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# Is Obesity *Really* the Next Tobacco? Lessons Learned from Tobacco for Obesity Litigation

*Brooke Courtney, M.P.H.\**

## I. INTRODUCTION

“[I]ncremental changes in U.S. common law . . . have undermined the culture of individual responsibility . . . and have also established the notion of the civil action as a vehicle of general economic redistribution.”<sup>1</sup>

Throughout the past few decades, individuals have increasingly attempted to hold manufacturers responsible for alleged problems with products.<sup>2</sup> Particularly for products known or suspected to be addictive, litigation has been viewed as a substitute for legislation and “the awards and settlements for these cases . . . are nowadays viewed as a desirable form of social justice.”<sup>3</sup> Product liability is a relatively recent phenomenon; it was not until after the mid-20th century that the United States witnessed a rash of lawsuits holding manufacturers liable for problems experienced with products ranging from asbestos to silicone breast implants and Agent Orange to tobacco.<sup>4</sup>

A century ago, consumers who attempted to recover damages resulting

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1. Amity Shlaes, *Lawyers Get Fat on McDonald's; New York Lawsuit Alleges Chain is Responsible for Obesity*, CHI. TRIB., Nov. 27, 2002, at 25.

2. *Id.*

3. *Id.*

4. MARTHA A. DERTHICK, UP IN SMOKE: FROM LEGISLATION TO LITIGATION IN TOBACCO POLITICS 73 (2002); Robert L. Rabin, *The Third Wave of Tobacco Tort Litigation*, in REGULATING TOBACCO 176, 176 (Robert L. Rabin & Stephen D. Sugarman eds., 2001); Samuel J. Romero, *Obesity Liability: A Super-Sized Problem or a Small Fry in the Inevitable Development of Product Liability?*, 7 CHAP. L. REV. 239, 243 (2004).

from their use of defective products could recoup only if they could prove negligence by the manufacturer and that they were in privity, meaning that they personally purchased the defective product.<sup>5</sup> After courts allowed non-privity plaintiffs to recover under implied warranty claims, many courts began interpreting product liability in terms of strict liability in tort rather than under the contract theory of implied warranty.<sup>6</sup> A significant factor prompting this shift was the adoption of section 402A of the Restatement (2d) of Torts, which essentially eliminated the privity requirement and allowed manufacturers to be held liable for the physical injuries that resulted from their defective products, regardless of fault.<sup>7</sup> With the acceptance of section 402A, “courts assigned manufacturer liability for three types of defects: ‘(1) manufacturing defects or production flaws, (2) design defects, and (3) information or warning defects.’”<sup>8</sup> Asbestos and tobacco are two of the most well publicized attempts to hold manufacturers liable for their products.<sup>9</sup> While plaintiffs’ lawyers are still pursuing asbestos and tobacco claims, they are also attempting to hold a wide variety of industries accountable for injuries allegedly caused by products, including the lead paint, cell phone, gun, and food industries.<sup>10</sup>

Consumer protection laws have also evolved, thus representing another tool for holding industries accountable for unfair, deceptive, or fraudulent trade practices.<sup>11</sup> These laws have been characterized as “legal reform[s] addressing certain inequities perceived in traditional legal doctrine.”<sup>12</sup> While the Federal Trade Commission was the first to assume responsibility for consumer protection and still “remains the leading source of legal doctrine on the issue of unfair or deceptive consumer practices,” all fifty states have now enacted consumer protection statutes.<sup>13</sup> While a state’s attorney general typically brings such claims, most states now allow consumers who suffered actual harm to file suit for alleged violations of the law.<sup>14</sup> Examples of consumer protection issues include lemon laws for new

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5. Romero, *supra* note 4, at 243-44.

6. CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS, AND THE COMMON LAW 173-84 (2001), *cited in* Romero, *supra* note 4, at 244.

7. Bogus, *supra* note 6, at 185, *cited in* Romero, *supra* note 4, at 244-45; Dan B. Dobbs, THE LAW OF TORTS § 353, at 974-75 (2002), *cited in* Romero, *supra* note 4, at 244-45.

8. Dobbs, *supra* note 7, at 979, *cited in* Romero, *supra* note 4, at 245.

9. Shlaes, *supra* note 1.

10. Andrew M. Dansicker, *The Next Big Thing for Litigators*, 37 MD. B. J. 12, 12-17 (2004).

11. Mary Dee Pridgen, CONSUMER PROTECTION AND THE LAW, *Chapter 1: Overview*, Oct. 2005, available at <http://www.westlaw.com> (CONPROT) (last visited Nov. 14, 2005).

12. *Id.*

13. *Id.*; Mary Dee Pridgen, CONSUMER PROTECTION AND THE LAW § 3:1, Oct. 2005.

14. Pridgen, CONSUMER PROTECTION AND THE LAW § 3:1, *supra* note 13.

cars and pending tobacco litigation for light cigarettes.<sup>15</sup>

Currently, lawyers are strategizing to target what many are calling the “next tobacco.” That is, personal liability and consumer protection litigation aimed at the food industry for allegedly causing obesity through the marketing and sale of unhealthy products.<sup>16</sup> Many significant similarities between the tobacco and obesity epidemics exist that make it appear, at least at first glance, that obesity litigation will logically become the “next tobacco.” Both problems represent two of the leading causes of preventable morbidity and mortality in the United States.<sup>17</sup> In addition, obesity and tobacco use impact tens of millions of individuals, result in enormous economic consequences in terms of medical expenditures and lost productivity, and involve habits that are generally formed during childhood and that are often carried into adulthood. However, fundamental differences between these two topics have led many in the legal field and mainstream media to question whether obesity litigation really is the new tobacco.<sup>18</sup>

The objectives of this paper are to determine: (1) whether useful lessons can be drawn for obesity litigation from experiences with tobacco litigation and (2) whether obesity is likely to become the next tobacco in terms of litigation. Part II of this paper describes the research design of the analysis, which involves the application of an analogical reasoning framework called analogical explanation.

Next, Part III provides an overview of the obesity epidemic in the United States and recent attempts to use personal injury and consumer protection litigation to hold food manufacturers and the fast food industry accountable for obesity. Part IV then examines the tobacco epidemic and associated efforts in litigation as a basis for comparison with obesity. Finally, Part V applies the analogical reasoning methodology to the tobacco and obesity situations to determine the lessons that can be learned from anti-tobacco litigation and applied to obesity litigation. Part V also discusses limitations of the analysis.

In answering the six diagnostic questions of the analogical explanation framework, this analysis shows that efforts in tobacco litigation do provide

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15. Pridgen, *supra* note 11; Price v. Philip Morris, Inc., No. 00-L-0112 (3d Cir. Ill. Cir. Ct. 2003).

16. Dansicker, *supra* note 10; Kenneth J. Parsigian & U. Gwyn Williams, *Obesity Litigation - The Next "Tobacco"?*, <http://articles.corporate.findlaw.com/articles/file/00338/009676> (last visited Nov. 20, 2005).

17. Morbidity is the incidence or prevalence of a disease, while mortality is the death rate. Dictionary.com, <http://dictionary.reference.com> (last visited Apr. 24, 2005).

18. Rebecca Coombes, *The New Tobacco?*, 328 BRIT. MED. J. 1572 (2004); Sarah Avery, *Is Big Fat the Next Big Tobacco?*, NEWS & OBSERVER, Aug. 18, 2002, available at 2002 WL 11733461; Parsigian & Williams, *supra* note 16.

useful insights for obesity litigation. Specifically, while there are important similarities between obesity and tobacco, there are also fundamental differences between the two issues. These differences, as well as the challenges faced by plaintiffs in tobacco litigation, suggest that contrary to what many plaintiffs' attorneys are predicting, obesity is not automatically destined to become the next tobacco in the near future. The differences also suggest that while some individuals and attorneys might benefit financially from obesity lawsuits, litigation alone is currently unlikely to impact the obesity epidemic in a substantial way.

## II. RESEARCH DESIGN

"The past has long been recognized as a powerful, determinative force acting upon the present."<sup>19</sup> The historical analogy is the principal device used in the process of learning from history.<sup>20</sup> By examining historical situations, prior interventions can help shape notions of what is feasible for contemporary issues.<sup>21</sup> For example, "experience of past situations in which the options and alternatives under consideration were tried - either successfully or unsuccessfully - may help to guide the decision-maker in dealing with a current problem."<sup>22</sup> Developed by foreign policy analysts, analogical reasoning is a "prominent model of decision-making" that is also useful at the domestic level.<sup>23</sup> As a leading tool by which lawyers consider legal and moral issues, "[r]easoning by analogy is the most familiar form of legal reasoning."<sup>24</sup>

This paper will use analogical explanation, a framework for applying analogical reasoning, to determine the lessons that can be drawn for obesity litigation from an analogous area, tobacco litigation.<sup>25</sup> Analogical explanation was developed "to explain how analogies have been used in decision-making [and] is based on ways in which policymakers have used history over time and on theories of cognitive social psychology."<sup>26</sup> Khong's analogical explanation framework performs the following six

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19. David P. Houghton, *Historical Analogies and the Cognitive Dimension of Domestic Policymaking*, 19(2) POLITICAL PSYCHOLOGY 279-303 (1998).

20. YUEN FOONG KHONG, *ANALOGIES AT WAR: KOREA, MUNICH, DIEN BIEN PHU, AND THE VIETNAM DECISIONS OF 1965* (1992).

21. Houghton, *supra* note 19, at 279.

22. *Id.* at 281.

23. *Id.* at 279.

24. Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 741-42 (1993).

25. See KHONG, *supra* note 20, at 10.

26. Brooke Courtney, *Global Tobacco Control: Lessons from the Infant Formula Situation 10-11* (1999) (unpublished Master of Public Health thesis, on file with the author and Yale School of Epidemiology and Public Health), *citing* KHONG, *supra* note 20, at 10.

diagnostic tasks:<sup>27</sup>

[f]irst and foremost, analogies ‘help’ define the nature of the problem or situation confronting the policymaker by comparing the new situation to previous situations with which the policymaker is more familiar. This comparison highlights the similarities between the two situations and downplays their differences. Once the new situation is partially or wholly defined in terms of a previous situation, the second and third diagnostic tasks follow: analogies give the policymaker a sense of the . . . stakes involved, and they also imply or suggest possible solutions to the problem so defined . . . The fourth, fifth, and sixth diagnostic tasks all pertain to evaluating the implicit policy prescribed . . . by ‘predicting’ [its] likelihood of success, ‘assessing’ [its] moral rightness, and ‘warning’ of dangers associated with [it].<sup>28</sup>

While analogical explanation was developed for analyzing policy problems, it is similarly applicable to analyzing litigation for the purposes of this paper because it involves drawing lessons from a past situation for a similar contemporary problem.<sup>29</sup> Under this framework, this paper applies the following set of six distinct yet related diagnostic tasks to the obesity problem:<sup>30</sup>

- (1) How does the problem of tobacco define the issue of obesity? What are the similarities and differences between the two situations and with respect to anti-tobacco and obesity litigation?
- (2) What can anti-tobacco litigation say about the stakes associated with obesity litigation?
- (3) Does anti-tobacco litigation provide an implicit solution for how to approach obesity litigation? If so, what is it?
- (4) What does anti-tobacco litigation say about the chances of success of the solution proposed in question 3?
- (5) What does anti-tobacco litigation say about the morality of the proposed solution in question 3?
- (6) What does anti-tobacco litigation say about the risks or dangers

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27. KHONG, *supra* note 20, at 20-21.

28. *Id.* at 20-21, *quoted in* Courtney, *supra* note 26, at 11.

29. When drawing analogies between legal issues, it is important to ensure that the comparisons being made are between situations that are actually and meaningfully analogous. Otherwise, the lessons learned from the comparisons will be limited in value. For example, firearms industry litigation might not work as a useful analogy for tobacco litigation due to specific limitations developed by states on suits against gun manufacturers and Second Amendment issues.

30. KHONG, *supra* note 20, at 20-21.

associated with implementing the solution in question 3?<sup>31</sup>

### III. OBESITY LITIGATION IN THE UNITED STATES<sup>32</sup>

Under the analogical explanation framework, an overview of the obesity epidemic and associated efforts in litigation shows the similarities and differences between obesity and tobacco to analyze whether useful lessons may be drawn from tobacco for obesity. This section summarizes the obesity problem in the United States and presents an overview of obesity litigation.

#### A. Overview of the U.S. Obesity Epidemic

In order to provide context for the discussion of obesity litigation, this section presents an overview of the issue of obesity in the United States, including a summary of the demographic background and health impacts of obesity, the economic impact and causes of obesity, and the current efforts to address this major health problem.

Obesity is becoming an increasingly significant public health concern in the United States.<sup>33</sup> Over the past four decades, “the number of overweight children, adolescents, and adults has risen,” and these increases “cut across all ages, racial and ethnic groups, and both genders.”<sup>34</sup> Analyses of the 1999-2002 National Health and Nutrition Examination Survey found that 30% of adults aged twenty years and over (which represents over sixty million people) were obese, compared with 23% of adults in 1994.<sup>35</sup> The

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31. See *id.*; Courtney, *supra* note 26, at 12.

32. For the purposes of this paper, the term “obesity” includes litigation addressing both being overweight and obesity.

33. “Obesity” refers to “an excessively high amount of body fat (BF) or adipose tissue (AT)” in relation to lean body mass. “Overweight” refers to “increased body weight in relation to height, when compared to some standard of acceptable or desirable weight.” OBESITY: THEORY AND THERAPY 14 (Albert J. Stunkard, M.D. & Thomas A. Wadden, Ph.D. eds., Raven Press 2d ed. 1993) (1992). See NAT’L RESEARCH COUNCIL, DIET AND HEALTH: IMPLICATIONS FOR REDUCING CHRONIC DISEASE RISK 563 (1989); Centers for Disease Control & Prevention, U.S. Dep’t of Health & Human Servs., Overweight and Obesity: Defining Overweight and Obesity, <http://www.cdc.gov/nccdphp/dnpa/obesity/defining.htm> (last visited Sept. 28, 2005) [hereinafter CDC, Defining Overweight & Obesity].

34. Press Release, Office of the Surgeon General, U.S. Dep’t of Health & Human Servs., Surgeon General Launches Effort to Develop Action Plan to Combat Overweight, Obesity (Jan. 8, 2001), available at <http://www.surgeongeneral.gov/news/pressreleases/obesitypressrelease.htm> (Nov. 4, 2004) [hereinafter Surgeon General Launches Effort]; Office of the Surgeon General, U.S. Dep’t of Health & Human Servs., The Surgeon General’s Call to Action to Prevent and Decrease Overweight and Obesity, Overweight and Obesity: At a Glance, [http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact\\_glance.htm](http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact_glance.htm) (Nov. 4, 2004) [hereinafter Surgeon General’s Call to Action].

35. Nat’l Center for Health Statistics, CDC, Fact Sheet: Obesity Still a Major Problem, New Data Show (Oct. 6, 2004), available at <http://www.cdc.gov/nchs/pressroom/04facts/>

same survey estimated that 16% of those aged six to nineteen years (over nine million children and teens) were overweight, which represented a 45% increase above the overweight estimates from the 1988-1994 survey.<sup>36</sup>

The mortality and morbidity associated with being overweight and/or obese are substantial. While overall health in the U.S. is improving, "health indicators show that improvements have slowed in recent years, in part because of increases in obesity."<sup>37</sup> For example, the risk of death increases with increasing weight; even moderate excess weight, such as ten or twenty pounds, can increase the risk of mortality.<sup>38</sup> Obese individuals, those with a body mass index ("BMI") greater than thirty, "have a 50 to 100% increased risk of premature death from all causes, compared to individuals with a healthy weight."<sup>39</sup> An estimated 112,000 deaths in the United States annually are related to obesity.<sup>40</sup>

In addition to mortality, the Surgeon General has reported that "[o]verweight and obesity substantially raise the risk of illness from high blood pressure, high cholesterol, type 2 diabetes, heart disease and stroke,

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obesity.htm (last visited Nov. 4, 2005) [hereinafter CDC Fact Sheet].

