TAKE THAT TOBACCO SETTLEMENT
AND SUPER-SIZE IT!:
THE DEEP-FRYING OF THE FAST FOOD INDUSTRY?

[S]ome of the tactics that are so effective against smoking could also be useful against obesity. . . . Fast-food companies could soon face similar suits for failing to disclose in commercials that some of their meals contain many times the recommended daily allowance of fat. Obesity is a public health epidemic that costs the U.S. economy more than $115 billion per year. Nonobese taxpayers pay much of this unnecessary cost in the form of higher taxes, higher health insurance premiums, etc. As with smoking, health advocates may increasingly be forced to turn to the courts if legislatures continue to do little or nothing about the problem.1

INTRODUCTION

On July 24, 2002, at 9:53 a.m., Caesar Barber filed a class action suit with the Bronx County Clerk in the Supreme Court of the State of New York against Burger King, KFC, Wendy’s and McDonald’s (hereinafter “fast food”).2 This was the first order of what may well become the hot new item on the menu of “social issue torts.”3 At the time, Mr. Barber, the lead plaintiff, was a fifty-six-year-old, African-American4 man and a maintenance worker who used to eat fast food at the defendants’ restaurants four to five times per week.5 He was five feet, ten inches tall, 270 pounds, diabetic, and had suffered two heart attacks, allegedly as a result of his fast food intake.6

In his complaint, Mr. Barber charged that the defendants sold fast food that was “high in fat, salt, sugar and cholesterol” which caused him and others in his plaintiff class to suffer “obesity, diabetes, coronary heart disease, high blood pressure, strokes, elevated cholesterol intake, related cancers and/or other detrimental and adverse health effects and/or diseases.”7 As a result, Mr. Barber

4. While race is not a specific issue in the lawsuit, it is an important issue in the context of this paper.
6. Id.
7. Pls. ’ Compl., supra note 2, at ¶ 35.
sought unspecified compensatory damages for him and his plaintiff class, an order forcing the defendants to label their products with nutritional content and health warnings, and money to fund an educational program to warn the public about the dangers of eating fast food.\(^8\) Mr. Barber’s suit sounds eerily similar to claims made against the tobacco industry, and like early tobacco lawsuits, Mr. Barber’s claim has been met with derision by a skeptical public.\(^9\)

Caesar Barber’s complaint outlined five causes of action: (1) defendants “negligently, recklessly, carelessly, and/or intentionally engaged in the distribution, ownership, retail, manufacture, sale, marketing and/or production” of the fast food which caused the plaintiffs injuries;\(^10\) (2) defendants “failed to warn and/or . . . adequately label and warn” their consumers of the dangers of their products and plaintiffs relied upon the defendants and their inadequate “representations and . . . warranties;”\(^11\) (3) defendants marketed their products “directly to children . . . and have been a substantial cause in the 13 percentage [sic] rate of children aged 6 to 11 years and 14 percentage rate of adolescents aged 12 to 19 years that are overweight in the United States;”\(^12\) (4) defendants “failed . . . warn or properly account to [plaintiffs] . . . nutritional values” of their food;\(^13\) and (5) “[d]efendants engaged in unfair and deceptive acts and practices, in violation of the consumer fraud statutes and provisions of the New York Consumer Protection Act”\(^14\) by failing to adequately warn plaintiffs of the dangers of their product and “by engaging in marketing practices which enticed the plaintiff-class members to consume their respective products in larger portions through the use of ‘value meal’ and ‘meal combo’ advertisements without disclosing the detrimental health effects . . . .”\(^15\)

On August 22, 2002,\(^16\) less than one month after Caesar Barber filed his suit, a second, similar, class action suit was filed against McDonald’s by the same attorney in the same court.\(^17\) This time the suit was filed on behalf of two overweight eight-year-olds,\(^18\) Ashley Pelman and Jazlen Bradley, with their respective parents, Roberta Pelman and Israel Bradley.\(^19\) In addition to the claims

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8. Id. at ¶¶ 13-14.
9. Our Opinion: Just Don’t Smoke the Fries — Lawsuit-Hungry People Aren’t Addicted to McDonald’s, YORK DAILY REC., at A6 (Sept. 27, 2002) (available at 2002 WL 4715306); Jennifer Heldt Powell, Fast-food suit gets heat; Experts say lawsuit will be hard to win, as well as to justify, Boston Herald 019 (July 29, 2002) (available at 2002 WL 4082373); Oh, Temptation: If Only Fast Food Were Truly Addictive, THE ECONOMIST (Aug. 3, 2002).
10. PIs.’ Compl., supra note 2, at ¶ 35.
11. Id. at ¶¶ 40-41.
12. Id. at ¶ 44.
13. Id. at ¶ 47.
15. PIs.’ Compl., supra note 2, at ¶ 52.
18. Bangs, supra note 16.
made in Barber, this complaint alleged that McDonald’s directly targeted children and minors through marketing and failed to disclose to either the children or their guardians the serious health dangers of consuming their products. Pelman and Bradley further alleged that McDonald’s fast food products were “physically or psychologically addictive and/or addictive in nature.” The issue had become super-sized.

