal consumer protection laws." The exemptions require the plaintiff to prove a "knowing and willful" violation and to plead the facts and elements underlying the violation with particularity. Fast food plaintiffs are most likely to succeed by utilizing the States' Attorney Generals. Pursuing fast food companies on behalf of the state provides a plaintiff with endless financing, a plaintiff without fault, and a plaintiff who is finite and can be quantified in settlement. Professor John F. Banzhaf III is one of the leading promoters of fast food litigation and was one of the substantial contributors to the anti-tobacco movement. Mr. Banzhaf speculates that persistence will build belief.

IV. TORT ECONOMICS, PUBLIC AWARENESS

There are several justifications for tort law, one of the most important being deterrence. In applying the deterrence theory, a tortfeasor will not cast negligence onto innocent parties if that tortfeasor will be responsible for the costs of any damages caused by his negligence. If a tortfeasor is not responsible for the costs of his negligence, an "externality" is then created that is paid for by society. Here, the externality is the cost associated with obesity-related issues, ultimately being paid by society. If the public remains ignorant to this externality, the obesity epidemic could escalate to irreparable proportions.

Statistics show that society is getting fatter. Public health care costs confirm that obesity is America's problem, regardless of one's

http://www.restaurant.org/government/state/nutrition/resources.cfm (2004)).

152  Id. at 1025.
153  Id.
154  See generally Courtney, supra note 45, at 78-84.
155  See Alderman & Daynard, supra note 13, at 83 (2006) (discussing the use of litigation as a strategy to protect the public health).
156  See Crawford, supra note 58, at 1169-71; see also JOHN F. BANZHAF III, www.banzhaf.net.
157  See Crawford, supra note 58, at 1169-71
159  See id.
160  See id.
own waistline. These facts might lead one to consider the following: (1) we should, as a society, start living healthier; (2) the government should provide more nutritional and healthy lifestyle education; and (3) the one-third of Americans that are clinically obese are probably not all genetically predisposed to obesity. Thus there must be something or someone responsible for our Nation’s decline in health. The first point, although not actionable, is the opinion of most Americans. The second point is currently in place at our public schools but could be improved. The third point is the basis for why it should be considered possible that the fast food industry is a core contributor to the obesity epidemic.

The dramatic increase in fast food consumption may be correlated to, but not causative of, the increase in obesity. Moreover, if the increase in obesity is caused by fast food, it is still possible that the increase in fast food consumption is simply due to good marketing. Constitutional arguments are also believable in stating that the industry is entitled to free speech and that the consumer is entitled to make his own choices.

A capitalistic perspective would still restrict an industry from casting externalities into the environment because of the potential for tort damages. Nonetheless, the fast food industry should not be halted from free enterprise. When compared to the $117 billion of annual obesity-related health costs, fast food litigation creates a proportionally inexpensive way to ensure the externality of declining health is assigned to the proper tortfeasor. Once obesity has been fully investigated, it may be found that the consumer is the one to blame. Alternatively, if the fast food industry is sufficiently linked to obesity, society will be able to assign the $117 billion of health care costs, or at least a portion thereof, to the fast food industry. In this case, the fast food industry will be forced to take measures to account for its externalities.

As previously mentioned, litigation can be useful in a variety of settings. The fast food industry is the most identifiable contributor to the increase in obesity. McDonald’s is not the only contributor, yet it tends to be the focus of this litigation and the following analysis because of its size and public recognition. McDonald’s has built an empire on promoting its value in a high-paced environment. Consumer desire has led McDonald’s to effectively align its goals with taste, convenience, speed, and low cost. Some believe that it is not the fast food industry’s responsibility to provide a healthy product if that is not what the consumer wants. Over time, McDonald’s has built a cul-

161 See U.S. Const. amend. I.
ture of consumers dependent (whether chemically or not) on a product that is inherently unhealthy. McDonald’s executives argue that the restaurant’s menu provides salad and fruit, which enables the possibility of a healthy “every day” McDonald’s lifestyle. Not surprisingly, only ten percent of McDonald’s domestic revenue comes from salads.\textsuperscript{162} The bottom line is that the industry is providing a menu that is unhealthy but is marketed as a meal, without adequately disclosing to its consumer that it exceeds the daily recommended caloric and fat intake.

McDonald’s began labeling initiatives in 2004 to promote the proper labeling of food within fast food restaurants.\textsuperscript{163} These initiatives have been set aside based on McDonald’s confidence that the consumer is adequately informed through the facts provided on the company’s website.\textsuperscript{164} However, consumers, especially the young ones, are easily influenced, and the fast food industry is incredibly persuasive with its marketing.\textsuperscript{165} McDonald’s has made efforts to encourage improved lifestyles.\textsuperscript{166} The addition of the salad and the fruit was a noteworthy gesture. McDonald’s has also provided programs to encourage active lifestyles. It launched a “‘[i]t’s what I eat and what I do . . . I’m lovin’ it’ campaign” (emphasis added) in March of 2005.\textsuperscript{167} Although small, McDonald’s is taking steps in the right direction to improve public health.\textsuperscript{168} Ironically, the launch of this new campaign came shortly after the appellate decision to remand the issue under the § 349.