36. NAT'L CENTER FOR HEALTH STATISTICS, CDC, PREVALENCE OF OVERWEIGHT AMONG CHILDREN AND ADOLESCENTS: UNITED STATES, 1999-2002, <http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overwght99.htm> (Nov. 4, 2004) [hereinafter CDC, PREVALENCE]; see also CDC Fact Sheet, *supra* note 35.

37. Robert Davis, *USA in a Fragile State of Health, Report Says*, USA TODAY, Nov. 8, 2004, cited in Kaiser Family Found., *Daily Health Pol'y Rep., U.S. Health Improvements Slowing in Part Due to High Infant Mortality Rates, Obesity, Report Says* (Nov. 8, 2004), [http://www.kaisernetwork.org/daily\\_reports/rep\\_hpolicy\\_recent\\_rep.cfm?dr\\_cat=3&show=yes&dr\\_DateTime=11-008-04#26624](http://www.kaisernetwork.org/daily_reports/rep_hpolicy_recent_rep.cfm?dr_cat=3&show=yes&dr_DateTime=11-008-04#26624).

38. Office of the Surgeon General, U.S. Dep't of Health & Human Servs., *The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity, Overweight and Obesity: Health Consequences*, [http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact\\_consequences.htm](http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact_consequences.htm) (last visited Nov. 20, 2005) [hereinafter *Surgeon General's Call to Action, Health Consequences*].

39. *Id.* "For adults, overweight and obesity ranges are determined by using weight and height to calculate a number called the 'body mass index' (BMI)... An adult who has a BMI between 25 and 29.9 is considered overweight. An adult who has a BMI of 30 or higher is considered obese." CDC, *Defining Overweight & Obesity*, *supra* note 33.

40. See Katherine Flegal et al., *Excess Deaths Associated With Underweight, Overweight, and Obesity*, 293 (15) J. AM. MED. ASS'N 1861, 1861-67 (2005). In March 2004, the CDC reported that 400,000 deaths per year were caused by obesity, but a more recent analysis of obesity data by Katherine Flegal et al. estimated that approximately 112,000 deaths are annually linked to obesity. Kaiser Family Found., *Daily Health Pol'y Rep., CDC Downscales Mortality Risk from Obesity* (Apr. 20, 2005), [http://www.kaisernetwork.org/daily\\_reports/print\\_report.cfm?DR\\_ID=29473&dr\\_cat=3](http://www.kaisernetwork.org/daily_reports/print_report.cfm?DR_ID=29473&dr_cat=3).

The 400,000 figure meant that obesity would have soon replaced tobacco as the leading cause of preventable death. Associated Press, *Chicago Group Tackles Childhood Obesity*, Oct. 18, 2004, available at <http://abcnews.go.com/Health/print?id=175920> (last visited Oct. 20, 2005). However, problems in the methodology used to produce that estimate were called into question in December 2004. See Betsy McKay, *Doctors Debate How to Gauge Lifestyle's Effect on Mortality*, WALL ST. J., Dec. 14, 2004, at D6.



gallbladder disease, arthritis, sleep disturbances and problems breathing, and certain types of cancers.”<sup>41</sup>

Enormous economic costs are also associated with the epidemic. According to the Surgeon General, in the year 2000 alone the economic cost of obesity was estimated to be \$117 billion.<sup>42</sup> This figure represented an increase from 1995, when the estimated total medical cost and lost productivity associated with obesity was \$99 billion.<sup>43</sup> In fact, state-level medical costs of obesity range from an estimated \$87 million to \$7.7 billion, depending on the state.<sup>44</sup>

A recent study examining the impact of obesity on rising medical spending found that the increase in obesity “contributed to large spending increases for the three medical conditions examined (diabetes, hyperlipidemia, and heart disease).”<sup>45</sup> Between 1987 and 2001, “growth in obesity and spending on obese people accounted for 27 percent of the growth in inflation-adjusted per capita health care spending.”<sup>46</sup> The study also found that, similar to previous studies, the “costs incurred by the obese were 37 percent higher than costs for those with normal weight in 2001.”<sup>47</sup> Another recent study found that obese middle-aged adults “will be up to twice as expensive to cover under Medicare” than adults who are not obese.<sup>48</sup>

Similarly, Blue Cross and Blue Shield of North Carolina found that claims for its obese members were 32% higher and claims for overweight members were 18% higher than claims for members with normal weight.<sup>49</sup>

41. Surgeon General Launches Effort, *supra* note 34.

42. Surgeon General’s Call to Action, *supra* note 34.

43. Surgeon General Launches Effort, *supra* note 34.

44. CDC, OVERWEIGHT AND OBESITY: ECONOMIC CONSEQUENCES, [http://www.cdc.gov/nccdphp/dnpa/obesity/economic\\_consequences.htm](http://www.cdc.gov/nccdphp/dnpa/obesity/economic_consequences.htm) (Nov. 4, 2004) [hereinafter CDC, ECONOMIC CONSEQUENCES].

45. Kenneth E. Thorpe et al., *The Impact of Obesity on Rising Medical Spending*, *WA HEALTH AFF.* 480, 485 (2004).

46. *Id.*

47. *Id.*

48. See Martha L. Daviglus et al., *Relation of Body Mass Index in Young Adulthood and Middle Age to Medicare Expenditures in Older Age*, 292 (22) *J. AM. MED. ASS’N* 2743, 2743-49 (2004), cited in Alison McCook, *Middle-Aged Obesity Threatens Medicare*, *REUTERS*, Dec. 7, 2004, available at <http://www.reuters.co.uk> (“[A]verage annual Medicare charges for normal-weight women worked out to be \$6224, compared with \$12,342 for severely obese women; the corresponding charges for men were \$7205 compared with \$13,674.”).

49. Betsy McKay, *Blue Cross of North Carolina To Cover Cost of Treating Obesity*, *WALL ST. J.*, Oct. 13, 2004, at D17, cited in Kaiser Family Found., *Daily Health Pol’y Rep., Blue Cross and Blue Shield of North Carolina Introduces Benefits Package Featuring Obesity Treatments* (Oct. 13, 2004), [http://www.kaisernet.org/daily\\_report.cfm?DR\\_ID=26217&dr\\_cat=3](http://www.kaisernet.org/daily_report.cfm?DR_ID=26217&dr_cat=3) [hereinafter *Benefits Package*].

Additionally, obese children may cost schools millions of dollars annually and may have lower test scores due to factors such as increased absenteeism and the additional time required for school officials to administer medications to students for their weight-related illnesses.<sup>50</sup> Furthermore, obesity has other serious, yet unexpected, economic impacts, such as increasing the fuel costs of the airline industry.<sup>51</sup>

The causes of the overweight and obesity epidemic are complex, but these conditions primarily result from an imbalance of excessive consumption of calories and/or an insufficient amount of physical activity.<sup>52</sup> In addition, myriad factors such as genetics, metabolism, behavior, environment, culture, and socioeconomic status can lead an individual to become overweight or obese.<sup>53</sup> The Surgeon General has emphasized that behavioral and environmental factors play significant roles in the epidemic.<sup>54</sup>

For example, average meal portion sizes have increased and physical activity has decreased.<sup>55</sup> In addition, fast food restaurants offer inexpensive meal options and have become increasingly accessible; such pervasive and easy access to fast food “makes it very difficult for consumers to exert the personal responsibility necessary to combat unhealthy weight gain.”<sup>56</sup> However, even when fast-food restaurants offer healthy food that tastes good, some argue that consumers generally do not purchase them.<sup>57</sup> Some even blame the obesity epidemic on effective tobacco control efforts

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50. Maggie Fox, *Fat Children Cost U.S. Schools Money: More - Report*, REUTERS, Sept. 23, 2004, available at <http://www.factiva.com>.

51. Daniel Yee, *Feds: Obesity Raising Airline Fuel Costs*, ASSOCIATED PRESS, Nov. 4, 2004, available at <http://www.factiva.com> (according to CDC estimates in a recent article published in the *American Journal of Preventive Medicine*, the average of 10 pounds of additional weight Americans gained through the 1990s “caused airlines to spend \$275 million to burn 350 million more gallons of fuel in 2000 just to carry the additional weight of Americans . . . The extra fuel burned also had an environmental impact, as an estimated 3.8 million extra tons of carbon dioxide were released into the air.”).

52. See Surgeon General’s Call to Action, *supra* note 34.

53. *Id.*; cf. Sally Squires, *A Question from the Edge: Is Fat Contagious?*, WASH. POST, Aug. 3, 2004, at HE01 (noting that some scientists are even researching whether there might be a “fat virus” that causes some people to become overweight).

54. See Surgeon General’s Call to Action, *supra* note 34.

55. Centers for Disease Control & Prevention, U.S. Dep’t of Health & Human Servs., *Overweight and Obesity: Contributing Factors*, [http://www.cdc.gov/nccdphp/dnpa/obesity/contributing\\_factors.htm](http://www.cdc.gov/nccdphp/dnpa/obesity/contributing_factors.htm) (last visited Sept. 24, 2005).

56. *Id.*; KELLY BROWNELL, *FOOD FIGHT: THE INSIDE STORY OF THE FOOD INDUSTRY, AMERICA’S OBESITY CRISIS, AND WHAT WE CAN DO ABOUT IT* (2003), cited in Lee J. Munger, *Comment: Is Ronald McDonald the Next Joe Camel? Regulating Fast Food Advertisements Targeting Children in Light of the American Overweight and Obesity Epidemic*, 3 CONN. PUB. INT. L. J. 456 (2004).

57. Avery, *supra* note 18, quoting Joanne S. Harrell, a nursing professor and obesity researcher at University of North Carolina.

because smokers who quit are likely to increase their food consumption.<sup>58</sup> For example, one study reported that every 10% increase in the real price of cigarettes produced a 2% increase in the number of obese individuals.<sup>59</sup>

The media is another important contributor to the increasing rates of obesity among children.<sup>60</sup> According to a recent issue brief by the Kaiser Family Foundation, “[d]uring the same period in which childhood obesity has increased so dramatically, there has also been an explosion in media targeted to children.”<sup>61</sup> Experts estimate that children are exposed to over 40,000 television ads annually.<sup>62</sup> Children spend an average of five-and-a-half hours per day using various media outlets, during which many advertisements elaborately promote candy, cereal, soda, snack food, and fast food, “influenc[ing] them to make unhealthy food choices.”<sup>63</sup>

In addition, the increasing time children spend using media results in less time spent engaging in physical activity.<sup>64</sup> Research suggests that “children’s food choices . . . are significantly impacted by the advertising they see,” and several studies have even found a “statistically significant relationship between media use and rates of obesity.”<sup>65</sup> For example, one study found that children who watched over five hours of television per day had more than four-and-a-half times the odds of being overweight compared to children who watched zero to two hours per day.<sup>66</sup>

At over \$30 billion spent annually on direct advertising and promotion, the expenditures on food industry advertising are greater than any other industry.<sup>67</sup> Fast food outlets, for example, spend approximately \$3 billion

58. Jonah Goldberg, *When Government Creates More Problems Than It Solves*, MANCHESTER UNION-LEADER, Sept. 9, 2004, available at <http://www.tobacco.org/news/175134.html>; see also Gina Kolata, *Exchanging Cigarettes for Bagels*, N.Y. TIMES, Dec. 15, 2004 (citing a study finding that “for every 10 percent increase in the price of cigarettes, the number of obese people rises 2 percent . . . [and] [s]moking cessation . . . accounted for 20 percent of the obesity increase in this country.”).

59. Joseph Brean, *Tobacco Taxes Blamed for Sharp Rise in Obesity: Second Only to Fast Food*, NAT’L POST, July 29, 2004, available at <http://www.tobacco.org/news/171529.html>.

60. KAISER FAMILY FOUND., ISSUE BRIEF: THE ROLE OF THE MEDIA IN CHILDHOOD OBESITY (Feb. 2004), available at <http://www.kff.org/entmedia/upload/The-Role-Of-Media-in-Childhood-Obesity.pdf> [hereinafter CHILDHOOD OBESITY].

61. *Id.* at 1.

62. *Id.*

63. *Id.* at 1-2.

64. *Id.* at 2.

65. *Id.* at 2, 10.

66. S. Gortmaker et al., *Television Viewing as a Cause of Increasing Obesity among Children in the United States*, ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 356, 356 (Apr. 1996), quoted in CHILDHOOD OBESITY, *supra* note 60.

67. Mickey Chopra & Ian Darnton-Hill, *Tobacco and Obesity Epidemics: Not So Different After All?*, 328 BRIT. MED. J., 1558 (June 26, 2004).

annually in television advertisements targeted toward children.<sup>68</sup> In 2001, McDonald's alone spent over \$600 million on advertising and boasts on its web site that Ronald McDonald - "[t]he smile known around the world"- is second only to Santa Claus in terms of recognition.<sup>69</sup> Market research and "the [recent] development of marketing firms, newsletters, and ad agencies specializing in the children's market" suggest that expenditures on food marketing to kids are likely to increase in the future.<sup>70</sup>

Aside from direct-to-consumer marketing and advertising, fast food restaurants and food manufacturers also target youth with appealing cross-promotions.<sup>71</sup> Recently, the marketing of food products in conjunction with popular movie and television characters in grocery stores and at fast food restaurants has increased tremendously.<sup>72</sup> Toy stores also expose children to the fast food phenomenon.<sup>73</sup> For example, major retailers sell toys with the McDonald's name, including a McDonald's cash register, restaurant playset, mealtime server set with apron and headphones, and a McFlurry maker.<sup>74</sup>

Current efforts to address the obesity epidemic vary. These efforts include national initiatives, such as federal legislation for education that promotes healthy lifestyles,<sup>75</sup> federal government agency efforts to study

68. ERIC SCHLOSSER, FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL (2001), cited in CHILDHOOD OBESITY, *supra* note 60, at 5.

69. Avery, *supra* note 18; see also *Golden Arches More Familiar Than the Cross*, THE PLAIN DEALER, Aug. 26, 1995, cited in, SCHLOSSER, *supra* note 68, at 294 (a survey of 7000 people in six countries, including the U.S., found that "88 percent could identify the golden arches . . . [while only] 54 percent could identify the Christian cross."); see also SUPER SIZE ME (Roadside Attractions, Samuel Goldwyn Films 2004).

70. CHILDHOOD OBESITY, *supra* note 60, at 5.

71. *Id.* at 6.

72. *Id.* ("From SpongeBob Cheez-Its to Hulk pizzas and Scooby-Doo marshmallow cereals, today's grocery aisles are filled with scores of products using kids' favorite characters to sell them food. Fast food outlets also make frequent use of cross-promotions with children's media characters.").

73. Toysrus.com/Amazon.com Toy Store, <http://www.amazon.com/exec/obidos/tg/browse/-/171280/104-8701861-9137543> (last visited Sept. 24, 2005).

74. *Id.* (Amazon.com also sells a Pizza Hut delivery set, Dairy Queen "Lil Chef" playset, and Keebler bake set.)

