



# An Evaluation of the Legal Responses to America's Obesity Epidemic

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## **An Evaluation of the Legal Responses to America's Obesity Epidemic**

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### **ABSTRACT**

This paper will examine the recent legal action surrounding one of America's major public health problems; obesity. The discussion begins with a quick presentation of information regarding our nation's obesity epidemic. The discussion will then turn to the recent obesity litigation and proposed legislation. The paper will analyze the strength and shortcomings of the *Pelman* plaintiffs' arguments against the McDonald's Corporation. Further, the paper will analyze the court's responses to these arguments in an attempt to hypothesize on future litigation. The paper will then turn its focus to proposed bill H.R. 339, "The Personal Responsibility in Food Consumption Act," which prohibits obesity lawsuits against members of the food industry. The discussion will analyze the political arguments surrounding obesity and obesity lawsuits. Finally, the discussion will suggest that analysis of the *Pelman* opinions and Congressional testimony on H.R. 339 indicate that obesity lawsuits, if allowed to continue, could be developed to the point of creating a legal response similar to that which accompanied tobacco litigation.

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**I. Introduction**

## A. The Current Obesity Epidemic

### 1. The Statistics

America has a weight problem. Television news, sitcoms, the Oprah and Dr. Phil shows are talking about it.<sup>1</sup> Radio programs, infomercials, commercials and magazines are all discussing it. Walking through the mall, we can see it. America has a problem with fat; a severe problem. More than merely being a little overweight, Americans are suffering with obesity. Obesity is defined as “a condition in which a person’s body fat represents thirty percent or more of their total weight.”<sup>2</sup> Further, obesity is a widespread epidemic. In fact, “there are currently ninety-seven million overweight or obese Americans.”<sup>3</sup> That means that obesity affects “an estimated 61 percent of U.S. adults. . . along with 13 percent of children and adolescents.”<sup>4</sup>

Obesity is an unhealthy condition which strains the heart and can even contribute to premature death.<sup>5</sup> The Secretary of Health and Human Services recently announced that “obesity contributes to about 300,000 deaths annually.”<sup>6</sup> Further, “[o]verweight and obesity may soon cause as much *preventable* disease and death as cigarette smoking.”<sup>7</sup> Obesity also contributes to such severe conditions as diabetes, heart disease and

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<sup>1</sup>See, e.g., *Mind and Body: Weight*, Oprah.com, available at [http://www.oprah.com/health/weight/health\\_weight\\_main.jhtml](http://www.oprah.com/health/weight/health_weight_main.jhtml) (2004); *Weight Loss Challenge*, DrPhil.com, available at [http://www.drphil.com/weightloss/weightloss\\_landing.jhtml;jsessionid=OB1EXKT3Z5NA](http://www.drphil.com/weightloss/weightloss_landing.jhtml;jsessionid=OB1EXKT3Z5NA) (2004).

<sup>2</sup>Jeremy H. Rogers, Note, *Living on The Fat of The Land: How To Have Your Burger And Sue It Too*, 81 Wash. U. L.Q. 869, 862 (2003) citing National Institutes of Health, *Clinical Guidelines on the Identification, Evaluation, and Treatment of Overweight and Obesity in Adults: The Evidence Report*, NIH Publ’n. No. 98-4083 at vii (2003), available at [http://www.nhlbi.nih.gov/guidelines/obesity/ob\\_gdlns.htm](http://www.nhlbi.nih.gov/guidelines/obesity/ob_gdlns.htm).

<sup>3</sup>*Id.* at 884.

<sup>4</sup>Press Release, U.S. Dep’t of Health and Human Servs, *The Surgeon General’s Call to Action to Prevent and Decrease Overweight and Obesity: Overweight and Obesity Threaten U.S. Health Gains* (Dec. 13, 2001), available at <http://www.surgeongeneral.gov/topics/obesity> (emphasis added).

<sup>5</sup>U.S. Surgeon General’s Office, *Overweight and Obesity Health Consequences* (2004), available at <http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact.consequences.htm>.

<sup>6</sup>*Id.*

<sup>7</sup>See U.S. Dep’t of Health and Human Services, *supra* note 4, available at <http://www.surgeongeneral.gov/topics/obesity> (emphasis added). The NIH does acknowledge that methods used to determine obesity status do have some problems of over- and under-inclusion. *Id.*

asthma.<sup>8</sup> Direct and indirect costs of health care associated with overweight and obesity have been estimated to be nearly \$160 billion.<sup>9</sup>

## 2. The Causes

There are, like with any problem, a number of correct answers to the question of what is creating the obesity epidemic. The writer of a recent Newsweek article hypothesized that obesity is just one problem of a wealthy society.<sup>10</sup> Over America's recent history, the average citizen's capital worth has increased. At the same time, the cost of food has gotten cheaper.<sup>11</sup> As a result, we are able to buy food for our pleasure and enjoyment, rather than just to meet basic nutritional needs. Also, we are able to choose now from a much larger assortment of tasty, and fattening, snacks. The food market has expanded to meet our on-the-go, quick sugar fix needs.<sup>12</sup> As the cheap and easy options have opened up to us, we have readily taken advantage.<sup>13</sup> The wealthy lifestyle and the flood of junk food are only some of the symptoms of our current society. We also have an easy lifestyle. Technological advancements and progressions in our culture have facilitated less active existence. It is true that we watch more television and play more video games, but moreover, we can also easily get on the internet to read, to shop for clothes and to order in foods like pizza and burgers. All activities we would have had to get up and get out of our houses to do in the past. Instead of walking to local stores, most of us drive from suburban neighborhoods to huge supermarket department stores. The National Restaurant Association (N.Rest.A.), though stressing the multifaceted nature of obesity, has

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<sup>8</sup>U.S. Surgeon General's Office, *supra* note 5, available at [http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact\\_consequences.htm](http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact_consequences.htm).

<sup>9</sup>Rogers, *supra* note 2, at 866.

<sup>10</sup>See Robert J. Samuelson, *The Afflictions of Affluence*, NEWSWEEK, Mar. 22, 2004, at 45.

<sup>11</sup>*Id.*

<sup>12</sup>Geoffrey Cowley & Anne Underwood, *Health for Life*, NEWSWEEK, Jan. 20, 2003 at 46.

<sup>13</sup>Rogers, *supra* note 2, at 877.



encouraged the legislature and the public to focus on these aspects of our lifestyles. In speeches before the U.S. Congress, representatives of the N.Rest.A. emphasized that the problem of obesity is strongly correlated to the sedentary lifestyles we have now the privilege of leading. As one speaker for the N.Rest.A espoused,

This issue has certainly raised the awareness of how important physical activity plays a role in attaining and maintaining a healthy lifestyle. The Centers for Disease Control and Prevention and numerous studies have shown that we have an incredibly sedentary society. According to the CDC, more than 40 percent of Americans are entirely sedentary. And, children are spending on average more than 4 hours a day watching TV or playing video games, instead of playing outdoors or getting some form of physical activity.<sup>14</sup>

Furthermore, many school programs no longer require physical education.<sup>15</sup> It is only logical that this increasing ability to avoid any physical activity results in fewer calories burned and more weight gained.

#### **a. Big Food as a Cause**

Still, the Center for Disease Control and Prevention (“the CDC”) points to “[i]ncreasing food portion sizes, consumption of high-fat fast-foods [sic], [in addition to i]ncreasingly sedentary lives.”<sup>16</sup> The true impact of our dietary choices and what we actually eat cannot be denied. It is undisputedly a major explanation of our obesity. The CDC reminds us that America’s passion for unhealthy foods is a contribution to our weight gain.<sup>17</sup> For instance, we now consume, on average, 150 pounds of sugars annually.<sup>18</sup> And we consume more fast-food. Ralph Nader has accused the cheeseburger of being America’s weapon of mass destruction.<sup>19</sup> Eric

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<sup>15</sup>Rogers, *supra* note 2, at 864.

<sup>16</sup>Gina Hill, *New Survey Underscores Rise in Obesity* (Oct. 8, 2002), available at <http://www.cnn.com/2002/HEALTH/diet.fitness/10/08/obesity.rise/index.html>.

<sup>17</sup>*Id.*

<sup>18</sup>Samuelson, *supra* note 3.

<sup>19</sup>*Personal Responsibility in Food Consumption Act, H.R. 339, supra* note 19, at H946 (statement of Rep. Jim Sensenbrenner, Chair, House Comm. on the Judiciary).

Schlosser even referred to America as the “Fast Food Nation” in his 2001 book.<sup>20</sup> He wrote that, “Americans now spend more money on fast-food than on higher education, personal computers, computer software, or new cars. They spend more on fast-food than on movies, books, magazines, newspapers, videos and recorded music – combined.”<sup>21</sup> McDonald’s Corporation (hereinafter McDonald’s) now proudly boasts that “on any given day, [McDonald’s] proudly serve[s] more than 46 million customers.”<sup>22</sup>

Moreover, we also consume larger portions of greasy, sugary foods and drinks at the fast-food restaurants. For instance, in the 1950’s a serving of McDonald’s french fries was two ounces, compared with the super size seven ounces available in 2000. Furthermore, single serving Coca Cola bottles were six and one half ounces in the 1950’s and twenty ounces in 2000.<sup>23</sup>

### 3. The Failed Solutions

#### a. Private Industry

While finding a cause for our obesity may be challenging, finding a solution, may be a mission impossible. Nonetheless, the push to find a cure to our never-ending appetites continues. Jane Fonda was unique when she launched her workout videos, but since then, an enormous weight loss industry has grown. Enterprising capitalists have picked up on America’s fixation with weight and their struggle to reach the ideal weight.

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<sup>20</sup>Eric Schlosser, *FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL* (Houghton Mifflin 2002) (2001).

<sup>21</sup>*Id* at 3.

<sup>22</sup>McDonald’s Corporation, *McDonald’s Means Food Quality*, available at <http://www.mcdonalds.com/usa/eat/quality0.html> (2004).

<sup>23</sup>Jacob M. Appel, *Portion Distortion and Public Perception: How Serving Size Guidelines are Over-Serving and Under-Serving the Consumer* (2002), in Peter Barton Hutt, ed., *Food and Drug Law: An Electronic Book of Student Papers*, citing Cynthia BeMent, *Remembering Real Portion Sizes*, available at <http://www.cookinglight.com/cooking/hl/nutrition/article/0,13803,362930,00> and Lisa Young and Marion Nestle, *The Contribution of Expanding Portion Sizes to the United States Obesity Epidemic*

Television commercials and magazines advertise weight loss drugs. Programs like Jenny Craig and Weight-Watchers have developed into nationally recognized weight loss plans. There are constantly infomercials for new pieces of fitness equipment, such as the Bowflex machine. Cooking appliance manufacturers have taken advantage of America's desire to lose weight by advertising that their products can help Americans quickly and easily prepare low-fat foods. For instance, the George Forman grill probably sell better because it clearly displays the phrase, "Lean, Mean, Fat- Reducing Grilling Machine" prominently on the front of the grill and America believes it will make lean, healthy foods in that grill.

### **b. Government Efforts**

In addition to private industry, government entities are also interested in a solution to our obesity. In addition to concern for our health, the government is also motivated by a concern about the rising health care costs of obesity. With costs of obesity in the hundred and two hundred billion range,<sup>24</sup> they contribute a significant amount to the highly political health care cost debate. To curb these costs and foster healthier American lifestyles, various governmental bodies have tried various approaches at improving consumers' food choices. Some efforts are aimed at regulating child access to unhealthy foods. For instance, a recent study at Arizona State University "counted more than 30 bills currently in the state legislatures on the issue of unhealthy snacks and drinks in the schools."<sup>25</sup> Other efforts have focused on educating consumers as to what is healthy. For example, the U.S. Department of Agriculture's Food Guide Pyramid attempted to simplify the message of a balanced diet, with some foods requiring more moderation than others.<sup>26</sup> Americans, however, are not exercising the indicated moderation.<sup>27</sup> Similarly, the White House and the Food and Drug Administration

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<sup>24</sup> See discussion *infra* Part I.A.1.

<sup>25</sup> Hon. Louis C. Bechtel, Ret., *Obesity and Related Health Claims: An Emerging Trend in Food Industry Litigation?*, 10 Andrews Class Action Litig. Rep. 31, (Andrews Publ'ns) 10 (2003) *citing* D. Barboza, *If You Pitch It, They Will Eat*, The New York Times, Aug. 3, 2003 at 1, c2.

<sup>26</sup> See generally Cowley & Underwood, *supra* note 12.

<sup>27</sup> *Id.*

(FDA) continue to try to help American consumers to eat healthy. The White House has recently announced a plan to educate consumers on the nutritional value and health effects of their food choices.<sup>28</sup> The FDA created the Nutrition Labeling and Education Act in the early nineties and has recently amended it to require food manufacturers to display the amount of trans-fat in the food product.<sup>29</sup> However, the acting commissioner of the FDA has conceded that these attempts have failed in the past.<sup>30</sup> In a 2004 hearing on fiscal appropriations for the FDA, he asked the Appropriations Committee to not focus too much money on the obesity problem, as the earlier attempt to encourage Americans to make healthier choices, by requiring food manufacturers to label the fat content and other ingredients, failed.<sup>31</sup>

## II. Holding Big Food Accountable

### A. 1982 Attempt to Link Fast-Food to Obesity

Americans have been fighting the weight battle in a number of ways, including blaming the food makers. Courts had their first opportunity to examine the causal connection between consuming fatty food and developing the disease of obesity in the early 1980s. In 1982, a former Washington, D.C. police officer, Liberty, brought suit against the D.C. Police and Firemen's Retirement and Relief Board making a similar argument.<sup>32</sup> Liberty alleged that his duties as a police officer caused, or at least aggravated, his coronary heart disease making his disability related to job performance and therefore entitling him to larger annuity payments. The officer claimed that various job factors were responsible for his disability. In explaining

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<sup>28</sup> See CNN.com, *White House Takes Aim at Obesity*, March 12, 2004, available at <http://www.cnn.com/2004/HEALTH/diet.fitness/03/12/obesity.campaign/index.html>.

<sup>29</sup> See 21 C.F.R. §§ 101.9, 101.36.

<sup>30</sup> *The Elephant in the Room: Evolution, Behavioralism, and Counteradvertising in the Coming War Against Obesity*, 116 Harv. L. Rev. 1161, 1182 (2003) ("The government's educational campaigns, on the whole, have been relatively ineffective. . . . research indicates that there is a significant disconnect between consumer knowledge about diets and the recommendations of the [government's] Dietary Guidelines.") (citations omitted).

<sup>31</sup> *Fiscal Year 2005 Appropriations for the Food and Drug Administration Before the SubComm. on Agric., Rural Dev., Food and Drug Admin., and Related Agencies, House Comm. on Appropriations*, 108th Cong. 38 (2004) (statement of Lester Crawford, Acting Comm'r, Food and Drug Admin.) (explaining that "when we got the Nutrition Labeling and Education Act of 1993, most of that worked on that felt that once that got on the market, that our problems with bad foods and bad eating would go away. Actually, it seems to have had the reverse effect.").

<sup>32</sup> *Liberty v. D.C. Police and Firemen's Ret. and Relief Bd.*, 452 A.2d 1187,1188 (D.C. 1982)

this claim, Liberty argued that job stress and irregular hours facilitated and mandated excess consumption of junk- and fast-foods.<sup>33</sup> The officer alleged that the nearly forced consumption of these unhealthy foods caused his obesity and heart condition. To determine the causal connection, the court looked to medical testimony for assistance. A medical doctor explained that numerous factors, including heredity and amount of exercise, contribute to obesity and that he could not state with specificity which factor was predominant in causing the heart condition.<sup>34</sup> The court examined the doctor's opinions and determined that officer's over-consumption of food while performing his work duties was not sufficiently connected to his disability. As such, the court agreed with the board and decided that Liberty's disability could not be attributed to the performance of his work duties.<sup>35</sup> Specifically, with regard to fast-food, the court noted only a tenuous link at most between its consumption and the officer's subsequent disability.<sup>36</sup>

Although this plaintiff was unable to establish a sufficient causal connection between fast-food consumption and his resulting obesity and heart problems, current lawyers have not been dissuaded. The existence of link is a factual truism, if not legal, and attorneys are attempting to develop that legal connection.

## **B. Big Tobacco Lawyers Turn to Big Food**

One of those lawyers is John H. Banzhaf III. As he explains, "[a] defendant need not be the sole cause of a harm to be held liable."<sup>37</sup> Banzhaf is a George Washington University Law professor,<sup>38</sup> and a successful

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<sup>33</sup>*Id.* at 1189.

