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## Living on the Fat of the Land: How to Have Your Burger and Sue It Too

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# LIVING ON THE FAT OF THE LAND: HOW TO HAVE YOUR BURGER AND SUE IT TOO

*It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.*

—Oliver Wendell Holmes, *The Path of the Law*<sup>1</sup>

## I. INTRODUCTION

In modern America, being fat is the norm, not the exception.<sup>2</sup> Overweight and obese people constitute more than half of America's population.<sup>3</sup> And although being overweight or obese may be detrimental, Americans are free to indulge in behavior that exacerbates their weight problems.<sup>4</sup> After all, freedom is the quintessence of America.<sup>5</sup> However, this freedom is bridled by one cardinal rule: Each person is responsible for the consequences of his or her own actions.<sup>6</sup>

In light of this rule, it seems appropriate that most Americans attribute their weight problem to a lack of personal responsibility.<sup>7</sup> But in light of

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1. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

2. See *infra* Part II.A.1. See also Tina Hesman, *Fighting Fat May Be War On Instinct*, ST. LOUIS POST-DISPATCH, Dec. 8, 2002, at A1 [hereinafter Hesman] (quoting an obesity researcher as saying, “[t]he truth is, it’s abnormal to be lean”).

3. See *infra* Part II.A (discussing the history of obesity).

4. *Id.*

5. See, e.g., Patrick Henry, Speech at the Virginia House of Delegates (Mar. 23, 1775), reprinted in 2 THE ANNALS OF AMERICA 1755-1783: RESISTANCE AND REVOLUTION 323 (William Benton ed., 1968) (“I know not what course others may take; but as for me, give me liberty or give me death!”); U.S. CONST. pmbl. (“WE THE PEOPLE of the United States, in Order to . . . secure the Blessings of Liberty to ourselves and our Posterity . . .”); U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”); Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), reprinted in 1 ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832-1858 536 (Don E. Fehrenbacher ed., 1989) (“[T]his nation, under God, shall have a new birth of freedom . . .”); Martin Luther King, Jr., I have a Dream, Address at the Lincoln Memorial (Aug. 28, 1963), reprinted in DOCUMENTARY HISTORY OF THE MODERN CIVIL RIGHTS MOVEMENT 124 (Peter B. Levy ed., 1992) (“Free at last! Free at last! Thank God Almighty, we are free at last!”).

6. See, e.g., ALAN WOLFE, ONE NATION, AFTER ALL: WHAT AMERICANS REALLY THINK ABOUT GOD, COUNTRY, FAMILY, RACISM, WELFARE, IMMIGRATION, HOMOSEXUALITY, WORK, THE RIGHT, THE LEFT AND EACH OTHER 267 (1999) (“The moral ideal of middle-class Americans revolves around the notion that people are responsible for their own fate . . .”).

7. GROCERY MANUFACTURERS OF AMERICA, *New GMA Survey: 89% of Americans Say Individuals Themselves Responsible For Obesity Problem* (Jan. 15, 2002), at <http://www.gmabrands.com/news/docs/NewsRelease.cfm?DocID=879> (last visited Jan. 28, 2003) [hereinafter GMA Survey] (GMA is the world’s largest association of food, beverage and consumer product corporations). The survey states that: “[O]nly 8% [of Americans] hold responsible external entities such as food

the many causes of obesity,<sup>8</sup> is it appropriate that overweight and obese people blindly adhere to the rule of personal responsibility and blame themselves? This Note asks the question: Should the corporations that create and sell the nation's food be partially responsible for America's weight epidemic? The answer: Yes.<sup>9</sup>

During the summer of 2002, while most Americans blamed themselves for being overweight or obese, at least three people attempted to shift this blame onto fast-food corporations.<sup>10</sup> To begin, Caesar Barber, a middle-aged 272-pound man, filed a lawsuit against four fast-food corporations claiming that years of eating burgers and fries had made him unhealthy and obese.<sup>11</sup> However, Barber summarily withdrew his suit because he could not rebut the rule of personal responsibility.<sup>12</sup> In another suit Jazlen Bradley and Ashley Pelman, two obese teenagers (the "Teens"),<sup>13</sup> sued only McDonald's and alleged that eating McDonald's fare three to five times a week caused them to become obese.<sup>14</sup> Although they attempted to

manufacturers (5%), restaurants (2%) or the federal government (1%).” *Id.*

*See also* Pelman v. McDonald's Corp., 237 F. Supp. 2d 512, 532 (S.D.N.Y. 2003). The court articulated:

If a person knows or should know that eating copious orders of supersized McDonalds' 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. Even more pertinent, nobody is forced to supersize their meal or choose less healthy options on the menu.

*Id.*; William C. Cockerham, *The Sociology of Health Behavior and Health Lifestyles*, in HANDBOOK OF MEDICAL SOCIOLOGY 159 (Chloe E. Bird et al. eds., 5th ed. 2000) (“[P]eople are healthy if they work at it, and risk disease and premature death if they do not. . . . Consequently, the responsibility for one's own health ultimately falls on one's self.”) (internal quotation and citation omitted). *Id.* at 159. *Cf.* Bridget Murray, *Fast-Food Culture Serves Up Super-Size Americans: Stop Blaming People or Their Genes—It's an Abundance of Unhealthy, Heavily-Advertised, Low-Cost Food that Underlies the Nation's Obesity Crisis*, MONITOR ON PSYCHOLOGY, at <http://www.apa.org/monitor/dec01/fastfood.html> (last visited Jan. 10, 2003) [hereinafter Murray] (arguing that the fast-food environment is the cause of America's obesity epidemic).

8. *See infra* Part II.A.1 (discussing the cause of obesity).

9. While this Note focuses on the fast-food industry, a more comprehensive answer to this question implicates the restaurant, beverage, candy and packaged-food industries.

10. *See infra* Part II.B.

11. *See* MSNBC, Associated Press, *Man's Lawsuit Claims Fast-Food Restaurants Caused His Obesity*, WALL ST. J., July 29, 2002, available at WL 3401972 (describing Barber as a fifty-six-year-old maintenance worker, who was five-feet-ten-inches tall, and weighted 272 pounds). The article also states that Barber “had heart attacks in 1996 and 1999 and has diabetes, high blood pressure and high cholesterol. He said he ate fast food for decades, believing it was good for him until his doctor cautioned him otherwise.” *Id.*

12. *See infra* note 93 and accompanying text.

13. *See* Benjamin Weiser, *Big Macs Can Make You Fat? No Kidding, a Judge Rules*, N.Y. TIMES ABSTRACTS, Jan. 23, 2003, at 3, available at WL 10853132 (describing the Teens). Ashley, fourteen-years-old, was approximately four-feet-ten-inches tall and weighed 170 pounds. *Id.* Jazlen, nineteen-years-old, was approximately five-feet-six-inches tall and weighed 270 pounds. *Id.*

14. *Id.*

use their status as minors to circumvent the rule of personal responsibility, a court later granted McDonald's motion to dismiss the suit.<sup>15</sup> The Teens then filed an amended complaint that was dismissed with prejudice.<sup>16</sup>

Despite the outcomes of these suits, it is likely that others will initiate similar causes of action against the fast-food industry ("Big Food").<sup>17</sup> This Note contends that the reason more suits will follow is twofold: (1) there are nearly 100 million overweight people in America, and Big Food serves them products that contribute to their weight problems;<sup>18</sup> and (2) caring for overweight and obese people costs approximately \$157 billion per year, and Big Food can afford to subsidize these costs.<sup>19</sup> This Note proposes that Big Food litigation is a feasible way for states to recoup incurred Medicaid expenses associated with treating overweight and obese people.<sup>20</sup>

Part II of this Note reviews the circumstances that have made Big Food litigation a viable alternative, first highlighting the obesity epidemic. Part II then incorporates relevant case law, discusses the success of Big Tobacco litigation, and notes some of Big Food's standard practices. Part III analyzes the thresholds that Big Food litigation must overcome. In particular, Part III examines whether Big Food litigation is frivolous and whether fast food causes people to become overweight or obese. Finally, Part IV presents this Note's proposal.

## II. THE RISE OF BIG FOOD LITIGATION

When attorneys and clients attempt to proceed on a novel cause of action, success can often be delayed.<sup>21</sup> For example, it took over forty years and 1,800 lawsuits to finally receive a victory over Big Tobacco for smoking-related illnesses.<sup>22</sup> In other words, the law does not readily

15. See *infra* notes 96, 99.

16. Pellman v. McDonald's Corp. ("Pellman II"), No. 02 Civ. 7821 (S.D.N.Y. Sept. 3, 2003), at <http://banzhaf.net/docs/mcop2.html> (last visited Nov. 21, 2003).

17. For purposes of this Note, "Big Food" means the fast-food industry in general and includes, but is not limited to, the following: AFC Enters., Inc. (operates Church's Chicken, and Popeyes Chicken and Biscuits); Altamira Corp. (operates Arby's); Burger King Corp.; Carl Karcher Enters. (operates Carl's Jr.); Checkers Drive-in Restaurants, Inc. (operates Rally's Burgers); Chick-fil-A, Inc.; Dairy Queen Corp.; Domino's Pizza, L.L.C.; El Pollo Loco, Inc.; Fatburger Corp.; In-N-Out Burger Corp.; Jack in the Box, Inc.; The Krystal Co.; McDonald's Corp.; Papa John's Int'l, Inc.; Schlotzsky's, Inc.; Sonic Corp.; Whataburger Corp.; Wendy's Int'l, Inc.; White Castle Corp.; Yum! Brands, Inc. (operates Kentucky Fried Chicken, Pizza Hut, Taco Bell, Long John Silvers, and A&W).

18. See *infra* Parts II.D, III.B.

19. See *infra* Parts II.A.3, II.D.1.

20. For purposes of this Note, the term "Big Food litigation" refers to attempts at suing Big Food for obesity-related harms.

21. See *infra* Part II.D.

22. Jonathan C. Lipson, *Fighting Fiction With Fiction--The New Federalism In (A Tobacco*

welcome change.<sup>23</sup> Regardless of whether the law is ready for another change, however, circumstances are ripe for Big Food litigation.