75. Kaiser Family Found., Daily Health Pol'y Rep., *Senate Health, Education, Labor and Pensions Committee Addresses Childhood Obesity* (Oct. 6, 2004), [http://www.kaisernetwork.org/daily\\_reports/rep\\_index.cfm?hint=3&DR\\_ID=26112](http://www.kaisernetwork.org/daily_reports/rep_index.cfm?hint=3&DR_ID=26112); S.2551, 108th Cong. (2004), sponsored by Frist and Wyden, would establish educational materials for people who work with children on physical education and encouraging healthy diets. *Id.* S. 2558, 108th Cong. (2004), sponsored by Harkin, would provide the Federal Trade Commission with greater authority to regulate advertising targeted toward children because, in part, "food manufacturers spend about \$12 billion annually on ads for foods with high sugar content." *Id.*

obesity and implement programs to reduce the prevalence of obesity,<sup>76</sup> the Federal Trade Commission's sponsorship of a workshop to assist food manufacturers and advertisers in developing guidelines to promote healthy eating,<sup>77</sup> and the National Academy of Science's action plan to prevent childhood obesity.<sup>78</sup> In November 2004, the federal Medicare program even began considering whether to extend coverage for bariatric weight-loss surgery for morbidly obese individuals.<sup>79</sup>

State and local efforts are also being implemented, such as an Arkansas program that sends letters home to parents warning them that their children are "at risk of overweight,"<sup>80</sup> a Connecticut elementary school's ban on sweets at parties,<sup>81</sup> and a Buffalo, New York, school program that will offer small rewards to children who choose fruits and vegetables at lunch.<sup>82</sup>

In addition, private health plans are beginning to recognize and address

76. CDC, Overweight and Obesity: State-Based Programs, [http://www.cdc.gov/nccdphp/dnpa/obesity/state\\_programs/index.htm](http://www.cdc.gov/nccdphp/dnpa/obesity/state_programs/index.htm) (last visited Nov. 14, 2005).

77. *Won't Ban Junk-Food Ads for Kids*, *Official Says*, REUTERS, March 11, 2005, available at <http://nature.berkeley.edu/pipermail/prc-obesity-network-cwh/2005-March000345.html>.

78. Judith Graham, *Road map on obesity: tough path: Report's Plan to Get Fat Out of Kids' Diets Blasted for Not Having Teeth*, CHI. TRIB., Oct. 1, 2004, at C12.

79. Vanessa Fuhrmans, *Medicare Mulls Coverage Shift On Obesity: As Panel Takes Up Issue of Surgery For Weight Loss, Private Carriers Begin Covering More Treatments*, WALL ST. J., Nov. 3, 2004, at D1; Elizabeth Weise, *Medicare panel 'favorable' toward weight-loss surgery*, USA TODAY, Nov. 9, 2004, at D13, cited in Kaiser Family Found., *Daily Health Pol'y Rep., Advisory Committee Appears to Support Medicare Coverage for Bariatric Surgery* (Nov. 9, 2004), [http://www.kaisernetwork.org/daily\\_reports/rep\\_hpolicy\\_recent\\_rep.cfm?dr\\_cat=3&show=yes&dr\\_DateTime=11-009-04#26643](http://www.kaisernetwork.org/daily_reports/rep_hpolicy_recent_rep.cfm?dr_cat=3&show=yes&dr_DateTime=11-009-04#26643). "Members of a Medicare advisory committee . . . agreed that 'there's good scientific data showing' the procedures can provide 'important health benefits' . . . Medicare coverage for bariatric surgeries likely would have 'broad implications for what treatments are available to patients nationwide' because private health insurers often follow Medicare in coverage decisions." Weise, *supra*, at D13.

80. Vanessa Gezari, *Overweight in Arkansas? State Will Let Kids Know*, ST. PETERSBURG TIMES, Sept. 26, 2004, available at <http://www.sptimes.com>. In the letters, "the state urged parents to talk to their doctors, give their kids more fruits and vegetables, cut back on soda and limit TV, video-game playing and computer time." *Id.* Some parents reportedly burned the letters or threw them away. *Id.*

81. *Conn. Principal Bans Cupcakes from School*, USA TODAY, Jan. 13, 2004, available at [http://www.usatoday.com/news/offbeat/2004-11-03-cupcakes-outlawed\\_x.htm#?POE=click=refer](http://www.usatoday.com/news/offbeat/2004-11-03-cupcakes-outlawed_x.htm#?POE=click=refer). The principal "adopted a new policy of using games and crafts instead of baked goods to fete birthdays, holidays, and special occasions . . . as a way to combat childhood obesity." *Id.*

82. Carolyn Thompson, *Schools Will Reward Kids Who Eat Right*, PHILLYBURBS.COM, Nov. 30, 2004, <http://www.phillyburbs.com/pb-dyn/articlePrint.cfm?id=408938>. The six-week district-wide effort, which began in January 2005, will teach kids about the benefits of eating healthy foods and will provide immediate rewards "in the form of a prize at the end of the week for students who have put things like carrot coins and kiwi on their trays." *Id.* Examples of prizes include bracelets and key chains. *Id.*

the significance of obesity. For example, Blue Cross and Blue Shield of North Carolina ("BCBSNC") estimated that about half of its members are overweight or obese and thus accounted for over \$83 million in excess costs in 2003.<sup>83</sup> BCBSNC announced in October 2004 that it planned to provide benefits for the prevention and treatment of weight problems for approximately one million members.<sup>84</sup> Under its new "Healthy Lifestyle Choices" plan, BCBSNC "will cover as many as four doctor visits annually and tests to assess weight problems," consultations with dietitians, and FDA-approved weight-loss drugs.<sup>85</sup> Despite all of these efforts, obesity remains an increasingly important and challenging public health concern.

### B. Legal Response to the U.S. Obesity Epidemic

Litigation has been one of the most well-publicized and controversial efforts to address the obesity epidemic in the United States. "As obesity rates in the United States continue to rise, self-styled consumer rights activists are turning their attention to the manufacturing and marketing practices of the food industry and considering whether litigation can be used to change those practices."<sup>86</sup> Obesity is frequently touted as the next tobacco in terms of litigation.<sup>87</sup> Some believe that legal action is a way of "forcing Big Food to pay its share of the costs of" the obesity epidemic.<sup>88</sup>

Personal injury lawsuits represented the "first litigation attacks against 'Big Food.'"<sup>89</sup> In the most well-publicized of these cases, *Pelman v.*

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83. Rob Stein, *N.C. Health Insurer To Offer Coverage For Weight Problems; Obesity a Public Health Crisis, Firm Says*, WASH. POST, Oct. 13, 2004, at A02, cited in *Benefits Package*, *supra* note 49.

84. Stein, *supra* note 83.

85. *Id.*; see also BCBSNC, <http://www.bcbsnc.com/members/health-wellness/mhp/healthylifestyle.cfm> (last visited Nov. 20, 2005) (describing the Healthy Lifestyle Choices program for members).

86. Parsigian & Williams, *supra* note 16.

87. *Id.*

88. Neil Buckley, *Big Food Faces Grilling over America's Obesity 'Epidemic': McDonald's Stands Accused of Making Two Girls Fat. It Is Unlikely to Be the Last of Its Kind*, FIN. TIMES, Nov. 27, 2002, at 20.

89. Parsigian & Williams, *supra* note 16. However, "[t]he first reported case of consumers suing the food industry for health damages was in 1983, when several food companies were sued for allegedly misleading advertising of children's cereal . . . [t]he case was settled." Emily Johns, *Pending Bill Fights Suits Against the Food Industry*, STAR TRIB. (Minneapolis, Minn.), Feb. 9, 2004, at 6A. In addition, in 2002, Caesar Barber alleged in a class action suit that McDonald's, Burger King, Kentucky Fried Chicken, and Wendy's negligently engaged in the production of food products with detrimental health effects, failed to warn consumers of the health effects of the restaurants' food, negligently marketed their food products to children, and engaged in unfair and deceptive acts in practices in violation of the New York Consumer Protection Act. Complaint of Barber v. McDonald's Corp. et al. (N.Y. Sup. Ct. 2002), available at <http://banzhaf.net/docs/nyccomp.html>. Barber's lawyer

*McDonald's Corp.* ("Pelman I"), the plaintiffs alleged that McDonald's caused obesity in minors who consumed the restaurant's food.<sup>90</sup> Part of the plaintiffs' complaint alleged that food products offered by McDonald's are unhealthy and inherently dangerous because they contain high levels of fat, cholesterol, sugar, and salt.<sup>91</sup> That allegation was dismissed because it is a well-known fact that fast food is generally unhealthy and that eating at McDonald's is a free choice (that is, no one is forced to eat at the restaurant).<sup>92</sup> The court concluded that to state a claim, a "[c]omplaint must allege either that the attributes of McDonalds [sic] products are so extraordinarily unhealthy that they are outside the reasonable contemplation of the consuming public or that the products are so extraordinarily unhealthy as to be dangerous in their intended use."<sup>93</sup> The failure of the personal injury claim in *Pelman* and similar suits has led some legal experts to suggest that personal injury lawsuits might not be very successful against the food industry at this time.<sup>94</sup>

Federal and state legislative efforts present additional hurdles to the success of personal injury cases. For example, in 2004, the U.S. House of Representatives passed H.R. 339, the Personal Responsibility in Food Consumption Act (also referred to as the "Cheeseburger Bill"), which banned personal injury obesity lawsuits against the food industry in federal or state courts.<sup>95</sup> In short, this bill prevented individuals from claiming that fast food restaurants made them fat.<sup>96</sup> However, the bill still allowed claims "for adulterated food, for mislabeling of food, [and] for false advertising."<sup>97</sup> In 2005, Representative Ric Keller reintroduced the Personal Responsibility in Food Consumption Act to "allow Congress, State legislatures, and regulatory agencies to determine appropriate laws, rules, and regulations to address the problems of weight gain, obesity, and health conditions associated with weight gain or obesity."<sup>98</sup> Similar bills have been

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reported that he "shelved" the case. Johns, *supra*, at 6A.

90. *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 516 (S.D.N.Y. 2003) [hereinafter *Pelman I*].

91. *Id.* at 531-32.

92. *Id.* at 532-33.

93. *Id.* at 532.

94. Parsigian & Williams, *supra* note 16; Johns, *supra* note 89.

95. Johns, *supra* note 89; Siobhan Morrissey, *Food Fight: 'Cheeseburger Bill' Triggers Debate over Restaurant Liability when Diners Get Fat*, 3 A.B.A. J. eREPORT 11 (2004) (noting that the House passed the bill (276-139) on March 10, 2004 and that there was no similar bill from the Senate as of March 2004); see also <http://thomas.loc.gov> (citing the full-text and detailing bill's status).

96. Morrissey, *supra* note 95.

97. Morrissey, *supra* note 95 (quoting, Rep. Ric Keller, the Florida Republican who introduced the bill).

98. Personal Responsibility in Food Consumption Act of 2005, H.R. 554, 109th Cong. §

introduced in more than twenty states and enacted in at least fourteen states, including Arizona, Idaho, Louisiana, South Dakota, Utah, and Washington.<sup>99</sup> Finally, successful personal injury litigation might be difficult or impossible for plaintiffs in states such as Maryland and North Carolina, where the theory of contributory negligence still applies, because any personal contribution to their own obesity would be a complete bar to recovery.<sup>100</sup>

Obesity litigation now appears to be shifting towards a focus on defendants who market unhealthy food as being healthy and on state consumer protection statutes. Consumer protection statutes “empower consumers with the right to bring lawsuits based on unfair or deceptive commercial practices.”<sup>101</sup> Such suits would likely target deceptive advertising, including ads “emphasizing ‘low-fat,’ ‘high fiber’ or ‘low sodium’ foods without disclosing the actual high calorie or sugar counts of those foods.”<sup>102</sup>

*Pelman I*, the New York case in which the plaintiffs alleged that McDonald’s caused the obesity of minors, included allegations that the company violated the New York Consumer Protection Act §§ 349 and 350 “by (1) deceptively advertising their food as not unhealthful and failing to provide consumers with nutritional information (Count I) and (2) inducing minors to eat at McDonalds [sic] through deceptive marketing ploys (Count II).”<sup>103</sup> McDonald’s argued, in part, that the Federal Nutrition Labeling and Education Act (“NLEA”) barred the plaintiffs’ claims that the restaurant’s “failure to provide nutritional information is deceptive” because the act exempts restaurants.<sup>104</sup> While the court held that the NLEA actually allows “states to impose labeling requirements for certain food industries that are

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1 (2005). A related bill was introduced in the Senate in 2005 by Senator Mitch McConnell. Commonsense Consumption Act of 2005, S.908, 109th Cong. (2005).

99. Parsigian & Williams, *supra* note 16; see also *Michigan Bans Lawsuits over Weight Gain*, MYRTLEBEACHONLINE, <http://www.myrtlebeachonline.com> (last visited Oct. 14, 2005); see also Peter Urban, *Lawmakers Join Fast Food Fight*, CONN. POST, Apr. 10, 2005. In October 2004, the Michigan governor signed into law “a bill that bans civil lawsuits against restaurants and other sectors of the food industry for serving or making food that made people fat. The new law prohibits a food manufacturer, packer, distributor, carrier, holder, seller, marketer or advertiser from being subject to civil liability for personal injury or death due to weight gain or an obesity-related condition.” *Michigan Bans Lawsuits over Weight Gain*, *supra*. See also Morrisey, *supra* note 95. A more recent article reported that eighteen states have banned personal injury suits against the food industry, while legislation is pending in twenty-seven others. Jeffrey Gilbert, *Senate OKs Obesity Bill that Limits Lawsuits*, HOUS. CHRON., May 26, 2005, at 3.

100. Avery, *supra* note 18.

101. Parsigian & Williams, *supra* note 16.

102. *Id.*

103. *Pelman I*, 237 F. Supp. 2d at 524.

104. *Id.* at 525; 21 U.S.C. § 343(q)(1) (1994) and 21 U.S.C. § 343(q)(5)(A)(i) (1994).



exempt under the act, including the restaurant industry,” Count I was dismissed because the complaint failed to identify “a single instance of deceptive acts” and failed to allege that only McDonald’s possessed the nutritional content of their food or that consumers could not obtain that information.<sup>105</sup> Count II was also dismissed for similar reasons because the complaint failed to “identify a single specific advertisement, promotion or statement directed at infant consumers.”<sup>106</sup>

The plaintiffs then filed a four-count amended complaint; Counts I-III were dismissed in 2003.<sup>107</sup> Each of the three dismissed counts alleged that McDonald’s violated §§ 349 and 350 of the New York General Business Law, also known as the New York Consumer Protection Act.<sup>108</sup> Count I alleged that McDonald’s promotional representations created a “false impression that its food products were nutritionally beneficial and part of a healthy lifestyle if consumed daily.”<sup>109</sup> Count II alleged that McDonald’s failed to adequately “disclose that its use of certain additives and the manner of its food processing rendered certain of its foods substantially less healthy than represented.”<sup>110</sup> Finally, Count III alleged that McDonald’s “deceptively represented that it would provide nutritional information to its New York customers when in reality such information was not readily available at a significant number of McDonald’s outlets in New York.”<sup>111</sup> The amended complaint further alleged that the plaintiffs were led to believe that McDonald’s food products were healthy and that they developed obesity and related conditions as a result of these deceptive practices.<sup>112</sup>

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105. *Pelman I*, 237 F. Supp.2d at 527, 529; 21 U.S.C. § 343-1(a)(4). See *Romero*, *supra* note 4, at 248-49 (noting that “[u]nder the NLEA, most packaged foods must be labeled with nutritional information. Restaurants, on the other hand, are specifically exempt from such labeling requirements. In fact, the Food and Drug Administration has interpreted the NLEA as permitting the states to enact laws protecting consumers from menus with ‘false or misleading information.’ Consequently, the court held that the federal labeling laws did not protect McDonald’s from plaintiffs’ New York state law claims.”); see also McDonalds.com, Nutrition Info, [http://www.mcdonalds.com/usa\\_eat/nutrition\\_info.html](http://www.mcdonalds.com/usa_eat/nutrition_info.html) (last visited Sept. 21, 2005) (posting the nutritional information of McDonald’s products on company’s website).

