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# The Assault on Bad Food: Tobacco-Style Litigation as an Element of the Comprehensive Scheme to Fight Obesity

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# The Assault on Bad Food: Tobacco-Style Litigation as an Element of the Comprehensive Scheme to Fight Obesity

## **Abstract**

This article provides a summary of the obesity epidemic - the economic costs and importantly, some causes. The need for a comprehensive scheme will be explained by examining the shortfalls of current regulatory mechanisms. Next, this article will explain the three waves of tobacco litigation, the strategy involved in each, and why the third wave left an impact. Then, the current status of food litigation will be explained. Next, applying the tobacco model to big food, this article will make it clear that discovery is crucial in several respects. Lastly, an explicit call to action and a battle plan will be explained.

## **Keywords**

Obesity--Law and legislation, Tobacco-Law and legislation

## **Disciplines**

Health Law and Policy

# The Assault On Bad Food: Tobacco-Style Litigation As An Element of the Comprehensive Scheme to Fight Obesity

JADA J. FEHN\*

## I. NO MORE NEEDLES

When Vanessa Castillo was just 14 years old, she was diagnosed with Type 2 diabetes.<sup>1</sup> Like low-income neighborhoods all over the country, the uptown neighborhood in New York where Castillo lives is disproportionately affected by the disease.<sup>2</sup> One of the major challenges facing those like Castillo is access to healthy food.<sup>3</sup> Food deserts, urban core areas with limited food access, are characterized by higher levels of racial segregation and greater income inequality.<sup>4</sup> The main sources of food in these neighborhoods are convenience stores and fast food outlets, providing almost no options that are nutritious and affordable.<sup>5</sup> “You just take whatever is cheaper,” Castillo said of her family’s shopping habits.<sup>6</sup> At 22, Castillo still struggles with her disease; she was recently prescribed insulin and faces the frightening prospect of regular injections.<sup>7</sup>

## II. INTRODUCTION – LITIGATION IN COMBAT

The prevalence of Type 2 diabetes and other obesity-related diseases in this country is alarming. No one can deny that weight gain happens over time when

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\* Candidate for Juris Doctor, Hamline University School of Law, May 2012. I would like to thank my husband, Daniel for his love and support and Micah Ludeke for pushing me. I would also like to recognize, my colleague, Elizabeth Stoneburg for being the best girl you could have by your side for this process.

<sup>1</sup> Medina Roshan, *Diabetes Rate Remains High Uptown*, THE UPTOWNER (Jan. 8, 2011), <http://theuptowner.org/2011/01/08/diabetes-rate-remains-high-uptown/> (profiling Castillo to demonstrate the situation in her neighborhood. In New York, 10.7 percent of residents in Harlem, East Harlem, Washington Heights and Inwood have diabetes, compared to the city’s average of 9.7 percent, according to the city health department).

<sup>2</sup> *Id.*; ECONOMIC RESEARCH SERVICE OF THE USDA, ACCESS TO AFFORDABLE AND NUTRITIOUS FOOD: MEASURING AND UNDERSTANDING FOOD DESERTS AND THEIR CONSEQUENCES iii (2009), available at <http://www.ers.usda.gov/Publications/AP/AP036/AP036fm.pdf>, (“Area-based measures of access show that 23.5 million people live in low-income areas (areas where more than 40 percent of the population has income at or below 200 percent of Federal poverty thresholds) that are more than 1 mile from a supermarket or large grocery store. However, not all of these 23.5 million people have low income. If estimates are restricted to consider only low-income people in low-income areas, then 11.5 million people, or 4.1 percent of the total U.S. population, live in low-income areas more than 1 mile from a supermarket.”).

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

<sup>4</sup> SARAH TREUHAFT & ALLISON KARPYN, THE GROCERY GAP: WHO HAS ACCESS TO HEALTHY FOOD AND WHY IT MATTERS, 5 (2010)(demonstrating that low-income communities of color suffer the most from the disparity). This article does not extensively address the issues of racial and economic inequality that permeate the health and social justice issues surrounding food, but health equity is relevant and important to the well-being of individuals and communities. See THE AMERICAN ACADEMY OF PEDIATRICS, POLICY STATEMENT – HEALTH EQUITY AND CHILDREN’S RIGHTS (2010), available at <http://pediatrics.aappublications.org/content/125/4/838.full>.

<sup>5</sup> Roshan, *supra* note 1.

<sup>6</sup> *Id.*; But see ERIC SCHLOSSER, FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL 9 (2002)(writing about concerns of how fast food affects consumers, workers and children; “But the value meals, two-for-one deals, and free refills of soda give a distorted sense of how much fast food actually costs. The real price never appears on the menu.”)

<sup>7</sup> *Id.*

you take in more calories than you use,<sup>8</sup> and eating a diet full of highly processed, high-calorie and high-fat foods is a major cause of the crisis.<sup>9</sup> In contrast, access to healthy food plays a role in promoting healthy local economies, healthy neighborhoods, and healthy people.<sup>10</sup> To prevent another child from facing insulin injections, we must halt the onslaught of mass-produced junk food into the American diet.

Obesity in the U.S. has reached epidemic proportions.<sup>11</sup> A dilemma of this sort must be attacked with a comprehensive, multi-faceted scheme.<sup>12</sup> Litigation against the companies providing dangerous food has been called trivial, but allowing market forces to regulate has proven ineffective.<sup>13</sup> The history of tobacco litigation has revealed that industry is willing to ignore dangers, act solely in the interest of profit, and completely disregard public health.<sup>14</sup> The notion that all consumers have enough information to make an autonomous choice and focus only on health when purchasing food borders on unrealistic.<sup>15</sup> Legislatures, that will ignore the huge lobbying dollars spent by the food industry,<sup>16</sup> and enact laws with only the public health of the citizenry in mind, fall in the same category of naiveté.<sup>17</sup> Corporations are obligated to shareholders, who are concerned universally with profits.<sup>18</sup> To get the attention of food industry, it is necessary to hit them where they notice - in the

<sup>8</sup> NATIONAL INSTITUTE OF HEALTH, DISEASES AND CONDITIONS INDEX – WHAT CAUSES OVERWEIGHT AND OBESITY?, [http://www.nhlbi.nih.gov/health/dci/Diseases/obe/obe\\_causes.html](http://www.nhlbi.nih.gov/health/dci/Diseases/obe/obe_causes.html).

<sup>9</sup> *Eat Less Processed Food, Say Experts*, BBC NEWS (Mar. 3, 2003, 11:25 AM) <http://news.bbc.co.uk/2/hi/health/2814253.stm>.

<sup>10</sup> Gap, *supra* note 4 at 7.

<sup>11</sup> CDC, U.S. OBESITY TRENDS: TRENDS BY STATE 1985-2009, <http://www.cdc.gov/obesity/data/trends.html>.

<sup>12</sup> John Cohan, *Obesity, Public Policy and Tort Claims Against Fast-food Companies*, 12 WIDENER L.J. 103, 132 (2003) (“A spectrum of tools must be employed if a society is to overcome a pervasive health problem such as obesity, which is associated with deeply engrained bad habits of consumption...”); *Contra* Richard Ausness, *Tell Me What You Eat, and I Will Tell You Who to Sue: Big Problems Ahead for “Big Food”*, 39 GA. L. REV. 839, 885 (2005) (stating that courts are not well equipped to deal with public health issues.)

<sup>13</sup> Forrest Andrews, *Small Bites: Obesity Lawsuits Prepare to Take On the Fast Food Industry*, 15 ALB. L.J. SCI. & TECH. 153, 154 (2004).

<sup>14</sup> See STANTON A. GLANTZ ET AL., *THE CIGARETTE PAPERS* (1996).