While not directly delineated as such in either complaint, issues of political and civil rights permeate the underlying problem that the lawsuit presents. Allegations that defendants market their products “directly to children” and the reality that fast food products are disproportionately consumed by minorities and the lower socio-economic classes raise issues of the protection of the most “vulnerable” members of our society and the government’s responsibilities to its citizens.

Furthermore, the fact that Barber, Pelman and Bradley, and their plaintiff-classes have sought remedies through the legal system rather than through legislative law-making or administrative regulation necessitates questions about the efficacy of the government and politics of our nation. Caesar Barber, Ashley Pelman and Jazlen Bradley are suing for economic damages. However, much of what the plaintiffs want, including the labeling of fast food products and a nutritional education program for the public, involves regulation of the fast food industry. According to the tenets of the separation of powers doctrine, Congress is supposed to take legislative action and the executive branch is supposed to enforce those laws and regulations. Thus, at least in theory, much of the type of regulation that the plaintiffs in this litigation seek is not meant to be achieved through the judicial branch of government. However, because Congress has failed to appropriately regulate the fast food industry in the ways that the plaintiffs suggest,

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20. Id.
21. Id. (citing Pls.’ Compl., supra note 2).
22. When the Plaintiff’s Amended Complaint was filed, the Barber suit was effectively put on hold. Benjamin Weiser, Big Macs Can Make You Fat? No Kidding, a Judge Rules, THE NEW YORK TIMES, (January 23, 2003). Because the Pelman suit is a class of minors and minors are given greater protection under the law, presumably the Pelman/Bradley suit has a greater chance of success for the plaintiffs than does the Barber suit. McDonald’s successfully removed the Pelman/Bradley case to federal court on September 30, 2002, by alleging a fraudulent joinder and then filed a motion to dismiss on October 7, 2002. The United States District Court for the Southern District of New York heard oral argument on November 20, 2002, and the Court dismissed the complaint on January 22, 2003. Pelman v. McDonald’s Corporation, 237 F. Supp. 2d 512 (S.D.N.Y. 2003). In his opinion, however, Judge Robert Sweet gave leave for the plaintiffs to amend and re-file their complaint within 30 days of the opinion, which they did. He also effectively gave the plaintiffs instructions on how to make their complaint more persuasive. Id. at 536. On September 3, 2003, Judge Sweet dismissed the Plaintiffs’ Amended Complaint. Pelman v. McDonald’s Corporation, No. 02 Civ. 7821 (RWS) (S.D.N.Y. Sept. 3, 2003). Despite Judge Sweet’s dismissal of the Pelman/Bradley complaint, this case and the issues underlying it are far from being decided. It should also be noted that many of the early complaints against the tobacco industry were similarly dismissed. However, legal claims against the tobacco industry have subsequently had significant success in the courts.
23. Pls.’ Compl., supra note 2, at ¶ 44; Pls.’ Am. Compl., supra note 17.
25. Pls.’ Compl., supra note 2, at ¶ 44.
the plaintiffs have been “forced to turn to the courts.”

In this way, these suits may be a symptom of a greater problem with our legislative process.

Clearly, the class action lawsuits filed against the fast food industry by Barber, Pelman and Bradley—and the avalanche of similar lawsuits that are likely to follow—present greater issues with economic, political, and moral dimensions. The lawsuits against the fast food industry set up dynamic tensions between paternalistic scapegoating and personal responsibility. It is common knowledge that fast food is generally bad for you, and none of these fast food companies has ever forced a single plaintiff to eat even one salty, greasy french fry. Barber and the others made personal choices of their own free will.

However, one must ask: Were these individuals making informed choices, and if not, were they able to do so? If not, does the fast food industry have a greater duty to disclose the dangers inherent in consuming its food products? And, are the dangers inherent in eating fast food even reasonable dangers or dangers that a reasonable person might expect? There is no evidence, as of yet, that fast food is chemically addictive in the way that cigarettes are, but there is evidence of psychological addiction or “craving.” Certainly by targeting their products to the youngest and most “vulnerable” in society, these fast food companies may be crossing some ethical, if not legal, lines.