106. *Pelman I*, 237 F. Supp. 2d at 530.

107. *Pelman v. McDonald’s Corp.*, (No. 02 Civ. 7821), 2003 U.S. Dist. LEXIS 15202, at \*5, \*42 (S.D.N.Y. 2003) [hereinafter *Pelman II*]; *Pelman v. McDonald’s Corp.*, 396 F.3d 508, 510 (2d Cir. 2005) (noting that 2003 U.S. Dist. LEXIS 15202, 2003 WL 22052778 is referred to as “*Pelman II*” and also noting that the plaintiffs voluntarily dropped Count IV of the amended complaint)

108. *Pelman II*, No. 02 Civ. 7821, at \*5-6; *Pelman*, 396 F.3d at 510.

109. *Pelman*, 396 F.3d at 510; *Pelman II*, No. 02 Civ. 7821, at \*6.

110. *Pelman*, 396 F.3d at 510; *Pelman II*, No. 02 Civ. 7821, at \*6.

111. *Pelman*, 396 F.3d at 510; *Pelman II*, No. 02 Civ. 7821, at \*6.

112. *Pelman*, 396 F.3d at 510; *Pelman II*, No. 02 Civ. 7821, at \*6-7.

While the consumer protection claims in *Pelman I* and *Pelman II* were initially dismissed, the United States Court of Appeals for the Second Circuit decided in January 2005 that the district court incorrectly dismissed Counts I-III under § 349 of the New York General Business Law in *Pelman II*.<sup>113</sup> The court therefore vacated the district court's dismissal of the portions of Counts I-III that related to §349 and remanded the case so that discovery could proceed.<sup>114</sup> In January, McDonald's stated that it was confident that the case would ultimately be dismissed.<sup>115</sup> While the result and impact that this case will have is unknown, McDonald's has taken steps to make its menu healthier since the suit was originally filed, including offering a new fruit salad and phasing out its Supersize servings.<sup>116</sup> An additional and significant impact is that the plaintiffs' lawyers might gain access to potentially incriminating marketing and advertising documents from McDonald's during the discovery phase.

Consumer protection lawsuits such as *Pelman* have distinct advantages over personal injury suits. These advantages include permitting plaintiffs to sue solely for economic injuries, alleging that "consumers were simply the recipient of a statement that was false or deceptive," eliminating contributory negligence as a defense, and increasing the likelihood of obtaining class certification.<sup>117</sup> While some states have banned or attempted to ban personal injury obesity lawsuits, none of the state legislative efforts ban suits based on deceptive advertising.<sup>118</sup> Recognizing the potential of such lawsuits, plaintiffs' lawyers have even been offering seminars to address these issues, such as "Legal Approaches to the Obesity Epidemic."<sup>119</sup> In addition to *Pelman*, some success has been achieved in this area of litigation. For example, by the end of 2004, out of ten suits brought against "Big Food," at least one source reported that there have been four settlements, two of which appear to be related to consumer

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113. *Pelman*, 396 F.3d at 511-12 (noting that "§ 349 of the New York General Business Law . . . makes unlawful 'deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state,'" and that "a private action brought under § 349 does not require proof of actual reliance." Because the plaintiffs' brief on appeal contained "no argument as to why the district court's dismissal of the claims asserted under § 350 was incorrect," the court regarded "any challenge to the dismissal of the § 350 claims as abandoned"). *Id.*

114. *Id.*

115. Marguerite Higgins, *Obesity Lawsuit Weighed Again*, WASH. TIMES, Jan. 27, 2005, available at <http://www.washingtontimes.com/archive>.

116. *Id.*

117. Parsigian & Williams, *supra* note 16.

118. *Id.*

119. *Id.*

protection.<sup>120</sup>

Most recently, the Superior Court of the State of California, County of Marin, preliminarily approved a settlement of two consumer protection lawsuits<sup>121</sup> against McDonald's for delaying its change to a new cooking oil in an effort to reduce trans fatty acids ("TFAs").<sup>122</sup> The suits claim violations of every state's consumer protection laws.<sup>123</sup> In exchange for release from the claims, McDonald's, which has agreed to settle but vigorously denies the allegations, has agreed to: (1) donate \$7 million to the American Heart Association for trans fatty acid programs; (2) spend a minimum of \$1.5 million to notify their customers about the delay in changing their cooking oil; and (3) pay plaintiffs' legal fees, up to \$2 million.<sup>124</sup> A fairness hearing on the settlement is scheduled for August 24, 2005.<sup>125</sup>

The following are brief descriptions of several additional suits that have been filed against the food industry:

- "Two recent lawsuits have questioned the veracity of the nutritional labels. A California woman won a \$50 million claim this spring against a company that mislabeled its Pirate's Booty rice puff snacks as low fat, when a serving actually had more fat than a Hershey's Chocolate Bar with Almonds."<sup>126</sup>
- "[A] suit last year accused McDonald's Corp. of leading consumers to believe that its french fries were vegetarian . . .

120. *Id.*

121. *Bantransfats.com, Inc. v. McDonald's Corp.*, No. CV 034828 (Cal. Super. Ct. 2004) (order preliminarily approving settlement, approving notice of proposed settlement and setting final fairness hearing); *Fettke v. McDonald's Corp.*, No. CV 044109 (Cal. Super. Ct. 2004) (order preliminarily approving settlement, approving notice of proposed settlement and setting final fairness hearing); TFA Settlement Information Website, <http://www.tfasettlement.com> (last visited Apr. 29, 2005); *see also* Letter from Stephen L. Joseph, Founder, President and Attorney, BanTransFats.com, (Feb. 11, 2005), *available at* <http://www.bantransfats.com/mcdonalds/html>.

122. TFA Settlement Information Website, *supra* note 121; *see also* Associated Press, *McDonald's Settles Fat Suit for \$8.5 Million*, N.Y. LAWYER, Feb. 15, 2005, *available at* <http://www.judicialaccountability.org/articles/mcdonaldscasesdismissed.htm>.

123. TFA Settlement Information Website, *supra* note 121; *see also* Letter from Stephen L. Joseph, *supra* note 121.

124. TFA Settlement Information Website, *supra* note 121; *see also* Associated Press, *McDonald's Settles Fat Suit for \$8.5 Million*, *supra* note 122.

125. TFA Settlement Information Website, *supra* note 121; *see also* *McDonald's to Pay \$8.5 Million for Misleading Public About Use of Trans Fat* (Feb. 16, 2005), DemocracyNow.org, <http://www.democracynow.org/article/pl?sid=05/02/16/157200> (last visited Sept. 26, 2005).

126. Avery, *supra* note 18.

McDonald's agreed in June to pay \$10 million to Hindu groups and others who claimed damage."<sup>127</sup>

- "In 1996, a consumer lawsuit led to a new rule barring restaurants from claiming that a menu item was diet, low-fat or heart healthy - unless it really was."<sup>128</sup>
- In 2002, "a 56-year-old consumer filed a class-action lawsuit against McDonald's, Burger King, Wendy's and KFC, saying they made him fat and, as a result, unhealthy. After eating at the restaurants at least twice a week since 1975, he developed heart disease, diabetes and high blood pressure. He is seeking undisclosed monetary damages and demanding that companies put warning labels on their food."<sup>129</sup>

#### IV. ANTI-TOBACCO LITIGATION IN THE UNITED STATES

In order to use tobacco as an analogy for obesity litigation under the analogical explanation framework, it is also necessary to understand the background of the tobacco epidemic and tobacco litigation in the United States.

##### *A. Overview of the U.S. Tobacco Epidemic*

An overview of the U.S. tobacco epidemic is important for drawing meaningful lessons for obesity. Similar to the previous discussion about obesity, this section presents an overview of the tobacco epidemic in the United States by summarizing the demographic background, health and economic impacts of tobacco use, causes of tobacco use, as well as efforts to curb tobacco use.

The use of tobacco continues to seriously threaten the public's health in the United States. Approximately forty-six million U.S. adults smoke cigarettes, which equates to more than 22% of all adults (25.2% of men and 20.0% of women).<sup>130</sup> In addition, over 4000 children try their first cigarette

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127. *Id.*

128. *Id.*

129. *Id.*

130. CDC, TARGETING TOBACCO USE: THE NATION'S LEADING CAUSE OF DEATH 2005, available at [http://www.cdc.gov/nccdphp/aag/pdf/aag\\_osh2005.pdf](http://www.cdc.gov/nccdphp/aag/pdf/aag_osh2005.pdf) (revised Mar. 2005) [hereinafter CDC, TARGETING TOBACCO USE]; CDC, *Cigarette Smoking Among Adults - United States, 2002*, 53 MORBIDITY & MORTALITY WEEKLY REP. 427, 427-28 (May 28, 2004), available at <http://www.cdc.gov/mmwr/PDF/wk/mm5320.pdf> [hereinafter CDC, *Cigarette Smoking Among Adults*].

and over 2000 additional minors become daily smokers every day.<sup>131</sup> This is significant because nearly 90% of adult smokers began smoking at or before they turned eighteen, and over one-third of children “who ever try smoking a cigarette become regular, daily smokers before leaving high school.”<sup>132</sup> Of those under the age of eighteen, 4.5 million currently smoke.<sup>133</sup> Nearly 22% of high school students are current smokers (21.8% of males and 21.9% of females).<sup>134</sup> “Although smoking rates fell among high school students from 2000-2002,” rates of smoking “did not decline significantly among middle school students.”<sup>135</sup>

“Since 1964, 28 Surgeon General’s reports on smoking and health have concluded that tobacco use is the single most avoidable cause of disease, disability, and death in the United States.”<sup>136</sup> Though it is the most preventable cause of morbidity and mortality, tobacco use caused over “440,000 premature-deaths annually in the United States during 1995-1999,” equating to about 20% of all deaths in the U.S.<sup>137</sup> Also, those who smoke cigarettes lose an average of thirteen to fourteen years of life.<sup>138</sup> If current trends in smoking continue, over 6 million children alive today will suffer premature deaths from diseases related to smoking.<sup>139</sup>

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131. SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN. [hereinafter SAMHSA], RESULTS FROM THE 2003 NATIONAL SURVEY ON DRUG USE AND HEALTH, NSDUH: DETAILED TABLES, available at <http://www.oas.samhsa.gov/nhsda/2k3tabs/PDF/2k3TabsCover.pdf>, cited in CAMPAIGN FOR TOBACCO-FREE KIDS, SMOKING AND KIDS (Sept. 20, 2004), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0001.pdf> [hereinafter SMOKING AND KIDS].

132. CDC, *Selected Cigarette Smoking Initiation and Quitting Behaviors Among High School Students- United States, 1997*, 47 MORBIDITY & MORTALITY WEEKLY REP. 386 (May 22, 1998), cited in CAMPAIGN FOR TOBACCO-FREE KIDS, TOBACCO USE AMONG YOUTH, (July 26, 2005), available at <http://tobaccofreekids.org/research/factsheets/pdf/0002.pdf> [hereinafter TOBACCO USE AMONG YOUTH].

133. TOBACCO USE AMONG YOUTH, *supra* note 132 (relying on data reported by SAMHSA, *supra* note 131).

134. CDC, *Cigarette Use Among High School Students – United States, 1991-2003*, 53 MORBIDITY & MORTALITY WEEKLY REP. 499, 501 (June 18, 2004), available at <http://www.cdc.gov/mmwr/PDF/wk/mm5323.pdf>, cited in SMOKING AND KIDS, *supra* note 131.

135. CDC, TARGETING TOBACCO USE, *supra* note 130.

136. *Id.*

137. CENTERS FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T OF HEALTH & HUMAN SERVS., PREVENTING CHRONIC DISEASES: INVESTING WISELY IN HEALTH: PREVENTING TOBACCO USE, available at [http://www.cdc.gov/nccdphp/factsheets/prevention/pdf/pe\\_tobacco.pdf](http://www.cdc.gov/nccdphp/factsheets/prevention/pdf/pe_tobacco.pdf) [hereinafter CDC, PREVENTING TOBACCO USE]; CDC, Reducing Tobacco Use, [http://www.cdc.gov/nccdphp/bb\\_tobacco](http://www.cdc.gov/nccdphp/bb_tobacco) (last visited Nov. 20, 2005).

138. CDC, *Annual Smoking-Attributable Mortality, Years of Potential Life Lost, and Economic Costs-United States, 1995-1999*, 51(14) MORBIDITY & MORTALITY WEEKLY REP. 300, 303 (Apr. 12, 2002), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5114a2.htm>.

139. CDC, PREVENTING TOBACCO USE, *supra* note 137.

Smoking harms nearly every organ in the human body.<sup>140</sup> Smoking has been linked to chronic lung disease, coronary heart disease, stroke, and cancer of the lungs, larynx, esophagus, mouth, and bladder.<sup>141</sup> Smoking also contributes to cancer of the cervix, pancreas, and kidneys,<sup>142</sup> as well as abdominal aortic aneurysm, acute myeloid leukemia, cataracts, pneumonia, periodontitis, stomach cancer, throat cancer, cardiovascular diseases, negative reproductive effects, and sudden infant death syndrome.<sup>143</sup> Over 8.6 million individuals in the United States alone “have at least one serious illness caused by smoking.”<sup>144</sup>

Smoking can also seriously impact non-smokers. For example, secondhand smoke causes about 3000 deaths from lung cancer and 35,000 deaths from heart disease among non-smokers annually.<sup>145</sup> An estimated 300,000 children per year are affected by respiratory tract infections due to secondhand smoke.<sup>146</sup> Smoking during pregnancy can also result in lower birth weight, respiratory distress, and a higher risk of sudden infant death syndrome.<sup>147</sup>

In addition to the grave health costs of tobacco use, the economic costs associated with the tobacco epidemic are staggering. For example, smoking costs an estimated \$75 billion in direct medical expenditures and \$92 billion in lost productivity annually.<sup>148</sup> To break that down, “[a]pproximately 20 billion packs of cigarettes were sold in the United States in 2002. Each pack cost the nation an estimated \$8.61 in medical care costs and lost productivity.”<sup>149</sup> Additionally, illnesses related to smoking account for approximately 14% of Medicaid expenditures.<sup>150</sup> Furthermore, the annual tax burden resulting from smoking-caused government expenditures is approximately \$64.6 billion, or \$596 per household.<sup>151</sup>

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140. U.S. DEP'T OF HEALTH & HUMAN SERVS., *The Health Consequences of Smoking: A Report of the Surgeon General: Four Major Conclusions of the 2004 Report*, [http://www.cdc.gov/tobacco/sgr/sgr\\_2004/Factsheets/9.htm](http://www.cdc.gov/tobacco/sgr/sgr_2004/Factsheets/9.htm) (last visited Nov. 20, 2005) [hereinafter *2004 Report Conclusions*].

141. CDC, PREVENTING TOBACCO USE, *supra* note 137.

142. *Id.*

143. *2004 Report Conclusions*, *supra* note 140.

