

BRIEFLY . . .

Perspectives on Legislation, Regulation, and Litigation

Volume 8, Number 8
August 2004

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

VICTOR E. SCHWARTZ
PHIL S. GOLDBERG

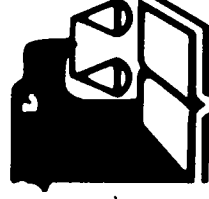
**National Legal Center
for the Public Interest**

1600 K Street, N.W., Suite 800

Washington, D.C. 20006

Tel: (202) 466 9360

Fax: (202) 466 9366



**National Legal Center
for the Public Interest**

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

Volume 8, Number 8
August 2004

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

VICTOR E. SCHWARTZ
PHIL S. GOLDBERG

TABLE OF CONTENTS

© 2004 National Legal Center
for the Public Interest
ISSN 1089-9820
ISBN 0-937299-46-4
ISBN 1-930742-53-3
Published August 2004

PREFACE
RICHARD A. HAUSER Inside Front Cover

**CLOSING THE FOOD COURT:
WHY LEGISLATIVE ACTION
IS NEEDED TO CURB OBESITY LAWSUITS**
VICTOR E. SCHWARTZ
PHIL S. GOLDBERG

INTRODUCTION	1
REGULATION THROUGH LITIGATION: THE USE OF TORT LAW TO CHANGE PUBLIC POLICY	2
REGULATION THROUGH LITIGATION IN THE FOOD COURT	4
THE LIABILITY OF SELLERS OF FOOD— TRADITIONAL “LAW” IN A NUTSHELL	5
HOW REGULATORS, LEGISLATORS, AND THE PRIVATE SECTOR CAN ADDRESS THE OBESITY HEALTH PROBLEM	7
OBESITY CLAIMS IN THE COURTS—A BRIEF ANALYSIS OF THE PELMAN (MCDONALD’S) DECISIONS	8
<i>The Direction of Future Litigation</i>	9
<i>Acts of Alleged Misrepresentation Distinguished</i>	11
SHOULD LEGISLATORS CLOSE THE “FOOD COURT” OF OBESITY LITIGATION? WHAT ARE THE PROS AND CONS? ..	12
<i>Reckless and Negligent Actions</i>	13
<i>Federalism: Should Obesity Litigation Be Left Solely to the States?</i>	14
<i>Threat of Lawsuits Has Current Ramifications</i>	15
<i>The Litigation Could Harm the Fight against Obesity</i>	16

NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST

1600 K Street, N.W., Suite 800
Washington, D.C. 20006
Tel: (202) 466-9360
Fax: (202) 466-9366

E-mail: info@nlcpi.org

Please visit our Web site at: www.nlcpi.org

The National Legal Center for the Public Interest is a tax-exempt, nonprofit public interest law and educational foundation, duly incorporated under the law of the District of Columbia, to provide nonpartisan legal information and services to the public at large. NLCPI is qualified to receive tax-deductible contributions under I.R.C. Sec. 501(c)(3).

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

VICTOR E. SCHWARTZ
PHIL S. GOLDBERG

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” lawsuits¹ 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.

¹See, 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).

IF LEGISLATION IS NECESSARY, SHOULD IT OCCUR AT THE STATE OR FEDERAL LEVEL?	17
<i>Federal Action</i>	17
<i>State Action</i>	18
<i>Public Support to End Obesity Suits</i>	19
CONCLUSION	20
ABOUT THE AUTHORS	23

THE MISSION OF THE NATIONAL LEGAL CENTER	Inside Back Cover
---	-------------------

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."²² 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.

²²Robert 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.³ 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,⁴ 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."⁵ Another plaintiffs' lawyer described a similar strategy arising from a litigation planning meeting: "A lot of what we discussed was

³Avery 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).

⁴See *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.).

⁵John 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."⁶

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.⁷ Consumer activist Ralph Nader has called the double cheeseburger "a weapon of mass destruction."⁸ 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.⁹

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

⁶Steven 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).

⁷See, 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).