<sup>34</sup>*Id.* at 1190.

<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

<sup>37</sup>John F. Banzhaf, *Dismissal of McDonald's Law Suit Was Expected, Four Wins, One Loss, and Several Legal Theories Yet to Go*, available at <http://banzhaf.net/docs/mcd2no.html> (2004).

<sup>38</sup>John F. Banzhaf, *Biography*, available at <http://www.banzhaf.net/> (2003).

lawyer who headed much of the litigation and reform efforts against Big Tobacco.<sup>39</sup> Now, one of Banzhaf's major focuses is Big Food. Big Food refers to the wealthy food manufacturing, distributing, marketing companies which comprise much of the fast-food industry.<sup>40</sup> Banzhaf has spoken out against Big Food on numerous occasions through a variety of media.<sup>41</sup> Banzhaf is looking to place the onus of our nation's obesity epidemic upon the major profit-making food companies. He comments that there "is the growing movement to use legal action as a weapon against obesity, just as litigation was used so effectively against smoking."<sup>42</sup> And while his opinion may be biased because he is leading that movement, he is right.

### III. Suing Big Food for Obesity

In 2002, with the help of John Banzhaf, a few citizens filed suits against various leaders in the food industry.<sup>43</sup> The media, surprised and intrigued by the so called obesity lawsuits provided ample coverage. So, Americans were repeatedly exposed to much of the legal debate regarding the lawsuits. Moreover, the media coverage often showcased the obesity lawsuits in a negative light persuading most American opinions.<sup>44</sup> Many people were shocked and amused by the lawsuits. A Gallup poll conducted found that "nearly 9 in 10 Americans oppose the idea of holding fast-food companies legally responsible for the diet-related health problems of fast-food junkies."<sup>45</sup> The claims blamed fast-food corporations for their consumers' obesity. The cases

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<sup>39</sup>*Id.*

<sup>40</sup>The similarity between the titles of Big Food and Big Tobacco is only one of many similarities between the two industries which have recently been highlighted.

<sup>41</sup>John F. Banzhaf, *Using Legal Action to Help Fight Obesity*, available at <http://banzhaf.net/obesitylinks> (2004).

<sup>42</sup>Banzhaf, *Dismissal*, *supra* at note 37.

<sup>43</sup>*Id.*

<sup>44</sup>*Pelman et al. v. McDonald's Corporation*, 237 F. Supp.2d 512, 518 note 5 (S.D.N.Y. 2003), (*Pelman I*). See also Overlawyered, *Public Balks at Obesity Lawsuits*, July 21, 2003, available at <http://www.overlawyered.com/archives/00142.html>.

<sup>45</sup>The Gallup Organization, *Public Balks at Obesity Lawsuits*, July 21, 2003, available at <http://www.gallup.com/content/login.aspx?ci=8869>.

alleged that the fast-food corporations neglected to inform their customers of the unhealthy nature of the food and moreover, ran a deceptive ad campaign to confuse customers into thinking that their food could be part of a healthy diet. Plaintiffs' attorneys were looking to hold Big Food, responsible for their role in our nation's epidemic of obesity. And despite the laughter or surprise of Americans, the suits are progressing and the courts are analyzing them closely.

### **A. The First Lawsuit**

In the summer of 2002, Caesar Barber filed a class action lawsuit against McDonald's Corporation, Burger King Corporation, KFC Corporation and Wendy's International, Inc..<sup>46</sup> This precedent-setting case<sup>47</sup> attempted to hold giant, wealthy corporations responsible for their contribution to America's weight problem.

The Plaintiff's Complaint alleged that the members of the Plaintiff class have "consumed Defendants' [food] products and as a result thereof, have become obese, overweight, developed diabetes, coronary heart disease, high blood pressure, elevated cholesterol levels, and/or other detrimental and adverse health effects and/or diseases."<sup>48</sup>

The complaint laid out the serious and widespread problem of obesity within the U.S. as well as the poor health effects associated with obesity. The Plaintiffs continued by explaining the enormous costs of obesity including health care costs, wages lost due to the aforementioned illnesses and the premature death of obese

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<sup>46</sup>Verified Complaint at 1, *Barber v. McDonald's, et al.* (No. 23145/2002) (N.Y. Sup. Ct. 2002), available at <http://news.findlaw.com/hdocs/docs/mcdonalds/barbermcds72302cmp.pdf>.

<sup>47</sup>Jonathan Wald, *McDonald's Obesity Suit Tossed*, Feb. 17, 2003, available at <http://money.cnn.com/2003/01/22/news/companies/mcdonalds/>.

<sup>48</sup>Verified Complaint, *supra* note 46, at 1.

persons.<sup>49</sup> Then the complaint turned to the Defendant's role in creating their health problems. Plaintiffs alleged that: (1) Defendants negligently or intentionally provided to the Plaintiff class, including minors, foods which are high in fat, salt, sugar and cholesterol- ingredients associated with obesity and its correlated health problems- and that the Plaintiffs suffered injury because of this; (2) Defendants' knew or should have known that and therefore failed their duty to warn the consumers (via label or otherwise) of the quantities of these ingredients and their detrimental health effects and Plaintiffs suffered harm due to their reliance on the representations, or lack thereof, of the Defendant corporations; (3) Defendants engaged in deceptive practices by failing to adequately inform consumers of the ill health effects of their food products and the Plaintiffs suffered as a result and (4) Defendants were unjustly enriched at the expense of the Plaintiff class.<sup>50</sup> As reparation for this harm, the plaintiffs therefore requested compensatory damages, an order requiring Defendants to properly label their food products with dietary information and to fund an educational program to inform both adult and child consumers of the adverse health effects of consuming Defendants' foods high in fat, salt, sugar and cholesterol.<sup>51</sup>

McDonald's responded that "[e]very responsible person understands what is in products such as hamburgers and fries, as well as the consequence to one's waistline, and potentially to one's health, of excessively eating those foods over a prolonged period of time."<sup>52</sup>

Barber withdrew his suit against several of the chains because he did not believe he could overcome the defense of consumers' personal responsibility.<sup>53</sup> With respect to the McDonald's claims, the N.Y. District Court Judge, Judge Sweet dismissed the complaint, though he granted Plaintiffs the opportunity to file an amended complaint.<sup>54</sup>

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<sup>49</sup>*Id.* at 6.

<sup>50</sup>*Id.* at 7-13.

<sup>51</sup>*Id.* at 13-14.

<sup>52</sup>Wald, *supra* note 47 (quoting McDonald's counsel), available at <http://money.cnn.com/2003/01/22/news/companies/mcdonalds>.

<sup>53</sup>Rogers, *supra* note 2, at 860, 871, citing Crossfire (CNN television broadcast, Sept. 2, 2002), available at <http://www.cnn.com/TRANSCRIPTS/0209/02/cf.00.html>. See also Maureen Minehan, *Is Your Food Making Employees Sick?*, 20 No. 6 Emp. Alert 3 (2003).

<sup>54</sup>Wald, *supra* note 47.



Unfortunately, there is no published opinion for this case but we did learn some of the court's opinions. The Judge determined that the plaintiffs failed to show that Defendants' food products "were dangerous in any way other than that which was open and obvious to a reasonable consumer."<sup>55</sup> However, Judge Sweet did note particularly that, if developed more fully, an argument that fast-food is so highly processed it may be more dangerous than a reasonable customer would assume.<sup>56</sup> Though this case failed, the court's insight and opinion will continue to help plaintiffs in future cases.

## **B. The *Pelman* Lawsuit**

Another suit filed during the same time period offers those interested much more insight into the future of legal action against Big Food. The *Pelman* case<sup>57</sup> allows curious lawyers and fast-food leaders to closely analyze plaintiff claims, defendant responses and the court's opinion on the success and failure of each. This case elicited similar claims and similar defenses as well as a few more of each. The *Pelman* case resulted in two insightful opinions which are very helpful in hypothesizing on the future of obesity lawsuits.<sup>58</sup>

Roberta Pelman, on behalf of herself and her daughter, Ashley Pelman, and Israel Bradley, on behalf of himself and his daughter, Jazlyn Bradley brought suit against McDonald's on August 22, 2002, in a New

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Pelman I*, 237 F. Supp.2d 512. *Pelman et al. v. McDonald's Corporation*, No. 02 Civ. 7821, 2003 WL 22052778 (S.D.N.Y. 2003).

<sup>58</sup> *Id.*

York state court.<sup>59</sup> The case was removed to the Southern District of New York where McDonald's filed a motion to dismiss.<sup>60</sup>

### 1. *Pelman I* (237 F. Supp.2d 512 (S.D.N.Y. 2003))

In the first complaint against the McDonald's, the *Pelman* plaintiffs alleged five counts under New York Gen. Bus. Law §§ 349 and 350.<sup>61</sup> The plaintiffs alleged that McDonald's: failed to disclose, and furthermore warn consumers of, the ingredients or adverse health effects of McDonald's food products; were negligent in selling food products which are high in fat, cholesterol, salt and sugar and were negligent in using deceptive marketing to induce adults and children to purchase the McDonald's food.<sup>62</sup>

#### a. Proximate Cause

First, if plaintiffs are to succeed in holding Big Food accountable for its contribution to the obesity epidemic, they must show that consumption of McDonald's food is the proximate cause of their overweight problem.<sup>63</sup> However, as McDonald's pointed out in its defense, there are many causes of obesity, including diet, exercise and heredity.<sup>64</sup> Plaintiffs therefore have the difficult task of negating the other possible lifestyle factors including diet and heredity for their obesity. Further, plaintiffs need to show that consumption of other foods is equally non-contributory. This is inevitably a burdensome task. Typically, the American diet is

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<sup>59</sup> *Pelman I*, 237 F. Supp.2d at 519.

<sup>60</sup> *Id.*

<sup>61</sup> *Pelman I*, 237 F. Supp.2d at 524 (explaining that New York Gen. Bus. Law. § 349 in relevant part, "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." and New York Gen. Bus. Law § 350 in relevant part "prohibits false advertising in the conduct of any business.").

<sup>62</sup> *Pelman I*, 237 F. Supp.2d at 520.

<sup>63</sup> *Id.* at 537.

<sup>64</sup> *Id.* at 537-8.

composed of a large variety of foods from numerous sources.

However, the task is not impossible. Courts have shown to be understanding of the inability to negate all other factors when a clear and strong connection does exist between the alleged factor and the injury. For instance, with the tobacco litigation, although there are numerous causes of lung cancer, the court recognized that smoking cigarettes is such a strong corollary to developing lung cancer that the connection cannot be negated.<sup>65</sup> Still, plaintiffs need to prove a very strong causal connection between fast-food, specifically McDonald's fast-food, and their obesity. Further, as the court suggested, the plaintiffs must make some effort to show that that connection is more predominant than any other contributing factor. Only then will plaintiffs have the potential to convince a court to hold that fast-food is the proximate cause of their obesity. The *Pelman* plaintiffs, however, did not sufficiently address these issues. The court explained that Plaintiffs failed to state with specificity the amount and types of foods they consumed at McDonald's or with what frequency.<sup>66</sup> Further, plaintiffs did not even discuss other possible factors, such as heredity and exercise, much less negate them.<sup>67</sup> As such, these plaintiffs failed to prove that McDonald's was the proximate cause of their obesity.<sup>68</sup>

#### **b. Duty to Warn**

The *Pelman* plaintiffs also alleged that McDonald's was negligent in making and selling its food without warning its customers of the deleterious health effects.<sup>69</sup> This claim probably amuses the average American the most because it is assumed that we all understand that eating fast-food will con-

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<sup>65</sup>Bechtle, *supra* note 25.

<sup>66</sup>*Pelman I*, 237 F. Supp. 2d at 538.

<sup>67</sup>*Id.* at 538-39.

<sup>68</sup>*Id.*

<sup>69</sup>*Id.* at 530.

tribute to weight gain. In fact, McDonald's response to the plaintiffs' argument was that the corporation has no duty to warn its consumers of such well known information.<sup>70</sup> McDonald's argued that consumers have known for some time that fat, sugar and other ingredients contribute to weight gain.

Plaintiffs suing Big Tobacco were faced with similar commentary and decisions from judges early in the cigarette litigation.<sup>71</sup> Smokers who started or continued smoking after the Surgeon General warned of the adverse health effects were considered knowledgeable and therefore responsible for their own informed decision.<sup>72</sup> Products which are considered unhealthy, and therefore dangerous in that regard, are not defective.<sup>73</sup> The court found that McDonald's products simply do not rise to the level of unhealthiness necessary to either be outside of "reasonable contemplation" or "dangerous."<sup>74</sup>

McDonald's further argued that it do not have a duty to warn consumers of the adverse health gains because those effects typically result only from excessive consumption of its product. McDonald's cited several cases for the notion that "[w]here as here a product by its very nature has a dangerous attribute, liability is imposed only when the product has an attribute not reasonably contemplated by the purchaser or is unreasonably dangerous for its intended use."<sup>75</sup> McDonald's continues by pointing to the Restatement (Second) of Torts which states that "[m]any products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption."<sup>76</sup> The court agreed with McDonald's and went on to explain that the Restatement also instructs "that 'a seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is

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<sup>70</sup>*Id.*

<sup>71</sup>Rogers, *supra* note 2, at 874. *See also American Tobacco Company, Inc. v. Grinnell*, 951 S.W.2d 420, 426-28 (Tex. 1997).

<sup>72</sup>*Id.*

<sup>73</sup>Franklin E. Crawford, Note, *Fit for Its Ordinary Purpose? Tobacco, Fast Food, and The Implied Warranty of Merchantability*, 63 Ohio St. L.J. 1165, 1181-82 (2002).

<sup>74</sup>*Pelman I*, 237 F. Supp. 2d at 532.

<sup>75</sup>*Id.* at 531.

<sup>76</sup>*Id.* citing RESTATEMENT (SECOND) OF TORTS § 402A, cmt i (2004).

generally known and recognized.”<sup>77</sup> The court concurred with McDonald’s, explaining that,

[i]f a person knows or should know that eating copious orders of supersized McDonald’s products is unhealthy and may result in weight gain (and its concomitant problems) because of the high levels of cholesterol, fat, salt and sugar, it is not the place of the law to protect them from their own excesses. Nobody is forced to eat at McDonald’s... Even more pertinent, nobody is forced to supersize their meal or choose less healthy options on the menu.<sup>78</sup>

Judge Sweet’s conclusion with regard to the plaintiff’s negligence claims is that the law is not in existence to protect ourselves from binging on legal, yet unhealthy, food products.<sup>79</sup> He stresses that we are not required to consume excess amounts of fast-food. The court decided that Plaintiffs did not sufficiently allege that the effects of eating cheeseburgers are outside the scope of reasonable contemplation. The Court clarified that it is common knowledge that fast-food is “bad for one.”<sup>80</sup> A manufacturer is not required to warn consumers when the risk is obvious because, the mere classification of obviousness implies that consumers know that risk.<sup>81</sup> Thus, as it is now, there is no one more responsible than ourselves for overeating and it would be inappropriate to ask those who provided the food to pay for our overindulgences.<sup>82</sup>

### **i. Processed Food**

However, the *Pelman* plaintiffs further alleged that McDonald’s food is so over-processed as to distinguish it from ordinary food products. Thus, the plaintiffs claimed that a reasonable consumer is therefore unaware

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<sup>77</sup>*Id.* at fn. 19 citing RESTATEMENT (SECOND) OF TORTS § 402A, cmt. j (2004) and *Plummer v. Lederle Labs.*, 819 F.2d 349, 356 n. 4 (2d Cir. 1987).

<sup>79</sup>*Id.*

<sup>80</sup>*Id.* at 532.

<sup>81</sup>RESTATEMENT (THIRD) OF TORTS Prod. Liab. § 2 cmt. g (T.D. No. 1 1994).