#### A. *Obesity: The Emergence of a New Disease*

Being overweight in America has become an epidemic.<sup>24</sup> Emphasizing this point, the Surgeon General states that “[l]eft unabated, overweight and obesity may soon cause as much preventable disease and death as cigarette smoking.”<sup>25</sup> Additionally, an estimated 300,000 deaths each year are attributed to being overweight or obese and to the concomitant conditions resulting therefrom.<sup>26</sup> The National Institutes of Health (“NIH”) reports that 97 million Americans are overweight or obese.<sup>27</sup> Moreover, scientists state that America’s weight problem may be worse than currently reported.<sup>28</sup> Specifically, the true estimate of the prevalence of overweight and obese Americans is likely underestimated due to self-effacing responses in weight surveys.<sup>29</sup>

*Company* Bankruptcy, 78 WASH. U. L.Q. 1271, 1276 (2000) [hereinafter Lipson].

23. See J.B. Ruhl, *Complexity Theory As a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849, 919 (1993) (noting that “common law changes slowly”); Scot Boulton, *How Uniform Will the Uniform Trust Code Be: Vagaries of Missouri Trust Law Versus Desires for Conformity*, 67 MO. L. REV. 361, 362 (2002) (noting that “trust law changes slowly”); William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2148 (2002) (noting that “Constitutional law changes slowly”).

24. See DAVID SATCHER, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, FOREWORD TO THE SURGEON GENERAL’S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY, at <http://www.surgeongeneral.gov/topics/obesity/calltoaction/foreward.htm> (last visited Jan. 28, 2003) [hereinafter Surgeon General] (noting that the nation’s weight problem has reached “epidemic proportions” and is increasing among men and women and among all population groups); Ali H. Mokdad et al., *The Spread of the Obesity Epidemic in the United States, 1991-1998*, 282 JAMA 1519 (1999) [hereinafter Mokdad] (propounding that obesity is an epidemic as serious as any infectious disease); James O. Hill & John C. Peters, *Environmental Contributions to the Obesity Epidemic*, 280 SCIENCE 1371, 1371 (1998) (“Obesity has reached epidemic proportions in the United States and is threatening to become a global epidemic.”); *Overweight, Obesity Threaten U.S. Health Gains*, FDA CONSUMER, Mar.-Apr. 2002, at 8 (“Overweight and obesity are among the most pressing new health challenges we face today.”) (citation omitted). See also Humphrey Taylor, *The Harris Poll: The Obesity Epidemic Is Getting Even Worse*, at [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=288](http://www.harrisinteractive.com/harris_poll/index.asp?PID=288) (last visited Jan. 28, 2003).

25. Surgeon General, *supra* note 24.

26. *Id.*

27. NATIONAL INSTITUTES OF HEALTH (“NIH”), *Clinical Guidelines on the Identification, Evaluation, and Treatment of Overweight and Obesity in Adults: The Evidence Report*, NIH Publication No. 98-4083 at vii, available at [http://www.nhlbi.nih.gov/guidelines/obesity/ob\\_gdlns.htm](http://www.nhlbi.nih.gov/guidelines/obesity/ob_gdlns.htm) (last visited Jan. 28, 2003) [hereinafter Clinical Guidelines].

28. See Ali H. Mokdad et al., *Prevalence of Obesity, Diabetes, and Obesity-Related Health Risk Factors*, 2001, 289 JAMA 76, 78 (2003).

29. *Id.* The scientists articulate their belief as follows:

[Overweight and obesity] rates are no doubt substantial underestimates. First, individuals without telephones are not included in [the selection pool], and such persons are likely to be of low

Recognizing the severity of this problem, the NIH has labeled obesity a disease.<sup>30</sup> Obesity is a condition in which a person's body-fat represents thirty percent or more of their total weight.<sup>31</sup> The most common method used to diagnose obesity is the Body Mass Index ("BMI"), which is calculated by computing:  $[\text{weight}(\text{pounds})/\text{height}(\text{inches})^2] \times 703$ .<sup>32</sup> A BMI of 18.5 to 24.9 is considered healthy.<sup>33</sup> To put the calculation in perspective, consider (1) a person who stands five-feet-six-inches tall and weighs 186 pounds, and (2) a person who is six-feet tall and weighs 222 pounds; both have a BMI of thirty which is classified as obese.<sup>34</sup> While the BMI's limitations may cause it to over-include and under-include certain persons,<sup>35</sup> it correlates highly with total body-fat for the general population.<sup>36</sup> Notwithstanding these limitations, studies show that obesity afflicts all demographics without impunity.<sup>37</sup>

socioeconomic status, a factor associated with both obesity and diabetes. Second, in validation studies of self-reported weight and height, overweight participants tend to underestimate their weight, and all participants tend to overestimate their height.

*Id.* The study also found that "obesity among US adults increased to 20.9% in 2001 from 19.8% in 2000[.]" *Id.* at 77 (internal references omitted).

30. Clinical Guidelines, *supra* note 27, at xi (discussing how obesity is a "complex, multifactorial chronic disease") (emphasis added). See generally AMERICAN OBESITY ASSOCIATION, *Obesity is a Chronic Disease*, at <http://www.obesity.org/treatment/obesity.shtml> (last visited Jan. 28, 2003) (noting that obesity has been recognized as a disease by the NIH, the National Academy of Sciences' Institute of Medicine, the Federal Trade Commission, the Maternal and Child Health Bureau, the World Health Organization, the American Heart Association, the American Academy of Family Physicians, the and the American Society of Bariatric Physicians).

31. See Clinical Guidelines, *supra* note 27, at xiv.

32. *Id.* The BMI approximates body fat by calculating a ratio using a person's weight respective to their height. *Id.*

33. *Id.* BMI is categorized according to the following scheme: Underweight (BMI < 18.5); Normal Weight (BMI = 18.5 to 24.9); Overweight (BMI = 25.0 to 29.9); Obesity I (BMI = 30.0 to 34.9); Obesity II (BMI = 35.0 to 39.9); and Obesity III [Morbid Obesity] (BMI ≥ 40). *Id.* Body fat can also be determined visually by looking at a person's "waist circumference," which is the presence of disproportionate excess fat in the abdomen. *Id.*

34. Using the BMI calculation produces the following results: Person 1 [weight (186 pounds)/height (66 inches)<sup>2</sup>] x 703 = BMI of 30; Person 2 [weight (222 pounds)/height (72 inches)<sup>2</sup>] x 703 = BMI of 30. See generally *Id.* at xvi tbl.ES-3.

35. *Id.* The NIH recognizes the two inherent limitations of the BMI: (1) "overestimation of body fat in persons who are very muscular" (e.g., athletes); and (2) "underestimation of body fat in persons who have lost muscle mass (e.g., the elderly)." *Id.*

36. *Id.* at xiv.

37. Mokdad, *supra* note 24, at 1520. The study reports, "obesity increased in every state, in both sexes, and across all age groups, races, educational levels, and smoking statuses. Rarely do chronic conditions such as obesity spread with the speed and dispersion characteristic of a communicable disease epidemic." *Id.*

### 1. Causation

Obesity is a complex disease influenced by many factors and its exact cause remains undiscovered.<sup>38</sup> The NIH propounds that obesity involves the “integration of social, behavioral, cultural, physiological, metabolic and genetic factors.”<sup>39</sup> Furthermore, the Surgeon General illuminates:

Many people believe that dealing with overweight and obesity is a personal responsibility. To some degree they are right, but it is also a community responsibility. When 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 new or expectant mothers are not educated about the benefits of breastfeeding, that is a community responsibility. When we do not require daily physical education in our schools, that is also a community responsibility. There is much that we can and should do together.<sup>40</sup>

Although obesity is caused by the interplay of many factors, it can be treated in a number of ways. Most importantly, scientists insist that people must reduce their caloric intake and increase their energy expenditure if they want to lose weight and keep it off.<sup>41</sup> This lifestyle change is the

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38. Clinical Guidelines, *supra* note 27, at xi; UNITED STATES DEPARTMENT OF ENERGY, *More Clues About Obesity Revealed By Brain-Imaging Study*, at <http://www.eurekaalert.org/features/doe/2002-07/dnl-mca071902.php> (last visited Jan. 20, 2003) [hereinafter DOE].

39. Clinical Guidelines, *supra* note 27, at xi; DOE, *supra* note 38 (“[O]besity is a complex disease with many contributing factors, including genetics, abnormal eating behavior, lack of exercise, and cultural influences, as well as cerebral mechanisms, which are not yet fully understood.”).

40. Surgeon General, *supra* note 24. See also William H. Dietz et al., *Policy Tools For the Childhood Obesity Epidemic*, 30 J.L. MED. & ETHICS 83 (2002) (“The rapid increases in childhood and adolescent overweight between 1980 and 1999 can only be explained by environmental factors.”); Michael Craig Miller, *A Little More Willpower Can Change Your Life*, NEWSWEEK, Jan. 20, 2003, at 70 (“Our appetites—forged in Stone Age settings where food was scarce and physical labor was a daily reality—are not easily suppressed. Our love of certain foods often takes root during childhood, long before we know or care about their nutritional value.”); Hesman, *supra* note 2, at A14 (“All animals, including humans, are constantly ‘switched on’ to eat when the opportunity presents itself . . . . That’s not an inherent failing in willpower, it’s a biological imperative.”) (citation omitted); Nanci Hellmich, *Food For Thought For a Fat Nation*, USA TODAY, Feb. 19, 2002, at B10 (“There are so many pressures on people to be thin and physically fit that if willpower was enough, we’d have the weight problem solved . . . [b]ut until the environment changes, it will be impossible to reverse the increasing prevalence of obesity.”) (internal citation omitted).