<sup>15</sup> Josie Raymond, *Surgeon General Says Obesity A Result of Poor Choices*, CHANGE.ORG HEALTH BLOG (Feb. 3, 2010 1:17 AM), [http://health.change.org/blog/view/surgeon\\_general\\_says\\_obesity\\_a\\_result\\_of\\_poor\\_choices](http://health.change.org/blog/view/surgeon_general_says_obesity_a_result_of_poor_choices), (“While gracefully noting that some people face obstacles in getting and preparing healthy food, [Regina Benjamin] says that being overweight is a matter of making poor choices, and that getting healthy can be done by making better ones.”) HHS, OFFICE OF THE SURGEON GENERAL, *THE SURGEON GENERAL’S VISION FOR A HEALTHY AND FIT NATION 1* (2010), available at <http://www.ncbi.nlm.nih.gov/books/NBK44660/pdf/TOC.pdf> (“Increased consumer knowledge and awareness about healthy nutrition and physical activity will foster a growing demand for healthy food products and exercise options, dramatically influencing marketing trends.” Although this statement is mostly accurate, it seems unlikely that enough resources would be allocated to increasing consumer knowledge to dramatically influence marketing by the food industry).

<sup>16</sup> Jonathan Goldman, *Take that Tobacco Settlement and Super-size It!: The Deep-frying of the Fast Food Industry?*, 13 TEP. POL. & CIV. RTS. L. REV. 113, 127-128 (2003) (“The political lobbies of the tobacco and restaurant industries are so powerful and influential with our elected officials that it has become politically difficult, if not impossible, for the legislative and executive branches of government to regulate them in a serious and effective manner.” Also, noting that McDonald’s gave \$479,537 to politicians in the 2000 election cycle).

<sup>17</sup> *Contra* Sarah Roller & Raqiyyah Pippins, *Marketing Nutrition & Health-Related Benefits of Food & Beverage Products: Enforcement, Litigation & Liability Issues*, 65 FOOD & DRUG L.J. 447 (2010); Joseph Price & Rachel Bond, *Litigation as a Tool in Food Advertising: Consumer Protection Statutes*, 39 LOYOLA L.A. L. REV. 277 (2006).

<sup>18</sup> ‘Big Food’ Gets the Obesity Message, N.Y. TIMES, July 10, 2003, at A22 (‘An industry that has prospered by selling high-fat, high-calorie or sugary foods in ever larger quantities will probably be loathe to deviate too much from a proven path to profits’).

wallet - by way of legal damage awards.<sup>19</sup> The battle against bad food needs to be fought on every possible front and the courtroom should be one theater of combat.<sup>20</sup>

Many commentators to date have pointed to fast food as the next target for personal injury litigation.<sup>21</sup> This article suggests two flaws with that approach. First, the net to catch defendants should be cast much wider.<sup>22</sup> Fast food is a big culprit, but most meals are still eaten at home,<sup>23</sup> but “instead of buying potatoes in the produce section, we buy potato au gratin in a package.”<sup>24</sup> Suits should be filed against the manufactures of soda, snacks and sugary cereal, along with fast food. Additionally, while fast food companies can defend claims with an assumption of risk defense, snack food defendants will face a challenge proving that it is within the “reasonable contemplation of the consuming public” that processed, packaged food is unhealthy.

Second, personal injury suits serve a purpose, but taxpayer suits will be the real success in making the food industry pay for the harmful products it has shoveled into the marketplace.<sup>25</sup> This article is a call to action.<sup>26</sup> As evidence of fraudulent and deceptive industry practice is brought to light, state attorneys general have a responsibility to take the same course of action as tobacco,<sup>27</sup> by filing fraud suits to recoup state funds spent on the negative health effects of the detrimental food. The legal theories needed to force major societal change have finally coalesced.<sup>28</sup> The American consumer deserves protection from the manipulative, corporate food giants and one facet of the battle can be fought in the judiciary.

First, this article will provide a summary of the obesity epidemic - the economic costs and importantly, some causes. Second, the need for a comprehensive scheme will be explained by examining the shortfalls of current regulatory mechanisms. Next, this article will explain the three waves of tobacco litigation, the strategy involved in each, and why the third wave left an impact. Then, the current status of food litigation will be explained. Next, applying the tobacco model to big food, this article will make it clear that discovery is crucial in several respects. Lastly, an explicit call to action and a battle plan will be explained.

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<sup>19</sup> See Stephen P. Teret, *Litigating for the Public Health*, 76 AMERICAN J. OF PUBLIC HEALTH 1027, 1029 (1986) (“For those products which have been able to avoid meaningful regulation, largely due to the political strength of lobbying groups, litigation represents the only de facto form of safety regulation”).

<sup>20</sup> Coby Warren Logan, *Medicaid Third-Party Liability and Claims for Restitution: Defining the Proper Role for the Tort System in Regulating the Food Industry*, 1 J. FOOD L. & POL’Y 433, 437 (“...tort liability can complement legislative and administrative government regulation of the food industry, providing sellers and manufacturers of food with an incentive to prevent consumers from over-consumption and becoming obese.”)

<sup>21</sup> See Cohan, *supra* note 12; Goldman, *supra* note 16; Courtney, *infra* note 48.

<sup>22</sup> Contra Logan, *supra* note 20 at 435, which does not identify particular defendants except to say “the main criteria for selecting the proper defendants should be to target companies that prioritize the generation of profits first and foremost without regard for the consequences of over-consumption of their products and do not take an active role in preventing obesity among America’s population.” This article completely endorses that criteria as appropriate and is also not willing to define “Big Food” in extensive detail, but it is important that defendants also include the producers of highly-processed, packaged food with excessive sugar, calories and sodium.

<sup>23</sup> Goldman, *supra* note 16 at 134.

<sup>24</sup> Kessler’s book at 91.

<sup>25</sup> *Supra* Section VII and VIII.

<sup>26</sup> See Logan, *supra* note 20 at 458, for the idea that tort liability should be used in this manner but not explicitly calling the attorneys general to act.

<sup>27</sup> See Margaret A Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Governments’ Tobacco Litigation*, 33 CONN. L. REV. 1143 (2001) for a theory of the unconstitutionality of the tobacco settlement.

<sup>28</sup> Ausness, *supra* note 12 at 842 (quoting John Banzhaf, law professor and social reformer, “as was the case with tobacco, it takes time for legal theories to coalesce in a way that forces major societal change”).

### III. THE ENEMY

#### *Obesity Epidemic and Costs*

Obesity is among the most pressing health challenges facing society today.<sup>29</sup> Two-thirds of adults are overweight or obese.<sup>30</sup> The ramifications of all this extra weight are extensive. "Obese adults are at increased risk for many serious health conditions, including high blood pressure, high cholesterol, type 2 diabetes and its complications, coronary heart disease, stroke, gallbladder disease, osteoarthritis, sleep apnea, and respiratory problems, as well as endometrial, breast, prostate and colon cancers."<sup>31</sup> The epidemic can have a huge toll on health; the number of Americans with diabetes has tripled since 1980.<sup>32</sup> Lowered quality of life is a big concern but ultimately, obesity-related disease leads to greater fatality. Obesity plays a part in an estimated 112,000 preventable deaths annually.<sup>33</sup> Astoundingly, the costs do not stop at physical health.

There are staggering economic costs both on the system and on individuals.<sup>34</sup> In 2008 dollars, the medical costs of obesity totaled about \$147 billion.<sup>35</sup> A 2003 study of data from the late 1990's revealed that obesity-related costs were at least \$10.7 billion of the total expenses of Medicaid.<sup>36</sup> An increase of medical spending of \$271 per overweight adult and an \$864 increase for obesity can be attributed to extra weight.<sup>37</sup> On a state level, "obesity-attributable Medicaid expenditures range from \$23 million (Wyoming) to \$3.5 billion (New York)."<sup>38</sup> Taxpayers bear the burden of the cost.

#### *Causes*

"As a society, we have moved well beyond the era when our dietary focus was on ensuring caloric sufficiency to meet basic metabolic needs."<sup>39</sup> The pendulum of diet has swung too far to the other extreme – obesity.<sup>40</sup> "People tend to think of overweight and obesity as strictly a personal matter, but there is much that com-

<sup>29</sup> Surgeon General, *infra* note 40 (quoting HHS Secretary Tommy G. Thompson, "Overweight and obesity are among the most pressing new health challenges we face today").

<sup>30</sup> Surgeon General's Vision, *supra* note 15 at 1. (citing K.M. Flegal, et al., *Prevalence and trends in obesity among US adults, 1999-2008*, 303(3) JAMA. 235 (2010).

