

# BRIEFLY . . .

Perspectives on Legislation, Regulation, and Litigation

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## CLOSING THE FOOD COURT: WHY LEGISLATIVE ACTION IS NEEDED TO CURB OBESITY LAWSUITS

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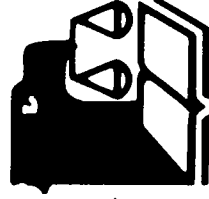
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# PREFACE

A few individuals made national headlines when they sued McDonald's and other fast-food companies for weight gain and weight-related conditions. These cases were dismissed, but the litigation has not disappeared. How judges and legislatures handle future obesity claims is certain to affect the food industry, its customers, and the general fight against obesity.

The future of obesity litigation also could have broader implications for American businesses. If the tort system is allowed to be used to regulate the foods we are permitted to buy, no industry will be immune from similar threats in the future.

What responsibility does any company have for the personal choices of its customers? Should someone be able to sue a restaurant or food manufacturer for gaining weight after eating the company's food? Should a state judge be able to expand or depart from long-established tort law and effectively set national policy—for the food or other industries—through a single lawsuit? Under which circumstances should Congress and state legislatures step in to preserve existing tort law? And, importantly, for obesity litigation, will lawsuits against fast-food companies do anything to positively affect the overall obesity problem in this country?

The authors of this monograph address the important tort law and public policy issues at play in the obesity litigation debate. They shine a spotlight on the small group of trial lawyers and so-called consumer advocates who are employing tobacco litigation-type techniques against the companies that make and sell food. The authors dissect the activists' theories for liability, explain how litigation could actually worsen the obesity predicament in this country, and show how state and federal legislatures can work together to achieve the right public policy and legal results.

Like all other publications of the National Legal Center, this monograph is presented to encourage a greater understanding of the law and its processes. The views expressed in this monograph are those of the authors and do not necessarily reflect the opinions of the advisors, officers, or directors of the Center. The *Briefly* . . . booklets are designed to be short, accessible, and portable treatments of leading legal issues of interest to the private sector.

**Richard A. Hauser**  
President  
National Legal Center

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# CLOSING THE FOOD COURT: WHY LEGISLATIVE ACTION IS NEEDED TO CURB OBESITY LAWSUITS

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## INTRODUCTION

Congress and state lawmakers around the country can help resolve the obesity health issue by enacting legislation that sends the right signal to policymakers, courts, and the American public: tort law and liability litigation are not the means to address the problem of obesity and illnesses related to obesity in America. Even if successful, the errant drive for obesity suits is adverse to society's needs—both in dealing with obesity and in using liability law to regulate an industry rather than to compensate someone who has been injured. It strays from the fundamentals of the common law by asking judges to assume the role of legislators or regulators and advance a political agenda.

This monograph explains how these “regulation through litigation” lawsuits<sup>1</sup> would transform traditional tort and food law, shows why courts should continue to dismiss obesity claims, and suggests that Congress and state legislatures should ban these nontraditional suits in order to maintain existing law. Such action would help draw a real line against changing the fundamental nature of the tort liability system. Specifically, it would end the ill effects that the threat of liability is creating for makers and sellers of food and their customers, and clear the way for legislative bodies to formulate a sound public policy response to obesity-related health problems in America.

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<sup>1</sup>See, e.g., Victor E. Schwartz & Leah Lorber, *Regulation Through Litigation Has Just Begun: What You Can Do To Stop It*, in BRIEFLY (Nat'l Legal Center for the Pub. Interest, Nov. 1999).

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### REGULATION THROUGH LITIGATION: THE USE OF TORT LAW TO CHANGE PUBLIC POLICY

Using tort lawsuits to address the obesity problem is part of a more general movement, appropriately named by former Secretary of Labor Robert Reich as "regulation through litigation."<sup>22</sup> This phenomenon has laid siege to the fundamentals of the common law of torts. When courts regulate through litigation, they shift away from the main purpose of tort law: to decide if it is appropriate for a plaintiff to be compensated because of a defendant's conduct. Regulation through litigation has a different purpose. Under regulation through litigation, judges make broad public policy determinations and use the threat of massive liability exposure to change the behavior of a defendant, pushing an individual judge's public policy views onto America's citizens.