144. CDC, TARGETING TOBACCO USE, *supra* note 130.

145. *Id.*

146. *Id.*

147. *Id.*

148. CDC, PREVENTING TOBACCO USE, *supra* note 137.

149. *Id.*

150. *Id.*

151. CAMPAIGN FOR TOBACCO-FREE KIDS, TOLL OF TOBACCO IN THE UNITED STATES OF AMERICA (Aug. 9, 2005), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0072.pdf> (last visited Oct. 13, 2005) (noting that the “[s]moking-caused federal/state tax burdens equals listed government expenditures plus 3% of total tobacco-caused health costs

Multiple factors explain this country's smoking trends. However, the most critical factors influencing high smoking rates appear to be the addictive nature of cigarettes and intense tobacco industry marketing and advertising. Nicotine is the psychoactive substance in tobacco products that causes addiction and is so highly addictive that "[t]he addiction rate for smoking is higher than the addiction rates for marijuana, alcohol, or cocaine . . . symptoms of serious nicotine addiction often occur only weeks or even just days after youth 'experimentation' with smoking first begins."<sup>152</sup> Research has also found that "[c]igarette smokers were more likely than persons who used the other substances to report having tried to cut down, and were approximately twice as likely as persons who used alcohol, marijuana, or cocaine to report having been unable to cut down."<sup>153</sup> The same study also reported that "[c]igarette smokers were more likely than users of the other substances to report feeling dependent on the substance or feeling sick when they stopped or cut down on its use."<sup>154</sup>

In addition to the addictive nature of nicotine, tobacco industry marketing and advertising significantly contribute to tobacco use. Multiple "internal industry documents . . . show that the tobacco companies have perceived kids as young as 13 years of age as a key market, studied the smoking habits of kids, and developed products and marketing campaigns aimed at them."<sup>155</sup>

Children are more influenced by tobacco advertising than adults and are "twice as likely as adults to recall tobacco advertising."<sup>156</sup> Over 80% of youths age twelve to seventeen years old who smoke choose "the three

to account for unlisted federal/state smoking costs."), citing CDC, *Medical Care Expenditures Attributable to Smoking-United States 1993*, 43(26) MORBIDITY & MORTALITY WEEKLY REP. 1, 4 (July 8, 1994).

152. CDC, *Symptoms of Substance Dependence Associated with Use of Cigarettes, Alcohol, and Illicit Drugs, 1991-1992*, 44 MORBIDITY & MORTALITY WEEKLY REP. 830 (Nov. 10, 1995) [hereinafter CDC, *Symptoms*], available at <http://www.cdc.gov/mmwr>; J.R. DiFranza et al., *Initial Symptoms of Nicotine Dependence in Adolescents*, 9 TOBACCO CONTROL 313, 313-19 (Sept. 2000), available at <http://tc.bmjournals.com>; CAMPAIGN FOR TOBACCO-FREE KIDS, *THE PATH TO SMOKING ADDICTION STARTS AT VERY YOUNG AGES* (Jan. 10, 2005), available at <http://tobaccofreekids.org/research/factsheets/pdf/0127.pdf>. Each of the sources in this footnote were cited in SMOKING AND KIDS, *supra* note 131.

153. CDC, *Symptoms supra* note 152.

154. *Id.*

155. CAMPAIGN FOR TOBACCO-FREE KIDS, *TOBACCO COMPANY MARKETING TO KIDS* (Sept. 20, 2004), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0008.pdf> (last modified Aug. 9, 2005) [hereinafter MARKETING TO KIDS].

156. R. Pollay et al., *The Last Straw? Cigarette Advertising and Realized Market Shares Among Youth and Adults*, 60(2) J. MARKETING 1-16 (Apr. 1996), cited in SMOKING AND KIDS, *supra* note 131; National telephone survey of 507 kids aged 12-17 and 1,005 adults conducted for Campaign for Tobacco-Free Kids through the International Communications Research Teen Excel Study, March 2003, cited in SMOKING AND KIDS, *supra* note 131.

most heavily advertised brands: Marlboro, Camel, and Newport,” while only about one-half of smokers over the age of twenty-five purchase the top three brands.<sup>157</sup> Camel was so successful with its “Joe Camel” ad campaign that a study found that nearly one-third of three-year-olds and 90% of six-year-olds who were surveyed recognized that the image of Joe Camel was linked to cigarettes.<sup>158</sup> Research has even shown that tobacco marketing may be more likely to influence teenagers to initiate smoking than peer pressure.<sup>159</sup> Industry expenditures on advertising and marketing for current and future smokers are tremendous. “The major cigarette companies, alone, now spend about \$15.1 billion per year (or more than \$41 million every day) to promote their products; and many of their marketing efforts directly reach kids.”<sup>160</sup> From 1998-2003, the companies’ marketing expenditures “increased by almost 125%”; preliminary data from 2004 indicates that such expenditures continue to rise.<sup>161</sup>

Since the 1964 Surgeon General’s Report on smoking, many efforts against the tobacco industry have focused on reducing tobacco use among adults and children. These efforts have included federal, state, and local legislation and regulation, ranging from tax increases to bans on smoking in certain public places; government agency tobacco prevention and control programs; government, class, and individual litigation; and non-governmental organization (“NGO”) mobilization against the tobacco industry.<sup>162</sup> For example, in 1965, Congress enacted the Federal Cigarette Labeling and Advertising Act, requiring packs of cigarettes to display a warning about the hazards of smoking to health; in 1983, San Francisco became the first major American city to adopt a clean indoor air ordinance;

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157. SAMHSA, *supra* note 131, *cited in* SMOKING AND KIDS, *supra* note 131.

158. RICHARD KLUGER, *ASHES TO ASHES: AMERICA’S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS* 702 (1997).

159. N. Evans et al., *Influence of Tobacco Marketing and Exposure to Smokers on Adolescent Susceptibility to Smoking*, 87 J. NAT’L CANCER INST. 1538-1545 (Oct. 1995), *cited in* SMOKING AND KIDS, *supra* note 131.

160. U.S. FED. TRADE COMM’N, *CIGARETTE REPORT FOR 2003* (2005), *available at* <http://www.ftc.gov/reports/cigarette05/050809cigrpt.pdf>, *cited in* MARKETING TO KIDS, *supra* note 155.

161. MARKETING TO KIDS, *supra* note 155.

162. *See, e.g.* MONT. CODE ANN. § 16-11-111 (2005) (increasing cigarette taxes in 2005 by \$1.00 to \$1.70 per pack), *available at* [http://data.opi.state.mt.us/bills/mca\\_toc/16\\_11\\_1.htm](http://data.opi.state.mt.us/bills/mca_toc/16_11_1.htm); CAMPAIGN FOR TOBACCO-FREE KIDS, *CIGARETTE TAX INCREASES BY STATE PER YEAR 2000-2005*, *available at* <http://www.tobaccofreekids.org/research/factsheets/pdf/0275.pdf> (outlining cigarette tax increases by state and by date and amount of increase per year); CDC, *TIPS – CDC’s Tobacco Information and Prevention Resource* (providing an overview of federal and state tobacco control programs), <http://www.cdc.gov/tobacco/>; U.S. Fed. Trade Comm’n, *Tobacco Products Fast Facts*, *available at* <http://library.findlaw.com/1992/Nov/1/128639.html> (last visited Nov. 20, 2005) (commenting on the requirements of the Federal Cigarette Labeling and Advertising Act).



in 1988, California increased its tobacco excise tax and allocated a portion of the tax revenues to a tobacco control program; in 1994, the Attorney General of Mississippi sued major tobacco manufacturers in an attempt to recover Medicaid costs linked to smoking; and in 1998, the Master Settlement Agreement (“MSA”), which cost the tobacco industry more than \$200 billion over twenty-five years and imposed advertising and marketing restrictions, was reached between forty-six attorneys general and the major cigarette manufacturers.<sup>163</sup> However, despite all of these efforts, smoking continues to be a leading public health concern in the United States.

### *B. Legal Response to the U.S. Tobacco Epidemic*

Litigation as a strategy to address problems associated with tobacco has had a long and controversial history and has achieved mixed success. Tort litigation against the tobacco industry began in the 1950s with the initial cancer scare associated with smoking.<sup>164</sup>

However, even though it is common for tort cases to be settled out of court, the first forty years of tobacco litigation resulted in a “total lack of success” for plaintiffs, including any settlements.<sup>165</sup> Approximately seven hundred cases were brought against the industry before the first trial, and over eight hundred cases were brought prior to obtaining a favorable verdict.<sup>166</sup> The industry invested vast sums of money in these suits by hiring the most prestigious law firms and by employing highly aggressive tactics, such as taking endless depositions.<sup>167</sup> For example, according to an official at R.J. Reynolds, “the way we won these cases was not by spending all of [Reynolds’s money], but by making that other son of a bitch spend all of his.”<sup>168</sup> The tobacco industry’s defense has generally focused on assumption of the risk by the smoker.<sup>169</sup>

The first anti-tobacco cases “relied on claims of negligence and failure to warn” and prior to the middle of the 1990s, the plaintiffs were individuals.<sup>170</sup> Product liability was generally not invoked at the time

163. DERTHICK, *supra* note 4, at 165-173. Texas, Minnesota, Florida, and Mississippi individually settled with the tobacco industry prior to the MSA. *Id.* Each of these four settlements provided more funds to the states than the MSA did for each of the forty-six states covered under that agreement. *Id.*

164. Rabin, *supra* note 4, at 176.

165. DERTHICK, *supra* note 4, at 28; Rabin, *supra* note 4, at 176.

166. Buckley, *supra* note 88, at 20; *see also* DERTHICK, *supra* note 4, at 27.

167. DERTHICK, *supra* note 4, at 28.

168. Frank Tursi et al., *Lost Empire: The Fall of R.J. Reynolds Tobacco Co.*, <http://extras.journalnow.com/lostepire/index.htm>, quoted in DERTHICK, *supra* note 4, at 28 (a Web-only account of the recent history of R.J. Reynolds).

169. DERTHICK, *supra* note 4, at 39.

170. *Id.* at 27, 29.

because a product had to be defective for such a claim; in the mid-1960s, the American Law Institute even stated that “[g]ood tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful.”<sup>171</sup>

The companies’ main arguments were that no conclusive proof showed that cigarettes caused any diseases; that even if there were such proof, “there was no way the manufacturers could have been aware of it before the plaintiffs contracted their illness,” and since tobacco use had been alleged to cause health problems for a long time, “smokers were guilty of contributory negligence” and made informed decisions to smoke.<sup>172</sup>

Even cases that appeared to be very favorable to plaintiffs faced legal obstacles.<sup>173</sup> *Pritchard v. Liggett & Meyers* involved a plaintiff who claimed that he smoked because he relied on statements negligently made by Liggett that their cigarettes did not pose a danger to one’s health.<sup>174</sup> The jury found that smoking Chesterfield cigarettes, a Liggett brand, was the cause, or one of the causes, of the plaintiff’s cancer.<sup>175</sup> However, they also found that Liggett was not negligent and despite its advertising assuring consumers that its cigarettes were safe, Liggett made “no ‘express warranties upon which the plaintiff relied and by which he was induced to purchase the cigarettes.’”<sup>176</sup> In addition, the jury found that “the plaintiff assumed the risk of injury by his smoking the cigarettes.”<sup>177</sup> After ten years of litigation and an order issued by the appellate court for a third trial, the plaintiff finally gave up pursuing the case, even though it would have been difficult to subsequently show that he assumed “a risk that the manufacturer explicitly advertised did not exist.”<sup>178</sup>

It was not until the mid-1980s that new kinds of suits could be filed against the industry due to the evolution of product liability and comparative fault, as well as the enactment of consumer protection laws.<sup>179</sup> These first cases, including *Galbraith v. R. J. Reynolds Tobacco Co.*<sup>180</sup> and

171. Restatement (Second) of Torts § 402(A) cmt. i (1965), *quoted in* Robert L. Rabin, *A Sociological History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 863 (1992), *cited in* DERTHICK, *supra* note 4, at 29.

172. KLUGER, *supra* note 158, at 281.

173. *Id.*

174. *Id.*; *Pritchard v. Liggett & Meyers Tobacco Co.*, 370 F.2d 95, 95 (3d Cir. 1966).

175. *Pritchard*, 370 F.2d at 95; KLUGER, *supra* note 158, at 282.

176. *Pritchard*, 370 F.2d at 95 (3d Cir. 1966).

177. *Id.*

178. KLUGER, *supra* note 158, at 281-82. Statements made by Liggett included, “Play Safe/Smoke Chesterfield” and “Nose, Throat, and Accessory Organs Not Adversely Affected by Smoking Chesterfields.” *Id.*

179. DERTHICK, *supra* note 4, at 30.

180. *Galbraith v. R. J. Reynolds Tobacco Co.*, No. C144 147 (Cal. Super. Ct. 1985).

*Horton v. The American Tobacco Company*,<sup>181</sup> were filed by individual plaintiffs and resulted in no damage awards.<sup>182</sup> However, the plaintiff achieved some success in *Cipollone v. Liggett Group, Inc.*<sup>183</sup> In that case, Rose Cipollone alleged that she “developed lung cancer because she smoked cigarettes manufactured and sold” by three cigarette companies and that the companies failed to warn her about the addictiveness of smoking and its health effects.<sup>184</sup> The case also addressed the question of whether the Federal Cigarette Labeling and Advertising Act “preempted state tort claims based on negligent failure to warn.”<sup>185</sup> While the jury found Liggett to be negligent and assigned 20% of the fault for Cipollone’s illness to the defendant, the court vacated on appeal a \$400,000 award to compensate Cipollone’s husband for caring for his wife because it lacked any legal foundation.<sup>186</sup> Also, the United States Supreme Court decided that the Federal Cigarette Labeling and Advertising Act preempted “the applicability of the post-1965 negligent failure to warn claims.”<sup>187</sup> However, during the trial, the plaintiff’s lawyer obtained access to important internal industry documents and testimony that exposed the collusive deception upon which the tobacco manufacturers agreed.<sup>188</sup> This proved to be an important victory in the case.<sup>189</sup>

Early product liability and consumer protection cases such as *Galbraith*, *Horton*, and *Cipollone* “showed . . . that even with a product liability law much more favorable to plaintiffs, juries remained reluctant to find cigarette companies at fault for smokers’ decisions to smoke.”<sup>190</sup> In addition, “the industry had successfully argued initially that smokers would have continued to smoke even if they had knowledge of the health risks involved

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Galbraith smoked cigarettes for fifty-five years and had other diseases in addition to lung cancer. A majority of the jurors found that causation between Galbraith’s smoking and his death could not be established. DERTHICK, *supra* note 4, at 31.

181. *Horton v. Am. Tobacco Co.*, 667 So. 2d 1289 (Miss. 1985). Nathan Henry Horton, who died of lung cancer after smoking Pall-Malls for thirty-seven years, filed suit in Mississippi, which had a pure comparative fault law. DERTHICK, *supra* note 4, at 31. While the jury found the American Tobacco Company liable for Horton’s death, it did not award compensation because the jurors believed it was well known that smoking caused illnesses. *Id.*

182. DERTHICK, *supra* note 4, at 30-31.

183. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

184. *Id.* at 509; see also DERTHICK, *supra* note 4, at 31-32.

185. *Cipollone*, 505 U.S. at 509; KLUGER, *supra* note 158, at 576; Rabin, *supra* note 4, at 176.

186. *Cipollone*, 505 U.S. at 512; DERTHICK, *supra* note 4, at 31-32.

187. Rabin, *supra* note 4, at 178; *Cipollone*, 505 U.S. at 549-50.

188. Rabin, *supra* note 4, at 178.

189. *Id.*

190. DERTHICK, *supra* note 4, at 32.

and, later, that smokers continued to smoke in full possession of that knowledge."<sup>191</sup>

Shortly after *Cipollone*, two critical factors dramatically changed the climate of tobacco litigation: consolidation of claims against the industry "into one massive tort challenge to the industry" and states seeking reimbursement from tobacco companies for health-related costs associated with smoking.<sup>192</sup> Both of these initiatives began as the consolidation of claims became more accepted as a litigation strategy and as industry documents revealing efforts to "conceal and misrepresent tobacco-related health concerns" were exposed to the public.<sup>193</sup> The document exposure was in part due to two whistleblowers, Merrell Williams and Jeffrey Wigand, who revealed damaging documents and that industry executives knew about the addictive nature of nicotine.<sup>194</sup> Plaintiffs' lawyers developed the new strategy of attacking the tobacco companies themselves rather than trying to argue that cigarettes were harmful.<sup>195</sup>

*Castano v. American Tobacco Co.* was one of the first forays into the consolidation of anti-tobacco cases.<sup>196</sup> *Castano*, which focused on nicotine addiction and implicated eight tobacco companies, was particularly well funded due to a total of \$6 million in contributions from sixty plaintiffs' attorneys to cover the potential costs of representing forty million claimants.<sup>197</sup> Focusing the case on addiction became a novel and important strategy because "the addictive character of nicotine was less familiar to smokers than the health effects of tobacco."<sup>198</sup> While the case initially obtained class certification, the class was eventually decertified.<sup>199</sup> It has

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191. Rabin, *supra* note 4, at 179.