<sup>82</sup>*Pelman I*, 237 F. Supp. 2d at 533. *See also* Restatement (Third) of Torts Prod. Liab. § 2 cmt. I (T.D. No. 1 1994) (explaining that manufacturers should not be forced to alter design and marketing techniques, and in turn raise prices, in order to subsidize “unusually dangerous modes of product use.”).

of the full ramifications of ingesting these processed products; that the effects of consumption are outside the scope of reasonable contemplation.<sup>83</sup>

The Court was perhaps most impressed by these claims, noting that if the plaintiffs' claims are accurate and can be adequately shown, some liability may attach to McDonald's.<sup>84</sup> One could argue that this is, in fact, a very strong argument against the defendant corporation and others like it. If a product is different in kind than what we rationally assume, there results in a duty upon that producer to educate us further, or it may even be inappropriate to sell the product under a common name. The court noted one example, explaining that, "Chicken McNuggets, rather than being merely chicken fried in a pan, are a McFrankenstein creation of various elements not utilized by the home cook."<sup>85</sup> The court suggested that this claim may have some merit, stating that, "[i]t is at least a question of fact as to whether a reasonable consumer would know—without recourse to the McDonald's website—that a Chicken McNugget contained so many ingredients other than chicken and provided twice the fat of a hamburger."<sup>86</sup>

Similar claims regarding the over-processing of our fast-food have been presented previously by Eric Schlosser in his commentary on the fast-food industry. He suggested that our food is much more heavily processed than the average person assumes.<sup>87</sup> He describes, for instance, that flavor manufacturing is a complicated process performed by a team of scientists, known as "flavorists."<sup>88</sup> Moreover, he argued that the mere definition of natural flavor would likely surprise Americans. We assume natural flavors do not involve chemical processing but Schlosser explains that the FDA only requires the flavor be derived from a natural source.<sup>89</sup> Yet, like artificial flavoring, natural flavors are "man-made additives that give most processed food most of its taste."<sup>90</sup>

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<sup>83</sup>*Pelman I*, 237 F. Supp. 2d at 533.

<sup>84</sup>*Pelman et al. v. McDonald's Corporation*, 237 F. Supp. 2d at 534.

<sup>85</sup>*Id.* at 535.

<sup>86</sup>*Id.* at 535.

<sup>87</sup>Schlosser, *supra* note 20 (suggesting that most people buy fast-food because "it has been carefully designed to taste good.").

<sup>88</sup>*Id.* at 127-8.

<sup>89</sup>*Id.* at 120.

<sup>90</sup>*Id.* at 120.

As such, if further research is conducted and plaintiff's attorneys can better develop the arguments for the lack of consumer knowledge, obesity lawsuits may evolve into a well-respected course of action. However, it will likely remain a difficult task for any plaintiffs to prove such strenuous processing exists to shock or confuse the reasonable consumer or to make it unexpectedly dangerous.<sup>91</sup> It can be assumed that most Americans are aware that their food products have been altered, so that a reasonable person expects some processing to have occurred. Thus, one would have to show that a defendant food corporation has not performed just this expected processing, but has gone so far as to as to process foods in ways or to the extent that the reasonable consumer would not expect. Moreover, it is likely that such a claim would also have to allege that the over-processing is not a necessary part of the food production or preservation. Most fast-food is prepared at an off-site factory and then shipped to the local retail stores for quick heating. As such, parts of the processing must surely be to prevent a varied or unsafe product at the stores. Plaintiffs would need to prove that processing goes well beyond the basic and normal preservation techniques.

Proving that may be difficult, however. Schlosser's work goes on to suggest that the Defendant Corporation is protective of its manufacturing process. McDonald's may be concealing information from consumers. He explains that "[t]he McDonald's Corporation will not reveal the exact origin of the natural flavor added to its french fries."<sup>92</sup> The secretive nature of McDonald's food processing may only be indicative of an interest in protecting the value of their product from competitors, but further investigation could reveal that the secretive attitude is an effort to keep the additive and ingredient processing information from the consumer. McDonald's may wish to keep the information from consumers because it fears that consumer knowledge of such processing would deter them from continuing to consume their products. If that can be proven to be the case, plaintiffs would have a much stronger argument for negligent or even intentional failure to warn

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<sup>91</sup> *But see Pelman I*, 237 F. Supp.2d at 535 (pointing out that although the popular book, *Fast Food Nation*, indicates as much, it is a more difficult standard to convince a legal audience of this allegation).

<sup>92</sup> Schlosser, *supra* note 20, at 128.

consumers regarding its products. More importantly, if intentional concealment can be proven, the cases will much more closely resemble those cases against Big Tobacco.

However difficult the task may be, it will be the most persuasive argument to a court.<sup>93</sup> Judge Sweet commented that “[i]f plaintiffs were able to flesh out this argument...it may establish that the dangers of McDonald’s products were not commonly well known and thus that McDonald’s had a duty towards its customers.”<sup>94</sup> If Americans feel they have been deceived as to what they are actually eating or that the deleterious effects have been misinterpreted based on a belief that they were consuming something less offensive than they actually were, courts would surely have to respond. Former District Court Judge Louis C. Bechtle explained that if McDonald’s food can be proven to be unhealthy to a point which is “outside the reasonable contemplation of the consumer in the public sector” through processing or ingredient additives, “plaintiffs will be in a stronger position.”<sup>95</sup>

The court would also prefer to see arguments like this one developed in future case because it will seemingly lessen the impact that these liability cases could have upon local and smaller profit food companies.<sup>96</sup> It is unlikely that the local ‘mom and pop’ type restaurants use as much processing as McDonald’s can afford to use. It is important to limit the scope of the lawsuits because otherwise such lawsuits may have the ability to cripple the food industry. Big Food corporations could be forced to pay multi-million dollar lawsuits and the ripple effect of bankruptcy, closed stores, lost jobs and so on is a dangerous threat. But also, other, smaller food companies could be intimidated by those lawsuits and thus, the fear of a litigious atmosphere

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<sup>93</sup>Wald, *supra* note 47 (explaining that Judge Sweet said this argument “could be compelling if addressed in more depth.”).

<sup>94</sup>*Id.* (commenting earlier in *Barber v. McDonald’s et al.*).

<sup>95</sup>Bechtle, *supra* note 25.

<sup>96</sup>*Pelman I*, 237 F. Supp. 2d at 536.



would prevent even small players from entering, or remaining in, the food production or distribution market.

## ii. Deceptive Practices

(b)

### **Failure to Provide Nutritional Information In Stores**

The plaintiffs further alleged that McDonald's violated state consumer protection law by engaging in deceptive practices because it failed to provide nutritional content of its food to customers in the store. Plaintiffs also attempted to fault McDonald's for failing to obey the Nutrition Labeling and Education Act (NLEA) but plaintiffs are not the appropriate body to bring such enforcement action, nor have they proven a violation.<sup>97</sup>

McDonald's first clarified that restaurants are exempt from a duty to provide nutritional information about its food products under an exception provision of the Nutrition Labeling and Education Act.<sup>98</sup> The plaintiffs responded however, that McDonalds created an affirmative duty to provide the information when it allegedly stated a commitment to nutrition. Plaintiffs argued that in spite of such an announcement, McDonald's continued to fail to inform in-store consumers of nutritional information. However, the court found that Plaintiffs did not provide sufficient proof of an explicit promise. A mere intention to be committed to nutrition does not necessarily entail in-store informational displays. More specifically, "[u]nless McDonalds has specifically promised to provide nutritional information on all its products and at all points of purchase,

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<sup>97</sup>*Pelman I*, 237 F. Supp. 2d at 537.

<sup>98</sup>21 U.S.C. § 343(q)(5)(A)(i) (exempting from nutrition labeling requirements, food "which is served in restaurants or other establishments in which food is served for immediate human consumption."). *But see* 21 U.S.C. § 343-1(a)(4) (explaining that states are not prevented from requiring some nutrition labeling for restaurants).

plaintiffs do not state a claim.”<sup>99</sup>

### (b) Affirmative Advertisements

Plaintiffs also alleged that certain positive advertisements were also deceptive. As to these deceptive practices, the court critiqued the plaintiffs for being too vague in their accusations. The plaintiffs did cite two questionable slogans, however, “McChicken Everyday!” and “Big N’ Tasty Everyday.”<sup>100</sup> The plaintiffs alleged that these advertisements encouraged them, and probably others as well, to eat at McDonald’s everyday. Furthermore, they claimed that the slogans deceived them into thinking that they could eat at McDonald’s everyday and still be healthy.<sup>101</sup> The court decided, however, that the plaintiffs’ allegations did not rise to an actionable level, explaining that “[m]erely encouraging consumers to eat its products ‘everyday’ is mere puffery.”<sup>102</sup> This court set the precedent for future courts hearing obesity cases. When analyzing the culpability of Big Food advertising, the courts must draw a line between “[t]he expression of an exaggerated opinion” and a specific attempt to mislead consumers.<sup>103</sup>

c.

### Additional Considerations

j.

### Class Action

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<sup>99</sup> *Pelman I*, 237 F. Supp. 2d at 530.

<sup>100</sup> *Pelman I*, 237 F. Supp. 2d at 527.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 528.

<sup>103</sup> Bechtle, *supra* note 25.

The court points out the difficulty of delineating a class of persons for a class action lawsuit.<sup>104</sup> In order

[t]o satisfy the commonality requirement for class certification of Federal Rule of Civil Procedure Rule 23(a)(2) and the predominance requirement of Rule 23(b)(3), plaintiffs would have to demonstrate that each member of the class shared essentially the same factual and legal situation and that these questions predominate over individual questions.<sup>105</sup>

Although each class will have some differences among members,<sup>106</sup> it would be nearly impossible to define a significant group of persons who were so similarly situated with regards to all of these factors that a decision would be appropriate and just.<sup>107</sup> Further, even if a plaintiff's attorney could be successful in defining a class action, doing so will present a new problem of proving that McDonald's was the proximate cause of each class member's obesity.<sup>108</sup>

## ii. Fast-Food Addiction

Plaintiffs finally alleged that McDonald's food is addictive. However, the court indicates that the plaintiffs have not offered any evidence to this fact.<sup>109</sup> The plaintiffs failed to state what ingredient or combination of ingredients makes the McDonald's food addictive. They also failed to state how much McDonald's one would have to consume before the addictive traits revealed themselves.<sup>110</sup> However, a former District Court Judge noted that Judge Sweet did not foreclose the success of such an allegation in the future but only ruled that

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<sup>104</sup> *Pelman I*, 237 F. Supp. 2d at 538-9.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* (explaining that it may be difficult to define an appropriate class in these type of cases). *But see* Santa Mendoza, *Viewpoint: Class Actions, Reform, and the Impact on Franchisors*, 10 No. 2 LJM's Franchising Bus. & L. Alert 3, (ALM) (Nov. 2003) (stating that class action lawsuits against the fast-food industry may be aiding class action reform proponents in gaining the upper hand over their opponents, as evidenced by the proposed legislation prohibiting such lawsuits).

<sup>108</sup> Bechtle, *supra* note 25.

<sup>109</sup> *Pelman I*, 237 F. Supp. 2d at 542. *See also* Bechtle, *supra* note 25.

<sup>110</sup> *Pelman I*, 237 F. Supp. 2d at 542.

these plaintiffs did not provide sufficient evidence.<sup>111</sup> That open path could be an important avenue because there are those that believe that food can be shown to have an addictive quality. Some have explained that,

Binging on foods that are high in fat and sugar may cause changes in the brain that make it hard to say no. By stimulating the brain's natural opioids, large doses of the foods can produce a high that is similar, though less intense, to that produced by heroin and cocaine.<sup>112</sup>

John Banzhaf also relies on a study in the *New Scientist* Journal supports his position on the addictive quality of fast-food.<sup>113</sup> Research is ongoing to determine the effects of excess fat and sugar on our brain chemistry and the resulting over-consumption of such foods.<sup>114</sup> In making this claim, Banzhaf hopes to draw a closer connection between successful tobacco cases and the future obesity cases.<sup>115</sup> However, others have disregarded the *New Scientist* study, pointing out that it is not a peer-reviewed, scientific journal.<sup>116</sup>

Still, The Physicians Committee for Responsible Medicine offered more support to the fast-food addiction theory. In a 2004 press release, the group explained that “[r]ecent studies reveal that some unhealthy foods—such as chocolate, sugar, meat, and cheese—are physically addictive.”<sup>117</sup> The Physicians Committee went on to speculate that “[l]awsuits could help uncover the extent to which the food industry knew about and took advantage of these food addictions.”<sup>118</sup> If a plaintiff attorney could offer sufficient proof that the fast-food industry has knowingly been taking advantage of food’s addictive quality, the obesity cases could potentially

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<sup>111</sup>See Bechtle, *supra* note 25.

<sup>113</sup>Christine Hall, *Fat Lawsuits Stand Fat Chance, Say Critics*, CNS News, June 19, 2003, available at <http://www.cnsnews.com/Culture/Archive/200306/CUL20030619d.html>.

<sup>114</sup>Ellen Ruppel Shell, *It's Not the Carbs, Stupid: Researchers Are Finding that Constant Exposure to Fat and Sugar Can Cause Some Humans to Crave Them as They Do an Addictive Drug*, NEWSWEEK, Aug. 5, 2002 at 41.

<sup>115</sup>See Robert F. Cochran, *From Cigarettes to Alcohol: The Next Step in Hedonic Products Liability?*, 27 Pepp. L. Rev. 701, 702 (2000) (explaining that the primary purpose of both alcohol and cigarettes is to provide pleasure). While fast-food may meet our basic need to consume calories, it is also true that the fatty foods available at fast-food restaurants do more to please our taste buds than to meet our nutritional needs.

<sup>116</sup>Hall, *supra* at note 113 (reporting Richard Berman’s, executive director of the Center for Consumer Freedom, statement that Banzhaf’s “first two obesity lawsuits against restaurants have gone nowhere in the courts, so he’s now trying his case in the media with ridiculous claims of food addiction from a British pop science magazine.”)

<sup>117</sup>Press Release, The Physicians Committee for Responsible Medicine, Doctors Urge House to Reject “Cheeseburger Bill”: H.R. 339 Threatens Consumer Rights, Grants Big Food Sweeping Immunity, (Mar. 8, 2004), available at <http://www.pcrm.org/news/health040308.html>.

<sup>118</sup>Susan Jones, *Don't Let 'Big Food' Off The Hook, Activist Group Says*, CNS News, Mar. 9, 2004, available at <http://www.cnsnews.com/Culture/Archive/200403/CUL20040309a.html>.

mimic successful tobacco lawsuits.<sup>119</sup> However, thus far, no plaintiff has offered sufficient evidence of this theory and Big Food continues to win dismissals.<sup>120</sup>

### iii. Other Claims

The *Pelman* plaintiffs, in this first complaint also alleged an allergic sensitivity to McDonald's food. The plaintiffs, however, provided no evidence of allergenic qualities of McDonald's food and so the court was forced to quickly disregard this allegation after only a cursory review.<sup>121</sup> The plaintiffs also alleged that their over-consumption of McDonald's food was a foreseeable misuse of the product, therefore creating a duty to warn.<sup>122</sup> However, plaintiffs offered no evidence that over-consumption of food is held to be a foreseeable misuse and the court thus, also dismissed this claim.<sup>123</sup>

### d. Disposition

On January 22, 2003 Judge Sweet granted the motion to dismiss with leave for plaintiffs to amend.<sup>124</sup>

## 2. *Pelman II*

(No. 02 Civ. 7821, 2003 WL 22052778 (S.D.N.Y. Sept. 3, 2003))

The plaintiffs submitted an amended complaint on February 19, 2003.<sup>125</sup> McDonald's again filed a motion to

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<sup>119</sup> *Id.*

<sup>120</sup> Although the Physicians Committee for Responsible Medicine claims, “[n]ew information has come to light, for example, showing that some manufacturers hawking unhealthy foods deliberately target consumers who are vulnerable to these food addictions.” *See also*, The Physicians Committee for Responsible Medicine, *supra* note 117.

<sup>121</sup> *Pelman I*, at 536-37.

<sup>122</sup> *Pelman I*, 237 F. Supp. 2d at 536-37. *See also* Robert F. Cochran, *From Cigarettes to Alcohol: The Next Step in Hedonic Product Liability?*, 27 Pepp. L. Rev. 701, 716 (2000) (arguing that alcohol manufacturers should be made to pay for bystander injuries in part because they are gaining significant profits “from the over-consumption of alcohol.”).

<sup>123</sup> *Pelman et al. v. McDonald's*, 237 F. Supp. 2d at 537.