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

⁹Int'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.¹⁰

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.¹¹

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."¹² 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

¹⁰See *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).

¹¹Richard 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).

¹²*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.¹³

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.¹⁴ 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.¹⁵

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

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

¹⁴ *Id.*

¹⁵ *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, 2003.¹⁶ 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

¹⁶ S. 1172, 108th Cong. (2003).

adult Happy Meal that includes a pedometer, bottled water, and salad.¹⁷ By doing so, the company reversed its sales slump in recent quarters.¹⁸ Others in the industry are looking to their customer base before acting. Wendy's, for example, which has sold salads and sandwich wraps for a few years, has decided to maintain its "Biggie" program: "We're following our customers' lead. We go where they go."¹⁹

Litigation based on the weight gain of consumers would only disrupt this market-based system and deprive the public of foods—fattening or otherwise—that people want to eat. The threat of the litigation could have the same effect. To make this point in a demonstrative fashion, a Seattle-based restaurant required consumers to sign a "waiver" that they would not sue the restaurant for weight gain before ordering a fattening and popular dessert called "The Bulge."²⁰

OBESITY CLAIMS IN THE COURTS—A BRIEF ANALYSIS OF THE PELMAN (McDONALD'S) DECISIONS

"Regulation through litigation" would have this country on the threshold of a new approach to food liability, one based on a false premise. The foundation of such cases brought against sellers of food is that food eaten in significant enough quantities causes harm, particularly obesity. It is not that any particular food product contains a defect; it has always been common knowledge that obesity can occur when people consistently overeat and fail to burn off excess calories. After all, people would expect that repeated consumption of an excessive amount of potato chips leads more quickly to obesity than eating a substantial portion of celery and lettuce.

Federal District Court Judge Robert Sweet understood these dynamics when he wrote two lengthy opinions dismissing the class

¹⁷*McDonald's Adult Happy Meal with Salad, Water, Pedometer, and Advice Coming to All U.S. Outlets*, MEDICALNEWS.TODAY.COM, Apr. 15, 2004, available at <<http://www.medicalnewstoday.com/index.php?newsid=7293>> (last visited May 21, 2004).

¹⁸Leon Stafford, *Rivals Await Fall-Out From McDonald's Menu Downsizing*, ATL. J.-CONST., Mar. 5, 2004, at B1.

¹⁹*Id.*

²⁰*Eatery Asks for Waiver*, OVERLAWYERED.COM, Sept. 23, 2003, at <<http://www.overlawyered.com/archives/000355.html>> (last visited May 21, 2004).

action case *Pelman v. McDonald's*.²¹ *Pelman* was a purported class action suit brought in New York by clinically obese children and their parents or guardians. The plaintiffs argued that their regular consumption of McDonald's foods was a significant or substantial factor in the development of their obesity, diabetes, coronary heart disease, high blood pressure, elevated cholesterol intake, or other adverse diseases or health effects.

Judge Sweet identified three major obstacles the plaintiffs would have to overcome in waging a successful lawsuit. First, if traditional rules are followed, plaintiffs would have to show that their obesity was caused by food, not by failure to exercise, other lifestyle choices, or genetics. Second, plaintiffs would have to show that a particular defendant's food caused this harm—something that will be very difficult to do, considering the multiple sources of food that people consume. Finally, as this monograph has shown, there will have to be a major change in the definition of what constitutes a "product defect" for liability to ensue. The only other lawsuit relating specifically to obesity and the effects of obesity was *Barber v. McDonald's*.²² The plaintiff voluntarily dropped this case. But Judge Sweet left the door open for future litigation. He provided a "menu," so to speak, as to how an obesity case might be brought successfully.²³

The Direction of Future Litigation

In that regard, the failure of these initial lawsuits is unlikely to discourage the entire trial bar from filing new claims. Rather, these cases generally are seen as "trial balloons," so the plaintiffs' bar can assess how their litigation theories will be met by certain judges. The trial lawyers are likely to reformulate their allegations and adjust their litigation tactics accordingly. At this point, it appears that future suits will not be filed as class actions; Judge Sweet noted in his opinion that

²¹See *Pelman v. McDonald's Corp.*, 2003 WL 22052778 (S.D.N.Y. Sept. 3, 2003) (dismissing amended complaint and denying plaintiffs' motion for leave to amend complaint); *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003) (dismissing original complaint without prejudice).