<sup>31</sup> *Id.* at 2 (citing NIH, CLINICAL GUIDELINES ON THE IDENTIFICATION, EVALUATION, AND TREATMENT OF OVERWEIGHT AND OBESITY IN ADULTS--THE EVIDENCE REPORT (1998)).

<sup>32</sup> *Id.* at 4. (citing CDC, DIABETES DATA & TRENDS. NUMBER (IN MILLIONS) OF CIVILIAN/NONINSTITUTIONALIZED PERSONS WITH DIAGNOSED DIABETES, UNITED STATES, 1980-2006, available at <http://www.cdc.gov/diabetes/statistics/prev/national/figpersons.htm>.)

<sup>33</sup> *Id.* (citing K.M Flegal, et al., *Excess deaths associated with underweight, overweight, and obesity*, 293(15) JAMA 1861 (2005).

<sup>34</sup> Cohan, *supra* note 12 at 106.

<sup>35</sup> CDC Vital Signs, Adult Obesity: Obesity Rises Among Adults (last visited Feb. 21, 2012) <http://www.cdc.gov/vitalsigns/AdultObesity/index.html>.

<sup>36</sup> ERIC A. FINKELSTEIN, ET AL., NATIONAL MEDICAL SPENDING ATTRIBUTABLE TO OVERWEIGHT AND OBESITY: HOW MUCH, AND WHO'S PAYING?, W3 HEALTH AFFAIRS 219 (2003), available at <http://nepc.colorado.edu/files/CERU-0305-71-OWI.pdf>.

<sup>37</sup> *Id.*

<sup>38</sup> CDC, OVERWEIGHT AND OBESITY: ECONOMIC CONSEQUENCES, (last visited Feb, 12, 2011), <http://www.cdc.gov/obesity/causes/economics.html> (citing Finkelstein, et al., *State-level estimates of annual medical expenditures attributable to obesity*. 12(1) OBESITY RESEARCH 18 (2004).

<sup>39</sup> IOM Committee on Food Marketing and the Diets of Children and Youth, Food Marketing to Children and Youth: Threat or Opportunity? 1 (J. Michael McGinnis, et al. eds., 2006)

<sup>40</sup> *Id.*

munities can and should do to address these problems.”<sup>41</sup> To prevent this epidemic from affecting the next generation, public health professionals have examined the changes that have occurred in society over the last generation leading to the changes in weight.<sup>42</sup> They point to a reduction in physical education classes and after-school athletic programs, the proliferation of sodas and snack foods in public schools, the increase in fast-food outlets across the U.S., the trend toward super-sizing food portions in restaurants, and the growth in highly processed high-calorie and high-fat grocery products.<sup>43</sup> “Parents, communities, the government, public health sector, health care systems, and private enterprise all face significant challenges to create an environment for our children and youth that turns the course and enhances their prospects for healthy lives.”<sup>44</sup>

The former Commissioner of the FDA calls the struggle not to overeat “one of the most consequential battles we face to protect our health.”<sup>45</sup> When we eat sugar, fat and salt layered in processed foods natural opioid molecules are activated causing sensations of pleasure that are reinforced in the reward center of the brain.<sup>46</sup> “[T]he . . . industry has spent a great deal of time learning the most effective ways to incorporate the core ingredients of sugar, fat, and salt into its products.”<sup>47</sup> Chemical flavor is another additive relied on heavily by the food industry.<sup>48</sup> “Refining foods through processing ensures that you get a lot of calories without chewing.”<sup>49</sup> Because there is less fiber, consumers do not experience a full feeling and because there is less of the expensive ingredients like meat, amongst all the breading, sauce, and injected water, the costs are low to the industry.<sup>50</sup> “Food product developers seem perfectly willing to exploit . . . lack of consumer awareness.”<sup>51</sup>

“Food marketing to children has also been singled out as playing a key role in this national crisis.”<sup>52</sup> Children are effective targets because they are susceptible to the messages of advertising and eating habits developed at a young age while impressionable are likely retained through life.<sup>53</sup> The overwhelming majority of food and beverage advertising targeted to the young is for products of poor nutritional quality.<sup>54</sup> For example, cereals marketed directly to children have 85% more sugar, 65% less fiber, and 60% more sodium than cereals marketed to adults.<sup>55</sup> “Cookies

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<sup>41</sup> News Release, Office of the Surgeon General, Overweight and Obesity Threaten U.S. Health Gains, (Dec. 13, 2001), available at [http://www.surgeongeneral.gov/news/pressreleases/pr\\_obesity.htm](http://www.surgeongeneral.gov/news/pressreleases/pr_obesity.htm). (quoting Surgeon General David Satcher).

<sup>42</sup> PUBLIC HEALTH LAW CENTER, FOOD MARKETING TO KIDS, <http://www.publichealthlawcenter.org/topics/healthy-eating/food-marketing-kids> (last visited Feb 12, 2011).

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

<sup>44</sup> IOM, *supra* note 38 at 2.

<sup>45</sup> DAVID A. KESSLER, M.D., THE END OF OVEREATING: TAKING CONTROL OF THE INSATIABLE AMERICAN APPETITE ix (2009).

<sup>46</sup> *Id.* at 5-37.

<sup>47</sup> *Id.* at 88.

<sup>48</sup> *Id.* at 116.

<sup>49</sup> *Id.* at 95.

<sup>50</sup> *See Id.*

<sup>51</sup> KESSLER, *supra* note 45, at 102.

<sup>52</sup> IOM, *supra* note 38.; *Also see* Sclosser, *supra* note 6 at 42-46 (explaining that marketing to children exploded in the 1980's. “The growth in children’s advertising has been driven by efforts to increase not just current, but also future, consumption.” Market research has found that children recognize brand logos before recognizing their own names. Almost all American 6-year-olds in 1991 could identify Joe Camel, and in a 1999 ad study, children identified a Budweiser commercial as their favorite. “The aim of most children’s advertising is straightforward: get kids to nag their parents and nag them well.”).

<sup>53</sup> Goldman, *supra* note 16 at 119.

<sup>54</sup> Public Health Law Center, *supra* note 41.

<sup>55</sup> Kids Spoon-fed Marketing, YALE BULLETIN (OCT. 26, 2009), available at <http://opac.yale.edu/news/article.aspx?id=7013>.

and cakes, pizza, and soda/energy/sports drinks are the top sources of calories in the diets of children 2 through 18.”<sup>56</sup> When proposing nutritional principles for food products that are heavily marketed to children, the Interagency Working Group on Food Marketed to Children noted that a shift in the marketing can have a significant impact on public health.<sup>57</sup>

#### IV. OTHER METHODS OF REGULATION ARE NOT DOING ENOUGH

The scheme used to combat obesity in this country must be comprehensive. Agency education and prevention programs, taxes and regulations on advertising are necessary,<sup>58</sup> but no one of these mechanisms alone is enough, and litigation is a crucial piece of the overall approach.

##### *The Market as a Regulator*

The economic theory, advanced by some commentators, posits that individuals should have autonomy to exercise preference and market forces should be allowed to regulate the purchase of products without government intervention.<sup>59</sup> This argument fails in this instance, because the industry is manipulating consumers and taking advantage of the fact that consumers do not know why they like particular foods.<sup>60</sup> “The food industry has done a masterful job exploiting...uncertainty.”<sup>61</sup> Without economic incentive, corporations are unlikely to act in the best interest of public health. Tort liability for the health consequences of high-calorie processed food, particularly on a large scale, could provide motivation for the food industry to stop exploiting consumers.<sup>62</sup>

##### *Congressional and Agency Deeds*

Action, by the legislative and executive branches, is an important mechanism to fight the battle against obesity, but cannot stand alone. “The traditional way to develop public policy is through legislation.”<sup>63</sup> Legislation and regulation do

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<sup>56</sup> *Food for Thought: Interagency Working Group Proposal on Food Marketing to Children*, 1 (2011) <http://www.ftc.gov/os/2011/04/110428foodmarketfactsheet.pdf>.

<sup>57</sup> *Id.* at 1-2.