41. Clinical Guidelines, *supra* note 27, at xix. The study reports in detail: “An increase in physical activity is an important component of weight loss therapy . . . . Most weight loss occurs because of decreased caloric intake. Sustained physical activity is most helpful in the prevention of weight regain.” *Id.*

safest and most economically efficient way to curb obesity.<sup>42</sup> Next, and more costly, some overweight and obese persons can be treated with pharmaceuticals.<sup>43</sup> While the short-term results of drug-therapy are promising, the long-term results indicate that some users experience serious side effects.<sup>44</sup> Finally, morbidly obese persons—those with a BMI of forty or higher—can alleviate their obese condition with gastrointestinal surgery.<sup>45</sup> This surgery is effective because it reduces the amount of caloric intake by decreasing the size of the stomach.<sup>46</sup> Nevertheless, surgery is not the most feasible option because it costs approximately \$15,000 and carries a risk of death for 1 in every 200 patients.<sup>47</sup>

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42. See *id.* See also Ross E. Andersen et al., *Effects of Lifestyle Activity vs Structured Aerobic Exercise in Obese Women: A Randomized Trial*, 281 JAMA 335, 336 (1999) (recommending lifestyle changes like thirty minutes per day of moderate exercise, such as walking instead of driving). The study describes further: “[A] program of diet plus lifestyle activity may offer similar health benefits and be a suitable alternative to diet plus vigorous activity for overweight women. The diet plus lifestyle program was as effective [as the diet plus aerobic exercise plan].” *Id.* at 339.

In addition, consider the following rationale: Not only is it free for people to eat less, it is actually cheaper for them to do so, for there would be less food to buy. Likewise, people can save themselves money if they walk short distances and leave their cars at home.

43. See generally Kristina Nabro et al., *Pharmaceutical Costs in Obese Individuals: Comparison With a Randomly Selected Population Sample and Long-Term Changes After Conventional and Surgical Treatment: The SOS Intervention Study*, 162 ARCH. INTERNAL MED. 2061 (2002) (discussing how the use and cost of medications are vastly higher for obese persons compared to the general population); Alfred Wirth & Jutta Krause, *Long-Term Weight Loss With Sibutramine: A Randomized Controlled Trial*, 286 JAMA 1331 (2001) (discussing long-term treat of obesity and its effectiveness); Julius M. Gardin et al., *Valvular Abnormalities and Cardiovascular Status Following Exposure to Dexfenfluramine or Phentermine/Fenfluramine*, 283 JAMA 1703 (2000) (discussing the adverse consequences of drugs previously used to treat obesity).

44. See, e.g., Michael H. Davidson et al., *Weight Control and Risk Factor Reduction in Obese Subjects Treated for 2 Years With Orlistat: A Randomized Controlled Trial*, 281 JAMA 235, 235 (1999) (discussing how the drug blocks “gastrointestinal uptake of approximately 30% of ingested fat.”). The study goes on: “[P]artial inhibition of fat absorption in obese subjects can produce sustained weight loss. Subjects treated with orlistat plus a mildly controlled-energy diet lost significantly more weight than those treated with placebo plus diet even though subjects received a high standard of care and similar dietary counseling.” *Id.* at 242.

45. Clinical Guidelines, *supra* note 27, at 87 (“Gastrointestinal surgery . . . can result in substantial weight loss, and therefore is an available weight loss option for well-informed and motivated patients with a BMI  $\geq$  40 or  $\geq$  35, who have comorbid conditions and acceptable operative risks.”). See also AMERICAN SOCIETY FOR BARIATRIC SURGERY, *Rationale For the Surgical Treatment of Morbid Obesity*, at <http://www.asbs.org/html/rationale/rationale.html> (last visited Jan. 29, 2003) [hereinafter *Bariatric Surgery*] (“Surgical treatment is medically necessary because it is the only proven method of achieving long term weight control for the morbidly obese. Surgical treatment is not a cosmetic procedure.”). *Id.* See generally Robert E. Brolin, *Bariatric Surgery and Long-term Control of Morbid Obesity*, 288 JAMA 2793 (2002).

46. *Bariatric Surgery*, *supra* note 45. This surgery is effective because it decreases the size of the stomach and “[e]ating behavior improves dramatically.” *Id.* Consequently, “[t]his reduces caloric intake and ensures that the patient practices behavior modification by eating small amounts slowly, and chews each mouthful well.” *Id.*

47. NATIONAL INSTITUTE OF DIABETES & DIGESTIVE & KIDNEY DISEASES, *Gastrointestinal Surgery for Severe Obesity*, at <http://www.niddk.nih.gov/health/nutrit/pubs/gastric/gastricsurgery.htm>



## 2. Consequences

Left untreated, the ramifications of being overweight or obese are severe and costly. Most noticeably, such people are more susceptible to premature death, heart disease, diabetes, cancer, breathing problems, arthritis, reproductive complications, and other adverse conditions.<sup>48</sup> Just as alarming, some obese children have begun to suffer from health conditions that have traditionally occurred only in adults.<sup>49</sup> In particular, the Surgeon General reports that obese children are exposed to an increased risk of diabetes, high cholesterol, and high blood pressure.<sup>50</sup>

Health implications notwithstanding, the costs of fighting obesity are staggering.<sup>51</sup> In 1995, the direct health care costs of treating obesity were approximately \$52 billion.<sup>52</sup> In 2000, these same costs had risen to \$61

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(last visited Jan. 29, 2003) (reporting the monetary costs of surgery). The article also reports some ill-health consequences, which include: (1) ten to twenty percent of patients require follow-up operations to correct complications; (2) gallstone development; (3) nutritional deficiencies; and (4) women have to delay pregnancy until their weight stabilizes. *Id.* See CNBC: Early Today, Newscast: *Growing number of dieters turn to stomach surgery to take off excess weight*, (Sept. 4, 2002), available at WL 5828228 (Robert Bazell reporting that “[o]ne in 200 people die from the operations themselves. Six in 200 suffer severe complications like ulcers, infections or constant heartburn. And one in 10 patients fail to lose weight.”).

48. Clinical Guidelines, *supra* note 27, at 12-20. An extensive list of health consequences includes: increased morbidity, hypertension, dyslipidemia, diabetes, coronary heart disease, congestive heart failure, stroke, gallstones, osteoarthritis, sleep apnea, colon cancer, breast cancer, endometrial cancer, gallbladder cancer, menstrual irregularity, and excessive weight-gain during and after pregnancy. *Id.*

49. See generally William H. Dietz & Steven L. Gortmaker, *Do We Fatten Our Children at the Television Set? Obesity and Television Viewing in Children and Adolescents*, 5 PEDIATRICS 807 (1985); Robert H. DuRant et al., *The Relationship Among Television Watching, Physical Activity, and Body Composition of Young Children*, 94 PEDIATRICS 449 (1994); Robert W. Jeffery & Simone A. French, *Epidemic Obesity in the United States: Are Fast Foods and Television Viewing Contributing?* 88 AM. J. PUB. HEALTH 277 (1998); Robert C. Klesges et al., *Effects of Television on Metabolic Rate: Potential Implications for Childhood Obesity*, 91 PEDIATRICS 281 (1993);

50. *Overweight in Children and Adolescents*, at [http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact\\_adolescents.htm](http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact_adolescents.htm) (last visited Jan. 29, 2003) [hereinafter *Overweight Children Facts*]. The report notes in particular: (1) “Risk factors for heart disease, such as high cholesterol and high blood pressure, occur with increased frequency in overweight children and adolescents compared to children with a healthy weight”; and (2) “Type 2 diabetes, previously considered an adult disease, has increased dramatically in children and adolescents.” *Id.* at 1.

51. See David B. Allison et al., *The Direct Health Care Costs of Obesity in the United States*, 89 AM. J. PUB. HEALTH 1194 (1999) (reporting that in 1995 direct health care costs were approximately \$52 billion annually); Anne M. Wolf & Graham A. Colditz, *Current Estimates of the Economic Cost of Obesity in the United States*, 6 OBESITY RESEARCH 97 (1998) (estimating in 1995 direct and indirect costs of obesity were \$99.2 billion annually).

52. Clinical Guidelines, *supra* note 27, at 9. The report details further: “Approximately \$51.6 billion of these dollars were direct medical costs associated with diseases attributable to obesity. The direct costs also associated with obesity represent 5.7 percent of the national health expenditure within the United States.” *Id.*

billion.<sup>53</sup> According to the National Governors Association (“NGA”), approximately ten percent of nationwide Medicaid budgets are spent treating obesity.<sup>54</sup>

While the direct costs of obesity are impressive, so are the indirect costs.<sup>55</sup> The NGA estimates that the nation spends \$56 billion indirectly on obesity.<sup>56</sup> These costs are due primarily to lost production opportunities, which are attributable to physical restrictions, morbidity and mortality.<sup>57</sup> What is more, these costs exclude the \$40 billion Americans spend annually on diet and weight-loss products.<sup>58</sup> In total, the overweight and obesity epidemic costs America approximately \$157 billion per year.<sup>59</sup>

Additionally, obese people may be charged more for life insurance premiums, or be denied coverage entirely.<sup>60</sup> Because life insurance is a

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53. Surgeon General, *supra* note 24, Economic Consequences, at [http://www.surgeongeneral.gov/topics/obesity/calloaction/1\\_3.htm](http://www.surgeongeneral.gov/topics/obesity/calloaction/1_3.htm) (last visited Nov. 21, 2003).

54. NATIONAL GOVERNORS ASSOCIATION (“NGA”), *NGA Highlights States Efforts to Combat Obesity*, at [http://www.nga.org/nga/newsroom/1,1169,C\\_PRESS\\_RELEASE%5ED\\_3995,00.html](http://www.nga.org/nga/newsroom/1,1169,C_PRESS_RELEASE%5ED_3995,00.html) (last visited Jan. 29, 2003) [hereinafter NGA Highlights]. *Id.*; See also CENTER ON AN AGING SOCIETY, Georgetown University, *Childhood Obesity: A Lifelong Threat to Health*, in CHALLENGES FOR THE 21ST CENTURY: CHRONIC AND DISABLING CONDITIONS 4 (2002), providing the following notes:

Health care coverage under the Medicaid program is important to many children who otherwise would have no health insurance. The publicly financed Medicaid program provides health insurance for over 4 million obese children. Nearly one-third . . . of obese children are covered under Medicaid, compared to just 18 percent of non-obese children.