²²Compl., No. 23145 (N.Y. Sup. Ct. filed July 24, 2002).

²³See, e.g., 237 F. Supp. 2d 512, 536 (explaining how plaintiffs could "flesh out" their arguments).

meeting the typicality requirement for class certification would be difficult, if not impossible.²⁴ New lawsuits also are likely to focus on advertising to children, as the law has allowed for different standards of duty to be imposed on those who directly market or sell to children. The plaintiffs also are likely to name multiple defendants—both horizontally and vertically in the production process—in a thinly veiled attempt to avoid having to name the specific food items that allegedly caused the obesity or obesity-related condition. This last tactic, which surely will increase litigation costs for a varied group of companies, also could allow plaintiffs to talk in generalities about the larger obesity problem in America and avoid addressing specific details.²⁵ Professor Banzhaf already has predicted that “we’ll find a judge. And we’ll find a jury” that will find food sellers liable for their customers’ overeating.²⁶

Trial lawyers also may try to team up with state attorneys general to file obesity suits, either under misrepresentation or government recoupment grounds.²⁷ This tactic was first tried in the tobacco context and later used in lead paint and HMO litigation. The number one problem with mixing personal injury lawyers and the state is that “Big Government” recoupment suits bend the rules by giving the government greater legal rights than the alleged injured persons. A fundamental principle of tort law was that an injured person’s claim is greater than or at least equal to any claims by others who may allege that they endured an indirect harm that may flow from that injury. Nevertheless, a few trial courts in tobacco cases gave the state a greater right to sue than an individual smoker. The industry’s defenses of the smokers’ “assumption of the risk” (that smokers knew of the risk and voluntarily encountered it) and contributory negligence were swept away. More fundamentally, the state was given “super plaintiff” status,²⁸ meaning that it did not have to show that an allegedly injured citizen became sick from smoking one brand or product made from one company. The

²⁴*Id.* at 539 n.30.

²⁵*See, e.g.,* Peter A. Cross, Remarks at the National Forum on Preventing and Defending Obesity Claims (Jan. 29, 2004) (materials on file with authors).

²⁶*Abrams Report* (MSNBC television broadcast, Jan. 23, 2003).

²⁷Julia Duin, *Obese People Use Lawsuits to Get Government Involved*, WASH. TIMES, June 11, 2003, at A5.

²⁸*Texas v. American Tobacco Co.*, 14 F. Supp. 2d 965 (E.D. Tex. 1997).

whole industry was placed in the Cuisinart™ of liability. Despite the fact that most courts did not abandon these fundamental rules and this novel legal argument was rejected by the only state supreme court to squarely address it,²⁹ these factors, along with other considerations specific to the tobacco litigation, led the companies to settle.

Some personal injury lawyers and their allies believe that some day they may be able to sue the food industry for \$117 billion, the amount the Surgeon General reported was the total direct and indirect costs attributed to overweight and obesity in the year 2000.³⁰ Right now, the industry is too popular for such action. But as Professors Banzhaf and Daynard know, popularity can change. Should state attorneys general use the weight and force of state government for obesity suits, such action would be a serious misuse of poorly received precedents.

Acts of Alleged Misrepresentation Distinguished

Several other lawsuits against food companies are generally discussed in the obesity context, but they are not focused on obesity and should be distinguished from this general debate. They are based on alleged misrepresentations. For example, McDonald’s settled a case for about \$12 million for not publicly disclosing that its french fries, while cooked in vegetable oil, contained beef flavoring, which may not be acceptable to some vegetarians.³¹ Big Daddy Ice Cream reportedly settled a case for \$1.2 million for allegedly failing to disclose hidden fat content. The company acknowledged the unintended mistake and corrected the labeling.³² Robert’s American Gourmet Foods, which was sued for allegedly understating the fat and calorie contents in the cheese snack Pirate’s Booty, agreed to pay \$4 million and to correct

²⁹*Miller v. Philip Morris, Inc.*, 575 N.W.2d 401 (Iowa 1998) (the quasi-sovereign doctrine had been used as an equity principle to give the state power to enjoin or stop wrongful conduct, but it had never been used to give the state greater power to collect money damages than an allegedly injured person).