<sup>124</sup> *Id.*

<sup>125</sup> *Pelman II*, 2003 WL 22052778, \*1 (S.D.N.Y. 2003).

dismiss. Both sides filed their briefs and oral arguments were held.<sup>126</sup> A reading of the second court opinion (*Pelman II*) is disappointing for those hoping to see obesity lawsuits succeed. In its first decision, the court made clear and strong suggestions indicating which arguments should be developed for re-argument. However, it is frustrating to read the court's second decision because the plaintiffs seemed to have ignored most of the court's suggestions.<sup>127</sup> For instance, in their amended complaint, the plaintiffs alleged four claims. However, the plaintiffs, prior to oral argument, dropped the fourth claim, which alleged negligence for "failure to warn plaintiffs of the dangers and adverse health effects of eating processed foods from McDonald's."<sup>128</sup> It is unclear why Plaintiffs dropped the claim with the most potential for success, unless they felt they still could not prove the allegations. So, instead of developing the previously well regarded arguments on McDonald's food over-processing, Plaintiffs focused on deceptive advertising from the late 1980s and 1990s.<sup>129</sup> Nonetheless, the court's analysis of these deception claims are helpful to understanding the future potential liability of fast-food corporations.

Before progressing onto the substantive claims, with which this paper is concerned, the court pointed out that the adult plaintiff's claims are barred by the statute of limitations. In their complaint, plaintiffs referred to advertising campaigns conducted by McDonald's in the late 1980's through approximately 1994. As such, the adult plaintiff's claims are barred by the statute of limitations which bars claims more than three years old.<sup>130</sup> The statute however, is tolled with regard to the infant plaintiffs until they reach the age of 18 and, as such, the claims can proceed with regard to the infant plaintiffs.<sup>131</sup>

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<sup>126</sup> *Id.*

<sup>127</sup> *Pelman II*, 2003 WL 22052778, \*14 (S.D.N.Y. Sept. 3, 2003) ("plaintiffs have not only been given a chance to amend their complaint in order to state a claim, but this Court laid out in some detail the elements that a properly pleaded complaint would need to contain. Despite this guidance, plaintiffs have failed to allege a cause of action.")

<sup>128</sup> *Pelman II*, 2003 WL 22052778, \*2 (S.D.N.Y. 2003).

<sup>129</sup> *Nutrition: Judge Says McDonald's Obesity Suit Lacks Bite*, 11 No. 4 *Andrews Health L. Litig. Rep.* 3 (Andrews Publ'ns.) (Sept. 2003).

<sup>130</sup> *Pelman II*, 2003 WL 22052778, \*4-6.

<sup>131</sup> *Pelman II*, 2003 WL 22052778, \*6.

Although the plaintiffs filed suit against the local McDonald's outlets as well as the corporation, Judge Sweet pointed out that the outlets had not utilized any unique practices, not common to the entire corporate chain, and thus the claims against them could not stand.<sup>132</sup>

#### a. Deceptive Advertising

The remaining three claims focused on the advertising campaigns McDonald's has run. The plaintiffs alleged: that the advertising misled the consumers into thinking the food was nutritious and healthy; that the advertising misled the consumers into thinking certain products were much healthier than they were as a result of processing and additives and that McDonald's engaged in unfair practices by representing that nutritional information was available in all of its stores when it was not in fact, available at a number of McDonald's restaurants.<sup>133</sup> The plaintiffs again claimed the damage they suffered was weight gain and the accompanying health problems, including increased risk of diabetes, coronary heart disease and more.<sup>134</sup>

The court's decision with regard to the surviving claims was based on the idea that "[t]he 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."<sup>135</sup> Plaintiffs alleged that they relied on certain deceptive McDonald's advertisements to believe that frequent ingestion of McDonald's food could be part of a healthy lifestyle.<sup>136</sup> Plaintiffs claimed they would not have consumed McDonald's as frequently had they not been

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<sup>132</sup> *Pelman I*, 237 F. Supp. 2d at 522-23.

<sup>133</sup> *Pelman II*, 2003 WL 22052778, \*2.

<sup>134</sup> *Pelman II*, 2003 WL 22052778, \*3.

<sup>135</sup> *Pelman II*, 2003 WL 22052778, \*4, citing *Marcus v. AT&T*, 138 F.3d 46, 64 (2d Cir. 1998), *Oswego Laborers v. Marine Midland Bank*, 85 N.Y.2d. 20, 26, 623 N.Y.S.2d 529, 533, 647 N.E.2d. 741 (1995).

<sup>136</sup> *Pelman II*, 2003 WL 22052778, \*8 (noting plaintiff's citation of the "McChicken Everyday!" and "Big N' Tasty Everyday!" advertising campaigns). It should be noted however, that *Pelman I* referred to two instances in which persons consumed fast-food daily without suffering ill health effects. Dan Gorske ate McDonald's food everyday while maintaining modest cholesterol and Jared Fogle ate Subway everyday and lost a considerable amount of weight. *Pelman I*, 237 F. Supp. 2d at 528, n.13, 15. (S.D.N.Y. 2003).

misled by these advertisements.<sup>137</sup>

Plaintiffs also alleged that McDonald's claims regarding the cholesterol levels in their french fries are deceptive. The plaintiffs explained that claims that french fries are cholesterol free are misleading because the oils used contain trans fatty acids which can have detrimental health effects.<sup>138</sup> However, the court made the distinction that claims regarding the contents of its food products are not to be understood as claims as to their effects. McDonald's has not announced that its foods will not have unhealthy effects on one's heart or arteries. Further, the court pointed out that an objective consumer would not make this jump. Moreover, McDonald's argued that its statements were regulated by, and in compliance with, FDA standards.<sup>139</sup> This helped McDonald's to appear more responsible in its advertising practices, making it less likely that they presented a deceptive campaign.

The actual deceptive quality of the advertisements is a questionable claim plaintiffs should have been better prepared to address. The standard for a deceptive practice is an objectionable one.<sup>140</sup> Thus, the plaintiffs are required to show more than their own belief of or confusion about the advertisement. They must show that a reasonable consumer would be misled.<sup>141</sup> However, the *Pelman* plaintiffs failed to do so,<sup>142</sup> The court reiterated its previous finding, stating that it is well known that McDonald's food has unhealthy attributes, including "high levels of cholesterol, fat, salt and sugar" which can lead to weight gain.<sup>143</sup> For all these reasons, Defendant's advertising was held to be not objectively deceptive.<sup>144</sup>

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<sup>137</sup> *Id.*

<sup>138</sup> *Pelman II*, 2003 WL 22052778 at \*13.

<sup>139</sup> *Pelman II*, 2003 WL 22052778 at \*13.

<sup>140</sup> *Pelman II*, 2003 WL 22052778, \*12.

<sup>141</sup> *Pelman II*, 2003 WL 22052778, \*12, citing *Marcus v. AT&T*, 138 F.3d at 64; *Oswego Laborers*, 85 N.Y.2d. at 26, 623 N.Y.S.2d at 533, 647 N.E.2d. 741.

<sup>142</sup> *Id.*

<sup>143</sup> *Pelman II*, 2003 WL 22052778, \*6, citing *Pelman I*, 237 F. Supp. 2d at 532.

<sup>144</sup> *Pelman II*, 2003 WL 22052778 at \*13.



But, if past advertising practices are any indication of current or future practices, plaintiffs who research further into McDonald's practices may succeed in proving that the advertisements are intentionally misleading. Previously, several class action lawsuits were filed against McDonald's by vegetarian consumers who consumed McDonald's french fries after being misled about their ingredients.<sup>145</sup> In 1990, McDonald's informed customers that it was switching to pure vegetable oil to prepare its french fries. However, the oil contained beef byproduct for flavor. McDonald's settled the lawsuits after agreeing to donate \$10 million to Hindus and other groups.<sup>146</sup> "McDonald's also posted an apology on its Web site, acknowledging that mistakes were made in communicating to customers about the ingredients in the fries and hash browns. The vegetable oil used to prepare the fries and hash browns was not pure, but contained essence of beef for flavoring purposes."<sup>147</sup> Defendants would argue that this was merely an oversight but failures to take measures to correctly inform consumers about one's product should be held accountable. Hence, even if McDonald's does not know, but should know, of characteristics which make its food unhealthier than we assume, they have a duty to inform the consumer.

#### **b. Proximate Cause**

However, even if the court were to accept that plaintiffs would not have consumed McDonald's nearly daily had it not been for these campaigns, the plaintiffs again failed to prove that McDonald's food is the proximate cause of their obesity. Despite the court's warnings and suggestions in its first decisions, plaintiffs still neglected to prove the sole effect of eating McDonald's upon their obesity. The plaintiffs failed

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<sup>145</sup>Laura Bradford, *Fat Foods: Back in Court*, Time.com, Aug. 03, 2003, available at <http://www.time.com/time/insidebiz/printout/0,8816,11010308111-472858,00.html>.

<sup>146</sup>Herbert G. McCann, *McDonald's Apologizes for Selling Fries with Beef Flavoring as Vegetarian*, June 5, 2002, available at <http://www.mindfully.org/Food/McDonalds-Apologizes-Hindu5jun02.htm>.

<sup>147</sup>*Id.*

to address other factors which are potentially responsible for their overweight.<sup>148</sup> The court explains that without addressing these factors, plaintiffs are unable to pinpoint McDonald's and its food as the proximate cause of their current weight problem. As such, even if McDonald's is a contributing factor, the court cannot hold McDonald's liable for their condition.

Although plaintiffs failed to follow the court's instruction to expound upon the amount and frequency of McDonald's food they consumed, it will continue to be difficult for any plaintiff to prove causation.<sup>149</sup> A former District Court judge opined that proving McDonald's caused one to be fat is a difficult task and that it may remain an impediment to plaintiffs' success in winning monetary damages.<sup>150</sup>

The court further explained its decision, noting that the *Pelman* plaintiffs had not provided defendant "McDonald's with enough information to determine whether its products are the cause of the alleged injuries."<sup>151</sup> Hence, it may be possible for McDonald's to argue in the future that because of the very nature of obesity they will never be presented enough information to determine whether their food products made a plaintiff fat. It would seem difficult for any doctor to point to one cause of person's obesity and say with any certainty how much of the obesity is due to the consumption of McDonald's food. If a doctor cannot tell his patient this, the patient, turned plaintiff, will be similarly unable to allege McDonald's role.

### c. Disposition

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<sup>148</sup> *Pelman II*, 2003 WL 22052778 at \*11.

<sup>149</sup> Bechtle, *supra* note 25 ("Causation was a particularly difficult issue for plaintiffs in this case, and will continue to be a challenge for plaintiffs in future damage actions of this type.").

<sup>150</sup> *Id.* (stating that proximate cause is an "extremely difficult [element] to prove" and that "[a]s a result, plaintiffs may be more successful in enjoining defendants from engaging in certain practices, . . . rather than in recovering dollar damages.").

<sup>151</sup> *Pelman II*, 2003 WL 22052778 at \*14.

After the court's second review of the plaintiff's claims, the court dismissed the case with prejudice explaining that "[t]here is no indication that granting plaintiffs leave to amend a second time would provide an opportunity to correct the failings in the amended complaint."<sup>152</sup>

### C. Summary of Obesity Lawsuits' Implications

The *Pelman* plaintiffs faced District Court Judge Sweet, a judge who is a self-professed strong proponent of consumer freedom and personal choice. Within his opinion of the first dismissed complaint, he is candid about his opinions regarding consumer choice.<sup>153</sup> Judge Sweet explains that he would even go so far as to decriminalize drugs. His opinions, therefore, are "based upon the notion that, as long as consumers have adequate knowledge about even harmful substances, they should be entitled to purchase [drugs]. . . The same logic must apply in the situation of fast-food, which is arguably less harmful and certainly less demonized than drugs that have been made illegal."<sup>154</sup> Furthermore, Judge Sweet said that the "opinion is guided by the principle that legal consequences should not attach to the consumption of hamburgers and other fast-food unless consumers are unaware of the dangers of eating such food."<sup>155</sup> He further reminds us that "the Court is cognizant of its duty 'to limit the legal consequences of wrongs to a controllable degree and to protect [Big Food] against the crushing exposure to liability."<sup>156</sup> In addition, though he surely took his responsibility seriously, even Judge Sweet managed to add some comedy relief to his opinion, at one point mentioning that the "plaintiff's real beef is with McDonald's Corp."<sup>157</sup> The obvious pun may have been

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<sup>152</sup> *Pelman et al v. McDonald's Corporation*, 2003 WL 22052778, \*14.

<sup>153</sup> *Pelman I*, 237 F. Supp.2d at 517, fn. 2.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 517.

<sup>156</sup> *Id.* at 518 (citations omitted).

<sup>157</sup> *Id.* at 523.

driven by the court's other observation; we all know McDonald's is bad for us.<sup>158</sup> The theory that we all know fast-food is bad for us is prevalent among Americans and most are mocking these lawsuits.<sup>159</sup> A recent Gallup poll indicated that "nearly 9 in 10 Americans oppose the idea of holding fast-food companies legally responsible for the diet-related health problems of fast-food junkies."<sup>160</sup> There have been numerous articles signifying America's frustration and amusement with obesity lawsuits.<sup>161</sup>

For all of these reasons, Judge Sweet is likely not going to be the judge who holds Big Food accountable. Though all judges can be assumed to act within the bounds of the laws, factors such as taking judicial notice of consumer knowledge are likely to be swayed by personal perceptions. John Banzhaf has already commented that there will be judge or jury somewhere that agrees with his plaintiffs.<sup>162</sup>

Nonetheless, certain impediments will continue to be difficult for plaintiffs to prove to any legal audience. First, courts are well aware of the potential impact of extensive litigation against fast-food.<sup>163</sup> Also, the District Court, in the *Pelman* decisions, stated several times that it is, and has been for some time, common knowledge that fast-food has unhealthy effects. Without thorough research revealing a lot of new evidence, it will be nearly impossible for a plaintiff to prove it was unhealthy to the point no one conceived.

It seems, therefore, that plaintiff's attorneys now should be focusing time on the processing operations conducted by the fast-food industry. It will be a strong argument if the food is, after processing, so changed

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<sup>158</sup>*Id.* at 532 for one example of such a comment.

<sup>159</sup>See *e.g.*, Silver Blue, McDonald's Obesity Lawsuit Downsized, June 27, 2003, available at <http://www.silverblue.org/archives/000122.html>. (A small website created a mock coupon advertising free fat with McDonald's food.)

<sup>160</sup>The Gallup Organization, *supra* note 45.

<sup>161</sup>*Id.* and *Pelman I*, 237 F. Supp. 2d at 518 n. 5.

<sup>162</sup>H.R. REP. NO. 108-432, 108th Cong., at 5 (2004), 2004 WL 409208.

<sup>163</sup>*Pelman I* at 518 ("The potential for lawsuits is even greater given the numbers of persons who eat food prepared at other restaurants in addition to those serving fast-food [sic].") (citations omitted). See also Christopher M. Fairman, *The Myth of Notice Pleading*, 45 Ariz. L. Rev. 987, 1051 ("the court was motivated by a fear of future frivolous 'McLawsuits.' " and "to protect against crushing exposure to liability.").

from what any of us expect, making it more dangerous or addictive.<sup>164</sup> Of course, plaintiffs will have to show that this is done with McDonald's corporation's knowledge or indirect knowledge.

Further, obesity plaintiffs should not feel foreclosed because past tort litigation reveals that "tort law is generally elastic."<sup>165</sup> The courts have the ability to interpret widely a number of legal standards as well as to determine the ability of public knowledge, public expectation, and so on.<sup>166</sup> As such, the courts may have the power legislators fear to facilitate the opening of the flood gates against Big Food defendants.

Moreover, courts are aware that if plaintiffs are able to win cases, or even elicit powerful, specific arguments against Big Food, it may bring about positive change. Even just the media attention to the problem of obesity and the recent obesity lawsuits can be a vehicle of positive change for our nation's health.<sup>167</sup> But, Big Food may be forced to provide more information to consumers regarding the detrimental health effects of its foods and their ingredients because of the lawsuits. Also, if Big Food is forced to payout, they will likely increase the costs of their products which in turn could discourage excessive consumption of its unhealthy products,<sup>168</sup> leading to healthier American population.

#### IV. Legislative Response to Obesity Lawsuits

##### **H.R. 339, The Personal Responsibility in Food Consumption Act**

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<sup>164</sup> See *infra*.

<sup>165</sup> John Alan Cohan, *Obesity, Public Policy, and Tort Claims Against Fast-Food Companies*, 12 Widener L.J. 103, 131 (2003).

<sup>166</sup> Crawford, *supra* note 73, at 1204 (with regard to tobacco litigation, "The issue, then, appears to revolve around whether the courts or juries will find that the health risks related to smoking are in fact common knowledge to the public at large. . . . there is no consensus in the law. Many judges simply evaluate the history of cigarettes in America and take judicial notice of common knowledge.").

<sup>167</sup> See Jonathan E. Fielding, et al., *How Do We Translate Science Into Public Health Policy and Law?*, 30 J.L. Med. & Ethics 22, 29 (2002).