*Id.* The report also states that only “one-quarter . . . of the health care costs for obese children are paid out-of-pocket by their families.” *Id.*

55. Clinical Guidelines, *supra* note 27, at 9 (“The indirect costs attributable to obesity are \$47.6 billion and are comparable to the economic costs of cigarette smoking. Indirect costs represent the value of lost output caused by morbidity and mortality, and may have a greater impact than direct costs at the personal and societal levels.”).

56. NGA Highlights, *supra* note 54.

57. *Id.*

58. Unmesh Kher, *How To Sell XXXL: With More Americans Overweight, Smart Firms Aim to Sell Them Things to Make Their Lives More Comfy*, TIME, Jan. 27, 2003, at 43 [hereinafter Kher] (“The weight-loss market grew to about \$40 billion last year, from \$33 billion in 1999.”).

59. This considers the NGA’s estimates of total cost related to treating the overweight and obese and estimates of the amount spent on weight-loss programs. See Jane Byeff Korn, *Fat*, 77 B.U. L. REV. 25, 47 n.150 (1997) [hereinafter Korn]. See also Nanci Hellmich & Anita Manning, *Tipping the Scales Toward Diabetes; Twin Scourge of Weight and Disease Could ‘Break the Bank’ of Health Care*, USA TODAY, Oct. 24, 2002, D.1 (indicating that the costs may be even higher). The article states: “Experts say the USA and other countries simply can’t afford to deal with the problem [of obesity]. Obesity cost the USA about \$123 billion in 2001.” *Id.* (citation omitted). Under these calculations, the aggregate amount spent on overweight and obesity would be \$163 billion.

60. See INSURE.COM, *Being Overweight Carries Life Insurance Pains*, at <http://www.info.insure.com/life/weight.html> (last visited Jan. 20, 2003). The article quotes a director of State Farm’s Life/Health Underwriting Department: “[A] person can be denied life insurance at [our] company if the person is ‘grossly overweight or dramatically obese’, even if he does not have any other health problems.” *Id.*

function of morbidity and mortality, a number of insurance companies incorporate policies that require people with higher BMIs to pay more.<sup>61</sup> For example: if a person with a BMI of less than twenty-five pays \$100 premiums, a similar person with a BMI of thirty-seven pays \$115-\$120 premiums, and a person with a BMI of forty-one pays \$130-\$135 premiums.<sup>62</sup>

Not only are obese people subject to higher insurance premiums, they are also required to pay more than their nonobese counterparts for some regular services and items.<sup>63</sup> Of note, in 2002 Southwest Airlines implemented its dormant “person of size” policy, which calls for passengers who do not fit comfortably in a Southwest Airline seat to purchase an additional seat.<sup>64</sup> Moreover, some obese people have to pay more for clothing,<sup>65</sup> or are quoted higher prices for rental housing.<sup>66</sup>

61. *Id.* The theory of morbidity and mortality is as follows:

The more you weigh in relation to your height, the more potential you have for health problems. The ideal life insurance customer is someone who is expected to live a long, healthy life . . . . [O]verweight people pose increased insurance risks, because they are likely to develop health problems as they grow older.

*Id.* The article notes that although a number of large insurance firms such as State Farm Life Insurance and Hartford Life Insurance adhere to this principle, a number of other firms specialize in insuring people with severe health problems. *Id.*

62. *Id.*

63. SONDRÁ SOLOVAY, *TIPPING THE SCALES OF JUSTICE: FIGHTING WEIGHT-BASED DISCRIMINATION* 26, 29 n.5 (Prometheus Books, 2000) [hereinafter Solovay] (discussing how clothes can cost more for fat people). See also Kher, *supra* note 58, at 43-46 (markets are beginning to adjust to an overweight and obese population by making roomier cars, wider furniture, plus-sized clothing, and medical equipment able to support weights from 500-1,000 pounds.)

64. SOUTHWEST AIRLINES, *A Message From Southwest Airlines*, at [http://www.southwest.com/about\\_swa/press/additional\\_seat.html](http://www.southwest.com/about_swa/press/additional_seat.html) (last visited Jan. 15, 2003). The press release reads:

Southwest has had its policy in place since 1980. In short, we ask a Customer to purchase the number of seats he/she occupies. And, as long as the flight does not oversell, we will refund the purchase of the additional seat(s) after travel is completed. Our goal is to ensure a safe flight for everyone and to make everyone’s experience pleasant from beginning to end. By informing Southwest in advance of the need for an additional seat, we can plan, up front, for two seats, not one, to be taken from our seat inventory. With two tickets in hand, a Customer of size can avoid any discussion at the Gate with our Employees, and our flight is less likely to experience an oversale-which ultimately ensures that the second ticket is refunded.

*Id.* See also United Kingdom Associate Press, *Woman Squashed by Plane Passenger*, at <http://www.cnn.com/2002/WORLD/europe/10/22/virgin.payout/index.html> (last visited Nov. 9, 2002) (Virgin Atlantic Airlines reached a \$20,000 settlement with a woman suffering from injuries due to an obese woman partially occupying her seat).

Southwest Airlines’s “person of size policy” raises a number of intriguing inquiries. If overweight or obese people are required to pay for a second seat, then: (1) do they receive an extra meal; (2) are they allowed to carry twice as much luggage; (3) are they entitled to twice as much attention from flight-attendants?

65. Solovay, *supra* note 63, at 27.

66. *Id.* (citing Lambros Karris, *Prejudice Against Obese Renters*, 101 J. SOC. PSYCHOLOGY 159-60 (1977)).

In another regard, being overweight entails two pertinent social costs. First, overweight and obese people may be culturally stigmatized.<sup>67</sup> Often, obese children, adolescents, and adults are the target of ridicule and discrimination.<sup>68</sup> Most noticeably, most Americans are of “[t]he belief that fat people could be thin if only they had enough will power or self-control.”<sup>69</sup> This stigma often leaves overweight and obese people feeling ashamed, alienated, and insecure.<sup>70</sup>

Second, in a very real sense, obesity can be a threat to national security.<sup>71</sup> One study reports that a sizeable proportion of recruitment-age men and women are too overweight to fight in a war—especially so for women.<sup>72</sup> Thus, if the U.S. Armed Forces were required to recruit or draft individuals on short notice, the pool from which it could draw would be severely limited.<sup>73</sup>

67. Clinical Guidelines, *supra* note 27, at 20 (“People’s negative attitudes toward the obese often translate into discrimination in employment opportunities, college acceptance, less financial aid from their parents in paying for college, job earnings, rental availabilities, and opportunities for marriage.”) (citations omitted). *Id.*

68. See Overweight Children Facts, *supra* note 50 (“The most immediate consequence of overweight as perceived by the children themselves is social discrimination.”); Solovay, *supra* note 63, at 44, describing in pertinent part:

Fat kids will suffer objectifying and stigmatizing events because of their weight. The discrimination is entirely predictable and the resulting devotation is foreseeable as well. These experiences result in lower self-esteem, alienation, and denial of the benefits of activity while unnecessarily curtailing the kids’ future opportunities. Protecting every fat child from all harassment is impossible, but some basic improvements need to be made.

*Id.* Concerning adult discrimination, Solovay states: “[F]at [male executives] pay a salary penalty of \$1,000 per year per pound they are overweight . . . [and] on average, fat women have a staggering \$6,710 less in income per year than thin women.” *Id.* at 106. See also Steven L. Gortmaker et al., *Social and Economic Consequences of Overweight in Adolescence and Young Adulthood*, 329 *NEW ENG. J. MED.* 1008 (1993) (describing how overweight men and women were less likely to be married and had lower household incomes).

69. Korn, *supra* note 59, at 44. See also *Drug Research Corp. v. Curtis Pub. Co.*, 166 N.E. 2d 319, 320 (N.Y. 1960) (“The underlying causes of overweight are often obscure: boredom, nervousness, unrequited love are only a few. But the cure—eating less—calls for something most fat people don’t have when it comes to food: will power.”); Solovay, *supra* note 63, at 27 (“The acceptability of fat prejudice and much of the hostility directed toward fat people is supported by the widespread belief that fat people can become thin if they choose to.”).

70. Solovay, *supra* note 63, at 58-61.

71. JOHN HOPKINS MEDICAL INSTITUTION, Office of Communications and Public Affairs, *Too Fat To Fight? Military Weight Guidelines May Be Keeping Qualified People Out of the Service*, at <http://www.hopkinsmedicine.org/press/2002/December/021210A.htm> (last visited Jan. 29, 2003).

72. *Id.* Specifically, the study reports that “15 to 20 percent of white men, 13 to 19 percent of black men and 12 to 24 percent of Mexican American men did not meet the [military’s weight] standard[s]” and “[12] to 36 percent of white women, 35 to 56 percent of black women and 20 to 55 percent of Mexican American women did not meet the [military’s weight] stand[s].” *Id.*

73. *Id.*

Putting the nation's weight problem into focus, America is the fattest nation in the world.<sup>74</sup> This "achievement" helped to establish another remarkable event: In 2000, for the first time in history, the number of overweight people in the world equaled the number of malnourished—1.1 billion each.<sup>75</sup>

### 3. Possible Solutions

To diminish the effects of untreated obesity, some health experts suggest that it may be "appropriate to tax foods on the basis of their [fat] content."<sup>76</sup> The revenue from such a tax would be used to promote health education and physical activity programs.<sup>77</sup> Although taxation may be a viable method of raising revenue to care for overweight and obese people, others suggest that suing Big Food is a good method of acquiring money to reach the same result.<sup>78</sup>

#### B. The Brief History of Big Food Litigation

Although Big Food litigation is a recent concept, in *Liberty v. District of Columbia Police and Firemen's Retirement and Relief Board*,<sup>79</sup> the District of Columbia Court of Appeals became the first court to comment on this type of argument.<sup>80</sup> In *Liberty*, an overweight retired police officer claimed he was entitled to higher annuity benefits because his employment as a patrolman caused him to suffer coronary heart disease.<sup>81</sup> *Liberty* also asserted that eating "junk food or fast foods high in cholesterol and fat-

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74. GREG CRITSER, *FAT LAND: HOW AMERICANS BECAME THE FATTEST PEOPLE IN THE WORLD* 4 (2003) [hereinafter Critser] (noting that "[t]oday Americans are the fattest people on the face of the earth (save for the inhabitants of a few South Seas islands)").