A key problem with "regulation through litigation" is that the process through which judges make decisions was designed to settle disputes between parties under traditional tort law, not to set national public policy agendas. Courts receive only limited information submitted by the individual litigants in an attempt to resolve a narrow dispute. They have no mechanism to hold public hearings, gather information from the public at large, or balance the varied interests of all affected persons, most of whom are not before the Court. A single judicial decision over a private dispute between civil litigants can regulate or change how much people pay for certain items, what products they can buy, and what products may be available in the future. A small band of trial lawyers and their sympathizers have been looking for opportunities, such as with food litigation, to expand the use of "regulation through litigation" to sue more American companies and affect more American industries. In recent years, they have tried to use courts to decide how much people should pay for pharmaceuticals, what safety equipment should be affixed to weapons, and, most recently, how food should be sold or marketed.

<sup>22</sup>Robert B. Reich, *Regulation Is Out, Litigation Is In*, USA TODAY, Feb. 11, 1999, at 15A; Robert B. Reich, *Don't Democrats Believe in Democracy?* WALL ST. J., Jan. 12, 2000, at A22, available at 2000 WL-WSJ 3013604.

Let us look at a practical result of one attempt at regulation through litigation. An Illinois state judge allowed a nationwide class action case to go forward over whether an insurance company can offer its customers less expensive, nonoriginal equipment as replacements for nonsafety automobile parts.<sup>3</sup> National insurance policy was established when the case resulted in a verdict of more than one billion dollars against a defendant, despite the fact that offering nonoriginal, non-safety parts costs less and lowered the price of insurance. Insurers, from then on, believed that to avoid this kind of litigation, they could only offer insureds original manufacturer parts,<sup>4</sup> for example, when replacing a dented fender. Without the competition from less expensive, nonoriginal equipment nonsafety parts, the ultimate byproduct of this "regulation through litigation" lawsuit was to increase dramatically prices for nonsafety-related automobile crash replacement parts. This did not help the consumer and was, in fact, contrary to the regulatory will of many states.

To get the public and courts to agree to suppress traditional tort law and "regulate" consumer markets, those pushing "regulation through litigation" focus on products or industries that are unpopular in some quarters, such as tobacco, guns, and insurance. These industries, as well as those initially popular, are vilified through a professional and persistent media campaign. John Coale, a plaintiffs' lawyer, explained: "We take these cases, such as tobacco, back in 1994, and then put together a three-pronged attack, legal, media, and political. We attacked on these three fronts for five years until they folded and settled."<sup>5</sup> Another plaintiffs' lawyer described a similar strategy arising from a litigation planning meeting: "A lot of what we discussed was

<sup>3</sup>Avery v. State Farm Mut. Auto. Ins. Co., No. 97-L-114, 1999 WL 1022134 (Ill. Cir. Ct. Oct. 8, 1999) (addressing claims for breach of consumer fraud statute); see generally Victor E. Schwartz & Leah Lorber, *State Farm v. Avery: State Court Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215 (2001).

<sup>4</sup>See *Personal Responsibility in [the] Food Consumption Act: Hearing Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 108th Cong. 32-33 (2003) (testimony of Victor E. Schwartz, Esq.).