192. *Id.* at 179, 182-84. A distinct advantage of consolidating cases is the "economy of scale in trial preparation" due to "developing a single narrative of industry misconduct and relying on causal inferences drawn from a comparison of statistical aggregations developed through epidemiological studies, rather than delving into the causal nexus in individual cases." *Id.*

193. *Id.* at 179, 183. After the Agent Orange case in the 1970s, lawyers increasingly began attempting to aggregate cases through class actions or less formal methods of consolidation, but initially there was not much success. *Id.* at 180.

194. *Id.* at 183. Williams was a paralegal who worked for a law firm representing the tobacco company, Brown & Williamson. *Id.* at 183. Wigand was the former head of research and development for Brown & Williamson. *Id.* at 180.

195. *Battling Against Big Food*, ECONOMIST, Dec. 19, 2002, available at [http://www.economist.com/markets/bigmac/displayStory.cfm?story\\_id=1487511](http://www.economist.com/markets/bigmac/displayStory.cfm?story_id=1487511).

196. *Castano v. Am. Tobacco Co.*, 160 F.R.D. 544 (E.D. La. 1995).

197. *Id.* at 548; Rabin, *supra* note 4, at 181, 186; DERTHICK, *supra* note 4, at 71.

198. Rabin, *supra* note 4, at 186.

199. *Castano*, 160 F.R.D. at 550, 560. The Federal Rules of Civil Procedure require the following four prerequisites for class certification: numerosity, commonality, typicality, and adequacy of representation. In addition, several other requirements must be met, such as the party that opposes the class having acted in a way generally applicable to the class, the issues

been speculated that decertification was ordered because of “individual determinations of reliance, comparative fault, consumer expectations, and actual damages.”<sup>200</sup> As of 2001, Louisiana was the only state that had granted and upheld a post-*Castano* class certification.<sup>201</sup>

Soon after *Castano* was filed, the Mississippi Attorney General brought a state health care reimbursement case that raised several different and novel legal theories.<sup>202</sup> “[T]he state’s theory of recovery was . . . not based on products liability law” because “the state was not a ‘direct’ victim suffering from tobacco-related disease.”<sup>203</sup> Rather, “Mississippi, and the states that were to follow its lead, argued for relief on equitable grounds such as unjust enrichment.”<sup>204</sup> The states also claimed consumer fraud and violations of consumer protection laws, including “assert[ions] that the industry’s deceptive and misleading conduct constituted a wrong against the public as well as against individual smokers.”<sup>205</sup> Additional claims included “deceptive advertising, antitrust violations, federal RICO (racketeering) claims, unfair competition, a variety of fraud allegations, and in at least two states . . . statutory claims based on the enactment of specific health care cost recovery legislation.”<sup>206</sup> Eventually, due to potential lawsuits by almost every state on a variety of claims, the industry settled individually with four states and entered into the \$206 billion Master Settlement Agreement with the remaining forty-six states in 1998.<sup>207</sup> While the settlement was costly for the industry, the tobacco companies involved benefited from the certainty and predictability of the settlement, including

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of law or fact predominating over questions affecting only individuals, or a class action being the superior method of handling the case. See FED. R. CIV. P. 23(a); see also DERTHICK, *supra* note 4, at 71.

200. Rabin, *supra* note 4, at 188.

201. *Id.*

202. *Id.* at 189; DERTHICK, *supra* note 4, at 72.

203. Rabin, *supra* note 4, at 189.

204. *Id.*, citing PETER PRINGLE, CORNERED: BIG TOBACCO AT THE BAR OF JUSTICE (1998); see also DERTHICK, *supra* note 4, at 75; see generally Complaint in Moore *ex rel.* State of Miss. v. Am. Tobacco Co. et al., (May 23, 1994), available at <http://stic.neu.edu/MS/2moore.htm>.

205. Rabin, *supra* note 4, at 190. See, e.g., Complaint in Moore *ex rel.* State of Miss. v. Am. Tobacco Co. et al. (May 23, 1994), available at <http://stic.neu.edu/MS/2moore.htm>; Complaint in Humphrey *ex rel.* State of Minn. v. Philip Morris Inc. et al. (Aug. 17, 1994), available at <http://stic.neu.edu/MN/3BCBS.HTM>; Complaint in State of Fla. v. Am. Tobacco Co. et al. (Feb. 21, 1995), available at <http://stic.neu.edu/FL/1florida.htm>; Complaint in State of Tex. v. Am. Tobacco Co. et al. (Mar. 28, 1996), available at <http://stic.neu.edu/Tx/3TXCOMP.HTM>.

206. Rabin, *supra* note 4, at 190.

207. *Id.* at 191, 192-93 (noting that the MSA “extinguished any further liability of the industry to the states” and included restrictions on marketing and advertising directed at youth.); see also DERTHICK, *supra* note 4, at 173.

being relieved of suits filed by state governments.<sup>208</sup>

Plaintiffs have achieved other successes with claims related to consumer protection since the MSA. For example, a federal court “found the major tobacco companies guilty of violating New York’s deceptive trade practices law and ordered payment of \$17.8 million in compensatory damages . . . in a case brought by Empire BlueCross BlueShield” in 2001.<sup>209</sup> A “new round of cases that seek to hold tobacco companies liable for deceiving consumers rather than for the personal injuries suffered by consumers” has also arisen.<sup>210</sup> The first of these, *Price v. Philip Morris, Inc.*,<sup>211</sup> is an Illinois class action suit brought under the Illinois Consumer Fraud Act by more than one million consumers of Marlboro Lights and Cambridge Lights.<sup>212</sup> In that case, the circuit court found that Philip Morris violated the Illinois Consumer Fraud Act and the Uniform Deceptive Trade Practices Act and ordered the company “to pay \$10.1 billion in damages for misleading smokers into believing that low tar cigarettes are safer than regular brands.”<sup>213</sup>

These plaintiffs successfully argued that the company committed fraud with each and every Marlboro Lights purchase by including “the words “lowered tar and nicotine” on the cigarette packs because “[t]here is a widespread belief that ‘light’ means a product contains less of an unhealthy ingredient.”<sup>214</sup> Since the plaintiffs brought the claim under a consumer fraud statute, the defendant could not rely on defenses such as “assumption of the risk, contributory negligence or competing causes of illness.”<sup>215</sup> The case is now on appeal and went to the Illinois Supreme Court for oral

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208. DERTHICK, *supra* note 4, at 87, 137 (noting that the MSA did not offer industry protection from the federal government or private class actions); see generally Nat’l Ass’n of Attorneys Gen., Master Settlement Agreement (1998), available at [http://www.naag.org/upload/1032468605\\_cigmsa.pdf](http://www.naag.org/upload/1032468605_cigmsa.pdf).

209. DERTHICK, *supra* note 4, at 196.

210. Tobacco Control Resource Ctr. [hereinafter TCRC], *Media Backgrounder & Commentary: Consumer Protection Lawsuit against Philip Morris Results in \$10.1 billion Award for Fraudulent and Misleading Sales Practices for Marlboro Lights and Cambridge Lights* (Mar. 21, 2003), available at <http://www.tobacco.neu.edu/litigation/cases/backgrounders/miles.htm> [hereinafter TCRC, *Media Backgrounder*].

211. *Price v. Philip Morris, Inc.*, No. 00-L-0112, 2003, 2003 WL 22597608 (Ill. Cir. Ct., Madison County, Mar. 21, 2003).

212. Univ. of Md. Sch. of Law, Legal Resource Ctr. for Tobacco Reg., Litigation & Advocacy, *Philip Morris Loses Class Action Suit on Light Cigarettes*, 2 TOBACCO REG. REV. 16 (Sept. 2003) [hereinafter *Light Cigarettes*].

213. *Price*, 2003 WL 22597608, at \*25, \*29; *Light Cigarettes*, *supra* note 212, at 16; see also TCRC, *Media Backgrounder*, *supra* note 210 (noting that Philip Morris was required to pay \$7.1 billion in compensatory damages and \$3.0 billion in punitive damages).

214. TCRC, *Media Backgrounder*, *supra* note 210; see also *Price*, 2003 WL 22597608, at \*24.

215. *Light Cigarettes*, *supra* note 212, at 17.

arguments in November 2004.<sup>216</sup>

Additionally, over 4000 lawsuits are pending against U.S. tobacco companies, including “lawsuits brought on behalf of individuals and their families . . . a class action lawsuit in Louisiana seeking compensation for the costs of smoking cessation for addicted smokers . . . and lawsuits brought on behalf of nonsmoking flight attendants who were harmed by on-the-job exposure to secondhand smoke before the smoking ban on airlines took effect more than 10 years ago.”<sup>217</sup>

In a significant pending case, the U.S. Department of Justice (DOJ) is seeking to hold the tobacco industry responsible for years of “illegal and harmful practices, including concealing the health risks and addictiveness of cigarettes and their marketing to children” in violation of the Racketeer Influenced Corrupt Organizations Act (“RICO”).<sup>218</sup> The DOJ originally sought “to recover \$280 billion in illegal tobacco industry profits and bring about fundamental changes in the manufacturing, marketing, labeling and sale of cigarettes.”<sup>219</sup> While the industry argued that “going after profits that it earned years earlier would not do anything to prevent and restrain future wrongdoing,” the DOJ asserted that going after such illegal profits would help prevent future fraud.<sup>220</sup> However, in February 2005, an appeals court denied the government’s \$280 billion disgorgement claim.<sup>221</sup> Then, in a surprise move in June 2005, the DOJ decided not to pursue a recommended \$130 billion smoking cessation program and suggested that the tobacco companies instead pay for a smoking cessation program that would cost \$10 billion over five years.<sup>222</sup>

Despite some important successes in anti-tobacco litigation, it has not been an easy road for plaintiffs and their lawyers, even considering the substantial body of empirical evidence demonstrating tobacco’s harmful

216. *Id.*

217. TCRC, Frequently Asked Questions on Tobacco Control, <http://www.tobacco.neu.edu/help/index.htm> (last visited Oct. 12, 2005).

218. Campaign for Tobacco Free Kids, *Justice Department Civil Lawsuit* (last updated Sept. 26, 2005), <http://www.tobaccofreekids.org/reports/doj/> (last visited Oct. 12, 2005).

219. CAMPAIGN FOR TOBACCO-FREE KIDS, *Justice Department Civil Lawsuit* (Sept. 21, 2004).

220. Nancy Zuckerbrod, *Tobacco Companies Argue Against Payments*, lexisONE, Nov. 17, 2004, <http://www.lexisone.com/news/ap/ap111704d.html>.

221. *Dep’t of Justice (DOJ) Tobacco Lawsuit* (Feb. 4, 2005), [http://www.altria.com/media/03\\_06\\_03\\_04\\_05\\_01\\_dojfilings\\_2004\\_05\\_24\\_01.asp#](http://www.altria.com/media/03_06_03_04_05_01_dojfilings_2004_05_24_01.asp#) (noting that the “U.S. Court of Appeals for the District of Columbia granted the Defendants’ summary judgment motion on the disgorgement issue holding that the disgorgement remedy was unavailable to the Government, therefore reversing the trial court,” and providing links to disgorgement documents from the case); Associated Press, *Feds Scale Back Tobacco Demand*, June 8, 2005, available at <http://www.cnn.com/2005/LAW/06/08/tobacco.trial.ap/index.html>.

222. *Feds Scale Back Tobacco Demand*, *supra* note 221.

effects, widespread public knowledge that smoking is harmful to one's health, and the availability of millions of industry documents that expose calculated and deceitful business practices by the tobacco industry. For example, as of December 2003, most of the sixteen individual plaintiff victories reported by the Tobacco Control Resource Center were pending the defendant's appeal, and in only one case, the defendant lost the final appeal and had to pay \$1.09 million to the plaintiff.<sup>223</sup> To date, case consolidation has generally not proven to be the successful strategy once anticipated, except that the strategy did lead to the MSA.<sup>224</sup> Cases such as the "lights" litigation might offer more chances of success for plaintiffs in the future; in at least ten states, consumer protection cases similar to *Price*<sup>225</sup> have been filed, and at least one class has already been certified.<sup>226</sup>

## V. ANALYSIS

The following analysis will apply the analogical explanation framework to the obesity and tobacco situations to determine whether useful lessons can be drawn from tobacco litigation for obesity litigation and, based on those lessons, whether obesity will become the next tobacco. It will also present some of the major limitations associated with the analysis and with analogical reasoning as a tool for analyzing similar situations.

The analysis shows that useful lessons can be drawn from tobacco litigation for obesity litigation. The similarities and differences existing between the obesity and tobacco situations demonstrate that the stakes associated with obesity litigation are very high. The history of tobacco litigation also suggests that obesity suits will have a low likelihood for success and that with the current state of public knowledge about the food industry, litigation alone will not significantly improve the obesity epidemic. Experiences with tobacco litigation also show that if obesity suits are pursued, they should focus on consumer protection claims. However, a multi-pronged approach is the best strategy to address the obesity epidemic. Finally, the analysis demonstrates that there could be serious risks associated with filing consumer protection suits against and

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223. TCRC, Individual Plaintiff Victories – Tobacco Litigation, <http://www.tobacco.neu.edu/litigation/resources/victories.htm> (last visited Oct. 13, 2005).

224. DERTHICK, *supra* note 4, at 196 (noting that while a post-MSA Florida class was certified as a statewide class action, and while the jury awarded \$12.7 million in compensatory damages and \$144.9 billion in punitive damages, the industry worked with the state legislature to change a law that would have required, as a condition for appeal, the industry to post a bond in the full amount of the award.).

225. *Price v. Philip Morris, Inc.*, No. 00-L-0112, 2003, 2003 WL 22597608 (Ill. Cir. Ct., Madison County, Mar. 21, 2003).

226. *Light Cigarettes*, *supra* note 212, at 16-17.



reaching settlements with the food industry. For these reasons, in contrast to what some plaintiffs' attorneys are predicting, it is currently unlikely that obesity will become the next tobacco.

### A. Questions 1-6

1. How does the problem of tobacco define the issue of obesity? What are the similarities and differences between the two situations and with respect to anti-tobacco and obesity litigation?

The tobacco and obesity epidemics can both be defined as significant national health issues for which litigation has been used to hold the tobacco and food industries liable for the harm their products have allegedly caused. Numerous similarities and differences exist between tobacco and obesity as public health problems and in the realm of litigation. In terms of health, a fundamental similarity between the two issues is that tobacco use and becoming obese are usually the result of lifestyle and personal choices. Therefore, the health impacts of both are largely preventable. Both cause major and multiple chronic diseases that often result in premature morbidity and mortality. For example, smoking-related illnesses annually cause over 440,000 deaths and approximately 112,000 deaths are caused each year by obesity.<sup>227</sup> Tobacco use and obesity impact substantial portions of the U.S. population, including adults and children. Approximately 22% of adults and youth smoke cigarettes and about 30% of adults and 16% of youths are overweight or obese.<sup>228</sup> Furthermore, the economic costs associated with both are staggering. Tobacco use costs an estimated \$115 billion in medical expenditures and lost productivity annually; similarly, obesity costs are roughly the same: around \$117 billion annually.<sup>229</sup>

The tobacco and food industries also share several important characteristics. Perhaps the most significant similarity is the vast expenditures that each industry makes in promoting products to consumers, particularly to children. These industries spend billions of dollars on advertising and marketing to adults and children each year. As evidence of their success, a majority of children have been found to recognize marketing figures such as Joe Camel and Ronald McDonald.<sup>230</sup> Due to

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227. CDC, PREVENTING TOBACCO USE, *supra* note 137; Flegal et al., *supra* note 40.