<sup>168</sup> See Cochran, *supra* note 115, at 717.

Although the public may be laughing at these lawsuits, and while it may seem that it will be difficult for a plaintiff to succeed against Big Food, Big Food, several state legislatures and the U.S. legislature are not laughing. In an effort to ban frivolous lawsuits, Congress has responded by initiating legislation.

Representative Ric Keller of Florida introduced H.R. 339, the “Personal Responsibility in Food Consumption Act” on January 27, 2003.<sup>169</sup> Since then, the house committees have debated the merits of the legislation and made some changes. H.R. 339 has passed in the House and has been passed to the Senate who referred the bill to the Senate Committee on the Judiciary.<sup>170</sup>

H.R. 339 is a bill which was proposed to prevent any claims of injury of weight gain or obesity or related illnesses from being from being filed against, or continuing against, the food industry. The bill protects “food manufacturers, distributors, advertisers, sellers, and trade associations” from facing these types of obesity lawsuits.<sup>171</sup>

## **A. Brief History of Liability Limitations**

In the past, Congress has deemed it necessary to protect to other industries and defendants from what they perceived to be excessive litigation.<sup>172</sup>

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<sup>169</sup> *Bill Summary and Status for the 108th Congress: H.R. 339*, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR01036:000X> (2004). A similar bill was also introduced in the Senate by Senator Mitch McConnell of Kentucky. *Bill Summary and Status for the 108th Congress: S. 1428*, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:s.01428>: (2004)

<sup>170</sup> *Bill Summary and Status for the 108th Congress: H.R. 339*, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR01036:000X> (2004).

<sup>171</sup> H.R. 339, 108th Cong. (2003).

<sup>172</sup> *See, e.g.*, Terrorism Risk Insurance Act of 2002, 15 U.S.C.A. §6701 (West 2002) (creating one exclusive cause of action for damage, injury or death should they be the result of an act of terrorism); Y2K Act, 15 U.S.C.A. §§ 6601- 6617 (West 1999) (limiting liability and damages against information technology systems not prepared to recognize dates after 1999); Biomaterials Access Assurance Act of 1998, 21 U.S.C.A. §§1601- 1606 (West 1998) (protecting raw material component suppliers of medical devices); Amtrak Reform and Accountability Act of 1997, 49 U.S.C.A. § 28103 (West 1997) (protecting Amtrak and other rail carriers from excess liability for passenger injuries, death and damage to property unless the harm can be shown to be a result of “conscious, flagrant indifference to the rights or safety of others.”); Volunteer Protection Act of 1997, 42 U.S.C.A. §§ 14501-

Most recently, in 2003, several similar bills were proposed to prevent frivolous lawsuits against the firearm industry for injuries sustained as a result of criminal or unlawful misuse of their products.<sup>173</sup> The bill was suggested “[t]o prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their products by others.”<sup>174</sup> The proposed bill, H.R. 1036 survived the initial stages and was eventually passed by the House and passed along to the Senate. Congress cited as cause for the bill, a need to “prevent State courts from bankrupting the national firearms industry.”<sup>175</sup> Legislators argue that holding the gun industry liable for the unlawful actions of others is an abuse of our judicial system.<sup>176</sup> Legislators fear that courts will be persuaded by public opinion to blame big profit corporations and award huge payouts to plaintiffs.<sup>177</sup>

However, though the bill to protect gun manufacturers passed in the house, it stalled in the Senate<sup>178</sup> in part because House Democrats attached gun control amendments to the bill before passing it on to the Senate.<sup>179</sup>

## **B. Attempt to Limit Big Food’s Liability**

There are several factors that our nation’s legislators pointed to when they argued over H.R. 339. The legislators are concerned about the financial impact these lawsuits could have upon Big Food.<sup>180</sup> The

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14505 (West 1997) (protecting volunteers at non-profit and government organizations from liability “for harm caused by an act or omission of the volunteer on behalf of the organization or entity”); General Aviation Revitalization Act, 49 U.S.C.A. §40101 (West 1994) (protecting aircraft and component part manufacturers from liability and excess damages for harm caused as a result of an aviation accident).

<sup>173</sup>H.R. REP. NO. 108-59, at 3.

<sup>174</sup>*Protection of Lawful Commerce in Arms Act, H.R. 1036*, available at <http://thomas.loc.gov/cgi-bin/query/D?c108:4:./temp/~c108QSHjrm::> (2004).

<sup>175</sup>H.R. REP. NO. 108-59, at 4.

<sup>176</sup>*Protection of Lawful Commerce in Arms Act, Extension of Remarks: Hearing on H.R. 1036 Before the Committee of the Whole House*, 108th Cong., (2003) (statement of Brad Carson).

<sup>177</sup>H.R. REP. NO. 108-59, at 4.

<sup>180</sup>Santa Mendoza, *Viewpoint: Class Actions, Reform, and The Impact on Franchisors*, 10 No. 2 LJN’s Franchising Bus. & L. Alert 3 (ALM) (Nov. 2003).

potential financial impact would have a rippling effect including bankruptcy, closed stores, lost jobs and industry fear of marketing or selling numerous food products. The legislators claim to be concerned about encouraging Americans to accept personal responsibility, at least for our physical lifestyle choices.<sup>181</sup> The legislators are also concerned for the waste of precious judicial time. We already have a crowded judicial system and any unnecessary cases, especially the involved class action suits which have been attempted, are an unwelcome and strenuous burden on that already congested system.

However, those opposed to H.R. 339 respond with the following arguments: the bill is written too broadly and it protects negligent or reckless manufacturer behavior, it is written solely for the benefit of one special interest group, Big Food, the legislature's rushed action is inconsistent with our nation's idea of federalism and, in legislation is not the answer to frivolous lawsuits.<sup>182</sup>

### **1. Protecting Big Food**

Legislators fear that the industry is being unfairly targeted as the next big money maker for plaintiff's attorneys.<sup>183</sup> The legislators referred to a 2003 Boston conference where personal injury attorneys congregated to discuss techniques for suing Big Food. The House Report accompany H.R. 339 indicates that attendees at that conference "were required to sign an affidavit in which they agreed to keep the information they learned confidential and to refrain from consulting with or working for the "food industry" before December 31, 2006, apparently setting a deadline for bring the industry to its knees."<sup>184</sup> Legislators and the food industry are concerned that lawyers at the conference will strategize together in order to make Big Food the next Big

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<sup>181</sup>H.R. REP. NO. 108-432, at 8.

<sup>182</sup>H.R. Rep. No. 108-432 at 22.

<sup>183</sup>H.R. Rep. No. 108-432, at 5, ("personal injury lawyer Richard Daynard, head of Northeastern University's Tobacco Products Liability Project, said 'I think we'll see a progression similar to what we saw with tobacco.'" Erin Duggan, *Tobacco-suit Tactics Now Target Fast Food*, Albany Times Union, Apr. 6, 2003, at A1.

<sup>184</sup>H.R. REP. NO. 108-432, at 5, *citing* the aforementioned affidavit, available at <http://www.phaionline.org>. Some of the documents from the "Legal Approaches to the Obesity Epidemic" are available online at the same website however. Also, the website indicates that another conference on the same topic is scheduled for September 2004.



Tobacco.<sup>185</sup> Concerned that a drive to fill their own pockets will push plaintiff's attorneys into filing million dollar claims against Big Food,<sup>186</sup> the legislation is moving to prevent any more "frivolous" lawsuits against the food industry.

Lawsuits against McDonald's and others threaten numerous restaurant chains, corporations and manufacturers who have collectively been dubbed, Big Food. Big Food, however, has fortunately for itself, spread its name and product throughout our lives at restaurants, vending machines, gas stations and school cafeterias.<sup>187</sup> Thus, it is in the best interests of the members of the legislature to gain the support of the National Restaurant Association. The desire to please this group to safeguard and further their own political careers pushes the legislators to approve this bill which is very protective of Big Food. Big Food also has the money to sponsor legislators they believe will aide their cause.<sup>188</sup> In fact, the sponsor of H.R. 339, Representative Ric Keller, has received support from Outback Steakhouse and the National Beer Wholesalers Association.<sup>189</sup>

Like Big Tobacco and the gun industry, Big Food has the strength to persuade and push Congress. Big Food is powerful because of its sheer number of members and its enormous economy. That is why despite the fact that

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<sup>185</sup>The Center for Consumer Freedom, *Pass the Cheeseburger Bill, Hold the Lawsuits*, Mar. 10, 2004, available at [http://www.consumerfreedom.com/release\\_detail.cfm?PR\\_ID=51](http://www.consumerfreedom.com/release_detail.cfm?PR_ID=51).

<sup>186</sup>Wald, *supra* note 47 (Although, plaintiff attorney Samuel Hirsch explained after *Barber v. McDonald's et al.* that, "Contrary to what many may think... we are not looking to get rich from a large settlement. We are proposing a fund that will educate children about the nutritional facts and contents of McDonald's food.").

<sup>187</sup>Bechtle, *supra* note 25 ("Schools frequently contract with food companies to offer soda and snacks in vending machines, and fast food in cafeterias, where students are basically a captive constituency.").

<sup>188</sup>*National Restaurant Association Political Action Committee*, (explaining how the association identifies which politicians it will support), available at <http://www.restaurant.org/government/nrapac.cfm> (2004).

<sup>189</sup>Press Release, The Physicians Committee for Responsible Medicine, Doctors Urge House to Reject "Cheeseburger Bill": H.R. 339 Threatens Consumer Rights, Grants Big Food Sweeping Immunity (Mar. 8, 2004), available at <http://www.pcrm.org/news/health040308.html>.

[c]orporations like McDonalds are well suited to take care of themselves, but the House leadership is taking a page out of their recent outrageous, unprecedented immunity for gun manufacturers. Not only is this legislation unneeded, but it would immunize defendants for negligent and reckless behavior including mislabeling of food products...<sup>190</sup>

Although some legislators in opposition to the bill argue against this added protection, at least three forceful lobbying powers in Big Food are the National Restaurant Association,<sup>191</sup> the Center for Consumer Freedom,<sup>192</sup> and the National Meat Association<sup>193</sup> fight to push protective legislation.<sup>194</sup>

The N.Rest.A. had at least two representatives speak to Congress regarding obesity lawsuits and legislation. First, Christianne Ricchi, owner of D.C. restaurant, i Ricchi Ristorante, spoke before the House Committee on the Judiciary's Commercial and Administrative Law Subcommittee.<sup>195</sup> Later, in October of 2003, Wayne Reaves, the owner of seven "quick-service restaurants," spoke before the Senate Subcommittee considering the obesity lawsuits and legislation.<sup>196</sup> Both speakers explained that the N.Rest.A. is an expansive organization "comprised of 870,000 restaurants and foodservice outlets employing 11.7 million people around the country."<sup>197</sup> With these numbers, legislators are legitimately concerned about acting on behalf of those restaurant and food industry owners, employers and employees within their voting jurisdictions. Legislators

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<sup>191</sup> See The National Restaurant Association, *Public Policy Issues Briefs: Litigation Reform: Food-Attack Lawsuits*, [www.restaurant.org](http://www.restaurant.org), available at [http://www.restaurant.org/government/issues/lawsuits\\_food.cfm](http://www.restaurant.org/government/issues/lawsuits_food.cfm), (2004) ("The National Restaurant Association strongly supports federal legislation that addresses frivolous obesity lawsuits. Obesity should be addressed through education, not litigation."). See also Susan Jones, *Legislation Discourages Obesity Lawsuits Against Restaurant Industry*, CNS News, Jan. 29, 2004, available at <http://www.cnsnews.com/Nation/Archive/200401/NAT20040129a.html> (quoting Nat'l Restaurant Ass'n President Steven C. Anderson who said, "We are grateful for Rep. Keller's leadership in pushing forward this important legislation that focuses on personal responsibility and the voluntary food choices all Americans make, rather than on costly litigation.").

<sup>192</sup> *Obesity Lawsuit Background*, The Center for Consumer Freedom, available at [http://www.consumerfreedom.com/article\\_detail.cfm?ARTICLE\\_ID=129](http://www.consumerfreedom.com/article_detail.cfm?ARTICLE_ID=129) (2004) (reporting on the groups ads mocking the obesity lawsuits and more).

<sup>193</sup> See also Morrissey, *supra* note 179 (quoting Rosemary Mucklow, the executive director of the Nat'l Meat Ass'n., expressing her support for legislation to prevent obesity lawsuits).

<sup>194</sup> Appel, *supra* note 23 (discussing industry group efforts to stop legal action against manufacturers, "The National Soft Drink Association has argued against further restrictions on vending machines in schools, and the National Restaurant Association has branded efforts to blame dietary choices for obesity as simplistic.") (citations omitted).

<sup>195</sup> *Hearing on H.R. 339*, *supra* note 14.

<sup>196</sup> *Fast-Food Super Sizing and Common Sense Consumption: Hearing on S. 1428 Before the Subcomm. on Admin. Oversight and the Courts, Committee on Senate Judiciary*, 108th Cong. (2003).

<sup>197</sup> See *Barring Frivolous Lawsuits: Hearing on H.R. 339*, *supra* note 14. See also *Fast Food Super Sizing*, *supra* note 196..

who wish to keep or attract Big Food business to their jurisdictions will attempt to please Big Food's major lobby groups. Moreover, such large numbers of people are strongly correlated with large numbers of dollars. The food industry fosters a strong economy by employing many people and providing a relatively cheap good to be purchased by the consuming tax payers.<sup>198</sup> Representatives of the N.Rest.A. explained that they fear monetary judgments against the food industry or the cost of settlement will strain the industry, increasing the cost of insuring their business,<sup>199</sup> driving up food prices and forcing job layoffs,<sup>200</sup> detracting from the amount of good Big Food can contribute to the economy.

Big Food also counters the lobbying power argument by describing plaintiff's attorneys' organizations in the same light. Big Food argues that trial attorneys are acting as a similar lobby group within the courthouses. Big Food and legislators have accused attorneys of gathering their efforts and resources together to act similarly to promote obesity lawsuits. The plaintiff's attorneys argue against obesity legislation, but legislators claim that is an effort to protect and fill their own pockets.<sup>201</sup>

Still, one lobby group in opposition to obesity legislation, The Physicians Committee for Responsible Medicine, "complains that the bill 'absolves the food industry from any legal liability for its contributing role in the nation's obesity epidemic.'"<sup>202</sup> The opponents of H.R. 339 argue that their counterparts have simply chosen a specific industry for protection.<sup>203</sup> In an age of corporate corruption, however, it is hard to conceive that the American public is readily open to the idea of protecting any Big business. It is counterintuitive to provide added protection during such a time. Representative Robert Scott of Virginia expanded on this theory when he explained

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<sup>198</sup> *Id.* (matching statements by Christianne Ricchi and Wayne Reaves, "our nation's restaurant industry is the cornerstone of the economy, careers and community involvement.").

<sup>199</sup> *Fast-Food Super Sizing*, *supra* note 196, at \*3.

<sup>200</sup> See *Barring Frivolous Lawsuits: Hearing on H.R. 339*, *supra* note 14.

<sup>201</sup> Jones, *supra* note 118.

<sup>202</sup> *Id.*

<sup>203</sup> H.R. REP. 108-432, at \*25.

[I]n a democracy it is fundamentally wrong for some industries to have the privilege of trying their cases in a form where their political allies will decide the merits of the case while everyone else is relegated to the court system where evidence is heard and the law applied by judges and juries without political considerations.<sup>204</sup>

A few of the legislators are resistant to the idea of selecting certain industries with powerful lobbies to protect. Representative Eleanor Holmes Norton of the District of Columbia agreed, exposing her opinion in a powerful statement when she said,

I do not know if my good friends [in support of this H.R. 339] are trying to change their political identity, but I thought they stood for federalism and local control. They are, however, developing a pattern of coming to the floor in response to interest groups to knock out lawsuits even when they are winning in the courts. What a waste of time.<sup>205</sup>

Even to protect the industry, the proposed bill utilizes very expansive language. Representative Stark agreed when he said,

I suppose just like every other self-serving business lobby in Washington, the fast food industry wants the Republicans to protect them from being responsible. It's as if they're asking the GOP to 'super size it' with a massively overreaching bill that grants fast food companies broad and unprecedented liability protection even in instances where they are clearly negligent.<sup>206</sup>

Further, we have spent much public attention stressing the power of the gun lobby, but food may prove to be the stronger lobby, if this legislation passes while similar gun legislation was abandoned by the Senate.<sup>207</sup> As this lobby power in favor of H.R. 339 explained, “[Legislators] were smart enough not to grant the tobacco industry immunity years ago, and tough enough not to give the gun industry immunity [more recently]. Let's not threaten Big Food any differently.”<sup>208</sup> The group continues by arguing that “H.R. 339 is an unsavory attempt to protect corporate profits at the expense of American Health.”<sup>209</sup>

<sup>207</sup> *Bill Summary and Status for the 108th Cong.: H.R. 1036*, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR01036:@@X> (2004).