<sup>58</sup> *Contra* Brooke Courtney, *Is Obesity Really the Next Tobacco? Lessons Learned from Tobacco for Obesity Litigation*, 15 *ANNALS HEALTH L.* 61, 94 (2006) (citing Robert L. Rabin, *The Third Wave of Tobacco Tort Litigation in REGULATING TOBACCO* (Robert L. Rabin et al. eds., 2001)).

<sup>59</sup> Michael I. Krauss, *Loosening the FDA's Drug Certification Monopoly: Implications for Tort*, 4 *GEO. MASON L. REV.* 457, 459 (1996). Noel Campbell, *Exploring Free Market Certification of Medical Devices, in AMERICAN HEALTH CARE: GOVERNMENT, MARKET PROCESSES AND THE PUBLIC INTEREST*, 313-44 (R. D. Feldman ed., 2000). (“There is an alternative to reform: abandon the current regulatory process and embrace the free market that has worked so well for so long in other fields. Free-market third-party certification promises safe and effective devices—quickly and efficiently—and gives consumers the freedom to choose the amount of risk that best suits them. The market provides consumers with the full remedies and protections of our legal system, and it frees businesses from the crippling costs of undue regulation.”)

<sup>60</sup> Ausness, *supra* note 12 at 888-889 (advocating for autonomy only absent fraud); Cohan, *supra* note 12 at 116-119 (explaining how addiction could apply to fast food). Even if we are unwilling as a society to accept food as addictive, it is uncontested that food marketing, advertising and design uses positive associations to override the risk assessments that consumers would normally make about the product.

<sup>61</sup> KESSLER, *supra* note 45, at 101.

<sup>62</sup> Ausness, *supra* note 12 at 884.

<sup>63</sup> *Id.* at 885.



provide forums for multiple viewpoints, including the input of experts, and studies commissioned on the issue.<sup>64</sup> The parties to be regulated prefer the clear legislative directives that allow them to avoid penalty prospectively,<sup>65</sup> but the health care costs from obesity have already been incurred. Bans on restaurant trans fat in many municipalities and California demonstrate that progress can be made.<sup>66</sup> Yet, the rare legislation that overcomes lobbying dollars, best serves to prevent future harms; litigation is necessary to redress the past.<sup>67</sup>

Legislatures have failed to make the changes to require socially responsible behavior from the food companies,<sup>68</sup> because, among other things, senators and representatives are being influenced by more than concern for constituents' well being. Cheeseburger bills, considered by Congress and numerous state legislatures, attempt to limit tort liability by restaurants and fast food chains by setting caps on recovery by obese plaintiffs.<sup>69</sup> The \$8.5 million dollars that the restaurant and bar industry spent on politicians in the 2000 election cycle was apparently quite effective.<sup>70</sup> In just the second quarter of 2010, Unilever, which makes Skippy peanut butter and Ben & Jerry's ice cream, spent \$140,000 lobbying the Congress and administrative agencies on issues, including sugar policy.<sup>71</sup> Coca-Cola Co. spent almost \$2.1 million lobbying Congress, the Department of Commerce, the Department of State in the same quarter on obesity prevention and labels on vending machine food products, among other things.<sup>72</sup> "The political lobbies of the tobacco and restaurant industries are so powerful and influential with our elected officials that it has become politically difficult, if not impossible, for the legislative and executive branches of government to regulate them in a serious and effective manner."<sup>73</sup>

### *Consumer Education*

Having knowledge about nutrition and ability through purchasing power fosters healthier decisions about food consumption.<sup>74</sup> Consumer education is a very important element of the scheme to fight obesity, but alone it is not enough, particularly for young people. Children cannot be expected to be educated to make healthy, rational food choices, yet they are bombarded with advertising messages about food products.<sup>75</sup> Each of the available routes for regulating consumption of highly processed food to fight obesity has its weaknesses and therefore, all of the strategies, including litigation must be utilized.

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Cal. Health & Safety Code § 114377, Alison Peck, *Revisiting the Original "Tea Party": The Historical Roots of Regulating Food Consumption in America*, 80 UMKC L. Rev. 1, 6 (2011).

<sup>67</sup> *Contra* Logan, *supra* note 20 at 437 ("The legislature is the proper branch of our government to determine the legislation and regulations needed to regulate the food industry...")

<sup>68</sup> *Id.* at 127.

<sup>69</sup> Many have been enacted into law. NATIONAL CONFERENCE OF STATE LEGISLATURES, FOOD VENDOR LAWSUIT IMMUNITY (2005), available at <http://www.ncsl.org/default.aspx?tabid=13869>.

<sup>70</sup> Goldman, *supra*, note 16 at 128.

<sup>71</sup> *Food & Alcohol Industries' Lobbying Dollars: Who's Spending, And Why*, THE HUFFINGTON POST (July 27, 2010 03:45 PM), [http://www.huffingtonpost.com/2010/07/27/food-industry-lobbying-do\\_n\\_659964.html#sl18696&title=undefined](http://www.huffingtonpost.com/2010/07/27/food-industry-lobbying-do_n_659964.html#sl18696&title=undefined).

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

<sup>73</sup> *Id.*

<sup>74</sup> Cohan, *supra* note 12 at 103-104.

<sup>75</sup> IOM, *supra* note 38 at 2.

## V. TOBACCO LITIGATION – ADVANCE RECONNAISSANCE

*Three Waves*

A generation before the obesity crisis, tobacco was the significant national health issue with a personal choice component at the center of the public consciousness.<sup>76</sup> Starting in the 1950's, scientists began reporting a link between cancer and cigarette smoking.<sup>77</sup> Reader's Digest delivered the message to the general public in an article titled "Cancer by the Carton."<sup>78</sup> The tobacco industry punched into crisis mode – holding secret meetings of high level executives and forming a joint committee for public relations.<sup>79</sup> Tort litigation for defective products and deceptive advertising was just a step behind the messages in popular media. The first tobacco lawsuit was filed in 1954,<sup>80</sup> beginning the first wave of tobacco litigation.<sup>81</sup> The industry response was to pummel plaintiffs with litigation strategy "spar[ing] no cost in exhausting their adversaries' resources short of the courthouse door."<sup>82</sup> Very few cases went to trial and no plaintiff was successful against the producers.<sup>83</sup> The defendants were usually able to avoid liability by proving that the potential harm from smoking was not foreseeable.<sup>84</sup> Although the Surgeon General's Report in 1964, estimated that average smokers had a nine- to ten-fold risk of developing lung cancer compared to non-smokers and pointed to smoking as a major cause of emphysema and bronchitis, the first wave still left the industry unscathed.<sup>85</sup> In 1965, the American Law Institute published a new Restatement of Torts and section 402A put the nail in the coffin of the first wave of tobacco litigation.<sup>86</sup> Comment i reads, "Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful. . . ." and requires that the product actually be defective to allow a strict liability claim for an unreasonably dangerous product.<sup>87</sup>

The second wave of tobacco litigation began in the early 1980's.<sup>88</sup> Products liability law had evolved; strict liability was now examined through a risk-utility lens and comparative fault allowed some recovery even if there was contributory negligence

<sup>76</sup> Courtney, *supra* note 48 at 92; LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 205 (2008).

<sup>77</sup> Gostin, *supra* note 63 at 205 (citing Edward Hammond & Daniel Horn, *Smoking and Death Rates: Report on Forty-four Months of Follow-up on 187,783 Men, I and II*, 166 JAMA 1159 (1958); Richard Doll & A. Bradford Hill, *A Study of the Aetiology of Carcinoma of the Lung*, Ernest L. Wynder & Everts A. Graham, *Tobacco Smoking as a Possible Etiological Factor in Bronchiogenic Carcinoma: A Study of 684 Proved Cases*, 143 JAMA 329(1950)).

<sup>78</sup> Roy Norr, *Cancer by the Carton*, READER'S DIG., Dec. 1952, at 7.

<sup>79</sup> PHILIP J. HILTS, SMOKE SCREEN, 5 (1996) (detailing a meeting December 15, 1953 at the Plaza Hotel with leading companies agreeing to an emergency plan to form the Tobacco Industry Research Committee including Philip Morris, R.J. Reynolds, Brown and Williamson, American Tobacco, U.S. Tobacco, and Benson and Hedges).