75. MARION NESTLE, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH* 16 (2002) [hereinafter Nestle].

76. Michael F. Jacobson & Kelly D. Brownell, *Small Taxes on Soft Drinks and Snack Foods to Promote Health*, 90 AM. J. PUB. HEALTH 854 (2000) [hereinafter Jacobson & Brownell]. Although some states already have a snack-tax, no states have a fat-tax. *Id.* The article notes that, "legislative bodies find it more practical to tax well-recognized categories of food that play little useful role in nutrition." *Id.*

77. *Id.* at 856-57. Currently, the states' revenues from the snack-tax range from approximately \$93 thousand to \$218 million, which is normally contributed to each state's general funds. *Id.* at 855.

78. See *infra* notes 81-89 and accompanying text. Big Food, however, believes that such lawsuits are frivolous. See Ellen Sorokin, *McDonald's Marketing Cited for Teens' Obesity: Fast-Food Giant Calls Suit 'Frivolous'*, WASH. TIMES, Sept. 10, 2002, at A03, [hereinafter Sorokin]; See generally John Wade, *On Frivolous Litigation: A Study of Tort*, 14 HOFSTRA L. REV. 433 (1986) [hereinafter Wade] (discussing the concept of frivolousness).

79. 452 A.2d 1187 (D.C. 1982).

80. *Id.* at 1189-90.

81. *Id.* at 1188.

content contribut[ed] to his obesity.”<sup>82</sup> The court rejected Liberty’s claim and held that his “disability was neither caused nor aggravated” by his patrolman duties.<sup>83</sup> Because Liberty was obese, had high cholesterol and hypertension, and smoked, the court reasoned that job-related stress could not be singled-out as the cause of Liberty’s disability.<sup>84</sup> Additionally, the court noted that, at best, there was only a tentative connection between eating fast food and becoming obese.<sup>85</sup>

Twenty years later, in *Barber v. McDonald’s Corp.*,<sup>86</sup> Barber filed the first Big Food litigation against McDonald’s, Burger King, Wendy’s, and KFC.<sup>87</sup> Barber alleged that the defendants manufactured and sold foods that were unhealthy,<sup>88</sup> failed to disclose pertinent nutritional information,<sup>89</sup> marketed unhealthy products,<sup>90</sup> and thereby caused him to become obese and suffer heart problems.<sup>91</sup> Barber sought compensatory damages, placement of nutrition labels on individual fast-food products, funding for an educational program teaching children and adults about the consequences of eating fast food, attorney’s fees, and court costs.<sup>92</sup> Yet, in early September 2002, Barber withdrew his complaint because he could not overcome the defenses of assumption of risk and contributory negligence.<sup>93</sup>

The United States District Court for the Southern District of New York was the first court to adjudicate a Big Food litigation case in *Pelman v. McDonald’s Corp.*<sup>94</sup> In *Pelman*, the Teens<sup>95</sup> made the same allegations

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82. *Id.* at 1189 (internal quotation omitted).

83. *Id.* at 1190.

84. *Id.* at 1189.

85. *Id.* at 1190.

86. Complaint, *Barber v. McDonald’s Corp.*, No. 23145/2002, (N.Y. Sup. Ct. Bronx County filed Jul. 26, 2002), at <http://news.findlaw.com/hdocs/docs/mcdonalds/barbermcds7202cmp.pdf> (last visited Jan. 10, 2003) [hereinafter *Barber Complaint*].

87. *Id.* at 1.

88. *Id.* at 9-10.

89. *Id.* at 10-11.

90. *Id.* at 11-12.

91. *Id.* at 7, 9-13.

92. *Id.* at 13-14.

93. See *Crossfire* (CNN television broadcast, Sept. 2, 2002), at <http://www.cnn.com/TRANSCRIPTS/0209/02/cf.00.html> (last visited Jan. 27, 2003). John Banzhaf III, a consultant to Barber’s attorney, Samuel Hirsch, indicates that Barber’s lawsuit had been withdrawn: “That suit is gone. . . . You’re defending a suit that no longer applies.” *Id.* See also <http://banzhaf.net/docs/nyckids.html> (last visited Jan. 27, 2003) [hereinafter *Banzhaf.net*] (Banzhaf articulates weaknesses in Barber’s claim). In particular, the article states: “Having only one defendant avoids the problem of potentially divided responsibility present in [Barber’s claim, and] at the same time [the Teens’ suit] avoids defenses of assumption of risk and contributory negligence.” *Id.*

94. *Pelman*, 237 F. Supp. 2d. 512 (S.D.N.Y. 2003).

95. See *supra* note 13.

that Barber made in his complaint.<sup>96</sup> In addition, the Teens made four allegations to show that McDonald's owed them a duty of care:<sup>97</sup>

(1) McDonalds' products have been processed to the point where they have become completely different and more dangerous than the run-of-the-mill products they resemble and than a reasonable consumer would expect; (2) plaintiffs have an allergic sensitivity to McDonalds' products; (3) McDonalds should know that consumers would misuse products (presumably by eating in larger quantities or at greater frequencies); and (4) policy arguments based upon the Nutrition Labeling and Education Act.<sup>98</sup>

The court dismissed the suit.<sup>99</sup> It reasoned that the "[p]laintiffs have failed to allege in the Complaint that their decisions to eat at McDonalds several times a week were anything but a choice freely made and which now may not be pinned on McDonalds."<sup>100</sup> The court then granted the Teens leave to amend their complaint,<sup>101</sup> which, in September 2003, the court dismissed with prejudice.<sup>102</sup>

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96. See *supra* notes 88-91 and accompanying text. Compare *Pelman*, 237 F. Supp. 2d, at 520, with Barber Complaint, *supra* note 86, at 9-14. This phenomenon is apparent because the Samuel Hirsch represented both Barber and the Teens. See Banzhaf.net, *supra* note 94 ("While suits by children may lead to arguments that the parents should be responsible for their child's obesity . . . by law, any negligence by parents is not a defense in a legal action by their children.") *Id.*

97. *Pelman*, 237 F. Supp. 2d at 532 (noting that while a court "may only consider allegations in the Complaint for the purposes of this motion, these arguments are important in determining whether the plaintiffs should have the right to amend their complaint, as they point to potentially viable claims, and thus will briefly be addressed") (citing *Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir. 1992)).

98. *Id.*

99. *Id.* at 518, 543. The court also noted concern that this case "could spawn thousands of similar 'McLawsuits' against restaurants." *Id.* at 518; but see *Buckley v. Am. Constitutional Law*, 525 U.S. 182, 195 n.16 (discussing the weakness of slippery slope arguments). See generally, Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 Harv. L. Rev. 1026 (2003) [hereinafter Volokh].

100. *Pelman*, 237 F. Supp. 2d at 533.

101. *Id.* at 543 ("When a motion to dismiss is granted, the usual practice is to grant leave to amend the complaint.") (internal quotation and citation omitted).

102. See *Pelman II*, *supra* note 16, at <http://benzhet.net.docs/mcop2.html>. Specifically, the judge noted:

The 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 plead complain would need to be contain. Despite this guidance, plaintiffs have failed to allege a cause of action . . . ."

*Id.*

### C. *The Fall of Goliath: Learning From Big Tobacco Litigation*

If people file Big Food litigation, perhaps the best chance of success is not via individual action, but by class action—like Big Tobacco litigation.<sup>103</sup> The prevalence of lung cancer and other smoking-related illnesses provided the catalyst for Big Tobacco litigation.<sup>104</sup> In fact, smoking-related diseases are the leading cause of preventable death in America, killing an estimated 440,000 people each year.<sup>105</sup> Add to that the economic costs of smoking, which amass to \$157 billion annually.<sup>106</sup> Consequently, in the 1990s, most states initiated suits against Big Tobacco to mitigate the economic effect of cigarettes and to recover Medicaid expenses.<sup>107</sup>

For over fifty years, Big Tobacco had known about the adverse health consequences of smoking.<sup>108</sup> Despite knowing the imposed dangers of smoking, Big Tobacco instituted pro-smoking campaigns, manipulated nicotine levels, and denied that cigarettes had adverse effects.<sup>109</sup> Big

103. For purposes of this Note, “Big Tobacco” means the tobacco industry in general, and includes but is not limited to: American Brands, Inc.; The American Tobacco Co.; British American Tobacco Co.; Brown & Williamson Tobacco Corp.; Dosal Tobacco Corp.; Liggett Group & Myers, Inc.; Loews Corp.; Philip Morris Co., Inc.; R.J. Reynolds Tobacco Co.; and United States Tobacco Co. In addition, for purposes of this Note, “Big Tobacco litigation” refers to attempts to hold the tobacco industry liable for smoking-related injuries.

104. *See, e.g.*, Complaint, *Minnesota v. Philip Morris, Inc.*, C1-94-8565, (D. Minn. filed Aug. 17, 1994), at <http://www.library.ucsf.edu/tobacco/litigation/mn/3bcbs.html> (last visited Jan. 29, 2003) [hereinafter *Minn. Complaint*]. The complaint asserts:

The defendants’ collective conduct has resulted in an unprecedented impact on the public health, in both human and economic terms. The death toll in one year alone from cigarette smoking equals the number of American lives lost in battles in all the wars this country has fought this century. Overwhelmingly, the new recruits in this death march are children and adolescents.

*Id.* at 2.

105. CENTERS FOR DISEASE CONTROL & PREVENTION (“CDC”), *Annual Smoking-Attributable Mortality, Years of Potential Life Lost, and Economic Costs—United States, 1995-1999*, 51 MORBIDITY AND MORTALITY WEEKLY REPORT 300 (2002).