<sup>208</sup> Jones, *supra* note 118. (quoting Neal Barnard, President, The Physicians Committee for Responsible Medicine).

<sup>209</sup> Jones, *supra* note 118.

However, proponents of this bill would prefer to characterize it differently. Proponents continued to repeat that H.R. 229 is needed to protect our “nation’s leading private sector employer” from bankruptcy.<sup>210</sup> Representative Robert Hayes supports the bill in part because it feels that it prevents “frivolous lawsuits that will serve only to victimize innocent restaurants. . . .”<sup>211</sup>

Proponents also argue along the slippery slope, noting that though attorneys have started with fast-food, ice cream manufacturers have also been targeted and perhaps grocery stores which stock fatty foods will be as well.<sup>212</sup> However, this argument can be addressed more appropriately by the courts. If the plaintiff’s attorneys stretch the link too far, courts will be able to step in, point out a lack of proof of proximate causation and dismiss the lawsuits. It is disrespectful to intimate that judges at any level are incapable of fulfilling this duty.

#### **a. Protecting Jobs**

One other reason to protect Big Food is to protect jobs. Although the legislation was proposed one year prior to an election year, job retention in the U.S. is proving to be an important election topic. Americans are worried about job ‘outsourcing’ which means sending jobs overseas to be performed by cheaper laborers. The most often outsourced jobs are in manufacturing and production. Historically, this has meant jobs like car and clothing manufacture, but proponents of H.R. 339 would have us believe that constructing cheeseburgers is a key manufacturing job. In a down economy, any argument to keep jobs in the U.S. will inevitably carry significant weight. However, it is clear that assembling hamburgers at a local McDonald’s are not the types

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<sup>210</sup>H.R. REP. NO. 108-432, at 3.

<sup>211</sup>*Personal Responsibility in Food Consumption Act: Hearing on H.R. 339, supra* note 19, at H952.

<sup>212</sup>H.R. REP. NO. 108-432, at \*5-6 *citing* Marguerite Higgins, *Lawyers Scream About Ice Cream*, The Washington Times, July 25, 2003, at A and C. Spencer, K. Schmid, & J. Zanetti, *Fast Food in the Gunsights-Class Actions as Political Weapons*, *Toxics Law Reporter*, Nov. 21, 2002, at 1093.

of jobs Americans fear will be outsourced, except that no one makes that clear to the public when they argue how important it is to pass house bill H.R. 339.

What is more, Big Food has not created high demand for their jobs. In fact, “fast-food workers typically quit or get fired every three to four months. The industry pays most of their employees minimum wage, and companies benefit from federal programs that reward them for creating jobs for the poor.”<sup>213</sup> Moreover, arguments that Big Food is looking out for its employees misleading, at the least.<sup>214</sup> “Ever since the administration of President Richard Nixon, the fast-food [sic] industry has worked closely with its allies in Congress and the White House to oppose new worker safety, food safety, and minimum wage laws.”<sup>215</sup> Furthermore, an argument that H.R. 339 helps protect the economy is similarly somewhat disingenuous. Keeping the minimum wage jobs in the US and keeping fast-food relatively cheap are not the key building blocks to jumpstarting the economy.<sup>216</sup>

## 2. Separation of Powers and Federalism

Proponents of the legislation argue that the previous court rulings only further highlight the frivolousness of these obesity lawsuits and it is therefore appropriate for the legislature to intervene before our courts become overwhelmed. It is also argued that it is important the legislatures intervene before a judge finds for a plaintiff and opens the flood gates to subsequent million dollar decisions and settlements.

However, such intervention and the proposed legislation raises questions of separation of powers and feder-

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<sup>213</sup>Amanda Spake, *How McNuggets Changed the World*, U.S. News & World Report, Jan. 22, 2001, at 54.

<sup>214</sup>*Id.* (“chicken companies, like beef producers, have turned to low-skilled workers, many from Mexico and Guatemala.”).

<sup>215</sup>Schlosser, *supra* note 20. “About sixty large food-service companies... have backed congressional legislation that would essentially eliminate the federal minimum wage...” *Id.* at 73.

<sup>216</sup>*Personal Responsibility in Food Consumption Act: Hearing on H.R. 339, supra* note 19, at H955 (statement of Rep. John Dingell, chastising that the current administration is “not giving tax cuts to the people who would buy those hamburgers or who would buy American automobiles or do other things to make the economy really move and go as it should.”).

alism. During House of Representative Committee hearings on H.R. 339, representatives opposed to the bill repeatedly pointed out that lawsuits which lack merit, as experts believe these cases do,<sup>217</sup> will be dropped by state and federal court judges without legislative intervention.<sup>218</sup> A leading force in lawsuits against Big Food commented that, “if ‘these fat lawsuits are truly frivolous’ then ‘the industry needs no Congressional protection.’”<sup>219</sup> It goes against the grain of our country’s separation of powers for the legislative branch to pass a blanket provision which robs the aggrieved from having their day in court.<sup>220</sup> “While proponents of H.R. 339 and similar bills on the state level claim obesity lawsuits are ‘frivolous,’ legal remedies already exist to eliminate such suits at early stages.”<sup>221</sup> Moreover, dismissals of the previous suits are likely to curtail plaintiff’s attorneys from bringing future similar lawsuits.<sup>222</sup> Legislators opposed to H.R. 339, and other bills like it, fear that the future of tort law is being shaped by legislation rather than judicial determination.<sup>223</sup>

However, opponents of H.R. 339 argue that tort law is traditionally a matter of state determination.<sup>224</sup> The House proponents counter that authority for H.R. 339 derives from the Commerce Clause.<sup>225</sup> The food industry is overwhelmingly interstate, especially with regard to fast-food corporations, their chains, and their advertising. As such, it would be helpful to regulate lawsuits against such corporations across the

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<sup>217</sup>Hall, *supra* note 113 (reporting the opinion of Cato Institute legal expert, Robert Levy).

<sup>218</sup>*Personal Responsibility in Food Consumption Act: Hearing on H.R. 339, supra* note 19, at H948, H958 (statement of Rep. Mel Watt).

<sup>219</sup>Susan Jones, *supra* note 118 (quoting John Banzhaf, George Washington Univ. Law Professor).

<sup>220</sup>*Personal Responsibility in Food Consumption Act: Hearing on H.R. 339, supra* note 19, at H948, H958 (Rep. Mel Watt, member House of Representatives Committee on the Judiciary, explaining “the system of justice and judicial responsibility and the division of responsibilities between the legislative branch and the judicial branch”).

<sup>221</sup>*Id.* (statement of Rep. Melvin Watt, noting the arrogance of the legislature in launching their own efforts because it fears the courts will not act as it wants). *See also* Press Release, The Physicians Committee for Responsible Medicine, Doctors Urge House to Reject ‘Cheeseburger Bill’ (Mar. 8, 2004), *available at* <http://www.pcrm.org/news/health040308.html>.

<sup>222</sup>*Personal Responsibility in Food Consumption Act: Hearing on H.R. 33, supra* note 19, at H950 (statement of Rep. Mel Watt).

<sup>223</sup>*Id.* at H953 (statement of Rep. Ron Paul).

<sup>224</sup>H.R. REP. NO. 108-432, at 25.

<sup>225</sup>H.R. REP. NO. 108-432, at 10, *but see*, H.R. Rep No. 108-432, at 26 (explaining the recent narrowing interpretations of the U.S. Supreme Court, “The era of Federal paternalism is over.”) (citations omitted) and Patrick J. Carleton, *Internet Activity and the Commerce Clause: Expansion of Federal Subject Matter Jurisdiction and Limitation of States’ Police Power?*, 79 U. Det. Mercy L. Rev. 659, 662-63 (2002) (“Recent developments in the United States Supreme Court have possibly begun to again limit the Federal Legislature’s reach into local activities.”).

board. However, there is something to be said for states which choose to be more favorable to corporations. For example, many corporations are incorporated within the state of Delaware because Delaware has many statutes which are corporation-friendly. Also, the legislation would prevent conflicting laws from allowing certain states to bankrupt the food industry.<sup>226</sup>

Proponents, however, argued that the legislation is sufficiently narrowly tailored so as not to overstep state judicial power. The bill is aimed at only preventing claims which indicate obesity or overweight and its affiliated illnesses as the injury. Proponents argue essentially that, but for willful violation of federal or state laws regarding food manufacture, distribution, and advertising, Big Food should not be held liable for consumers getting fat. As such, the bill only prevents wasting precious judicial time by filing suits which lack substance. Proponents would say that any lawsuit blaming another for one's obesity which does not point to some flagrant willful conduct is frivolous.

However, there has been no showing that the courts are not acting fairly and rationally, and quickly dismissing obesity lawsuits, so the legislation is unnecessary.<sup>227</sup> Although proponents of the H.R. 339 contend that all of these obesity lawsuits are frivolous, they do not show faith in the courts, as they have included a provision in the bill which operates retroactively to force any court to dismiss immediately any pending actions.<sup>228</sup>

The bill does only allow for claims which allege a willful or knowing violation of consumer protection laws, with particularity.<sup>229</sup> As such, if a company recklessly advertises that their product has fewer grams of fat than it actually does and a person consumes based on that info, and subsequently gains weight, though that

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<sup>226</sup>*Personal Responsibility in Food Consumption Act: Hearing on H.R. 339, supra* note 19, at H958 (statement of Jim Sensenbrenner, Chair, House Comm. on the Judiciary) and at H959 (Rep. Ric Keller quoting the U.S. Supreme Court in *Healy v. Beer Institute*, “Generally speaking, the Commerce Clause protects against inconsistent laws arising from the protection of one State regulatory regime into the jurisdiction of another State.”).

<sup>227</sup>H.R. REP NO. 108-432 at 24, (“it is inappropriate for the Majority to deny harmed parties their rights in the complete absence of any evidence that the courts are not processing the cases before them in a just and equitable manner.”)

<sup>228</sup>H.R. 339, 108th Cong. § 3(b) (2003).

<sup>229</sup>H.R. 339, 108th Cong. § 4(5)(B)(i) and (ii) (2003).



person is aggrieved as a result of the food producer’s recklessness they are prevented from seeking any redress in a courtroom.<sup>230</sup> Opponents of H.R. 339 argue that there should still exist a method to seek legal recourse. Further, while the supporters claim that H.R. 339 does not encroach upon states’ abilities to enforce their own consumer protection laws, opponents disagree. The bill defines a “person” who cannot bring these types of suits to include “any governmental entity.”<sup>231</sup> Therefore, states, as well as the federal government, could be precluded from fully enforcing their consumer protection laws so that no manufacturer could recklessly violate those laws.<sup>232</sup>

The bill also incorporates a specific discovery provision, which appears to be quite protective of the food industry as well. The bill first explains that actions alleging the manufacturer or seller committed a willful violation of Federal or State law which results in a person’s weight gain or an action alleging breach of contract or express warranty are not barred by H.R. 339.<sup>233</sup> The bill, however explains that in any of these types of actions, “all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss.”<sup>234</sup> It seems only over-protective of the legislature to interfere at all in the discovery process in these cases, but especially in the cases not even prohibited by the bill. John Banzhaf explains that, “[y]ou preclude the litigation if you preclude the discovery’...‘It was the discovery that sunk Big Tobacco’ by showing that cigarette manufacturers deliberately made their products more addictive so people would keep buying them.”<sup>235</sup>

### 3. Personal Responsibility

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<sup>230</sup>It could be argued that a person would still have had to consume that food in excess and would still have difficulty negating other contributing factors before they could pinpoint the reckless advertisement as the proximate cause of the injury.

<sup>231</sup>H.R. 339, 108th Cong. § 4(3).

<sup>232</sup>*Personal Responsibility in Food Consumption Act: Hearing on H.R. 339, supra* note 19, at H963 (statement of Rep. Jay Inslee explaining, “If someone refuses to honor the legal mandate for conduct that the U.S. Congress imposed due to inattention or negligence, there is legal responsibility for that.”).

<sup>233</sup>H.R. 339, § 4(5)(B)(i) and (ii) (2003).

<sup>234</sup>H.R. 339, § 3 (c)(1) (2003). The bill does specify that parties can make a motion for particularized discovery in order to preserve evidence and prevent undue prejudice.

<sup>235</sup>Morrissey, *supra* note 179 (quoting plaintiff’s attorney, John Banzhaf).

Instead of looking to blame Big Food, supporters of H.R. 339 argue that we should be fostering a sense of personal responsibility. They argue that preventing obese persons from being able to point the finger at others for their problems, they will have to make personal changes. Those who spoke on behalf of the National Restaurant Association explained that the industry should not be punished for meeting consumer demand,<sup>236</sup> because what we eat is, in the end, a matter of personal choice. Ms. Ricchi advocated for the food industry reminding the legislators, that the food industry may in fact offer the most variety of options to its consumers.<sup>237</sup> Still, the representatives reminded Congress, personal responsibility in choosing the foods we eat and the amount of exercise we undertake, as well as many other factors, all impact our weight. The representatives of the association warn that the obesity lawsuits are only “a distraction from finding sensible solutions to this very complex issue [of obesity].”<sup>238</sup>

Lawsuits such as the *Pelman* case and others like it indirectly encourage Americans to finger point and blame others for their faults instead of self reflecting to determine how to make a positive change.<sup>239</sup> Nonetheless, there are numerous contributing factors to obesity besides free will. It has been argued that solutions to obesity are not just about personal responsibility, but also community responsibility. For instance,

[w]hen there are no safe, accessible places for children to play or adults to walk, jog, or ride a bike, that is a community responsibility. When school lunchrooms or office cafeterias do not provide healthy and appealing food choices, that is a community responsibility. . . . When we do not require daily physical education in our schools, that is also a community responsibility.<sup>240</sup>

Moreover, when such a large proportion of the food advertisements are for cheeseburgers, pizza, subs and fries, rather than broccoli, carrots, and apples, it is no wonder why Americans seek out fast-food.<sup>241</sup> Further,

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<sup>236</sup> *Barring Frivolous Lawsuits: Hearing on H.R. 339, supra* note 14.

<sup>237</sup> *Barring Frivolous Lawsuits: Hearing on H.R. 339, supra* note 14.

<sup>238</sup> *Fast-Food Super, supra* note 196.

<sup>239</sup> *Personal Responsibility in Food Consumption Act: H.R. 339, supra* note 19, at H949 (Rep. Kay Granger, R- Tex, noting that “not one American will lose weight until they eat better and exercise more frequently”).

<sup>241</sup> Cowley & Underwood, *supra* note 12 (“Unfortunately, no one can afford to promote spinach or bell peppers the way snackmakers promote their goods. McDonald’s spent \$1.1 billion on advertising in 2001. That same year, the budget for the government’s pro-vegetable ‘5 a Day for Better Health’ program was \$1.1 million. Not surprisingly, only 23 percent of U.S. adults were meeting the five-a-day target at last count.”).

“Big Food is ubiquitous. Not only can fast food [sic] be purchased everywhere, it can be purchased on a twenty-four hour basis.”<sup>242</sup>

Still, proponents of the legislation argue that the food industry should not be held liable and be forced to pay out for irresponsible over-consumption.<sup>243</sup> If manufacturers are not concealing illegal additives in the over-processing of its foods, then they are producing legal goods. Furthermore, as it has already been discussed, the American consumer is aware of the deleterious effects of consuming fast-food in excess. Therefore, there is no duty which has been failed by the fast-food industry because “[s]ome degree of abuse is inseparable from the proper use of every thing.”<sup>244</sup>

Proponents of H.R. 338 argue that obesity is a serious problem which is in need of redress, and forcing Big Food to pay out will not change America’s eating habits. To testify on this theory, Congress welcomed Dr. Gerard J. Musante, a clinical psychologist working at Structure House.<sup>245</sup> Structure House is a “residential weight loss facility. . . where participants come from around the country. . . to learn about managing their relationship with food.”<sup>246</sup> Supporters of H.R. 339 rely on Dr. Musante’s testimony to support the importance of personal responsibility. Dr. Musante testified that,

[t]hrough working with obese patients, I have learned the worst thing one can do is to blame an outside force to get themselves ‘off the hook,’ to say it’s not their fault and that they are a victim. Congress has rightly recognized the danger of allowing Americans to continue blaming others for the obesity epidemic. It is imperative that we prevent lawsuits from being filed against any industry for answering consumer demands.<sup>247</sup>

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<sup>242</sup>Rogers, *supra* note 2, at 877 (citations omitted).