<sup>80</sup> Gostin, *supra* note 63 at 205, (citing *Lowe v. R.J. Reynolds Tobacco Co.*, No. 9673(C) (E.D. Mo. filed March 10, 1954)(case subsequently dropped)).

<sup>81</sup> Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 857 (1992).

<sup>82</sup> *Id.*; Franklin E. Crawford, *Fit for its Ordinary Purpose? Tobacco, Fast Food, and the Implied Warranty of Merchantability*, 63 OHIO ST. L.J. 1165, 1183 (2002).

<sup>83</sup> Rabin, *supra* note 68 at 859.

<sup>84</sup> Crawford, *supra* note 69 at 1178.

<sup>85</sup> PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE, PUB. NO. 1103, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE 26 (1964).

<sup>86</sup> Rabin, *supra* note 68 at 863-864.

<sup>87</sup> RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

<sup>88</sup> Rabin, *supra* note 68 at 864; Katherine Roberts & Albert Scardino, *A Trial Opens in a New Wave of Cigarette Suits*, N.Y.TIMES, Nov. 17, 1985, at E8.

by the plaintiff.<sup>89</sup> Successful claims against the asbestos industry gave plaintiffs' lawyers a promising framework for going after the tobacco manufacturers.<sup>90</sup> Even with the improved circumstances, this wave of tobacco cases hit roadblocks. In 1986, an appeals court ruled that claims after 1966 were preempted by the Federal Cigarette Labeling and Advertising Act<sup>91</sup> and the industry continued its aggressive and uncompromising litigation tactics.<sup>92</sup> The defense also relentlessly probed of the plaintiffs' moral habits to point juries to the personal fault of the individual.<sup>93</sup> Claims under a theory of implied warranty of merchantability faced the assumption of risk defense, buttressed by juries knowledgeable about the scientific evidence of the risks of smoking, like the Surgeon General's Report of 1964.<sup>94</sup> Lastly, in a fractured decision, the Supreme Court held that the Cigarette Labeling and Advertising Act, amended as the Public Health Cigarette Smoking Act of 1969, preempted state regulations based on smoking and health and barred state claims based on a failure to warn theory.<sup>95</sup> Other theories of liability—fraud, deceit and conspiracy—were left open by the decision.<sup>96</sup>

The defendants were their own worst enemy in the third wave. In 1994, a box of 10,000 documents from Brown & Williamson Tobacco was sent to Professor Stanton Glantz at the University of California.<sup>97</sup> The information in the documents revealed that the industry had known for 30 years that smoking led to a variety of diseases and that cigarettes were addictive.<sup>98</sup> For decades, industry executives had been claiming cigarettes were safe and not addictive.<sup>99</sup> "Thomas E. Sandefur Jr., the chairman and chief executive of Brown & Williamson, said in his testimony [at a hearing of the House Energy and Commerce Subcommittee of Health and the Environment], 'I believe nicotine is not addictive.'"<sup>100</sup> The leaks didn't stop there and cigarette manufacturers were left exposed and facing crippling litigation.<sup>101</sup>

In the third wave, the alternate theories that were left undisturbed by the Supreme Court's preemption decision were used in imaginative ways to finally bring victory for plaintiffs.<sup>102</sup> The dominant theme was governments seeking reimbursement for tobacco-related illness.<sup>103</sup> "As Minnesota Attorney General Hubert Humphrey, III explained upon filing Minnesota's action, '[P]revious lawsuits have said the tobacco companies should pay because their products are dangerous. This suit says they should pay because the conduct ... is illegal.'"<sup>104</sup>

<sup>89</sup> Rabin, *supra* note 68 at 866-867.

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

<sup>91</sup> Gostin, *supra* note 63 at 209 (citing 15 U.S.C. § 1331 (1965) & *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987)).

<sup>92</sup> *Id.* at 208.

<sup>93</sup> *Id.*

<sup>94</sup> Crawford, *supra* note 69 at 1184.

<sup>95</sup> Gostin, *supra* note 63 at 209 (describing the holding in *Cipollone v. Liggett Group*, 505 U.S. 504 (1992)).

<sup>96</sup> *Id.*

<sup>97</sup> Crawford, *supra* note 69 at 1187; Glantz, *supra* note 14 **Error! Bookmark not defined.** at 6.

<sup>98</sup> Glantz, *supra* note 14 at 3.

<sup>99</sup> See Gostin, *supra* note 64 at 209.

<sup>100</sup> Philip J. Hilts, *Tobacco Company was Silent on Hazards*, N.Y. TIMES, May 7, 1994, at page 1.

<sup>101</sup> See Philip J. Hilts & Glenn Collins, *Records Show Philip Morris Studied Influence of Nicotine*, N.Y. TIMES, June 8, 1995, at A1.

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

<sup>103</sup> Gostin, *supra* note 63 at 209.

<sup>104</sup> Ingrid L. Dietsch Field, *No Ifs, Ands or Butts: Big Tobacco is Fighting for Its Life Against a New Breed of Plaintiffs Armed with Mounting Evidence*, 27 BAL. L. REV. 99, (1997) (citing *State of Minnesota, Private Insurer Sue Tobacco Companies*, WASH. POST, Aug. 18, 1994, at A4 and referring readers to the complaint in *State v. Phillip Morris, Inc.*, No. C1-94-8565 (Minn., Ramsey County Dist. Ct.) (filed Aug. 17, 1994)).

Mississippi's attorney general filed a Medicaid reimbursement claim in 1994 and many other states joined the litigation.<sup>105</sup> The strategy was to present the case against the industry in four parts:

- (1) Medical studies demonstrating the link between smoking and illness,
- (2) Records and testimony of taxpayer expenditures for treating indigent smokers,
- (3) Documents detailing the industry's conspiracy of deceit, including the manipulation of nicotine levels, and
- (4) Information about the industry's efforts to target advertising to children.<sup>106</sup>

The strategy never had to be implemented because, in 1997, a settlement was reached, which would give immunity from some litigation to the industry and \$368 billion to the states over twenty-five years, but it required Congressional action to codify.<sup>107</sup> Bills were introduced but ultimately the effort failed.<sup>108</sup> A few states took their own path. Minnesota moved forward and, through discovery, gained access to ten million pages of industry documents.<sup>109</sup> Eventually, Florida, Minnesota, Mississippi and Texas settled for \$40 billion.<sup>110</sup> A Master Settlement Agreement, reached with the other states in 1998, requires compensation by the industry in perpetuity, payments totaling \$206 billion through 2025, creation of a charitable foundation to reduce teenage smoking, disbanding of some lobbying organizations, public access to documents online, and restricted advertising.<sup>111</sup> In return the industry got civil immunity for future state claims but was not protected from individual suits or class actions.<sup>112</sup> In 1994, flight attendants settled as a class for exposure to secondhand smoke and several substantial verdicts have been won by individual plaintiffs.<sup>113</sup>

### *The Impact*

The tobacco settlements have had a positive impact on public health. Smoking has decreased. In 1998, 24.1% of adults were current smokers.<sup>114</sup> The rate in 2009 was 21%.<sup>115</sup> In Fiscal Year 2011, states will collect \$25.3 billion in revenue from the tobacco settlement and tobacco taxes.<sup>116</sup> \$517.9 million will be used to prevent childhood smoking and to help current smokers quit.<sup>117</sup>

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<sup>105</sup> Gostin, *supra* note 63 at 209.

<sup>106</sup> Jack Nelson, *Untested Theory Becoming Tobacco Firms' Top Threat*, L.A. TIMES, Aug. 4, 1996.

<sup>107</sup> Gostin, *supra* note 63 at 209-210.

<sup>108</sup> *Id.* at 210.

<sup>109</sup> Field, *supra* note 91 at 120.

<sup>110</sup> Gostin, *supra* note 63 at 210.

<sup>111</sup> *Id.* at 210 (citing the Master Settlement agreement from the National Association of Attorneys General, available at <http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/>.)

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 211.

<sup>114</sup> CDC, *Cigarette Smoking Among Adults – United States, 1998*, MORBIDITY AND MORTALITY WEEKLY REPORT, OCT. 6, 2000, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm4939a1.htm>.

<sup>115</sup> CDC, FASTSTATS: SMOKING, <http://www.cdc.gov/nchs/fastats/smoking.htm>, (last viewed Nov. 12, 2011).