Since the inception of this lawsuit, McDonald’s has made a number of initiatives to improve its product and the way the public perceives it.\textsuperscript{169} Some of the initiatives include reducing “the trans fatty

\textsuperscript{162} Melanie Warner, \textit{You Want Any Fruit with that Big Mac?}, N.Y. TIMES, Feb. 20, 2005, at 3(1).


\textsuperscript{164} \textit{See Pelman, 2003 WL 22052778, at *13.}

\textsuperscript{165} \textit{See Mary Story & Simone French, Food Advertising and Marketing Directed at Children and Adolescents in the US, 1 INT’L J. BEHAVIORAL NUTRITION AND PHYSICAL ACTIVITY, Feb. 10, 2004, at 1, available at http://www.ijbnpa.org/content1/ll3 (discussing the lifestyle habits that children develop at a young age, noting that children obtain 50% of their calories from added fat and sugar).}


\textsuperscript{167} \textit{Id.}

\textsuperscript{168} \textit{See id.}

\textsuperscript{169} Plaintiff’s Amended Complaint, Pelman v. McDonald’s Corp., No. 02 CV
acids in their cooking oil," providing additional nutritional information on their website (including a reference to the Surgeon General's 2001 obesity report), increasing labeling in the UK, and issuing warnings to French children to eat at its restaurants no more than once per week. All of these changes support the reason for pursuing tort remedies from McDonald's. These initiatives will hopefully instigate a change in public health, but more drastic measures are likely needed. Not only should McDonald's advise people not to eat unhealthy food, it needs to inform people that its food is unhealthy. Lastly, McDonald's should attempt to overhaul its menu to improve the fat, caloric, and cholesterol content of its food.

Exposure to one product that only partially contributes to a problem is generally not enough to satisfy the standards of causation for tort law. Thomas C. Galligan, Dean of the University of Tennessee College of Law, discussed the idea that when a product contributed to a portion of some danger ("Proportional Fault"), that cause-in-fact might provide enough evidence to hold a company liable for the dispersion of risk onto a community. On the other hand, the claim of one individual may be unsuccessful based on the lack of specificity to cause-in-fact.

Depending on the jurisdiction, fast food plaintiffs will also have to overcome the contributory negligence or comparative fault principles. Contributory negligence bars a plaintiff from recovery whereas comparative fault generally allows the plaintiff recovery in proportion to the defendant's negligence, e.g., a plaintiff would recover $80,000 for a $100,000 tort if the defendant was only eighty percent liable.

More complex than the prior two theories illustrated is the application of the market share liability theory used in the diethylstilbesterol (DES) cases. The DES cases involved a product that pregnant

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170 Id.
173 Id.
174 Id. at 1046-48 (discussing the different types of contributory negligence and comparative fault in public tort).
175 See id.
women used to decrease the risk of miscarriage.\textsuperscript{177} DES was later found to cause "cancerous vaginal and cervical growths in the daughters exposed to it before birth," known as adenocarcinoma cancer, which "manifests itself after a minimum latent period of 10 or 12 years."\textsuperscript{178} Market share liability is not a widely adopted theory for recovery. However, it appears to have had some effect on the tobacco settlements.\textsuperscript{179} The market share theory, combined with the proportional fault theory, could be a reasonable compromise for obesity litigation. This combined theory would need to establish the following: (1) the costs of obesity ("Costs"), (2) the portion of obesity related to fast food ("Obesity"), and (3) the percent of the market each fast food company controls ("Market"). Each fast food company would be responsible for its respective factor in the following equation: Costs $\times$ Obesity $\times$ Market.

Most thought the collusion involved in Big Tobacco litigation was impossible. It seems implausible that the fast food industry is involved in similar collusion; however, in light of the prior events of Big Tobacco, it should not seem impossible. Big Tobacco litigation demonstrated that public support was necessary to establish an effective campaign against a product that is widely understood to be unhealthy. In addition to litigation, engaging widespread support can be accomplished in several ways, such as (1) lobbying to Congress\textsuperscript{180} or (2) advertising through the media.\textsuperscript{181}

Lobbying Congress for the passage of laws that would engage public concern is the most formalistic approach of the two.\textsuperscript{182} This method is unlikely to be effective because of cost, lack of scientific evidence, and the persuasiveness of the established opposing food lobbies.\textsuperscript{183} Similar to Big Tobacco lobbyists, food company executives and U.S. Department of Agriculture (USDA) officials often have close relationships, and in some cases, switch roles with one another.