228. CDC, TARGETING TOBACCO USE, *supra* note 130; CDC, *Cigarette Smoking Among Adults*, *supra* note 130; CDC Fact Sheet, *supra* note 35; CDC, PREVALENCE, *supra* note 36.

229. CDC, PREVENTING TOBACCO USE, *supra* note 137; Surgeon General's Call to Action, *supra* note 34.

230. KLUGER, *supra* note 158, McDonald's, <http://www.mcdonalds.com> (last visited Nov. 13, 2004).

large profits and economic power of the companies, the tobacco and food industries have deep pockets that attract potential litigants. While not as well-documented as the tobacco industry, some have claimed that “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>231</sup> It has been speculated that fast food manufacturers, like tobacco manufacturers, “purposefully make their foods addictive and misrepresent the health benefits of their foods to deceive the public.”<sup>232</sup>

Further, tobacco use and obesity significantly impact children. While each deleteriously impacts the health of adults, the high prevalence of youth tobacco use and obesity is particularly problematic because children are likely to continue these habits into adulthood and suffer the resulting health consequences. For example, an estimated 80% of adult smokers began their habit before turning eighteen-years-old and approximately 80% of overweight adolescents will remain overweight into adulthood.<sup>233</sup>

Similarities exist in litigation as well. For example, the first suits against the tobacco and food industries centered on personal injury and products liability. As evidenced by the tobacco cases, “personal injury lawsuits are not likely to succeed against the food industry.”<sup>234</sup> Therefore, plaintiffs’ lawyers are now pursuing the tobacco and food industries under consumer protection laws and through case consolidation. In any case against the food industry, favorable points for plaintiffs’ lawyers are the “strong medical evidence supporting the plaintiffs’ claims that poor nutrition, including excessive consumption of fast food, causes obesity and health problems” and the “massive pool of plaintiffs available to plaintiffs’ attorneys.”<sup>235</sup> Furthermore, like tobacco, obesity is likely to face significant hurdles in court, partly because of the powerfully deep pockets of the food industry as well as legislative attempts to prohibit or limit lawsuits.<sup>236</sup> An additional challenge to successful litigation is the element of personal

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231. Dansicker, *supra* note 10.

232. *Id.*

233. CDC, PREVENTING TOBACCO USE, *supra* note 137; D. Styne, *Childhood and Adolescent Obesity: Prevalence and Significance*, 48 PEDIATRIC CLINICS OF N. AM. (2001), cited in CHILDHOOD OBESITY, *supra* note 60.

234. Parsigian & Williams, *supra* note 16.

235. Dansicker, *supra* note 10. Tens of millions of Americans eat fast food on a regular basis, and on any given day, nearly twenty-five percent of all adults visit a fast food restaurant. *Id.*

236. Shlaes, *supra* note 1, at 25 (“The Big Mac contains only half the calories of the standard serving of fettuccine Alfredo; the Quarter Pounder has 70 fewer calories than Starbucks’ venti café mocha with whipped cream. McDonald’s is the target not because of its ‘supersized’ offers but because of its deep pockets.”).

responsibility associated with engaging in behaviors that are widely known to be unhealthy.

Finally, litigation is not the only, or even optimal, method to address the epidemics associated with tobacco and obesity.<sup>237</sup> Plaintiffs' successes in tobacco and obesity litigation will generally only benefit plaintiffs and their lawyers. Therefore, litigation may not result in broad public health initiatives to address the tobacco and obesity epidemics.<sup>238</sup> Effectively addressing these two problems demands a multi-pronged approach, which, for example, includes federal, state, and local government agency education and prevention programs, tax increases, and regulations such as advertising and marketing restrictions on the products.

Despite the numerous similarities, there are many differences between tobacco and obesity. One of the most significant differences is that using tobacco products as they are intended generally leads to addiction.<sup>239</sup> However, while some have argued otherwise, there is a dearth of empirical evidence suggesting that food products are inherently addictive or intrinsically harmful.<sup>240</sup> Many people are able to eat multiple types of food, including fast food and other junk food, without becoming overweight, obese, or even unhealthy.

"[C]onsumers tend to believe fast-food consumption in moderation is not as harmful as smoking in moderation."<sup>241</sup> In part, this belief is due to the numerous causes of obesity, including overeating, lack of exercise, environment, behavior, and genetics, all of which are much more complex than the causes of tobacco product addiction, which are generally limited to simply consuming tobacco products.<sup>242</sup> Therefore, consumption of unhealthy food alone is not "driving the nation to obesity."<sup>243</sup> Further, overeating does not harm those who are within close proximity to overeaters, while the secondhand smoke effects of cigarette use can seriously harm individuals who are in the vicinity of people who smoke.

Also, parents play a more prominent role in their children becoming overweight or obese than in becoming tobacco users, as parents generally make food purchasing decisions for their children, especially young ones. For example, it is socially acceptable and very common for a mother to take her ten-year-old child to a fast food restaurant for a meal, but not if a mother goes to a convenience store and purchases a pack of cigarettes for

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237. See Rabin, *supra* note 4, at 199-201.

238. *Id.*

239. Coombes, *supra* note 18.

240. *Id.*; Dansicker, *supra* note 10.

241. Munger, *supra* note 56, at 477.

242. Surgeon General's Call to Action, *supra* note 34.

243. Munger, *supra* note 56, at 478.

that child. Unlike food products, it is illegal for minors to purchase cigarettes.

Differences emerge between the structure and business practices of the tobacco and food industries. For the most part, the tobacco industry is an oligopoly. With just a few major companies controlling most of the tobacco market, it is fairly easy to point the finger at who is to blame for smoking-related conditions. However, the food industry is much more complex, consisting of numerous manufacturers, restaurants, and retailers of various sizes. These features make it much more difficult to determine which product or company is responsible for obesity. Also, while it is a well-documented and a well-accepted belief that tobacco companies have deceived the public about the addictiveness and the dangers of using tobacco products, there is no well-established or substantiated belief or evidence that the food industry has similarly misled consumers about its products.<sup>244</sup> Many food companies disclose product ingredients without being required to do so. Restaurants are exempted under the NLEA from disclosing the nutritional values of food, but some restaurants, such as McDonald's, freely disclose such information despite not being required to under the law.<sup>245</sup> Further, McDonald's, Wendy's, and Burger King disclose their products' trans-fat levels on their respective websites and in their restaurants.<sup>246</sup>

Additionally, "although the similarities of the advertising methods are uncanny, public sentiments regarding fast food advertising targeting children has not reached the same level of intensity and vigilance as that directed toward tobacco advertising."<sup>247</sup> Both industries heavily advertise and market products. However, advertising food is not as intrinsically harmful as advertising tobacco products because tobacco "is the only legally available product that, if you use it as the manufacturers intend, it

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244. *Battling Against Big Food*, *supra* note 195. There has been some anecdotal evidence that the fast food industry is deceiving the public, but it has not been substantiated. *Id.* For example, a lawyer obtained records of research by a burger chain "which had concluded that the correct mixture of fat, sugar, and flavour-enhancing chemicals made its product 'irresistibly craveable'"; the same lawyer found a set of memos from a pizza chain stating that "those who regularly took advantage of the firm's two-for-one offers would probably die younger, but would still contribute more to the bottom line than those who munched only occasionally"; and a Yale journalism graduate secretly recorded conversations of fast food executives over lunch. One executive asked why "a salad can never be as totally addictive as the stuff we make." *Id.*

245. *Pelman I*, 237 F. Supp. 2d 512, 525 (S.D.N.Y. 2003); Buckley, *supra* note 88 (noting that McDonald's has stated "that facts about its food are freely available in its stores, on its website and on a free telephone line").

246. Steven Gray, *Pressure Mounts on Fast-Food Chains to Remove Trans Fats*, WALL ST. J., Dec. 14, 2004, at D1.

247. Munger, *supra* note 56, at 477.

will do you some harm.”<sup>248</sup> Also, the “[b]ig brands don’t tend to promote the quality of their products, they just remind you that they are there. McDonald’s seldom claims any nutritional value to their hamburgers, for example.”<sup>249</sup>

An important difference between tobacco and obesity litigation is that “[f]ood is not a product like tobacco. There are 320,000 food products sold or served by many thousands of food manufacturers and restaurants . . . and millions of households. It would be essentially impossible to prove that a person’s obesity or health problems are solely caused by any particular item or place.”<sup>250</sup>

One difficulty in establishing causation is that the causes of obesity, which are generally not limited to consuming certain kinds of food, are far more complex than the causes of addiction to tobacco products, which are generally limited to using tobacco products.<sup>251</sup> Unlike tobacco litigation, which has been ongoing since the 1950s, obesity litigation is in its infancy.<sup>252</sup> Also, there is only circumstantial evidence of food industry deception about the unhealthy nature of its products and of the addictive nature of junk food and fast food.<sup>253</sup> Finally, “[c]igarette . . . consumption by minors, as a result of targeted advertisements, is illegal, and clearly affronts parental authority and autonomy . . . fast-food does not have the same legal consequences.”<sup>254</sup> For all of these reasons, tobacco and obesity litigation are significantly different.

## 2. What can anti-tobacco litigation say about the stakes associated with obesity litigation?

The second question in the analogical explanation framework addresses whether litigation, the major initiative being used to hold the tobacco and food industries accountable for the health impacts of their products, can be expected to accomplish anything.<sup>255</sup> Tobacco litigation suggests that though obesity litigation may accomplish something, the result may be much more limited than the results of tobacco litigation. While it took many decades to happen, tobacco suits have exposed deceitful industry practices, thus confirming the addictive nature of nicotine. Therefore,

248. Coombes, *supra* note 18.

249. *Id.*

250. Fotios M. Burtzos, *My Big Fat Greek Lawsuit*, 33 COLO. LAW. 53 (June 2004).

251. Surgeon General Launches Effort, *supra* note 34.

252. Avery, *supra* note 18 (quoting Donald Beskind, a personal injury lawyer and Duke law professor).

253. *Battling Against Big Food*, *supra* note 195.

254. Munger, *supra* note 56, at 478.

255. Courtney, *supra* note 26, at 53.

litigation has substantially increased public awareness about the harms associated with using tobacco products and has led government agencies to address the considerable public health problems caused by tobacco. In addition, some suits have resulted in damage awards for plaintiffs and settlements, such as the MSA, that address broader public health concerns.

However, after more than five decades, litigation has not completely solved the problem of tobacco use. Despite some progress, smoking prevalence rates are still high and tobacco use continues to be the major cause of morbidity and mortality in the United States. What little success plaintiffs have had in tobacco suits has not come easily, as hundreds of suits were filed before any plaintiff prevailed.<sup>256</sup> The suits have also been extraordinarily expensive, time-consuming, and vigorously fought by the tobacco industry.<sup>257</sup> Additionally, as litigation generally affects individuals or groups of individuals, “[t]here is little reason to think that tort litigation contributes much in a direct sense to achieving” public health goals.<sup>258</sup> Also, even though the MSA was one of the most significant results of tobacco litigation, tobacco companies continue to violate its provisions.<sup>259</sup>

As with tobacco, the stakes associated with obesity litigation will likely include extraordinarily expensive and protracted litigation,<sup>260</sup> which is unlikely to have a substantial impact on the prevalence of obesity in the United States. As a deterrence strategy, litigation “operate[s] so haphazardly as to lose virtually all meaning.”<sup>261</sup> For example, despite the fact that “a groundswell of individual awards or even a single multibillion dollar aggregate award might threaten the financial viability of the industry . . . this affords no clear signal whether, from a public health or economic efficiency perspective, tobacco litigation is having the desired impact on smoking.”<sup>262</sup> The same is likely to be true for obesity suits.

Similar to what anti-tobacco efforts have shown in terms of the health impact, there are extraordinarily high stakes associated with failing to take action to address the problem of obesity. These stakes include avoidable morbidity, mortality, health care costs, and lost productivity. While an important benefit of litigation is “a judicial outcome [that] is dispassionate

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256. Buckley, *supra* note 88, at 20; *see also* DERTHICK, *supra* note 4, at 27.

257. Rabin, *supra* note 4, at 178, 197 (observing that the litigation in *Cipollone* cost the plaintiff about \$3 million to pursue and the defendant roughly \$75 million to defend).

258. *Id.* at 201.

259. Charles King & Michael Siegel, *The Master Settlement Agreement with the Tobacco Industry and Cigarette Advertising in Magazines*, 345 NEW ENG. J. MED. 504-511 (Aug. 16, 2001), *cited in* MARKETING TO KIDS, *supra* note 155.

260. *Cf.* Rabin, *supra* note 4, at 200 (noting that defendants in tobacco litigation spared no expense in fighting tort cases against them).

261. *Id.* at 199.

262. *Id.* at 200.

and free of bias,” there are also very high stakes associated with using litigation to address obesity.<sup>263</sup> In fact, the stakes will likely be much higher with obesity because causation will be much more difficult to prove due to the lack of substantiated evidence that fast food or junk food is addictive and the fact that the causes of obesity are much more complex. Tobacco plaintiffs have had trouble establishing causation despite an abundant supply of scientific studies and industry documents showing links between smoking and health conditions and revealing the addictive nature of nicotine. Without similar evidence, obesity plaintiffs are likely to have even more difficulty establishing causation. All of these factors suggest that, as with tobacco, the stakes are likely to be extremely high for obesity litigation.

3. Does anti-tobacco litigation provide an implicit solution for how to approach obesity litigation? If so, what is it?

Anti-tobacco litigation provides an implicit solution for obesity litigation. The solution for obesity proposed by many in the legal community is litigation similar in nature to tobacco litigation. Experiences with tobacco litigation as well as fundamental characteristics about obesity and recent experiences with obesity litigation suggest that litigation alone might not be the best answer to address the obesity epidemic. Due to significant challenges faced in suits against the food industry, litigation might not be the answer at all for obesity.

However, because momentum appears to be building for obesity litigation, the pursuit of such suits will not likely end in the near future.<sup>264</sup> Therefore, the solution proposed for obesity is two-pronged: (1) if obesity suits continue to be pursued, they should be consolidated and focus on violations of consumer protection statutes as the basis for liability; and (2) a comprehensive obesity control strategy focused on children, such as the approach used in many tobacco control efforts, should be developed and implemented to address this major public health epidemic. This comprehensive strategy should include settlements or voluntary agreements that address broader public health concerns (e.g., restrictions on advertising and marketing aimed at children); federal, state, and local education and prevention programs; and litigation as a last resort if the food industry fails to change its practices.

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263. DERTHICK, *supra* note 4, at 218.