<sup>243</sup>H.R. REP. NO. 108-432, at 5.

<sup>244</sup>H.R. REP. NO. 108-432, at 7, *citing New York Times Co. v. Sullivan*, 736 U.S. 254, 271 (1964) (quoting James Madison).

<sup>245</sup>*Fast-Food Super Sizing and Common Sense Consumption, Statement of Dr. Gerard J. Musante, CEO and Founder, Structure House Before Subcomm. on Admin. Oversight and the Courts, Comm. on Senate Judiciary*, 108th Cong. (Oct. 16, 2003).

<sup>246</sup>*Fast-Food Super Sizing and Common Sense Consumption, Statement of Dr. Gerard J. Musante, CEO and Founder, Structure House*, at \*2

Proponents of the bill side with Dr. Musante's idea to encourage more exercise and better dieting habits. Dr. Mustante urged the legislators that, "[r]ather than assigning blame, we need to work together toward dealing more effectively with obesity on a national level."<sup>248</sup>

Testimony like that of Dr. Musante gives the legislators more credibility in arguing for a solution which requires working together and caring for one another, instead of seeking monetary settlements. Proponents further argue that health officials also urge us to focus on the entire picture. We should all follow the advice of the Surgeon General and change our sedentary lifestyles and junk food habits.<sup>249</sup> In other words, Americans need to turn off the televisions and video games and turn to their doctors, nutritionists and trainers to develop sensible weight loss plans.

However, similar arguments of consumer responsibility were made to defend Big Tobacco.<sup>250</sup> While jurors were told of and considered the role of a consumers' deliberate choice to smoke, they did not use that to negate the role of cigarette companies. Jurors, instead, held Big Tobacco accountable for their liability in creating an epidemic of ill health derived from cigarette smoking.<sup>251</sup>

Another reason that the personal responsibility argument may be so persuasive in this context is because we are not as sympathetic to the fat plaintiffs as we are to other so-called victim groups. Though a 2003

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<sup>248</sup>*Fast-Food Super Sizing and Common Sense Consumption, Statement of Dr. Gerard J. Musante, CEO and Founder, Structure House*, at \*3.

<sup>249</sup>U.S. Dep't of Health and Human Services, *supra* note 4, available at <http://www.surgeongeneral.gov/topics/obesity>. See also H.R. REP. NO. 108-432, at 8 ("H.R. 339 will encourage society to focus on the true cause of obesity: a lack of exercise."); *Personal Responsibility in Food Consumption Act: H.R. 339*, *supra* note 19 at H947 (statement of Rep. Jim Sensenbrenner, Chair, House Comm. on the Judiciary, referring to statement by Susan Finn, chairman of the American Council for Fitness and Nutrition).

<sup>250</sup>Cochran, *supra* note 115 (suggesting that the effects of second hand smoke on innocent bystanders, rather than consumers, is a unique factor which makes Big Tobacco more demonized and culpable).

<sup>251</sup>Cohan, *supra* note 165 (explaining that "[j]uries in the tobacco cases considered the voluntary nature of the plaintiff's conduct but nonetheless imposed liability."). *But see Johnson v. Philip Morris, et al.*, 159 F. Supp.2d 950, 953 (2001) (granting Defendant's Motion for Judgment on the Pleadings) ("The law recognizes that along with freedoms and rights enjoyed by citizens of the United States comes personal responsibility. For well over twenty years, the American public has been so saturated with information regarding the risks associated with smoking that even the most disinterested, uninformed citizen is aware that cigarette smoking is harmful to one's health... Those who have continued to smoke, the law deems, have done so, however tragically, at their own risk.") (citations omitted).

Gallup poll indicated that over seventy-five percent of Americans do not respect overweight people less<sup>252</sup>, the discussions at Congress were less politically correct. Even when arguing in opposition to the legislation, Representative Melvin Watt explained, “I suspect that my colleagues are going to hear that I am somehow a defender of fat, irresponsible people.”<sup>253</sup> In an age of political correctness, it may be the last arena in which bureaucrats can be openly disrespectful without subjecting themselves to public contempt.

Opponents of H.R. 339 argue that legislation to limit liability in no way aides the public in solving the obesity epidemic. Though, supporters counter, it will encourage personal responsibility by foreclosing even the possibility of blaming others for our own indulgences. Nonetheless, the bill does not suggest a plan for changing American eating habits. The bill is more focused on protecting Big Food than it is on saving American diets. Opponents urge that the governmental agencies, such as the FDA and the Dep’t of Health and Human Services are better equipped and more appropriately designed to take measures to improve American health.<sup>254</sup>

## C. Current Status of Obesity Legislation

### 1. H. R. 339

After debating, the House voted to pass the bill by a vote of 276-139,<sup>255</sup> and is currently on the Senate Calendar.<sup>256</sup> Regardless of his decision, or the public’s opinion, Judge Sweet intelligently recognized that the

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<sup>252</sup>Rick Blizzard, *Do Unhealthy Americans Get Too Much Respect?*, The Gallup Poll, Sept. 16, 2003, available at <http://www.gallup.com/content/login.aspx?ci=9265>. The poll also indicates that Americans are not less likely to respect smokers or alcohol drinkers.

<sup>253</sup>*Personal Responsibility in Food Consumption Act: Hearing on H.R. 339, supra* note 19, at H948

<sup>254</sup>H.R. Rep. 108-432 at 26, referring to new FDA requirements of food labels with trans fats contents information.

<sup>255</sup>Morrissey, *supra* note 179.

<sup>256</sup>*Bill Summary and Status for the 108th Cong.: H.R. 339, available at* <http://thomas.loc.gov/cgi->

*Pelman* case was an important one which raised “[q]uestions of personal responsibility, common knowledge and public health. . . and the role of society and the courts in addressing such issues.”<sup>257</sup> The US legislature, and the legislatures of several states, similarly recognized these important issues, and in tackling them, have potentially raised another. What is the role of the legislature in addressing these issues?

The irony may be that if the legislation passes, plaintiffs may challenge the validity of the regulation. A judicial review of this bill would be focused upon the existence of, and the bill’s relationship to, a reasonable state interest.<sup>258</sup> However, such judicial review is often conducted in a retroactive light. Courts are able to name what could have been a proper motivation for the legislation, even if it was not considered predominant by legislators. The court will often uphold the legislation as serving that purpose. Here, the legislation is entitled “Personal Responsibility” so government would argue that they passed the bill in order to encourage public health. Further, government could argue that the protection of major food corporations, protects public jobs- another important state interest.

However, it is not clear that a court would automatically uphold such a connection. Courts have stricken much simpler statutes on the basis that they are not sufficiently contributory to improving public health.<sup>259</sup> Nonetheless, we currently exist under the authority of a more conservative administration which is utilizing the legislative process to regulate our personal choices.<sup>260</sup>

## 2. State Legislation

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<sup>257</sup> *Pelman I*, 237 F. Supp. 2d at 516.

<sup>258</sup> Glenn H. Reynolds, *The Evolving Police Power: Some Observations For A New Century*, 27 *Hastings Const. L. Q.* 511, 529 (2000).

<sup>259</sup> *Id.* (“Even in contexts for which the police power . . . is unquestioned—such as fire protection—courts have stricken fire safety rules after finding that rules in question do not actually contribute to public safety, health, or welfare.” *citing Colorado Springs v. Grueskin*, 422 P.2d 384, 388 (CO 1967) (en banc).)

<sup>260</sup> For instance, several state legislatures and state courts are engaged in a battle over the rights to gay marriage, including Massachusetts.

Several states have already considered or enacted similar legislation.<sup>261</sup> States, of course, must be interested in the aforementioned issues,<sup>262</sup> but also must consider the protective legislation as an attempt to retain or attract major Big Food companies to their state. To date, four states, Idaho, Louisiana, South Dakota and Utah have signed into law, statutes which protect food manufacturers from facing obesity related litigation.<sup>263</sup> At least ten other states have considered similar measures.<sup>264</sup>

## V. Conclusion

### A. Impact of Obesity Lawsuits

Much of the writing about obesity lawsuits and legislation focuses much more on the existence of an obesity epidemic than the possible future of both legal reactions. However, no one could feasibly argue that obesity is not a problem for America. We must therefore continue to analyze the merits of legal responses to this public health problem.

One argument in favor of obesity lawsuits, is the resulting change they have had, and continue to have, on American food suppliers and consumers. “Michael Jacobson, executive director of the Center for Science

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<sup>261</sup>The state versions are strikingly similar calling for an end to any lawsuits against those in the food industry based on long term consumption of unhealthy food, notwithstanding claims which allege adulterated or mislabeled foods. *See infra* notes 248-49.

<sup>262</sup>*See Colorado Considers Ban on Fast-Food Lawsuits*, 10 No. 5 L.J.N.’s Franchising Bus. & L. Alert 7 (2004) (reiterating arguments of frivolous litigation and frivolous legislation).

<sup>263</sup>LA. REV. STAT. ANN. § 2799.6 (West 2004); H.B. 590, 57th Leg., 2d Reg. Sess. (Id. 2004); H.B.1282, 79th Legis. Ass., 2004 Reg. Sess. (S.D. 2004); S.B. 214, 56th Leg., 2004 General Sess. (Ut. 2004).

<sup>264</sup>California- A.B. 1909, 2003 CA. Ass., 2003-04 Reg. Sess. (Cal. 2004); Colorado- S.B. 20, 64th Gen. Ass., 2d Reg. Sess. (Colo. 2004); Georgia- S.B. 540, 147th Gen. Ass., 2003-04 Reg. Sess. (Ga. 2004); Illinois- S.B. 2813, 93rd Gen. Ass. (Ill. 2004); Kentucky- S.B. 176, 2004 Ky. Sen., 2004 Reg. Sess. (Ky. 2004); Mississippi- S.B. 2910, 2004 Miss. Leg., 2004 Reg. Sess., (Miss. 2004); New Hampshire- S.B. 408, 158th Sess., First Year, (N.H. 2004); Ohio- S.B. 161, 125th Gen. Ass., 2003-04 Reg. Sess. (Ohio 2004); Washington- S.S.B. 6601, 58th Leg., 2004 Reg. Sess. (Wash. 2004); and Wisconsin- S.B. 289, 96th Legis. Sess., 2003-04 Reg. Sess. (Wis. 2004).

in the Public Interest, which supports [obesity] lawsuits [said,] ‘It’s going to take a whole lot of lawsuits to... affect the dietary habits of the thousands that suffer obesity related disease.’<sup>265</sup> The lawsuits and their media attention force the obese population to think about making better food choices. Also, and more importantly, the threat of legal action has, and will continue, to inspire many fast-food corporations to make changes. Banzhaf explained this idea in a 60 Minutes interview,

If we can win one out of 10 cases, if we can persuade one out of ten juries to hit these people with big verdicts, the way we have with tobacco, we can force them to make important changes and finally somebody will be doing something about the problem of obesity, because, at this point nobody else, not the health educators, not the bureaucrats, not our legislators, are doing a damn thing about it.<sup>266</sup>

Though it can be argued that health educators and government officials have tried to make changes to help Americans slim down, the growing obesity epidemic is likely evidence that these attempts have failed. On the other hand however, lawsuits already filed and dismissed have instigated immediate responses from Big Food. Despite claims that the changes are solely a response to consumer demand and unrelated to recent litigation, fast-food has surely felt the impact of these potential payouts.<sup>267</sup> For instance, McDonald’s has begun promoting a new “Go Active!” Meal which will include a salad and bottled water as well as stepometer.<sup>268</sup> McDonald’s will also offer alternative ingredients to the children’s Happy Meal such as apple slices and 1% milk.<sup>269</sup> Further, Kraft Foods announced that it is making several changes to encourage a healthier consumer, including “[a] cap on the portion size of Kraft single-serve packages... [an] effort to improve existing products and provide alternative choices... the elimination of all in-school marketing... [and] added

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<sup>265</sup>H.R. Rep. 108-432, at \*4-5 citing Marguerite Higgins, *Advocates Meet to Plan Big Mac Attack on Fat; Legal Assault on Fast-food Industry Will Follow Blueprint Used Against Tobacco Firms*, The Washington Times (June 22, 2003) at A1.

<sup>267</sup>Bechtle, *supra* note 25 (suggesting a similar motivation, “[w]ith all of this publicity, it is reported that some food companies have begun to make changes in their products.”).

<sup>268</sup>Press Release, McDonald’s Inc., *McDonald’s Unveils Bold Balanced Lifestyle Platform*, (Apr. 15, 2004), available at [http://164.109.33.187/usa/news/current/conpr\\_04152004.html](http://164.109.33.187/usa/news/current/conpr_04152004.html). See also Press Release, McDonald’s Inc., *McDonald’s Announces “Step With It!” Expansion* ( June 25, 2003) (describing how stepometers can keep track of steps walked), available at <http://164.109.33.187/corp/news/corppr/pr06252003.html>.

<sup>269</sup>Press Release, McDonald’s Inc., *McDonald’s Unveils Bold Balanced Lifestyle Platform*, (Apr. 15, 2004), available at [http://164.109.33.187/usa/news/current/conpr\\_04152004.html](http://164.109.33.187/usa/news/current/conpr_04152004.html).



nutrition and/or activity-related information on product labels and company websites to assist consumer choices.”<sup>270</sup> Whether or not the recent litigation was a direct factor in initiating these changes, the increased public awareness surrounding the lawsuits and the restaurants’ menu items surely played a role.

The FDA definitely took notice as well, enacting new trans-fat labeling requirements after a public lawsuit against Kraft alleging the danger of the Oreo ingredient.<sup>271</sup> More importantly than the changes themselves, are the resulting impact on consumer diets, considering McDonald’s “proudly serve[s] more than 46 million customers” per day.<sup>272</sup> Those persons are bound to note the changes.

Additionally, it is in Big Food’s interest to make these healthier changes. The threat of legal action and its financial repercussions are more persuasive motivation for industry change.<sup>273</sup> By responding to consumer concerns with institutional change, the industry is helping to insulate themselves from further lawsuits. As a former District Court Judge explained,

[w]ith all of this publicity, it is reported that some food companies have begun to

make changes in their products... Continuing such widespread campaigns, with added publicity, should weaken opportunities for evidence suitable for lawsuits to develop on the supply side, and produce a better-informed consumer on the demand side. These consequences should both reduce the case filings and strengthen the defense of the ‘informed consumer’ in response to claims that are filed.<sup>274</sup>

Further, despite the recent plaintiff failures in the courtroom, obesity lawsuits have not been foreclosed. Plaintiff’s attorneys have gotten some feedback from Judge Sweet on how to better design their cases and allegations and they are not likely to let a major deep pocket like Big Food slide out of their grasp because

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<sup>270</sup>Press Release, Kraft Foods, Kraft Foods Announces Global Initiatives to Help Address Rise In Obesity (July 1, 2003), available at <http://www.kraft.com/newsroom/07012003.html>.

<sup>271</sup>*Personal Responsibility in Food Consumption Act: Hearing on H.R. 339, supra* note 19 (statement of Rep. Sheila Jackson Lee).

<sup>272</sup>*McDonald’s Means Food Quality*, available at <http://www.mcdonalds.com/usa/eat/quality0.html>, (2004).