³⁰Lance Gay, *Is a Fat Tax the Answer to Obesity Epidemic?*, SCR. HOWARD NEWS SERV., Apr. 29, 2002.

³¹*Block v. McDonald’s Corp.*, Docs. Available at <http://www.hbharti.com/h_bharti_mcd/mcdonalds_suit.htm>.

³²*Cohen v. DeConna Ice Cream Co.*, Notice of Pendency, available at <www.wklawyers.com/noticeofpendency.pdf>.

the label.³³ Importantly, none of the allegations in these suits would be barred by the proposed federal or state legislation to ban obesity litigation because acts of affirmative misrepresentation are not protected by the legislation.

SHOULD LEGISLATORS CLOSE THE "FOOD COURT" OF OBESITY LITIGATION? WHAT ARE THE PROS AND CONS?

Legislators should close the food court of obesity litigation for several reasons. From the public policy perspective, legislatures and not courts are the appropriate bodies to determine food safety laws and government policies toward obesity. In part, that is because when judges are involved in regulation through litigation, it only takes one judge in one jurisdiction to effectively make law for the entire country. Moreover, even if these suits are not successful—as they should not be—the mere specter of massive liability comes at a significant cost. Insurance premiums already are rising, stock prices of large food manufacturers and restaurants may become depressed, and companies are likely to deprive responsible customers of certain food choices in the effort to avoid litigation. Finally, and most important to America's fight against obesity, nutritionists argue that the key to helping overweight people fight their weight gain is to empower them to make the right choices. Letting them blame someone else, such as a food manufacturer, for their own personal consumption habits, these professionals suggest, sends obese individuals the wrong signal.

The arguments against federal legislation to ban obesity suits focus on four general themes: it would permit food companies to engage in negligent and reckless actions without repercussion; tort law generally is governed by the states and should not be legislated by Congress; if the suits have not been successful, legislation is not needed; and the litigation is working if it focuses people on the obesity problem. Some of these contentions have been echoed at the state level.

³³ See Editorial, *Food Choices*, ARIZ. DAILY STAR, Apr. 12, 2004.

Reckless and Negligent Actions

The legislation under consideration in Congress would not allow a company to engage in reckless or negligent behavior.³⁴ Rather, the legislation is narrowly tailored to sift out only the litigation concerning obesity and conditions related to obesity. The bill does not apply to any nonobesity-related conditions, such as mercury poison from the consumption of fish, or single incidents, such as food poisoning or *E. coli* infections. With regard to obesity litigation, the bill includes specific public policy exemptions so that companies cannot be immune from litigation if they allegedly make false claims or intentionally violate a state or federal statute or regulation in a way that causes obesity.

First, the bill would not affect liability if the seller breached an express contract or warranty in connection with the purchase of the food product or if the product was adulterated. Second, companies would not be immune from litigation if it can be shown that they knowingly and willfully violated a federal or state statute and that violation was a proximate cause of the obesity or obesity-related injury. Third, the bill allows for actions by the Federal Trade Commission (FTC) and the Food and Drug Administration (FDA). Consequently, a seller of food may still be subject to liability under existing law for making a reckless or negligent claim or fraudulent misrepresentation about a product, such as fat content, that proves to be false.

Consider, for example, the recent dispute over advertising by Kentucky Fried Chicken (KFC) in which the company allegedly suggested that eating fried chicken could contribute to "eating better" and is helpful for dieters who are watching their carbohydrate intake.³⁵ The Center for Science in the Public Interest filed a complaint with the FTC seeking an investigation into whether this constitutes deceptive advertising. While there have been no conclusions about the legality of KFC's commercials, the obesity legislation under consideration at both the federal and state levels would not affect KFC's potential civil liability in this situation.