106. *Id.* Coincidentally, this amount is identical to the approximate amount spent caring for overweight and obese people. *See supra* notes 51-59 and accompanying text.

107. *See* Tobacco Control Archives, *Tobacco Litigation Summary Chart*, at <http://www.library.ucsf.edu/tobacco/litigation/summary.html> (last visited Jan. 29, 2003) (presenting a chart that shows forty-one states initiated Big Tobacco litigation actions; suits brought in Idaho and Indiana were dismissed; tobacco-producing states, such as Kentucky, North Carolina, and Virginia, failed to participate).

108. *Minn. Complaint, supra* note 104, at 5-6 (noting that Big Tobacco has known of the negative health consequences of smoking since the 1950s). In particular, it notes: “One of the first of these studies was published in 1952 by Dr. Richard Doll . . . [who] found that lung cancer was more common among people who smoked and that the risk of lung cancer was directly proportional to the number of cigarettes smoked.” *Id.* at 5.

109. *Id.* at 6-8, 15-16. The complaint notes that Big Tobacco felt that it “should sponsor a public relations campaign which is positive in nature and is entirely pro-cigarettes.” (internal quotation



Tobacco also promoted smoking to children and adolescents via child-friendly advertising.<sup>110</sup>

Consequently, the public was willing to hold Big Tobacco liable for its conduct.<sup>111</sup> Initially, most Big Tobacco cases failed because smokers started smoking upon their own free will and continued to do so in spite of the Surgeon General's warnings.<sup>112</sup> Eventually, however, the states used class actions to win a collective \$200 billion settlement.<sup>113</sup>

The states prevailed primarily on the theory of indemnification for medical costs associated with treating smoking-related illnesses.<sup>114</sup>

omitted). *Id.* at 6. Moreover, "cigarette manufacturers can manipulate precisely nicotine levels in cigarettes, manipulate precisely the rate at which the nicotine is delivered in cigarettes, and addictive nicotine to any part of cigarettes." *Id.* at 14.

110. *Id.* at 15. The complaint provides:

The most notorious recent example of the industry targeting of minors is the Joe Camel advertising campaign conducted by R.J. Reynolds. When R.J. Reynolds began this cartoon campaign in 1988, Camels' share of the children's market was only 0.5%. In just a few years, Camel's share of this illegal market has increased to 32.8%, representing sales estimated at \$476 million per year.

*Id.* It goes further to note that ninety-one percent of six-year-olds could recognize Joe Camel. *Id.*

111. See Lipson, *supra* note 22, at 1276 (discussing the success and failure of early tobacco litigation).

112. See *Roysdon v. R.J. Reynolds Tobacco Co.*, 623 F.Supp. 1189 (E.D. Tenn. 1985) (holding that tobacco companies could not be held strictly liable for smoking-related illnesses because common knowledge of the adverse effects of smoking precluded a finding that cigarettes are unreasonably dangerous); Alan L. Calnan, *Distributive and Corrective Justice Issues In Contemporary Tobacco Litigation*, 27 SW. U. L. REV. 577, 582 (1998) ("Although concepts of freedom of choice and personal responsibility were used to defeat the claims of early tobacco litigants, courts never really explained why these principles operated to foreclose liability against the tobacco industry."); Marc S. Klein, *The Viability and Advisability of the Tobacco Industry Product Liability Suits*, 191 N.J. LAWYER 20, at 21 (1998) ("Juries of our peers have consistently rejected claims for tobacco related injuries—including those allegedly premised on the bad behavior of the tobacco industry. They have done so based on our society's normative precepts of personal responsibility and freedom of choice.") (internal quotation omitted).

113. Lipson, *supra* note 22, at 1278. Lipson states:

[T]he [Master Settlement Agreement] provides that the tobacco companies will pay the states approximately \$200 billion over 25 years, beginning in the year 2000. The MSA also restricts specified advertising and marketing practices of the tobacco companies and requires them to fund a number of antismoking initiatives, among other things.

*Id.*

114. *Id.* at 1277. See also RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 22 INDEMNITY (2000), providing in pertinent part:

(a) When two or more persons are or may be liable for the same harm and one of them discharges the liability of another in whole or in part by settlement or discharge of judgment, the person discharging the liability is entitled to recover indemnity in the amount paid to the plaintiff, plus reasonable legal expenses, if . . .

(2) the indemnitee

(i) was not liable except vicariously for the tort of the indemnitor, or

(ii) was not liable except as a seller of a product supplied to the indemnitee by the indemnitor and the indemnitee was not independently culpable.

Florida, however, proceeded using its Medicaid Third-Party Liability Act.<sup>115</sup> Under both methods, Attorneys General argued that it was only fair for Big Tobacco to subsidize the economic harm that its products had caused.<sup>116</sup>

Not only did they sue Big Tobacco, states also increased tax rates on cigarettes to continue offsetting expenses.<sup>117</sup> For example, on the low end, Virginia and Kentucky tax cigarettes at a rate of 2.5¢ and 3¢ per pack,

*Id.*; RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIABILITY § 23 CONTRIBUTION, states in pertinent part:

- (a) When two or more persons are or may be liable for the same harm and one of them discharges, the liability of another by settlement or discharge of judgment, the person discharging the liability is entitled to recover contribution from the other, unless the other previously had a valid settlement and release from the plaintiff.
- (b) A person entitled to recover contribution may recover no more than the amount paid to the plaintiff in excess of the person's comparative share of responsibility.

*Id.*

115. See Fla. Stat. § 409.910 *et seq.* (Supp. 1994), provides in pertinent part:

(1) It is the intent of the Legislature that Medicaid be the payor of last resort for medically necessary goods and services furnished to Medicaid recipients. All other sources of payment for medical care are primary to medical assistance provided by Medicaid. If benefits of a liable third party are discovered or become available after medical assistance has been provided by Medicaid, it is the intent of the Legislature that Medicaid be repaid in full and prior to any other person, program, or entity. Medicaid is to be repaid in full from, and to the extent of, any third-party benefits, regardless of whether a recipient is made whole or other creditors paid. Principles of common law and equity as to assignment, lien, and subrogation are abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources. It is intended that if the resources of a liable third party become available at any time, the public treasury should not bear the burden of medical assistance to the extent of such resources.

(6) When the agency provides, pays for, or becomes liable for medical care under the Medicaid program, it has the following rights, as to which the agency may assert independent principles of law, which shall nevertheless be construed together to provide the greatest recovery from third-party benefits:

- (a) The agency is automatically subrogated to any rights that an applicant, recipient, or legal representative has to any third-party benefit for the full amount of medical assistance provided by Medicaid. Recovery pursuant to the subrogation rights created hereby shall not be reduced, prorated, or applied to only a portion of a judgment, award, or settlement, but is to provide full recovery by the agency from any and all third-party benefits. Equities of a recipient, his or her legal representative, a recipient's creditors, or health care providers shall not defeat, reduce, or prorate recovery by the agency as to its subrogation rights granted under this paragraph.

*Id.*

116. See, e.g., Minn. Complaint, *supra* note 104, at 21, alleging:

Defendants assumed and owe a duty to pay for the harm caused by their wrongful conduct, yet defendants have repeatedly refused to do so. Instead, these defendants embarked on a campaign of denial, subterfuge, and deceit to deny responsibility and to avoid paying for the consequences of the harm they have caused.

117. See generally FEDERATION OF TAX ADMINISTRATORS ("FTA"), *State Cigarette Excise Tax Rates*, at [http://www.taxadmin.org/fta/rate/tax\\_stru.html](http://www.taxadmin.org/fta/rate/tax_stru.html) (last visited Nov. 21, 2003) (providing links to various state tax data).

respectively; on the high end, Rhode Island and New Jersey tax cigarettes at a rate of \$1.71 and \$2.05 per pack, respectively.<sup>118</sup> In addition, some states even allow their counties and cities to place an additional tax on cigarettes.<sup>119</sup>

In sum, Big Tobacco litigation has reconfigured the rule of personal responsibility.<sup>120</sup> Put simply, the states' victory evidenced the notion that Big Tobacco should be partially responsible for the negative consequences that its products have caused.

#### *D. Big Food at the Stove: Understanding the Industry*

Just as Big Tobacco ignored and denied the negative health consequences of smoking, Big Food seems impervious to the nation's weight problem.<sup>121</sup> Big Food steadily entices people to eat bigger portions and to eat them more frequently.<sup>122</sup> And these efforts have not gone unrewarded.<sup>123</sup> In fact, people are eating out more often than ever.<sup>124</sup> By merely giving people larger portions, Big Food knows that customers will eat them regardless of their levels of hunger.<sup>125</sup>

118. FTA, *State Excise Tax on Cigarettes (July 1, 2003)*, at <http://www.taxadmin.org/fta/rate/cigarette.html> (last visited Nov. 21, 2003) [hereinafter Cigarette Tax].

119. *Id.* The specific amounts states allow their counties and cities to charge are as follows: Alabama (1¢-6¢); Illinois (10¢-15¢); Missouri (4¢-7¢); New York (\$1.50); Tennessee (1¢); and Virginia (2¢-15¢). *Id.* "Dealers pay an additional enforcement and administrative fee of 0.1¢ per pack in [Kentucky] and [0.5¢] in [Tennessee]. In [Arizona], a \$1.25/1,000 cigarette fee is imposed." *Id.*

120. *See supra* note 6 and accompanying text.

121. *See supra* note 106.

122. *See* Nestle, *supra* note 75, at 12 (citing the economic pressures on the food industry to expand); MCDONALD'S, *McDonald's Fact Sheet*, at <http://www.mcdonalds.com/corporate/investor/financialinfo/factsheet/index.html> (last visited Feb. 27, 2002) [hereinafter McDonald's Facts] (highlighting that McDonald's, which already claims one percent of all meals eaten throughout the year, seeks to "capture many more meal occasions."); WENDY'S, *Wendy's International, Inc. Reports 3rd Quarter Results*, at <http://www.wendys-invest.com/ne/wen32.htm> (last visited Oct. 26, 2002) (In 2002 Wendy's reported that it wanted to increase its revenue by an additional fifteen to eighteen percent).