\begin{footnotesize}
\footnotetext{177} See Sindell, 607 P.2d at 925-26.
\footnotetext{178} See id.
\footnotetext{179} See Galligan, supra note 158, at 1039.
\footnotetext{182} See generally Maskell, supra note 180 (explaining the procedural rules governing lobbying).
\footnotetext{183} See Alderman & Daynard, supra note 13, at 84; see also Maskell, supra note 180.
\end{footnotesize}
This could lead one to believe that regulatory or legislative attempts to address the obesity epidemic will likely be unsuccessful. Even more fundamental is the lack of scientific evidence linking obesity to fast food. Lobbying is competitive because it requires one group to promote its own interests at the expense of another’s interests. Lobbying can be expensive because it requires a persuasive presentation of the relevant information. Also, lobbying can be a lengthy process because of the procedures necessary to pass a bill through both houses and into law.

Advertising through the media can be a shortcut to gaining public awareness. Several media channels, such as newspapers, magazines, and television, exist that might be effective at gaining public awareness. However, to avoid paying for the advertisements in these media channels, it would be necessary to first persuade media executives that this information was important and relevant to their subscribers. One example of this approach is a documentary called “Super Size Me.” Director and actor Morgan Spurlock ate McDonald’s food three times a day for thirty days and limited himself to the exercise of the average consumer through the use of a pedometer.


\[187\] See generally id.


\[191\] Lisa O’Carroll & Tim Barlass, Diana Hands Branson a £5m Advert for Free, EVENING STANDARD, November 24, 1995, at 5 (discussing the ability of celebrities to provide free advertisement based on their constant exposure to the public eye).

\[192\] See SUPER SIZE ME, (Tartan Video 2004). Contra James K. Glassman, In
He gained twenty-four pounds, and his cholesterol increased forty percent. This film created mixed reactions, yet received a lot publicity. Shortly before the release of his documentary, McDonald's removed the “Super Size” option at all of their locations. This film illustrates the ability of media coverage to create public awareness and instigate change in an industry.

At the core of each of these methods is the necessity to develop a better understanding of what causes obesity. In order to develop this information, it is necessary to spend significant funds on researching the obesity epidemic. Prior to the Pelman case, there was no economic benefit for any researchers to devote the resources necessary to understand the obesity epidemic. The limited research available indicates that there might be an unknown danger to fast food—it is addictive. These reports are preliminary but could prove to unveil an idea that seemed ridiculous just a few years ago. However, in light of the events that occurred during Big Tobacco litigation, i.e., the uncovering of documents that proved nicotine was addictive and the fact that the Big Tobacco executives knew of this and attempted to cover the problem and continued to alter the levels of nicotine in cigarettes to increase their addictive qualities, it should not seem impossible that fast food contains addictive qualities or that the fast food industry executives are altering the contents of fast food in order to yield a most addictive product.

Therefore, the pursuance of fast food obesity litigation is essential to creating the economic incentive to forge ahead in the unknown territory of the contributing factors of obesity. In order to understand the most effective approach to increasing public awareness for obesity, review of Big Tobacco litigation is helpful to understand the importance of public perception.

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Defense of Individual Rights, CAPITALISM MAGAZINE, http://capmag.com/article.asp?ID=3591 (critics, such as Mr. James K. Glassman, noted that not only did Morgan Spurlock eat McDonald's three times per day, but he also ate excessively during each meal).

See id.


CONCLUSION

At first glance, fast food litigation seems frivolous and wasteful. However, when compared to the economic and public health consequences of obesity, the costs of litigation are minor and should not be neglected as a medium for generating public awareness of obesity-related health concerns. In comparison to Big Tobacco litigation, fast food litigation is significantly deficient of authoritative evidence to substantiate the addictive qualities of fat, sugar, and cholesterol. Further, there is no indication that fast food giants have designed their products as fat, sugar, and cholesterol delivery devices in an effort to hook their consumers. Therefore, fast food plaintiffs need to forge ahead with the use of market share theories and statistical evidence in order to associate proportional liability with the fast food industry. Early victories for increased public awareness will need to exceed that of publicity stunts such as "Super Size Me."196

Unfortunately, once fast food plaintiffs have invested enough time and resources in litigation, a shift in public sentiment might be too late to effectively curtail the obesity epidemic. At that point, similar to the effect of Big Tobacco, it will require an overhauling of the public lifestyle. Advertisements, food labels, and restaurant locations will need to be restructured to create an alternative to fast food. For now, anti-fast food believers like John Banzhaf will continue to force the fast food industry to consider its liability and may also cause them to change current marketing practices.

196 See SUPER SIZE ME, supra note 192.