³⁴ See H.R. 339, 108th Cong. (2004).

³⁵ See H.R. REP. NO. 108-339, at 57 (2004).

Federalism: Should Obesity Litigation Be Left Solely to the States?

The notion of federalism is an inherent and important aspect of the American political system. In the U.S. Constitution, as well as in practice, the authority of the states is well balanced with the authority of the federal government to correct abuses of federalism through the Commerce Clause when “inconsistent [laws] aris[e] from the projection of one State regulatory regime into the jurisdiction of another State.”³⁵⁶

As demonstrated by Judge Sweet’s reasoning in the *Peiman* case, state tort laws do not support obesity suits—the traditional tort requirement of causation is tremendously difficult to establish and those who choose to eat fattening foods assume the risk of weight gain and obesity. This leads to a subtle, yet important, concept for those concerned about federalism: the Personal Responsibility in Food Consumption Act and its state counterparts *actually preserve* the current state of the law in this area and, to that end, prevent a handful of judges from creating new, retroactive laws assigning liability to food sellers for the personal consumption practices of their customers. Federal legislation banning these suits, therefore, would reinforce state tort law and guard it against abuse.

Such abuse, even by a single judge, would have national ramifications. The food service industry employs 11.7 million Americans, which makes it the largest private sector employer. Practically speaking, Mars, Inc., for example, could not viably adjust its Snickers™ to reflect conflicting judge-made law in different states. The same is true with McDonald’s, Applebee’s, and other national chain restaurants. The food industry, which is intertwined with interstate commerce, provides a perfect example of the public policy reasons underlying the Founders’ decision to give Congress the authority to regulate interstate commerce when they drafted the U.S. Constitution. Congress has used that authority in charging the federal FDA with regulating the food industry.

³⁵⁶Healey v. Beer Institute, 491 U.S. 324, 337 (1998).

Threat of Lawsuits Has Current Ramifications

Opponents of the legislation argue that if the lawsuits are not successful, why should Congress and state legislatures use their time and resources to prohibit them? The answer is that the threat of massive liability over the entire food industry already is having significant adverse repercussions.

In testimony before the U.S. Senate in October 2003, Wayne Reaves, an owner of a small chain of restaurants under the name “Jack’s Family Restaurants,” said that the mere threat of obesity litigation is having a direct impact on the cost of insuring his business.³⁷ One insurance industry publication coined the term “food fright” to describe the potential insurance costs of the litigation, and Mr. Reaves’s own insurance company has acknowledged that obesity litigation is a significant factor in how it prices future liability products. To highlight this point, the Insurance Information Institute (Institute) reported in January 2004 that obesity litigation “is of special concern.”³⁸ The Institute stated that large restaurant chains are “vulnerable” to the litigation and sounded an alarm particularly with regard to “smaller companies,” saying the smaller chains and outlets could be “impacted by high dollar settlements and awards.”³⁹

The threat of litigation also can create a cloud of uncertainty for potential investors, making it difficult for food companies to gain financing to sustain or grow their business. In the last year, several brokerage firms have produced extensive evaluation reports on the effect that the obesity epidemic will have on the food industry and whether the litigation poses a financial risk for investors. JPMorgan, in bold highlighting, underscores the point that “litigation risks and their impact” on food companies “should not be

³⁷Common Sense Consumption: Super Sizing Versus Personal Responsibility, Hearings on S. 1428 Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary, 107th Cong., 1st Sess. (Oct. 16, 2003) (statement of Wayne Reaves, owner of Manna Enterprises, Inc.), available at <http://judiciary.senate.gov/testimony.cfm?id=963&wit_id=2728>.

³⁸Robert P. Hartwig & Claire Wilkinson, *Obesity, Liability & Insurance* (Ins. Info. Inst. Jan. 2004) (on file with authors).