123. *See, e.g.*, NATIONAL RESTAURANT Association ("NRA"), *Frequently Asked Questions*, at <http://www.restaurant.org/faq.cfm> [hereinafter NRA, FAQ]. The NRA reports that "[b]etween 1970 and 2001, restaurant-industry sales will post a compound annual growth rate of 7.5 percent. In 2001, the restaurant industry will post its tenth consecutive year of real (inflation-adjusted) sales growth." *Id.* *But see Not So Fast: Fast Food in America*, THE ECONOMIST, Dec. 7, 2002, at 63 (noting that McDonald's and Burger King have had recent declines in sales).

124. McDonald's Facts, *supra* note 122.

125. Critser, *supra* note 74, at 28 ("Human hunger could be expanded by merely offering more and bigger portions."). Critser articulates further: "Between 1970 and 1994, the USDA reports, the amount of food available in the American food supply increased . . . by about 500 calories per person per day." *Id.* In addition, "[d]uring about the same period (1977-1995), average individual caloric intake increased by almost 200 calories . . . [o]ne could argue which came first, the appetite or the bigger burger." *Id.* *See also* Samara Joy Nielson & Barry M. Popkin, *Patterns and Trends in Food*

Moreover, there is some inclination that fast food may be addictive.<sup>126</sup> In a recent study, scientists argue:

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>127</sup>

### 1. *The All-American Meal*

Fast food is particularly attractive because it tastes good, and is cheap and convenient.<sup>128</sup> Concerning taste, Big Food "engineers"<sup>129</sup> its food to have distinctive flavors that cannot be replicated at home.<sup>130</sup> In addition, Big Food prices some items so low that people of all socioeconomic status are able to enjoy its fare.<sup>131</sup> Finally, Big Food is ubiquitous.<sup>132</sup> Not only can fast food be purchased everywhere, it can be purchased on a twenty-four hour basis.<sup>133</sup>

*Portion Sizes, 1977-1998*, 289 JAMA 450 [hereinafter Nielson & Popkin] (discussing how the size of food portions have increased in the fast-food industry and in the home and suggesting that the restaurant's portion sizing has influenced people's at-home portion sizing).

126. See Jeremy Laurance, *Fast Food is Addictive in Same Way as Drugs, Say Scientists*, THE INDEP.—LONDON, Jan. 30, 2003, available at 2003 WL 11350316 [hereinafter Laurance].

127. *Id.*

128. Nestle, *supra* note 75, at 15-20.

129. ERIC SCHLOSSER, *FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL* 127 (2002) [hereinafter Schlosser] (discussing how flavors are created). The author notes: "Natural and artificial flavors are now *manufactured* at the same *chemical plants*, places that few people would associate with Mother Nature. Calling any of these flavors 'natural' requires a flexible attitude toward the English language and a fair amount of irony." *Id.* (emphasis added).

130. *Id.* (describing the food-flavoring process). Schlosser documents in particular:

In order to give a processed food the proper taste, a flavorist must always consider the food's "mouthfeel" - the unique combination of textures and chemical interactions that affects how the flavor is perceived. The mouthfeel can be adjusted through the use of various fats, gums, starches, emulsifiers, and stabilizers.

*Id.*

131. See Nestle, *supra* note 75, at 17-18, detailing the importance of food value:

Cost is so important a factor in food choice that economists are able to calculate the effect of a change in price on nutrient intake. They estimate that a decline in the price of meat, for example, causes the average intake of calcium and iron to rise but also increases the consumption of calories, fat, saturated fat and cholesterol.

*Id.* at 18.

132. See Schlosser, *supra* note 129, at 3 (illustrating the availability of fast food). In particular, he notes: "Fast food is now served at restaurants and drive-throughs, at stadiums, airports, zoos, high schools, elementary schools, and universities, on cruise ships, trains, and airplanes, at K-Marts, Wal-Marts, gas stations and even at hospital cafeterias." *Id.*

133. See Nestle, *supra* note 75, at 19-20 (discussing the convenience factor of fast food). The

In earlier decades, families seldom ate out of the home; they considered it a treat.<sup>134</sup> However, in contemporary America, eating out is an everyday affair<sup>135</sup>—now eating at home is the treat.<sup>136</sup> Americans spend nearly fifty percent of their “food dollar” eating outside the home.<sup>137</sup> Accordingly, that means Big Food receives \$121 billion of the \$426 billion spent on all food eaten outside the home, which dwarfs the approximate \$157 billion spent treating overweight and obesity.<sup>138</sup>

## 2. Advertising and Inducement

To achieve its goal of increased revenues, Big Food makes use of effective advertising.<sup>139</sup> Children are the prime targets of these ads.<sup>140</sup> The theory is that “if [Big Food] could appeal to children—not only through its menu but also with the toys and licensed character cups and play[grounds]—it would get the parents as well.”<sup>141</sup> This practice of

author notes, “convenience overrides not only considerations of health but also the social and cultural meanings of meals and mealtimes . . . convenience adds value to foods and stimulates the food industry to create even more products that can be consumed quickly and with minimal preparation.” *Id.*

134. Critser, *supra* note 74, at 33 (discussing how American families justify consuming “larger [meal] portions [by reasoning that] they were ‘eating out’ or [by saying that] it was ‘a treat’”).

135. See generally Critser, *supra* note 74; Nestle, *supra* note 75; Schlosser, *supra* note 129; McDonald’s Facts, *supra* note 122.

136. See Critser, *supra* note 74, at 33 (describing the benefits of eating at home). He suggests that people could lose weight simply by eating out less frequently: “We calculate that if food away from home had the same average nutritional densities as food at home . . . Americans would have consumed 197 fewer calories per day. Put another way, that’s an extra pound’s worth of energy every twenty days.” *Id.* (internal quotation and emphasis omitted).

137. NRA, FAQ, *supra* note 123 (“The restaurant-industry share of the food dollar today is 46.1 percent, compared with only 25 percent in 1955.”).

138. *Id.*; NRA, Restaurant Industry Food-and-Drink Sales Projection Through 2003, at [http://www.restaurant.org/research/forecast\\_sales.cfm](http://www.restaurant.org/research/forecast_sales.cfm) (last visited Jan. 29, 2003) [hereinafter NRA Sales] (estimating fast-food sales to be \$120.8 billion in 2003).

139. Nestle, *supra* note 75, at 21. The author states: “[Food corporations] expand sales to existing as well as new audiences through advertising but also by developing new products designed to respond to consumer ‘demands.’ Advertising, new products, and larger portions all contribute to a food environment that promotes eating more, not less.”

140. *Id.* at 22 (discussing how Big Food spends approximately \$33 billion annually on advertising, allocating almost \$13 billion directly on advertising to children). Moreover, “[n]early 70% of food advertising is for convenience foods, candy and snacks, alcoholic beverages, soft drinks, and desserts, whereas just 2.2% is for fruits, vegetables, grains, or beans.” *Id.*

141. PACO UNDERHILL, WHY WE BUY: THE SCIENCE OF SHOPPING 145 (1999) [hereinafter Underhill]. Underhill also points out how Big Food can improve their marketing to children: “The counters are all too high for children to use. A seven- or eight-year-old is certainly capable of going alone from table to counter to order more fries or another soda.” *Id.* Furthermore, “[e]ven the menu boards are so high that only an adult can comfortably see them. There should be kid-level menus that employ large photos of the food and as few words as possible.” *Id.*

targeting children is so harmful that even the United States Supreme Court has commented.<sup>142</sup>

In *Lorillard Tobacco Co. v. Reilly*,<sup>143</sup> the Supreme Court noted some of the dangerous effects that fast-food advertising had on children.<sup>144</sup> Of particular interest, the Court reasoned that while fast food is not addictive like tobacco, the effect of advertising fast food to children could cause damage that is hard to rectify.<sup>145</sup> Specifically, the Court stated: “[T]here is considerable evidence that [advertisements directed at children] have been successful in changing children’s eating behavior.”<sup>146</sup>

### 3. *Self-Preservation*

Finally, Big Food protects itself with the help of its lobbyist, the National Restaurant Association (“NRA”).<sup>147</sup> The NRA staunchly advocates pro-restaurant agendas—namely, class-action reform, minimum wage earnings, and the food industry’s perspective on nutrition and living a healthy lifestyle.<sup>148</sup> Most importantly, the NRA protects the food industry from any campaign that promotes eating less, as that would be bad for business.<sup>149</sup>

## III. AN ANALYSIS OF WHY BIG FOOD LITIGATION IS A GOOD IDEA

While the conditions are ripe for Big Food litigation to proceed, its success depends upon the fulfillment of at least two qualifications. Proponents of Big Food litigation must show: (1) that such litigation would neither be frivolous nor produce crippling liability; and (2) that eating fast-food products does contribute substantially to weight gain in overweight or obese consumers.

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142. See *infra* notes 143-46.

143. *Louillard*, 533 U.S. 525 (2001) (holding a state regulation that prohibited tobacco advertisements within 1,000 feet of a school or playground violated the First Amendment).

144. *Id.* at 582.

145. *Id.* at 588 (dicta). The Court articulated in pertinent part: “First, childhood obesity is a serious health problem in its own right. Second, eating preferences formed in childhood tend to persist in adulthood.” *Id.* (citations omitted).

146. *Id.* (citation omitted).

147. NRA, *What We Do: We Represent Restaurants*, at <http://www.restaurant.org/aboutus/initiatives.cfm> (last visited Jan. 29, 2003) [hereinafter NRA History] (“The [NRA is] ranked the #10 lobbying organization by *Fortune* magazine.”).