264. See Parsigian & Williams, *supra* note 16.

4. What does anti-tobacco litigation say about the chances of success for the solution proposed in question 3?

Anti-tobacco litigation suggests that litigation will likely be very difficult for plaintiffs and that litigation alone will not have a substantial impact on the obesity epidemic. Some lawyers remain hopeful that obesity litigation will overcome the hurdles once faced by tobacco litigation. For instance, if juries begin to feel hostile toward the fast food industry and its marketing tactics, then the food industry might enter into settlements as the tobacco industry did.<sup>265</sup> Product liability and personal injury suits, however, are unlikely to work well for obesity litigation, because the food industry could assert, similar to what the tobacco industry has successfully argued, that: (1) consumers assumed the risk of eating unhealthy food; (2) causation of alleged injuries is even more difficult to prove for food than for tobacco; and (3) even with knowledge of associated health risks, individuals would continue to consume unhealthy food.<sup>266</sup>

If litigation continues to be used as a solution to address obesity, as is likely, recent consumer protection claims involving tobacco suggest that such suits probably offer the best chance of success against the food industry. “[C]onsumer protection litigation against tobacco companies is a very sensible approach to protect the buying public from the sort of inherently deceptive tactics that are this industry’s stock and trade. There are consumer protection statutes that are tailor-made for these cases in most states.”<sup>267</sup> In addition, as tobacco has shown, the food industry cannot not rely on such defenses as assumption of risk, contributory negligence, or other causes of health problems.<sup>268</sup> It is also possible that “the case against food companies could evolve, like those against cigarette-makers, if hidden manufacturing or marketing strategies come to light through company whistle-blowers or the legal disclosure process.”<sup>269</sup>

For several reasons, consumer protection obesity litigation will not likely be as successful as tobacco suits. First, it is not likely that products such as “Big Macs have the necessary attributes to become the tobacco litigation gold-mine of the next decade . . . The fast food industry can fall back on the fact that Americans are, and have been, well-educated about the deadly risks with eating excessive amounts of unhealthy food but choose to do so

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265. *Id.*

266. *Cf.* Rabin, *supra* note 4, at 179, 197 (noting that “correlation is not causation . . . [b]ecause of the long latency of tobacco-related disease, the plaintiff’s life history often creates the possibility of multiple causes of life-threatening illness”).

267. TCRC, *Media Backgrounder*, *supra* note 210 (quoting Richard Daynard, Northeastern University law professor and Chair of the Tobacco Products Liability Project).

268. *Light Cigarettes*, *supra* note 212, at 17.

269. Avery, *supra* note 18.



anyway.”<sup>270</sup> As a result, consumer protection claims alleging deceptive and fraudulent practices might be difficult to support. Even with tobacco, where millions of incriminating industry documents have been publicly disclosed and where there is an abundance of research directly linking tobacco use to numerous health problems, victories for plaintiffs have been few and far between while tobacco use remains a significant health concern. Another potential challenge is that juries may be less sympathetic to overeaters than to those addicted to nicotine. Also, as evidenced by *Pelman v. McDonald’s*, the food industry, which is even bigger than the tobacco industry, will probably fight very aggressively in any suits filed against them; this could diminish any chance of success for those allegedly harmed by these products and business practices.<sup>271</sup>

While there are also obstacles for success if the comprehensive approach is used to address obesity, this approach offers more hope for impacting the obesity epidemic because obesity is not always caused solely by the consumption of unhealthy food. However, experiences with tobacco control strategies suggest that success in addressing such a significant health issue is very difficult, even with settlements and with the use of various well-funded prevention strategies.<sup>272</sup>

##### 5. What does anti-tobacco litigation say about the morality of the proposed solution in question 3?

Morality has been defined as “[t]he quality of being in accord with standards of right or good conduct.”<sup>273</sup> Under the natural rights approach to morality, free speech gives businesses the right to market products to customers.<sup>274</sup> Consumers then have the choice to ignore or to receive and use that information.<sup>275</sup> Accordingly, any effort to limit food industry advertising and marketing practices would violate the rights of sellers and buyers to freely market products and choose whether or not to recognize and accept such marketing.<sup>276</sup> However, if it could be demonstrated that the food industry has engaged in misleading and deceptive marketing and advertising that attract individuals to consume products that are actually

270. Dansicker, *supra* note 10.

271. See generally *Pelman I*, 237 F. Supp. 2d 512, 512 (S.D.N.Y. 2003).

272. King & Siegel, *supra* note 259.

273. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, <http://dictionary.reference.com/search?q=morality> (last visited Oct. 13, 2005).

274. Courtney, *supra* note 26, at 59 (quoting FD MILLER, OUT OF THE MOUTHS OF BABES: THE INFANT FORMULA CONTROVERSY (1983)).

275. *Id.*

276. Courtney, *supra* note 26, at 59.

very dangerous to one's health, the argument would likely be weak.<sup>277</sup> Since such information has not been exposed as it was for tobacco, it is difficult to reach any definitive conclusions on the merits of the natural rights argument.

In addition, attempts to hold the food industry accountable for misleading and harming the public, as well as efforts to regulate the industry to prevent future harm, can be characterized as "being in accord with standards of right or good conduct"<sup>278</sup> because placing limits on "individual freedom by protecting individuals from harmful products is in the best interest of . . . public health."<sup>279</sup> In other words, implementing limits on how food companies can act, which in turn would limit the rights of individuals to be exposed to such industry practices, could benefit overall health status.<sup>280</sup> This is particularly important given the immense public health impact of obesity and that overeating unhealthy foods is a major cause of obesity. Reducing exposure to harmful products and misleading advertising could also result in enormous cost savings for the country as people adopt healthier eating habits and attain normal weight. As mentioned above, no solid evidence has been revealed that clearly proves that the food industry has acted deceptively towards consumers. Product information is generally available for customers, who ultimately make the decision whether or not to consume certain foods. Therefore, it is challenging to speculate on the morality of limiting individual freedom in this context.

6. What does anti-tobacco litigation say about the risks or dangers associated with implementing the solution in question 3?

While there are serious risks associated with failing to address the obesity epidemic, experiences with tobacco lawsuits suggest that serious dangers accompany consumer protection litigation as well as settlements. As mentioned, suits will be extremely expensive and time-consuming, with little prospect for success. Therefore, a risk is that plaintiffs might be deterred from initially filing suits or might give up as the industry appeals any of their victories.

The most important risk is that the "real" winners in obesity cases may only be the plaintiffs and their lawyers, who stand to benefit substantially from potential awards from the multi-billion dollar food industry. Therefore, as with tobacco suits, it is unlikely that broader public health

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277. *Id.*

278. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 273.

279. Courtney, *supra* note 26, at 59.

280. Courtney, *supra* note 26, at 60.

concerns will be addressed with litigation. In other words, even if incriminating documents exposing food industry deceit are revealed, litigation will have little effect on the problem of obesity. According to one commentary, “[t]ort awards translate into money judgments to smoking victims rather than compelling retailers to check the age of cigarette purchasers, dictating the character of tobacco advertising, or punishing the possession of cigarettes.”<sup>281</sup> While the latter efforts “offer no magic solution either . . . they may serve as more reliable allies than tort litigation in directly addressing the tobacco control problem.”<sup>282</sup>

Aside from the MSA, which was a result of litigation, it does not appear that tobacco litigation alone has had a substantial impact on reductions in tobacco use. However, despite the risks associated with litigation as a public health strategy, there are probably fewer risks associated with consumer protection suits. These types of lawsuits appear to offer more hope of success for plaintiffs than personal injury cases, particularly with legislation being proposed and passed to prohibit personal injury suits against “Big Food.”

Experience with tobacco control also demonstrates that there are risks associated with comprehensive public health approaches used to address epidemics, including settlements like the MSA. Even with enormous expenditures made each year on a wide variety of tobacco control efforts, tobacco use remains high among youths and adults. In addition, broad efforts attempting to limit advertising and marketing might be fallible, as evidenced by the industry approach to the MSA. Tobacco companies frequently violate the MSA, and a recent study found that the agreement has not had a large impact on youth exposure to cigarette advertising in magazines.<sup>283</sup> For example, in 2000, “tobacco companies spent \$59.6 million in advertising . . . for the most popular youth brands in youth oriented magazines . . . Magazine ads for each of the three most popular youth brands (Marlboro, Newport, and Camel) reached more than 80 percent of young people in the United States an average of 17 times in 2000.”<sup>284</sup>

Obesity suits could result in some important benefits, such as exposing food industry practices, educating the public, and persuading the industry to change unethical practices. However, the many significant risks associated with such litigation appear to outweigh any benefits.

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281. Rabin, *supra* note 4, at 201.

282. Rabin, *supra* note 4, at 204.

283. King & Siegel, *supra* note 259, at 504, *cited in* MARKETING TO KIDS, *supra* note 155.

284. *Id.* at 507.

The application of the six tasks of this analysis shows that there are useful lessons to be learned from tobacco for obesity litigation. First, significant similarities and differences exist between the obesity and tobacco problems and efforts in litigation. Based on these factors, the stakes associated with pursuing obesity litigation are very high. Additionally, tobacco litigation provides solutions for obesity litigation, including focusing obesity suits on consumer protection violations and using a multi-pronged approach to address the obesity epidemic. Tobacco litigation also suggests that the chances of success for obesity suits are low and that litigation alone will not substantially impact the obesity epidemic. Finally, the analysis demonstrates that the morality of the proposed solutions for obesity litigation is difficult to predict, and that there are serious risks associated with consumer protection suits against and reaching settlements with the food industry.

### B. Limitations

There are important limitations with reasoning by analogy. Despite the many strengths of the analogical reasoning methodology, it “does not guarantee good outcomes or truth. For analogical reasoning to operate properly, we have to know that A and B are ‘relevantly’ similar, and that there are not ‘relevant’ differences between them.”<sup>285</sup> Also, issues “are always different from each other along some dimension,” and it can be risky to use the past to make predictions about the future, in part because the “past . . . can be an enemy of vision.”<sup>286</sup> In addition, the analysis could be strengthened by using more analogies. For example, additional personal injury and consumer protection cases from tobacco could be analyzed in greater detail and then compared to existing obesity litigation. The analysis could also be further expanded by exploring, identifying, and analyzing other potentially analogous situations aside from tobacco, such as asbestos.

Another key limitation of this analysis is that lawsuits against the food industry are in their infancy.<sup>287</sup> As a result, the “legal merits [of such suits] are difficult to gauge.”<sup>288</sup> There is also a lack of empirical evidence demonstrating that certain unhealthy foods are addictive or that they cause the nation’s obesity epidemic. It is possible that, like anti-tobacco litigation, suits against food manufacturers “could evolve . . . if hidden manufacturing or marketing strategies come to light through company

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285. Sunstein, *supra* note 24, at 745.

286. *Id.*; RICHARD E. NEUSTADT & ERNEST R. MAY, THINKING IN TIME: THE USES OF HISTORY FOR DECISION MAKERS (Free Press 1988), *cited in* Courtney, *supra* note 26, at 62.

287. Avery, *supra* note 18(citing Beskind, *supra* note 252).

288. *Id.*

whistle-blowers or the legal disclosure process.”<sup>289</sup> In addition, the addictive nature of fast food could be revealed, as “researchers are investigating whether large amounts of fat in combination with sugar can trigger a craving similar to addiction.”<sup>290</sup> If such information about marketing and addictiveness becomes available, cases against the food industry would be much more analogous to suits against the tobacco industry. Finally, the analysis does not address any future legal theories that might be developed to address obesity. For example, a leading tort litigator, John Banzhaf, has commented that the fast-food industry will be held liable in the future under a legal theory that does not exist today.<sup>291</sup>

## VI. CONCLUSION AND RECOMMENDATIONS

“The reality is anyone with an IQ higher than room temperature will understand that excessive consumption of food served in fast-food restaurants will lead to weight gain . . . This is all about trial lawyers looking for the next big pay day.”<sup>292</sup>

The analysis shows that tobacco litigation provides useful lessons for obesity litigation. On the surface, obesity seems to be the next tobacco in terms of litigation, but the fundamental differences between food and tobacco products, as well as the challenges faced by plaintiffs in tobacco litigation, suggest otherwise. Tobacco litigation shows that obesity litigation might be successful if it is focused on consumer protection claims, but that success will be extremely difficult. This finding is based on the fact that

[m]any legal experts believe that food will not go the way of tobacco. Food is not addictive like nicotine, and differences in lifestyles and genetic make-up mean it is difficult to pin an individual’s or group’s obesity on one cause. ‘All the many risk factors - heart disease, obesity, diabetes - must be examined in a case by case basis.’<sup>293</sup>

In addition, “tort is a haphazard public health strategy because it is powerfully influenced . . . by ever-changing normative judgments about the scruples of the contestants and extraordinary investments of lawyering

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289. *Id.*

290. Avery, *supra* note 18.

291. Romero, *supra* note 4, at 257.

292. Buckley, *supra* note 88, at 20 (quoting John Doyle, co-founder of the Center for Consumer Freedom).

293. *Id.*; see also Munger, *supra* note 56, at 477-78.

activity in attempting to stage an effective appeal to moral sensibilities."<sup>294</sup> Litigation is not "likely to fine-tune behavior through the medium of liability awards."<sup>295</sup> For all of these reasons, any type of obesity litigation will face significant challenges, and these hurdles should be seriously analyzed before suits are pursued.

Based on the analysis in this paper, there are several recommendations for addressing the problem of obesity. First, litigation does not appear to be the optimal solution to addressing obesity. Therefore, other approaches such as regulating the food industry, conducting additional empirical research on obesity and its causes, and developing and offering education and prevention programs, should be implemented. Second, if plaintiffs' lawyers continue their attempt to find the food industry liable for causing obesity, they should focus on consumer protection claims until more appropriate legal strategies are identified or developed. Ideally, these claims should be brought by state attorneys general to provide a higher level of legitimacy to the litigation and to avoid the controversies surrounding massive plaintiffs' attorney payouts associated with tobacco litigation.

Third, any initiatives to address obesity should primarily focus on children. As with tobacco, the food industry heavily targets children through advertising and marketing, and most children who adopt unhealthy eating habits carry those habits forward into adulthood.<sup>296</sup> Some have even suggested that "[t]o avoid anti-tobacco advocates' failures . . . and to limit the reach of Ronald McDonald and his progeny, legal advocates must challenge the political doctrine of free-speech rights for adults, in favor of the claims of vulnerable children to be protected from exposure to harmful cultural material, especially fast-food advertisement."<sup>297</sup>

Finally, two of the least expensive mechanisms, pressure from the public and the threat of lawsuits, might actually be the most efficacious strategies to change the behavior of the food industry. Evidence from movies that have exposed the health impact of certain foods<sup>298</sup> and advocacy for the regulation and disclosure of ingredients in fast food restaurants<sup>299</sup>

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294. Rabin, *supra* note 4, at 200.

295. *Id.*

296. Styne, *supra* note 233.

297. Munger, *supra* note 56, at 480.

298. Around the time the movie *Super Size Me* was released, McDonald's announced that it would phase out its Super Size option for french fries and soft drinks by the end of 2004 in an effort to provide "balanced choices" for its customers. See, e.g., SUPER SIZE ME, *supra* note 69; Press Release, McDonald's, McDonald's Media Response to Core Menu and Super Sizing (Mar. 2, 2004), available at [http://www.mcdonalds.com/usa/news/2004/conpr\\_03022004.html](http://www.mcdonalds.com/usa/news/2004/conpr_03022004.html) (last visited Oct. 14, 2005).

299. Gray, *supra* note 246 (noting that after Denmark tried to limit trans fat levels in

demonstrates that the significant impact of such efforts should not be overlooked as critical ways to address obesity. Whatever the approach, the problem of obesity in the United States, like tobacco use, must be addressed immediately to protect the future health of our nation and to avoid millions of preventable and debilitating illnesses that lead to premature mortality and largely avoidable health care expenditures.

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food, major fast food companies reduced trans-fat levels almost overnight. In the U.S., restaurants are not required to disclose nutrition content or reduce trans fat levels, but efforts to regulate those issues have apparently led fast food chains such as McDonald's, Wendy's, and Burger King to begin disclosing such information voluntarily.); McDonald's, Food and Nutrition, <http://www.mcdonalds.com/usa/eat.html> (last visited Oct. 14, 2005) (illustrating McDonalds' very detailed website that provides information about making healthy eating choices and the nutritional content of the restaurant's food).