<sup>116</sup> Tobacco Free Kids, *A Broken Promise to Our Children: The 1998 State Tobacco Settlement Twelve Years Later* (2010), available at [http://www.tobaccofreekids.org/reports/settlements/FY2011/StateSettlementReport\\_FY2011\\_web.pdf](http://www.tobaccofreekids.org/reports/settlements/FY2011/StateSettlementReport_FY2011_web.pdf).

<sup>117</sup> *Id.* (noting that the CDC recommends spending \$3.7 billion.)

## VI. FIRST AND SECOND WAVE TOBACCO-STYLE SUITS AGAINST FOOD

### *Fast Food*

Like the tobacco industry, food manufacturers should be held liable for creating social ills and exposing the public to potential danger.<sup>118</sup> Food may even require a higher standard of corporate responsibility in some respects. Unlike tobacco which is thoroughly a luxury item, food is a necessity. The first tobacco-style complaints against the food industry began in 2002, when Caesar Barber filed a class action against four fast food restaurants.<sup>119</sup> Barber complained of illness from over-consumption of fast food with five theories of liability: negligent production and distribution of food causing injuries, failure to warn, marketing to children, violating New York state consumer protection law, and deceptive advertising.<sup>120</sup> The industry immediately responded in the media with an argument all too familiar to tobacco plaintiffs – personal responsibility.<sup>121</sup>

*Pelman v. McDonald's Corp.* was next.<sup>122</sup> The same attorney filed another class action on behalf of two young girls, alleging that the restaurant targeted children, failed to disclose dangers and that the food was addictive.<sup>123</sup> The case was hopeful because plaintiffs' claims for deceptive representation of nutritional benefits were allowed to go to trial, but fast food litigation based on health claims has been mainly unsuccessful.<sup>124</sup> Like the second wave of tobacco cases, this wave of food cases faces assumption of risk defenses. If any fast food claims can be successful, deceptive advertising or negligent marketing will be the ones to prevail.<sup>125</sup>

### *Packaged Food*

Although the focus in the literature thus far has mainly examined fast food as the target of tobacco-like litigation for food,<sup>126</sup> there are numerous potential targets. About 90 percent of food dollars American spend is on processed food.<sup>127</sup> Because processed, packaged food is often prepared in distant places from ingredients unknown to the consumer, the health effects are mysterious, at best.<sup>128</sup> Influenced by the food industry, Americans have completely changed the way they eat over just a generation or two.<sup>129</sup> Glossy packaging and industrial processing mechanisms are now the norm.<sup>130</sup> "That fast food is not the healthiest of fare is no doubt common

<sup>118</sup> Crawford, *supra* note 69 at 1217.

<sup>119</sup> *Id.* at 1218.

<sup>120</sup> Goldman, *supra* note 16 at 114.

<sup>121</sup> *Obese Man Sues Fast Food Chains*, MSNBC.com (July 26, 2002), (quoting Steve Anderson, President and CEO of the National Restaurant Association, "The important thing to remember is that there is a certain amount of personal responsibility we all have...the issues of obesity and nutrition are much more complicated than this and involves factors such as genetics, medical conditions and the level of physical Activity.")

<sup>122</sup> 237 F.Supp. 2d 512 (S.D.N.Y. 2003).

<sup>123</sup> Goldman, *supra* note 16 at 115, (citing *Pelman*, 237 F.Supp. 2d 512 (S.D.N.Y. 2003)).

<sup>124</sup> Gostin, *supra* note 63 at 508.

<sup>125</sup> Ausness, *supra* note 12 at 843.

<sup>126</sup> See *Supra* note 21.

<sup>127</sup> Schlosser, *supra* note 6 at 120.

<sup>128</sup> Logan, *supra* note 20 at 460.

<sup>129</sup> MICHAEL POLLAN, IN DEFENSE OF FOOD: AN EATER'S MANIFESTO 4 (2008); Schlosser *supra* note 6 at 7 ("What we eat had changed more in the last forty years than in the previous forty thousand.").

<sup>130</sup> Pollan, *supra* note 116 at 19; Schlosser, *supra* note at 119 ("Since the end of World War II, farmers in the United States have been persuaded to adopt one new technology after another, hoping to

knowledge.”<sup>131</sup> Conversely, highly processed high-calorie and high-fat food products are usually purchased at a grocery store, in the same way as raw broccoli, so it may be more difficult for the industry to prove that the consuming public knew the risks. Eaters are not in the same position as smokers—if a person stopped consuming tobacco, their life span would probably be extended, but a person cannot survive without sustenance. Many processed foods have harmful additives like corn syrup and hydrogenated oil,<sup>132</sup> plus, they are advertised just as aggressively as fast food, especially to children. “Few consumers understand the extent to which the industry has...used sensation to generate consumer satisfaction, yet the intent is clear in the corporate promotional literature.”<sup>133</sup> General Mills targets cereal advertising mostly to kids and makes six of the ten worst cereals advertised, including the worst nutrition score - Reese’s Puffs, which is 41% sugar.<sup>134</sup> Statistics like this reek of a food manufacturer savvy to the addictive nature of salt and sugar and manipulating the levels to hook consumers. If big food plays out like big tobacco, discovery and insider disclosure will reveal that the food industry knew the dangers of their products and even with that knowledge, enticed people to consume more by manipulating their products to optimize appeal.<sup>135</sup> In addition, evidence may eventually reveal that the industry concealed information and misrepresented the issues to the public. There have been some small successes in using litigation to bring about change in this area.

### *Some Success*

#### *i. Trans Fat*

In 2003 before trans fat was included on product labels, Kraft was sued for failing to disclose that its popular Oreo cookies contained hydrogenated oils.<sup>136</sup> Stephen Joseph, who filed the suit, aimed to force Kraft to stop using the hydrogenated oils.<sup>137</sup> The lawsuit was dropped because Kraft planned to remove the trans fat from its cookies.<sup>138</sup> Joseph claimed a home run in reducing the negative effects on human health from trans fats.<sup>139</sup>

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improve their yields, reduce their costs, and outsell their neighbors. By embracing this industrial model of agriculture—one that focuses narrowly on the level of inputs and outputs, that encourages specialization in just one crop, that relies heavily on chemical fertilizers, pesticides, fungicides, herbicides, advances harvesting and irrigation equipment—American farmers have become the most productive farmers on earth. Every increase in productivity, however, has driven more American farmers off the land. And it has left those who remain beholden to the companies that supply the inputs and the processors that buy the outputs. William Heffernan, a professor of rural sociology at the University of Missouri, says that America’s agricultural economy now resembles an hourglass. At the top there are about 2 million ranchers and farmers; at the bottom there are 275 million consumers; and at the narrow portion in the middle, there are a dozen or so multinational corporations earning a profit from every transaction.”).

<sup>131</sup> Andrews, *supra* note 13 at 157.

<sup>132</sup> University of Maryland Medical Center, *Trans Fat 101*, FEATURE STORIES, Nov. 3, 2010, available at <http://www.umm.edu/features/transfats.htm>.

<sup>133</sup> KESSLER *supra* note 45, at 119.

<sup>134</sup> Yale, *supra* note 47.

<sup>135</sup> Some believe this evidence already exists about the food industry. Andrew M. Dansicker, *The Next Big Thing for Litigators*, 37 MD. B. J. 12, 15 (2004). (citing Schlosser, *supra* note 6 “there is substantial documentary evidence that the fast food industry, like the tobacco industry, knew about the dangers of its products before choosing to promote ‘super-sized’ and ‘value’ meals as well as numerous nutritionally deficient products”)

<sup>136</sup> *Lawsuit Dropped as Oreo Looks to Drop the Fat*, CNN.COM/LAW CENTER (May 14, 2003), <http://www.cnn.com/2003/LAW/05/14/oreo.suit/>.