148. *Id.*

149. Nestle, *supra* note 75, at 21.

### A. *Debunking Frivolousness and the Slippery Slope*

A frivolous cause of action is devoid of legal foundation and/or is intended to harass or embarrass the opposing party.<sup>150</sup> As long as a course of action has a modicum of legal merit it should withstand a charge that it is frivolous.<sup>151</sup> Accordingly, Big Food litigation is not frivolous if it presents evidence that links consuming fast food to becoming overweight or obese.<sup>152</sup>

Regardless of potential frivolous suits, courts are mindful that Big Food litigation may produce a devastating slippery slope of liability.<sup>153</sup> In effect, the litigation floodgates would open, allowing suits against anything from restaurants to packaged-food manufactures to parents and home-cooked meals.<sup>154</sup> In *Pelman*, the court noted that it has a duty “to limit the legal consequences of wrongs to a controllable degree and to protect against crushing exposure to liability.”<sup>155</sup>

Indeed, the slippery slope argument may be a valid concern, but if taken to the extreme it could preclude nearly all causes of action.<sup>156</sup> Most importantly, note that both the slippery slope concept and the doctrine of *stare decisis*—the essence of common law—travel on the same path of precedent.<sup>157</sup> Hence, the Supreme Court cautioned that “judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom.”<sup>158</sup> Judicial precedent notwithstanding, Big Food litigation, like all other causes of action, must stand on its own merits.<sup>159</sup>

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150. Wade, *supra* note 78, at 464. A frivolous cause of action falls into at least one of the following categories: “(i) The party’s primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party. (ii) The party had no reasonable basis to believe that the facts underlying the party’s legal position were in fact true. (iii) The party’s legal position was devoid of arguable legal merit.” *Id.*

151. *Id.*

152. See *supra* note 150.

153. See *Pelman*, 237 F. Supp. 2d at 518 (“Even if limited to that ilk of fare dubbed ‘fast food,’ the potential for lawsuits is great . . .”).

154. *Id.* at 518, 536.

155. *Id.* at 518 (citation omitted).

156. See Volokh, *supra* note 99, at 1028 (providing an example of a decision that incorporates the slippery slope consideration).

157. *Id.* at 1064-65.

158. *Buckley*, 525 U.S. at 195 n.16 (citation omitted).

159. See *supra* notes 150-52 and accompanying text.

*B. Does Eating Fast Food Make People Obese?*

As discussed above, obesity is caused by many factors; there is support, however, for the claim that the cause of America's current weight epidemic is limited to environmental factors.<sup>160</sup> Some health experts have concluded that genetics is not the direct cause of obesity.<sup>161</sup> Specifically, they argue that genes do not account for the rapid increase in America's overweight and obese population.<sup>162</sup>

In addition, although much of the American lifestyle has become rather sedentary, the amount of exercise and participation in energy-expending activities has remained relatively constant for most of the 1990s.<sup>163</sup> All other contributing factors notwithstanding, it is intuitive that if exercise levels remained constant, levels of obesity should have remained constant. "This gap leaves overeating as the most probable cause of excessive weight gain."<sup>164</sup>

Overeating may be the prime factor leading to obesity, but taken alone it does not cause obesity.<sup>165</sup> The type of food that people eat is also a pertinent factor.<sup>166</sup> For example, a person consumes more calories by overeating cheeseburgers and fries than by overeating carrots and sprouts.<sup>167</sup> Furthermore, there is an inkling that eating foods high in fat-content may be addictive and produce a heroin-like euphoria.<sup>168</sup> Thus, the extent of overeating should always be considered with respect to the type of food that people actually eat.

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160. See *supra* note 40.

161. See Nestle, *supra* note 75, at 8.

162. *Id.* Nestle also notes:

[P]eople gain weight because they eat too many calories or are too inactive for the calories they eat. Genetics affects this balance, of course, because heredity predisposes some people to gain weight more easily than others, but genetic changes in population occur too slowly to account for the sharp increase in weight gain over such a short time period.

*Id.* See also Mokdad *supra* note 24, at 1521 (noting that such a rapid increase in obesity levels is not due to "genetic or other biological changes in the population").

163. Mokdad, *supra* note 24, at 1521 ("[O]ur data demonstrate that a major contributor to obesity—physical inactivity—has not changed substantially at the population level between 1991 and 1998."); Nestle, *supra* note 75, at 8 ("[S]urveys do not report enough of a decrease in activity levels to account for the current rising rates of obesity.") (citation omitted).

164. Nestle, *supra* note 75, at 8.

165. See *supra* note 40 and accompanying text.

166. See Nestle, *supra* note 75, at 77-78 (noting that "fat is fattening; it contains more than twice the caloric value of equal amounts of protein or carbohydrates").

167. See *id.*

168. Laurance, *supra* note 126.



### C. *The Trouble with Individual Action in Big Food Litigation*

In *Pelman v. McDonald's Corp.*,<sup>169</sup> the Teens filed a lawsuit that was riddled with flaws.<sup>170</sup> First, as a matter of both fact and law, the Teens failed to state a valid claim—it was frivolous.<sup>171</sup> The court noted “legal consequences should not attach to the consumption of hamburgers and other fast food fare unless consumers are unaware of the dangers of eating such food.”<sup>172</sup>

Most critically, the Teens could not overcome the rule of personal responsibility.<sup>173</sup> Although the Teens tried to side-step personal responsibility by arguing that minors are not held to the same legal standards as adults, it is common knowledge that eating fast food in large quantities is not healthy.<sup>174</sup> Therefore, the Teens could not claim that they were unaware of the dangers of eating fast food.<sup>175</sup> To claim otherwise ignores the obvious and lacks merit.<sup>176</sup>

Although the court properly dismissed the Teens’ lawsuit, McDonald’s had achieved only a pyrrhic victory.<sup>177</sup> In addition to granting the Teens leave to replead, the court provided them a detailed guide upon which to replead, specifically:

A better argument based on over-consumption would involve a claim that McDonalds’ products are unreasonably dangerous for their intended use. The intended use of McDonalds’ food is to be eaten, at some frequency that presents a question of fact. If plaintiffs can allege that McDonalds products’ intended use is to be eaten for every meal of every day, and that McDonalds is or should be aware that eating McDonalds’ products for every meal of every day is unreasonably dangerous, they may be able to state a claim.<sup>178</sup>

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169. *Pelman*, 237 F. Supp. 2d. 512 (S.D.N.Y. 2003).

170. *Id.* at 518-19.

171. *Id.* at 532-33. *See also supra* notes 99-100, 150-52 and accompanying text.

172. *Id.* at 517.

173. *See supra* notes 6, 96 and accompanying text.

174. *See supra* note 97. *See generally* Benjamin Franklin, Poor Richard’s Almanac (June 1733), reprinted in POOR RICHARD: THE ALMANACS FOR THE YEARS 1733-1758, at 7 (Richard Saunders ed., 1964) (“To lengthen they life, lesson thy meals.”).

175. *Pelman*, 237 F. Supp. 2d, at 532 (noting that “any liability based on over-consumption is doomed if the consequences of such over-consumption are common knowledge”).

176. *See id.*

177. *Id.* at 518-19. *See also id.* at 535-38.

178. *Id.* at 537. *See also supra* note 102.

The court also provided the Teens with an additional alternative, suggestion that they may want to allege that “[McDonald’s products were so highly-processed] that the dangers of [its] products were not commonly well known and thus that McDonald’s had a duty toward its customers.”<sup>179</sup>

#### IV. PROPOSAL

The best way for Big Food litigation to succeed is by class action, not individual action.<sup>180</sup> This Note proposes that states should sue Big Food to recoup Medicaid costs that were incurred caring for overweight and obese people.<sup>181</sup> Big Food litigation is attractive for states particularly because, as they are not able to eat fast food because of their intangible existence, states need not overcome the rule of personal responsibility.<sup>182</sup>

The crux of this proposal does not abrogate the rule of personal responsibility—it punctuates the rule. Because “Medicaid is the payor of last resort,” states alone should not bear the responsibility of treating overweight and obese people.<sup>183</sup> Similar to Big Tobacco, it is only fair that Big Food be partially responsible for the ill effects of its fare.<sup>184</sup>

Not only would litigation make Big Food accountable, it would also produce tangible benefits.<sup>185</sup> As a direct result, states’ Medicaid burdens may be lessened.<sup>186</sup> Additionally, the states may use recovered funds to curb obesity by initiating programs that promote a healthy lifestyle and increased physical activity.<sup>187</sup> Indirectly, Big Food may begin to create and advertise more healthy items in efforts to preclude further liability.<sup>188</sup> These factors, whether independently or in combination, may alleviate the plight of overweight and obese Americans.

Finally, even though taxing fast food may provide the best method of obtaining revenue to care for overweight and obese people, states are unlikely to implement such a scheme.<sup>189</sup> First, the NRA would fight

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179. *Id.* at 536.

180. *See supra* Part II.A.4, II.B, III.C.

181. NGA Highlights, *supra* note 53 (discussing states’ funds used to care for overweight and obese people).

182. *See supra* note 74.

183. Fla. Stat. § 409.910(1).

184. *See generally supra* Part II.C.

185. *See* Lipson, *supra* note 22.

186. *See, e.g.,* Cigarette Tax, *supra* note 118 and accompanying text.

187. *Id.*

188. *Id.*

189. Jacobson & Brownell, *supra* note 76, at 854 (noting that “[e]ven small taxes on widely consumed foods can raise substantial revenues” but legislative bodies prefer not to do so).

vigorously against such a tax.<sup>190</sup> Secondly, taxation is subject to the whims of the state legislatures which have chosen not to tax Big Food. But when the legislatures remain silent on an issue, as is the case here, that issue will sooner or later be addressed in the courts.<sup>191</sup>

#### V. CONCLUSION

Big Food litigation is in its infancy and will continue to grow. As there are currently ninety-seven million overweight or obese Americans, achieving success with Big Food litigation is not a matter of if, but a matter of when. This Note argues that, in the interim, states, via class action, have the greatest chance at succeeding with Big Food litigation.

*Jeremy H. Rogers*\*

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190. NRA History, *supra* notes 147-48 and accompanying text.

191. *See generally* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270 (J.P. Mayer ed., 1969) (“There is hardly a political question in the United States which does not sooner or later turn into a judicial one.”).

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