<sup>273</sup>Press Release, The Physicians Committee for Responsible Medicine, Doctors Urge House to Reject “Cheeseburger Bill,” (Mar. 8, 2004) (explaining that “the elimination [via legislation] of this legal threat [of obesity lawsuits] will remove any further motivation by the food companies to curtail their most harmful and irresponsible behaviors.”), available at <http://www.pcrm.org/news/health040308.html>.

of two or three dismissals.<sup>275</sup> Regardless of the appropriateness of class action lawsuits against corporations, they are powerful motivators to inspiring corporate responsibility and cooperation.<sup>276</sup>

## B. Attempt to Make Big Food the Next Big Tobacco

One theory suggests,

Those intrigued by the recent events in the field of mass tort litigation that concern the food industry should pay special attention to the history and analysis of tobacco litigation. . . The history of tobacco litigation is the future of the fast food industry. Those who dismiss the likelihood of success for fast food plaintiffs have not grasped the lesson of tobacco litigation. As Professor Banzhaf recently stated, “[w]e know from tobacco litigation that initial suits have real difficulties because the public has real problems accepting new ideas and new concepts. . . . It took us many years to get us to the point of educating juries about tobacco, [but] now they are.”<sup>277</sup>

One of the major reasons that the tobacco industry has been so demonized is their intentional and flagrant concealment of the dangers of cigarettes.<sup>278</sup> Cigarette lawsuits helped to reveal information concealed by cigarette companies for so long.<sup>279</sup> American consumers were disgusted to learn that, though Big Tobacco knew of the adverse health effects of smoking its cigarettes, they continued to produce, market, and sell the “cancer sticks.”<sup>280</sup> Current public service announcements, which we see as “the truth” commercials on television are still revealing lies or concealments taken by the tobacco companies.<sup>281</sup> While the claims against McDonald’s have not risen to the level of those against Big Tobacco, plaintiffs have succeeded in showing that McDonald’s has deceived its customers in the past.<sup>282</sup> McDonald’s has settled a lawsuit admitting that it misled customers about the vegetarian quality of its french fries. McDonald’s claimed to use pure vegetable

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<sup>275</sup>Daniel McGinn, *Food Fight*, NEWSWEEK, Feb. 10, 2003 at 11.

<sup>276</sup>John Alan Cohan, *Obesity, Public Policy, and Tort Claims Against Fast-Food Companies*, 12 Widener L. J. 103, 130 (2003)

<sup>278</sup>Bechtle, *supra* note 25.

<sup>279</sup>Morrissey, *supra* note 179 (explaining that discovery revealed or developed many of the key arguments against Big Tobacco, quoting plaintiff’s attorney, John Banzhaf).

<sup>280</sup>Rogers, *supra* note 2, at 873 (citations omitted).

<sup>281</sup>*the Truth*, available at <http://www.thetruth.com/index.cfm?connect=facts> (2004).

<sup>282</sup>Hall, *supra* note 113.

oil in preparing its fries, the oil, in fact, contained traces of beef product.<sup>283</sup> Although allegations of over-processing and concealed flavor ingredients have been made about Big Food, plaintiffs have not provided sufficient evidence of such reprehensible behavior. If ever such proof could be developed, public opinion and legal opinion with regard to McDonald's may change and Big Food will even more closely resemble Big Tobacco. Even if such proof cannot be shown with respect to Big Tobacco, Big Food has similarly known the detrimental effects of its fast-food fare and yet continues to profit off of gluttonous customers. As such, a key remaining difference between the two Big industries is that American consumers are more aware of the detrimental effects of food than they were of cigarette smoking. Although *Fast Food Nation* does describe "the flavor industry is highly secretive."<sup>284</sup> So, it is yet to be determined how well American consumers understand the effects of fast-food processing and where that level of knowledge falls on the slippery slope of evils. Knowing of America's obesity epidemic, how far will Big Food be allowed to push and market their products before Americans are fed up?<sup>285</sup>

Further, Big Tobacco was scorned for their marketing techniques. One of the current "the truth" commercials explains that one tobacco company referred to new smokers as replacements.<sup>286</sup> It seems that Americans are still bothered by these marketing techniques and the way in which the industry dehumanizes its customers. In the *Pelman* plaintiffs' amended complaint they alleged that McDonald's marketing "specifically targets "Heavy Users" and "Super Heavy User" consumers in their advertising campaigns in an effort to have them increase the frequencies of purchases at their stores and consumption of their products."<sup>287</sup> While this can be seen as an effort to further attract interested customers, plaintiffs could go further and argue that

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<sup>283</sup> *Id.*

<sup>284</sup> Schlosser, *supra* note 20, at 120.

<sup>285</sup> Crawford, *supra* note 73, at 1217 ("We take Joe Camel off the billboard because it is marketing bad products to our children, but Ronald McDonald is considered cute.").

<sup>286</sup> *the Truth*, available at <http://www.thetruth.com/index.cfm?connect=facts> (2004).

<sup>287</sup> Plaintiff's Amended Verified Complaint, *Pelman II*, (No. 24809/02) (2003 WL 22052778), available at <http://news.findlaw.com/hdocs/docs/mcdonalds/pelmanmcds21203acmp.pdf>.

McDonald's was attempting to take advantage of an already unhealthy population.<sup>288</sup>

Because it is unlikely that these lawsuits will die out, plaintiffs should focus on developing proof of the most persuasive arguments of over-processing. If such techniques are revealed to exceptionally alter our food from that which we assume we are ingesting, plaintiffs attorneys would surely be able to hold those knowledgeable players in the food industry accountable.

How, will still be difficult to determine. Plaintiffs attorneys would find the most success in seeking equitable damages in the form of reformed production techniques and required consumer education, through labeling and media efforts.<sup>289</sup> Courts and legislators alike prefer consumer education and responsible corporate behavior over limiting consumer freedom. Further, because like lung cancer was, and still is, obesity is a serious health concern for millions of Americans,<sup>290</sup> local regulations of Big Food have already begun to resemble those of Big Tobacco. The same way that government bodies began to regulate tobacco, they have already begun to regulate fatty foods. "For example, Texas and California have moved to ban the sale of junk foods such as candy, caffeinated drinks, cookies, potato chips, and other products of low nutritional value in school, as are many school districts in other states."<sup>291</sup>

Several states increased taxes on cigarettes in order to fund a portion of the health care costs associated with smoking.<sup>292</sup> Similarly, money raised from obesity taxes could also be used to pay for the health care costs associated with obesity. Some have suggested taxing high fat foods to fund health physical education

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<sup>288</sup>Further, if plaintiffs could find scientific evidence of the addictive qualities McDonald's foods, they could argue that McDonald's is targeting its already addicted population.

<sup>289</sup>Crawford, *supra* note 73, at 1180-81 (explaining that "the first wave of tobacco litigation" resulted in "the enactment of the Cigarette Labeling and Advertising Act.") (citations omitted); *see also* Bechtle, *supra* note 25 (stating that "plaintiffs may be more successful in enjoining defendants from engaging in certain practices, such as deceptive advertising and production practices, rather than in recovering dollar damages.").

<sup>290</sup>*See* Bechtle, *supra* note 25.

<sup>291</sup>Cohan, *supra* note 165, *citing* Timothy Egan, *In Bid to Improve Nutrition, Schools Expel Soda and Chips*, N.Y. Times, May 20, 2002 at A1.

<sup>292</sup>Rogers, *supra* note 2, at 875.

programs.<sup>293</sup> Recently, as a result of lawsuits to recover costs of health care associated with tobacco, a Master Settlement Agreement was reached between various tobacco manufacturers and several state governments. The agreement requires the tobacco manufacturers to distribute among the signing states money to reimburse Medicare funds. In return, the states agree to drop their own lawsuits against the manufacturers seeking such damages.<sup>294</sup> Because obesity health care costs are skyrocketing, Big Food could find themselves facing suit to compensate state governments for those costs.<sup>295</sup>

Further regulations on Big Tobacco also require each package of cigarettes to display one of several Surgeon General warnings. Banzhaf and his fellow trial attorneys argue that defendant food corporations have neglected their duty to inform customers of the detrimental health effects of their products. The FDA has already made some nutrition labeling mandatory in an effort to educate consumers.<sup>296</sup> It would behoove interested parties to follow a similar line of regulation with fast-food. Big Food will likely not want to associate negative consequences with the immediate consumption of its food products,<sup>297</sup> but they would be informing consumers of dangers and therefore insulating themselves from most legal action. Representative Sensenbrenner mocked this idea in House hearings,<sup>298</sup> but it could be a better solution to each party's concern. Big Food could eliminate most liability by putting its customers on notice. Plaintiff's attorneys and consumers could be satisfied knowing that Big Food has taken responsibility for producing these unhealthy products. And the FDA and the Surgeon General could be happy to know that an education process has been initiated and may inspire change. Counteradvertising has, in fact, been shown to have a noticeable

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<sup>293</sup>*Id.* at 861, citing Michael F. Jacobson & Kelly D. Brownell, *Small Taxes on Soft Drinks and Snack Foods to Promote Health*, 90 Am. J. Pub. Health 854 (2000); see also *Perspectives*, NEWSWEEK, June 23, 2003 at 27 (noting a local N.Y. politician's proposal to tax things that contribute to obesity, such as junk food, videogames and TV).

<sup>294</sup>Seth M. Wood, Note, *The Master Settlement Agreement As Class Action: An Evaluative Framework For Settlements of Publicly Initiated Litigation*, 89 Va. L. Rev. 597, 597-99 (2003).

<sup>295</sup>Rogers, *supra* note 2, at 861 (suggesting "that Big Food litigation is a feasible way for states to recoup incurred Medicaid expenses associated with treating overweight and obese people.").

<sup>296</sup>See N.L.E.A. discussed *infra* Part III(B)(1)(b).

<sup>297</sup>Although people may continue to smoke regardless of warnings because they have already developed a nicotine addiction (assuming no addiction is derived from fast-food), there are still others who began smoking and continue to do so after the warning labels were required on cigarette packs.

<sup>298</sup>*Personal Responsibility in Food Consumption Act: Hearing on H.R. 339, supra* note 19.

impact upon consumers.<sup>299</sup> Whether Big Food likes the idea or not may be irrelevant because some believe that it is “only a matter of time before McDonald’s and other fast-food chains are going to be forced into having health warnings to inform consumers about the dangers of eating too much fat, salt, and sugar.”<sup>300</sup>

### C. Popular Attitudes on Obesity

Numerous theories exist as to how to solve our nation’s obesity epidemic. Researchers at the Center for Disease Control and Prevention suggest assisting parents to educate their children on how to make healthy food choices, and encouraging school programs to restructure diets and change sedentary lifestyles.<sup>301</sup> Wal-Mart has urged food manufacturers to provide healthier snacks to fill their shelves.<sup>302</sup> Consultants are recommending that employers offer nutritional alternatives in their cafeterias and to clearly post nutritional information.<sup>303</sup>

Yet, most still disregard the problem as one of laziness. Thus, serious change may first require a change in American attitude. Unfortunately, most of the appropriately sized (as in, not overweight) Americans are not only laughing at obesity lawsuits, they are laughing at obese persons as well.<sup>304</sup> America is fixated on weight and popular magazines, television, and movies promote an overly-thin image as desirable.<sup>305</sup> The

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<sup>299</sup>*The Elephant in the Room*, *supra* note 30, at 1182-82.

<sup>300</sup>Cohan, *supra* n. 243.

<sup>301</sup>See Daniel M. Fox, Mary Kramer & Marion Standish, *From Public Health to Population Health: How Law Can Redefine the Playing Field*, 31 J.L. Med. & Ethics 21, 28 (2003). See also Hill, *supra* note 16, available at <http://www.cnn.com/2002/HEALTH/diet.fitness/10/08/obesity.rise/index.html>.

<sup>302</sup>Peg Tyre & Isolde Raftery, *Just Saying No to Junk; Kraft Announces Plans to Slim Down its Snack Foods*, Newsweek, July 14, 2003 at 44 (quoting Romitha Mally, Goldman Sachs, “You know when Wal-Mart picks up the cry for healthier foods, fat has become a solidly Middle American issue.”).

<sup>303</sup>Maureen Minehan, *Is Your Food Making Employees Sick?*, 20 No. 6 Emp. Alert 3 (2003) (recommending educating employees as to healthy food choices, “While it’s true that no one is forcing people to make poor food choices, it is also true that many people do not realize just how harmful their food choices may be.”).

<sup>304</sup>Rogers, *supra* note 2, at 869 (describing the social costs of obesity).

<sup>305</sup>Milena D. O’Hara, *“Please Weight to Be Seated”*: *Recognizing Obesity As a Disability to Prevent Discrimination in Public Accommodations*, 17 Whittier L. Rev. 895, 900 (1996).

overweight people who do not fit that desirable model are stigmatized as lazy and irresponsible.<sup>306</sup> The regulations imposed upon other industries will continue to seem inappropriate in the context of fatty food until we recognize that food choices are more than an uninfluenced personal decision.<sup>307</sup> In truth, the impact excessive advertising has on our personal choices is overwhelmingly strong.<sup>308</sup>

While most still laugh at obesity lawsuits, even those laughing can see the similarities between Big Food and Big Tobacco.<sup>309</sup> If plaintiff's attorneys can successfully carve obesity lawsuits to resemble the decades of tobacco litigation our nation has faced, the obesity litigation and its subsequent reform could become a serious vehicle for improving American health.

Eric Schlosser encourages readers of *Fast Food Nation* to change their habits, to hold fast-food accountable and to, at the very least, to refrain from contributing to Big Food's profits, and at the very least, to think about all the facets of fast-food.<sup>310</sup> If nothing else, we can hope that obesity lawsuits, obesity litigation legislation, and all the media attention surrounding those two topics have made America think about what they consume.

#### **D. Final Commentary**

Perhaps the story of obesity lawsuits and legislation get more public attention because every American feels touched and every American has an opinion on this and most likely, because Americans understand this legal picture more than most others. Big Food is counting on that theory. After all, their repeated defense is that

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<sup>306</sup>*Id.* at 902.

<sup>307</sup>*The Elephant in the Room*, *supra* note 30, at 1161-62 (addressing "the distortive influence of private-sector manipulation.").

<sup>308</sup>*Id.* at 1167-69. *See also*, Karen Springen, *Taking a Bite Out of Hershey's*, *NEWSEK*, Nov. 4, 2002 at 12.

<sup>309</sup>Bill Haltom, *Caesar Barber v. Ronald McDonald: A Big Fat Lawsuit*, 38-SEP *Tenn. B. J.* 38, 40 (2002).

<sup>310</sup>Schlosser, *supra* note 277 at 270.

consumers know what is unhealthy about a Big Mac and that therefore McDonald's is not irresponsible in meeting consumer demand. Another reason, however, that this topic may be receiving so much popular press coverage is because the ideas involved in the obesity lawsuits and legislation were suggested by a popular publication as early as 2000.

In August of 2000, *The Onion*, a popular online news magazine with amusing pseudo-news stories, published an article entitled, *Hershey's Ordered to Pay Obese Americans \$135 Billion*.<sup>311</sup> The article reported that a chocolate-consuming class of plaintiffs held Hershey's responsible for "knowingly and willfully marketing rich, fatty candy bars containing chocolate and other ingredients of negligible nutritional value."<sup>312</sup> Throughout the article, comparisons are made between chocolate, alcohol and tobacco. For instance, one plaintiff referred to his wife's battle with "chocolism" and explained that in adulthood she switched to "Hershey's Special Dark, a stronger unfiltered form of the product."<sup>313</sup> The comparisons between chocolate, alcohol and tobacco continued when the article described past courtroom decisions. The article stated that previous judges

ordered chocolate manufacturers to fund \$27 billion in education programs to

prevent youth chocolate consumption. . . prohibited chocolate advertising on TV and billboards and banned the use of cartoon imagery in advertising. . . [and required] that a warning label must be placed on all chocolate products reading, 'The Surgeon General Has Determined That Eating Chocolate May Lead To Being Really Fat.'<sup>314</sup>

Furthermore, the article informed readers that Hershey defended itself with claims that consumers know the risk.<sup>315</sup> Hershey's argued that customers know what detrimental

effects attach to eating copious amounts of food so that they should not be held accountable for delivering

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<sup>311</sup> *Hershey's Ordered to Pay Obese Americans \$135 Billion*, THE ONION, Aug. 2, 2000, available at <http://www.theonion.com>. Ironically, the Onion very recently published another article mocking America's fixation with weight and diet. The article describes a Senatorial candidate's success utilizing a low-carb platform. *Senatorial Candidate Introduces New Low-Carb Platform*, The Onion, Apr. 21, 2004, available at <http://www.theonion.com/news/index.php?issue=4016&n=1>.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>315</sup> *Id.*



a good and desirable product. Hershey's, convinced of this theory, announced a plan to appeal the decision.

The amusing story concluded with an ironic pun from a mock plaintiff stating that, “[f]or over a century, Hershey's has lived off the fat of the land, . . . [n]ow it's time to pay us back.”<sup>316</sup>

One other comment in the article may be all too true in the real world lawsuits today; the article observes that, “[w]hatever the outcome of the Hershey's appeal, the chocolate industry has irrevocably changed as a result of [the] verdict.”<sup>317</sup> Similarly, obesity lawsuits have resulted in a serious and permanent change in the way consumers and industry members alike view Big Food.

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<sup>316</sup> *Id.*

<sup>317</sup> *Id.*