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

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

A class action was also filed against Unilever alleging that defendants engaged in false advertising for the product “I Can’t Believe It’s Not Butter!”<sup>140</sup> The product is advertised to be “cholesterol free” but the plaintiffs assert that this misleads consumers because margarine is hydrogenated vegetable oil that increases bad cholesterol and risk for heart disease.<sup>141</sup> Late last year the case was in the settlement stage but there was a dispute between plaintiffs’ attorneys.<sup>142</sup>

*Chacanaca v. Quaker Oats Company*, thus far surviving a motion for judgment on the pleadings, is based on the assertion that a reasonable consumer may be duped by the box photo to make an inference that active, healthy children are fueled with Chewy Bars.<sup>143</sup> One important victory in the order is that “Front of the Box” advertising is not preempted by federal labeling acts.<sup>144</sup> Also, positive for the plaintiff is that the term “wholesome” and the “smart choices made easy” decal cannot be deemed to constitute non-actionable puffery.<sup>145</sup> Other claims survived using California unfair competition law, false advertising law of California, and California’s Consumer Legal Remedies Act.<sup>146</sup> Lastly, the court decided the economic loss, of the purchase of food products that contain an ingredient the plaintiffs find objectionable, is sufficient as the injury in fact to establish standing.<sup>147</sup>

## ii. *High Fructose Corn Syrup*

Prior to November 2008, Snapple beverages were advertised as “all natural”, but in fact contained high fructose corn syrup, an artificial sweetener.<sup>148</sup> It has been suggested that Snapple made the change to real sugar in response to a class action lawsuit filed in 2007 by Stacy Holk.<sup>149</sup> The suit was originally dismissed based on preemption under the Federal Food, Drug and Cosmetic Act (FDCA) but it was revived in the summer of 2009 when the Third Circuit Court of Appeals reversed.<sup>150</sup> Similarly, *Lockwood v. Conagra Foods Inc.* focused on the “all natural” claim on Healthy Choice Pasta Sauce that also contained high fructose corn syrup.<sup>151</sup>

## *Hurdles*

### i. *Federal Preemption*

Congress amended the Food Drug and Cosmetic Act (“FDCA”) in 1990 with the Nutrition Labeling and Education Act (“NLEA”) to strengthen the Food and Drug Administration’s legal authority to require nutrition labeling.<sup>152</sup> This presents

<sup>140</sup> Red v. Unilever, No. C 10-00387 JW, 2010 WL 3629689, \*1 (N.D.Cal. Sept. 14, 2010).

<sup>141</sup> Roller, *supra* note 17 at 467.

<sup>142</sup> Kevin Underhill, et al., ABA Consumer Protection Law Update (Sept., 2010) at 17, available at <http://www.abanet.org/antitrust/at-committees/at-cp/pdf/programs/10/cpu-10-04-10.pdf>.

<sup>143</sup> No. C-10-0502 RS, 2010 WL 4055954 (N.D.Cal. Oct. 14, 2010).

<sup>144</sup> *Id.* at \*9.

<sup>145</sup> *Id.* at \*11-12.

<sup>146</sup> *Id.* at \*11.

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

<sup>148</sup> Holk v. Snapple, 575 F. 3d 329, 332 (3d Cir. 2009).

<sup>149</sup> *Snapple Again being Sued for Not Being ‘All Natural’*, NATURAL WELLBEING.COM, (AUG. 17, 2009), <http://www.naturalwellbeing.com/blog/snapple-again-being-sued-for-not-being-all-natural>.

<sup>150</sup> Snapple, *supra* note 134 at 331.

<sup>151</sup> See 597F. Supp. 2d 1028 (N.D.Cal. 2009).

<sup>152</sup> 21 U.S.C. § 343, *Chacanaca*, *supra* note 129 at \*3.

a hurdle to plaintiffs asserting state law claims for food labeling. The NLEA "shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under [21 U.S.C. § 343-1(a)] of the [FDCA]."<sup>153</sup> However, it does contain two express preemption provisions – 343(q) and (r) – relating to any state or local requirement for nutrition labeling, in the nutrition box and elsewhere on the label, of food that is not identical to the requirements of two sections of the law.<sup>154</sup> These provisions are supplemented by regulation. For example, in *Chanaca*, the District Court in Northern California held that a "0 grams trans fat" statement that appears on the side label of the Chewy Bars box was preempted.<sup>155</sup> "The Supreme Court has clarified that, in the context of express preemption provisions, the term "requirements" reaches beyond positive enactments like statutes and regulations, to embrace common-law duties and judge-made rules."<sup>156</sup> These provisions will bar many labeling claims.

## ii. *Limitations on Liability*

"[A] plaintiff who alleges that the defendant's product caused a specific health problem will have to show a causal connection between consumption of the product and that health condition."<sup>157</sup> This presented a problem in the first and second wave of tobacco litigation because defendants were able to scour the history of plaintiffs' health and lifestyle choices to find other potential causes of the injury.<sup>158</sup> For food, in a jurisdiction that follows the 'but for' test of causation, the plaintiff will have to prove that the health problems would not have occurred otherwise.<sup>159</sup> This presents particular difficulties for a plaintiff whose health problems are due to obesity, since other factors such as lifestyle or heredity may cause obesity regardless of the plaintiff's eating habits.<sup>160</sup> Additionally, "one who claims that a producer who made false claims about the nutritional value of its product must also prove that he or she would not have purchased or consumed the product if the false claim had not been made."<sup>161</sup> The necessity of proving these elements all but collapses a plaintiff's ability to succeed on basic product liability claims.

Food manufacturers may also argue that the doctrine of misuse should bar consumers from recovering damages for their obesity.<sup>162</sup> Misuse, a defense to defective or dangerous product claims, applies if a product is utilized in an unforeseeable or unadvisable manner, shifting liability to the user.<sup>163</sup> A major question is whether overconsumption of food could be a misuse. "[I]f the court regards the misuse as unforeseeable, it will probably characterize the misuse as a superseding cause and completely relieve the product manufacturer of liability."<sup>164</sup> Another approach is to treat misuse as a form of comparative fault.<sup>165</sup>

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<sup>153</sup> *Chacanaca* at \*5 (citing Pub. L. No.101-535, § 6(c)(1), 104 Stat. 2353, 2364).

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

<sup>155</sup> *Id.* at 1119.

<sup>156</sup> *Id.* (citing *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 443 (2005)).

<sup>157</sup> Ausness, *supra* note 12 at 872.

<sup>158</sup> Rabin, *supra* note 68 at 868.

<sup>159</sup> Ausness, *supra* note 12 at 872.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 873.

<sup>162</sup> *Id.* at 874.

<sup>163</sup> See Aaron D. Twerski, *The Many Faces of Misuse: An Inquiry into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403 (1977-1978).

<sup>164</sup> Ausness, *supra* note 12 at 874-875.

<sup>165</sup> *Id.*



In the end, food plaintiffs are left in a similar position as tobacco plaintiffs of the first and second wave – facing industry giants, prestigious law firms with aggressive strategy, and unfavorable law.

## VI. A LITTLE DISCOVERY GOES A LONG WAY

### *Hidden Value in Unsuccessful Food Suits*

Although the food suits thus far have not reached great success, there is hope that history will repeat itself.<sup>166</sup> Tobacco litigation put pressure on the industry and eventually, through litigation discovery and guilty-conscience employees, the truth of the companies' knowledge, deceit and fraudulent practices was revealed.<sup>167</sup>

To enable tobacco-style claims against the food industry to recoup tax-payer health care dollars, state attorneys general would need documents that detail the industry knowledge about the harmful medical link between their products and illness and industry efforts to manipulate the addictive nature of the products. There is no doubt that certain foods - especially sugar, fat and salt - cause a release of pleasure-producing dopamine in the brain, in the same way as opiates.<sup>168</sup> Flavor and color additives are another way that food companies manipulate consumer response to their products.<sup>169</sup> In the tobacco era, studies with titles like "Nicotine in Smoke and Human Physiological Response", demonstrated that the tobacco companies had studied the drug-like impacts of nicotine in the brain.<sup>170</sup> Detailed, internal studies demonstrating that the food companies knew the effects of flavor additives, trans fat, or high fructose corn syrup on physiological or mental processes and the negative effects on health would be the ammunition needed to start a war against bad food.