<sup>5</sup>John Coale, *The Public Policy Implications of Lawsuits Against Unpopular Defendants: Guns, Tobacco, Alcohol and What Else*, Address Before The Federalist Society on Law and Public Policy Studies (Nov. 11, 1999) (transcript on file with authors).

how to talk about the [issue] to the general public. This is a war that has lots of fronts. One of the fronts is the battle for the hearts and minds of the American people."<sup>6</sup>

It should not be surprising, then, that the advocates for obesity litigation have begun using those same tactics, such as calling the food industry "Big Food" to echo the "Big Tobacco" moniker they gave tobacco companies.<sup>7</sup> Consumer activist Ralph Nader has called the double cheeseburger "a weapon of mass destruction."<sup>8</sup> Books, such as *Fast Food Nation*, and movies, including the recently released documentary *Super Size Me*, can be viewed in that same context. In fact, since the first obesity suit against McDonald's was filed in July 2002, coverage of the obesity problem in America has more than doubled.<sup>9</sup>

#### REGULATION THROUGH LITIGATION IN THE FOOD COURT

At the time the state tobacco suits were filed in the early 1990s, one of the authors of this monograph, Victor Schwartz, suggested that "regulation through litigation" could in the future be extended to other products, even if they were much more popular, such as fast food. When he raised this notion in a debate with Professor John F. Banzhaf, III, a well-known consumer advocate who favored "regulation through litigation" tobacco lawsuits, Mr. Banzhaf said that this concern was misplaced because tobacco was the only product that could kill a person if used as "intended." Mr. Schwartz replied that if one ate enough hamburgers (which are intended to be eaten), such indulgence could lead to premature death, too. What seemed hyperbole then is reality now, as Professor Banzhaf has changed his view and is one of

<sup>6</sup>Steven B. Handler, *Trial By Newswire*, LITIG. MGMT., Summer 2003, at 16 (quoting an attorney with the Castano Group, as reported in Peter J. Boyer, *Big Guns*, NEW YORKER, May 17, 1999, at 54-67, available at 1999 WL 15457952).

<sup>7</sup>See, e.g., Press Release, Physicians Committee for Responsible Medicine, Health Advocates Condemn Proposed Bill to Shield Junk Food Industry (June 16, 2003) (on file with authors).

<sup>8</sup>C. Spencer et al., *Fast Food in the Gunshots—Class Actions as Political Weapons*, 17 BNA TOXIC L. REP. 1090, 1093 (Nov. 21, 2002).

<sup>9</sup>Int'l Food Information Council, *Trends in Obesity-Related Media Coverage*, at <http://www.ific.org/newsroom/index.cfm#research> (last visited May 18, 2004).

the leading advocates in the "regulation through litigation" against purveyors of food.<sup>10</sup>

Personal injury lawyers and their allies, including Professor Banzhaf, at George Washington University Law School, and his colleague Professor Richard Daynard, at Northeastern Law School, are urging courts to make this leap against restaurants and sellers of food by arguing that the ends justify the means. They openly admit that they are trying to use the price tag of litigation to tax or increase the cost of less nutritious food, to educate the public about the "obesity epidemic," and to force companies to reformulate their food products, even if those foods are popular among consumers.<sup>11</sup>

While these goals may or may not constitute appropriate public policy considerations, the consumer advocates' venue for attaining these "solutions" has not been primarily directed at the appropriate chambers of public policy power, namely, Congress, state legislatures, and regulatory bodies. Professor Banzhaf has admitted complete disregard for the boundaries of authority for the separate branches of government, saying, "if the legislatures won't legislate, then trial lawyers will litigate."<sup>12</sup> The result of such litigation would be that health problems related to obesity, as well as the rules for marketing food, would be decided by judges and juries under the common law of torts.

#### THE LIABILITY OF SELLERS OF FOOD— TRADITIONAL "LAW" IN A NUTSHELL

While tort law has always had a public policy component to help ensure that wrongdoers pay for a harm they cause, tort law has achieved those goals under traditional standards. In this instance, people who sell food were among the first product sellers to be subject

<sup>10</sup>See *Personal Responsibility in [the] Food Consumption Act: Hearing Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 108th Cong. 8-29 (2003) (testimony of Professor John Banzhaf).