³⁹*Id.* at 16.

understated."⁴⁰ Similarly, Morgan Stanley warns investors not to underestimate "the persistence and creativity of plaintiff lawyers," stating that the ability of the trial bar to vilify the food industry is a key factor for determining whether the suits will be successful.⁴¹

The Litigation Could Harm the Fight against Obesity

The public's choice of what they eat or do not eat is not going to be made more informed by tort lawsuits. If anything, if such lawsuits are successful, they will send precisely the wrong signal: you can have your rich cakes and a successful lawsuit too. In testimony before the U.S. Senate, clinical psychologist Dr. Gerard J. Musante, the founder of the world-renowned weight loss clinic at Structure House, which is located near Duke University in North Carolina, made this exact point. He said that personal responsibility is at the heart of his program to empower people to manage their own healthy lifestyles and healthy weight.⁴² "These lawsuits do nothing but enable consumers to feel powerless in a battle for maintaining one's own personal health," he told the senators.⁴³ Dr. Musante also referred to other factors that lead to obesity and cited a Centers for Disease Control study directly linking television watching with obesity among children. Dr. Musante mused, "Should we sue the television industry, the networks, cable, the television manufacturers or the parents that permit this? And now we have Internet surfing and computer games. Where does it stop?"⁴⁴

⁴⁰Food Manufacturing: *Obesity: The Big Issue*, JPMORGAN (Apr. 16, 2003).

⁴¹*Litigation: Food Is Not Tobacco*, MORGAN STANLEY (Oct. 31, 2003).

⁴²*Common Sense Consumption: Super Sizing Versus Personal Responsibility, Hearings on S. 1428 Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 107th Cong., 1st Sess. (Oct. 16, 2003) (statement of Dr. Gerard Musante, Clinical Psychologist, CEO, and Founder of Structure House, Residential Weight Loss and Life Style Change Clinic), available at http://judiciary.senate.gov/print_testimony.cfm?id=963&wit_id=2730 (last visited Jan. 5, 2004).

⁴³*Id.*

⁴⁴*Id.*

IF LEGISLATION IS NECESSARY, SHOULD IT OCCUR AT THE STATE OR FEDERAL LEVEL?

Federal Action

If Congress believes that regulation of food should be left to federal and state legislatures and regulatory bodies, it should act to preserve the proper jurisdiction of these bodies. Congress has a history of successfully acting in the area of tort law when a national solution is appropriate and necessary to address problems caused by excessive liability exposure. For example, Congress passed the General Aviation Revitalization Act of 1994 to address excessive lawsuits against the small aviation industry;⁴⁵ the Biomaterials Access Assurance Act of 1998 to help ensure that the makers of medical devices would be able to obtain raw materials to make their products and that liability exposure of suppliers would not stand in their way;⁴⁶ and the Paul D. Coverdell Teacher Protection Act of 2001 to ensure that teachers and principals could exercise reasonable discipline in the classroom without being compromised by a fear of lawsuits.⁴⁷ All of these measures limited excessive liability that, Congress collectively believed, created significantly unsound nationwide public policy. As a result of these federal laws, the proponents' goals were achieved, and the opponents' concerns did not materialize.⁴⁸

Looking to these precedents, the bills put forward to end obesity and weight-gain-related litigation against sellers of food in the U.S. Congress—by Representatives Ric Keller (R-Fla.) and Collin Peterson (D-Minn.) in the House, and Republican Majority Whip Mitch McConnell (R-Ky.) and Democratic Minority Whip Harry Reid (D-Nev.) in the Senate—follow sound public policy guidelines. The bills respect and retain the 240-year history of the common law of torts, as

⁴⁵49 U.S.C.A. § 40101 (2003).

⁴⁶21 U.S.C.A. §§ 1601-1606 (2003).

⁴⁷20 U.S.C.A. §§ 6731-6738 (2003).