Even better than just documents, would be a turncoat industry scientist. Jeffrey Wigand was that person for the tobacco industry.<sup>171</sup> Wigand was the chief of research at Brown and Williamson Tobacco Company for three years but was terminated.<sup>172</sup> He did not reveal the company's deceitful conduct, even after questioning from the Justice Department, until his family was threatened to ensure his silence.<sup>173</sup> When Dr. Wigand was deposed for a smoker's suit in New Orleans, he divulged that his employer objected to researching a non-addictive product –because it was contradictory to the company's position relative to liability issues associated with smoking and health.<sup>174</sup> Additionally, Wigand testified extensively that documents and reports were altered to hide the knowledge the company gained from research of addiction or marked as privileged when they were really created not for litigation but for scientific reasons.<sup>175</sup>

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<sup>166</sup> *Contra* Logan, *supra* note at 456-457 (explaining that the proper role of tort litigation is to enforce legislation.) Logan seems to dismiss the value of individual suits like *Pelman*.

<sup>167</sup> *See infra* note 154.

<sup>168</sup> NEAL D. BARNARD & JOANNE STEPANIAK, *BREAKING THE FOOD SEDUCTION* 17-19 (2004), *See* KESSLER, *supra* note 45.

<sup>169</sup> Schlosser, *supra* note 6 at 123 (stating that aroma and memory are linked and fast food chains work hard to promote the pleasure and reassurance of comfort foods).

<sup>170</sup> Hilts, *supra* note 66 at 55-56.

<sup>171</sup> *Id.* at 154.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 155.

<sup>174</sup> *Id.* at 158.

<sup>175</sup> Hilts, *supra* note 66 at 158.

The lead research and development scientist of a major food processing manufacturer disclosing information of this nature about products would be extremely helpful to state attorneys general pursuing litigation against the food companies. Other scientific studies have demonstrated the dangers of additives like trans fat and high fructose corn syrup but an insider could make it clear when the industry was aware of the health risks and how they concealed that knowledge.

### *Lessons Learned from Minnesota Tobacco Litigation*

Plain old litigation discovery may be crucial to successful food litigation. In the tobacco litigation, Minnesota accomplished one of the most significant public health achievements of the second half of the 20th century by forcing the industry to reveal thirty-five million pages of internal documents “disclosing the industry’s manipulation of nicotine, and . . . disclosing the industry’s dependence upon new generations of American youth to preserve the viability of the cigarette market.”<sup>176</sup> But they were hard won. The discovery battles lasted several years and did not end until the United States Supreme Court required production of documents which the industry had withheld on claims of privilege.<sup>177</sup> Yet, settlement came only a month later.<sup>178</sup>

## VIII. HOW STATE ATTORNEYS GENERAL COULD BE THE HEROES AGAIN

Like tobacco litigation, justice will finally prevail against the food industry when the states demand repayment for taxpayer costs from the health epidemic.<sup>179</sup> And also like the tobacco suits, the attorney generals must act when four components are clearly in place. There are already medical studies demonstrating the link between eating processed food and illness, records of taxpayer expenditures for treating the indigent obese, and information about the industry’s efforts to target advertising to children and manipulate the content of food. When documents detailing the industry’s conspiracy of deceit, including the knowledge of addiction and health consequences, come to light, the states must act once again.

Mississippi, with the country’s highest obesity rate,<sup>180</sup> may once again be poised to lead the charge. Jim Hood, the current attorney general of Mississippi, worked to strengthen laws to protect consumers after Hurricane Katrina brought unscrupulous opportunists to his state.<sup>181</sup> “He has recovered more than \$300 million for Mississippi tax-payers from large corporate violators.”<sup>182</sup> Hood could be a champion to protect consumers from bad food.

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<sup>176</sup> Michael V. Ciresi, et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477, 479 (1999.)

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Goldman, *supra* note 16 at 133. (citing *The Man Who is Taking Fat to Court*, THE HERALD (Sydney) (July 14, 2002) and detailing Professor Banzhaf’s strategy for “a broad legal case seeking restitution of money spent for the health problems caused by fast food”).

<sup>180</sup> KAISER FAMILY FOUNDATION, STATE HEALTH FACTS, <http://www.statehealthfacts.org/compare-maptable.jsp?ind=89&cat=2> (last visited Jan. 17, 2011) (charting Mississippi’s rate of overweight and obes as 67.8% while the nation as a whole is 60.8%).

<sup>181</sup> OFFICE OF THE ATTORNEY GENERAL STATE OF MISSISSIPPI, ABOUT YOUR ATTORNEY GENERAL, [http://www.ago.state.ms.us/index.php/pages/about\\_your\\_attorney\\_general](http://www.ago.state.ms.us/index.php/pages/about_your_attorney_general) (last visited Jan. 17, 2011).

<sup>182</sup> *Id.*

Although Minnesota's obesity rate is only slightly above the national average,<sup>183</sup> the state may also be a leader in obesity litigation. Minnesota Attorney General Lori Swanson is a "champion of justice."<sup>184</sup> Her consumer protection record includes health issues from insurance to hospitals.<sup>185</sup> In addition to an ardent attorney general, Minnesota is home to *The Public Health Law Center* which was chosen as the National Coordinating Center for the Public Health Law Network.<sup>186</sup> The founder and director of the center played a key role in the historic Minnesota litigation that resulted in the release of thirty-five million pages of secret tobacco industry documents.<sup>187</sup> The center is also a key partner in a nationwide legal network to support childhood obesity prevention strategies and the network's latest initiative is a national study of the strengths and weaknesses of industry self-regulation of food marketing practices that contribute to childhood obesity.<sup>188</sup>

## XI. CONCLUSION

Research has shown that extra weight leads to enormous health consequences. The obesity epidemic is not just scary from a public health standpoint, it is also economically costly. A particularly troubling cost is taxpayers footing the bill, through Medicaid, for the health problems of indigent state citizens who are overweight and obese, when food manufacturers are reaping profits from products, which the industry most likely knows are harmful and addictive. A problem this big can only be attacked with a multi-faceted approach including all the tools available. Agencies working hard to educate consumers, regulators minimizing the advertising aimed at small children, and legislators voting based on public health and not lobbying efforts, can work in concert with litigation to meet the challenge.

Tobacco has proven that the state tax-payer expenditures can be successfully recouped by litigation. The food product liability law suits, even if unsuccessful, are chipping away at the barricades around the food industry leading to important information and, eventually, these little victories may even pressure insiders to act in good conscience and divulge what they know. Sooner or later, the industry's knowledge of the health dangers, efforts to manipulate addiction, and practices of deception should come to light and state attorneys general will be poised to attack.

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<sup>183</sup> *Supra* note 164 (showing MN at number 29 with a rate of 62.1%).

<sup>184</sup> THE OFFICE OF ATTORNEY GENERAL LORI SWANSON, BIOGRAPHY OF MINNESOTA ATTORNEY GENERAL LORI SWANSON, <http://www.ag.state.mn.us/Office/AGBio.asp> (last visited Jan 17, 2011) ("The National Consumer Law Center awarded her the Robert Drinan "Champion of Justice" award for her consumer protection work.")

<sup>185</sup> *Id.*

<sup>186</sup> PUBLIC HEALTH LAW CENTER, *Announcing the Public Health law Network*, <http://publichealthlawcenter.org/> (last visited Jan 17, 2011).

<sup>187</sup> PUBLIC HEALTH LAW CENTER, <http://publichealthlawcenter.org/about/staff> (last visited Jan 17, 2011) ("Doug Blanke, J.D., Director "is founder and director of the Public Health Law Center. He oversees all its programs, with a focus on encouraging healthier lives, including work to reduce the harm caused by tobacco use, prevent childhood obesity, support healthy eating and encourage physical activity. Doug is also executive director of the Tobacco Control Legal Consortium, America's legal network for effective tobacco control policies. Doug's international work has included monitoring development of the Framework Convention on Tobacco Control for the American Lung Association and editing the World Health Organization's handbook on tobacco control legislation. Previously, as an assistant attorney general of the State of Minnesota, he played a key role in the historic Minnesota litigation that resulted in the release of thirty-five million pages of secret tobacco industry documents.")

<sup>188</sup> PUBLIC HEALTH LAW CENTER, *Healthy Eating Program*, <http://publichealthlawcenter.org/programs/healthy-eating> (last visited Jan. 17, 2011).