<sup>11</sup>Richard Daynard, *You Want Fries with That? Why the Food Industry Deserves to Face Litigation*, NORTHEASTERN U. MAG., May 2003, available at <http://www.numag.neu.edu/0305/field.html> (last visited Dec. 30, 2003).

<sup>12</sup>*Fast Food on Trial* (Nat'l Public Radio broadcast, Aug. 8, 2002), at <http://banzhaf.net/docs/npr.html> (last visited May 18, 2004).

to strict liability. As a result, if food has a "manufacturing defect," a potentially harmful element that is not supposed to be present (such as a can of peas containing a pebble or a bowl of soup containing a nail), and that element injures a consumer, the seller is liable. In strict liability for so-called manufacturing defects, there were, and are, no excuses.<sup>13</sup>

Sellers of food also may be subject to liability for failure to warn. If a seller of a candy bar, for example, fails to inform a consumer in the ingredients list that the candy contains peanuts, a well-known allergen, and the consumer is injured, then, under the *Restatement of Torts*, Third: *Products Liability*, the manufacturer is subject to liability.<sup>14</sup> Sellers of food also may be subject to liability if their products fail to conform to applicable safety statutes or administrative regulations. This is known in legal terms as "negligence per se." For example, if a regulation stipulates that hamburgers are to be cooked at more than 160°F, and the seller of food fails to do so, and this causes an injury to a person who is harmed by bacteria that would have been killed if the hamburger had been properly heated, the seller is liable.

Until very recently, the only real debate in food cases arose when an ingredient that caused a plaintiff's harm was an inherent aspect of the product, something that might be naturally in a product, but could cause harm. A typical question was whether a one-inch chicken bone in a chicken enchilada or a fish bone in chowder could be considered a manufacturing defect or an inherent aspect of the product. The new *Restatement of Torts*, Third: *Products Liability* contains a rule to address those situations. It focuses on whether a reasonable consumer would not expect the food to contain that item. If the consumer would not expect a one-inch chicken bone to be present in a chicken enchilada and he or she is injured by it, the seller is liable.<sup>15</sup>

That is more than two hundred years of food law in the proverbial "nutshell."

<sup>13</sup> See RESTATEMENT OF THE LAW THIRD, TORTS: PRODUCTS LIABILITY § 7 (1997).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* § 7 cmt. b.

## HOW REGULATORS, LEGISLATORS, AND THE PRIVATE SECTOR CAN ADDRESS THE OBESITY HEALTH PROBLEM

Under existing food law, regulatory and legislative bodies, as well as consumers, can step in to address issues of obesity and food. In fact, they already have done so.

For example, some believe that children consume too many soft drinks and have persuaded regulatory bodies in California to ban traditional soft drinks in public schools. While some people may vigorously disagree with that regulatory decision, it was rendered in the context of the check and balance of American politics. If California residents as a whole want to restore soft drinks in public schools, they can change this decision by voting out their elected representatives or by proposing ballot initiatives.

There also is a belief that people, especially children, are not as active as they were in the past and need a better understanding of nutrition. To help solve this problem, the U.S. Senate passed S. 1172, the Improved Nutrition and Physical Activity Act (IMPACT Act), on December 9, 2003.<sup>16</sup> The IMPACT Act would provide grants for training people to treat children and others who are overweight or obese and at risk for serious medical conditions. The Act also would use grants to establish various locally controlled programs to encourage more physical activity and improved nutrition. The bill is awaiting action in the House of Representatives, where hearings can be held on the most effective means of implementing these programs.

Perhaps the most effective tool for changing industry and individual behavior, though, is market pressure. The American public has a direct impact on the food that companies sell. If people choose to eat more healthily and express that choice through their eating habits, then companies will produce healthier foods. If people choose to treat themselves to fattening foods, then restaurants and food manufacturers will provide those items. Recently, McDonald's responded to its customers' desires by stopping its "supersize" program and selling an

<sup>16</sup> S. 1172, 108th Cong. (2003).