⁴⁸For example, the General Aviation Revitalization Act of 1994 resulted in more than 25,000 new, high-paying jobs, and the renewal of an industry. See Victor E. Schwartz & Leah Lorber, *The General Aviation Revitalization Act: How Rational Civil Justice Reform Revitalized an Industry*, 67 J. AIR L. & COM. 1269, 1282-84 (2002). It did not bar legitimate claims.

well as the right of Congress, state legislatures, and appropriate regulatory bodies to address the very real problem of obesity in this country. They also help ensure that restaurants and other sellers of food will not be subject to the huge costs of discovery to defend against baseless suits that are not supported by existing law. The bills help ensure that consumers will not be denied food choices because litigation threats have forced restaurants and other sellers of food to stop selling food products that are perfectly healthy when they are consumed in moderation. And they provide important public policy exemptions, as discussed *infra*, to protect the public against bad corporate actors. In sum, H.R. 339 and S. 1428 solidify existing law and draw the line where experience and practical wisdom suggest it should be drawn.

The Keller-Peterson bill, H.R. 339, passed the House of Representatives with a healthy bipartisan majority. The final vote was 276 to 139 and included 55 Democrats supporting the bill. The McConnell-Reid bill, S. 1428, as of this writing, is pending in the Senate and has garnered strong support.

State Action

State legislatures can and should act as well. Many of them have. While congressional action certainly has gained momentum, it may take time and is likely to address only the broadest principles of obesity lawsuits. States can act to stop the specific types of unwarranted cases that, given the particularities of state laws, can be filed in those states. In just more than a year, legislation banning obesity suits has passed in nine states—Arizona, Colorado, Florida, Georgia, Idaho, Louisiana, Missouri, South Dakota, Tennessee, Utah, and Washington. As of this writing, legislation is awaiting the governor's signature in Illinois. Overall, the issue has been debated in 25 state legislatures.

A resource for state legislators is the American Legislative Exchange Council (ALEC), which has developed a fair and balanced model bill, the Commonsense Consumption Act.⁴⁹ The ALEC bill, as

⁴⁹As with the federal bills, the ALEC model bill is tailored to clarify the separation of powers among the branches of government with regard to food issues. Importantly,

well as some of the state bills, includes additional provisions to the legislation pending in Congress. Specifically, some bills also protect companies from liability if their customers sustain other long-term consumption conditions, such as heart disease and high blood pressure. As with obesity, these conditions are not ones that sellers can police or use as the bases for conditions of sale. In addition, many of the state bills include heightened pleading requirements so that courts can determine early in the process whether a suit has merit, thereby saving valuable time and resources.

Finally, some state legislatures have chosen to toughen state consumer protection statutes with regard to obesity litigation by requiring intentional misrepresentation or reliance for a plaintiff to bring an obesity suit under such a law. Currently, some states, such as California, allow individuals to sue if they believe that members of the public are likely to be deceived by a particular practice or advertisement.⁵⁰ Other states, such as Connecticut and Florida, do not require individuals to actually rely on a company's statements or practices in order to file suit.⁵¹ While these relaxed standards may be appropriate in other contexts, in suits concerning obesity, allowing these lower thresholds could be misused to let back in the very lawsuits this bill seeks to prohibit.

Public Support to End Obesity Suits

The public overwhelmingly supports legislation banning obesity suits, as people generally believe that sellers of food should not be held responsible for the personal eating choices of their customers. A July 2003 Gallup poll showed that 89 percent of respondents oppose the idea of suing fast-food restaurants for obesity problems.⁵² Similarly, a survey released by Research International and Lightspeed Research

it does not protect manufacturers or sellers of food from liability if they knowingly or willfully violate any statute applicable to the manufacturing, marketing, distribution, advertising, labeling, or sale of food, including state consumer protection laws, or sell products that are adulterated or misbranded.

⁵⁰See CAL. BUS. & PROF. CODE §§ 17200 *et seq.*

⁵¹See Unfair Trade Practices Act, CONN. GEN. STAT. § 42-110a *et seq.*; Florida Deceptive and Unfair Trade Practices Act, FLA. STAT. ch. 501-201 *et seq.*

⁵²Emily Heil, *Can Big Government Fight Big Waistlines?*, NAT'L J., Oct. 18, 2003.