These lawsuits beg the question: What should be done about this very real problem of fast food and public health in our society? Even the possible solutions raise broad questions about all three branches of our government and the doctrine of separation of powers: If there should be regulation of the fast food industry, should it be achieved through Congressional legislation or judicial action, as certain outcomes of this litigation would necessitate? Should groups of individuals, organized through a class action lawsuit, be allowed to force regulation of industry through the judiciary branch of our government? Specifically with regard to the problem of fast food: Is the legal system the best avenue, or even an acceptable method, through which to attempt a solution?

This article explores the problems that these lawsuits present and analyzes their implications in the sphere of political and civil rights. It will examine both the very real health hazards and policy predicaments that precipitated these lawsuits, and the prior legal actions against the tobacco industry which are the current lawsuits’ historical precedent. This article further dissects the political problems presented by the doctrine of separation of powers and its present day reality, and argues that in today’s political climate these class action lawsuits are not only appropriate, they are necessary. In so doing, solutions and predictions are made about the future of legislation regarding the fast food industry. Finally, this article shows that while the plaintiffs in these cases may lose some legal battles along the way, the American public as a whole will ultimately win the war against the fast food industry.

The first section of this article squarely places these lawsuits against the fast food industry in the arena of political and civil rights and in the context of contemporary policy and politics. The second section examines how the tobacco

litigation created both the novel tort theories, and the legal and societal precedent that made the ground fertile for these lawsuits. The third section will evaluate the validity of the plaintiffs’ claims and their potential for success. The conclusion summarizes specific comparisons between the tobacco claims and the claims against the fast food industry in terms of likelihood of success and offers predictions and recommendations for the future.

I. BACKGROUND

A. Political & Civil Rights: Society’s Most “Vulnerable” Citizens

So far, the Barber and Pelman/Bradley lawsuits against the fast food industry do not allege specific violations of civil rights. However, examining these class action suits through the lens of political and civil rights focuses the situation and better places them in their social and political context. About twenty-five percent of the United States adult population eats at a fast food restaurant on a daily basis and Americans, on average, eat about three hamburgers and four orders of french fries weekly. However, the products that the fast food industry sells, and the harm that these products cause, disproportionately effect society’s most “vulnerable” citizens: minorities and people of color, and children and young adults.

1. Race: Marketing to Minorities

It is probably not a coincidence that Caesar Barber, the lead plaintiff in Barber v. McDonald’s, is an ethnic minority. Ethnic minorities and people of color disproportionately patronize fast food restaurants. Thirty percent of Burger King’s 1998 sales were from African Americans and Hispanics. In the same year, “25 cents of every $1 spent at McDonald’s” was spent by an African American or Hispanic consumer. This amounted to total sales of $469 million from African Americans and $279 million from Hispanics. These numbers are neither

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28. Id. at 6.
29. See Austin, supra note 24, at 226-30 (“Dining at a fast food restaurant has a different significance for African Americans than for other racial/ethnic groups and fulfills a different set of consumer tastes or preferences.”).
30. Id. at 230 (citing Targeted Promotions/Advertising: Fast Food: Minority Consumers Mean Major Revenues, MINORITY MARKETS ALERT, May 1, 1998).
31. Id.
32. Id. By contrast, in 1998, African Americans made up 12.7% of the United States population and Hispanics comprised 11.2% of the United States population such that African Americans and Hispanics taken together comprised 23.9% of the United States population in 1998. No. 13. Resident Population Characteristics – Percent Distribution and Median Age, 1850 to 1998, and Projections, 2000 to 2050, United States Census Bureau, Statistical Abstract of the United States: 1999, 14 Population, available at http://www.census.gov/prod/99pubs/99statab/sec01.pdf. This difference between minority proportion of the population and proportion of sales, while not enormous in number, is statistically significant due to the large sample of restaurants. Though I have scoured articles and journals and I have contacted
surprising nor accidental; minority consumers are actively sought by the fast food industry.

Aspects of the fast food industry's business model minimize actual and perceived discrimination that ethnic minorities and people of color may face at other types of restaurants. For example, customers are served according to their place in line so there is no discrimination in the service; food products are produced with uniform portions and quality so there is no discrimination in the product; and prices are clearly posted and programmed into computer cash registers so there is no discrimination in the pricing. These characteristics of fast food restaurants create at least the perception of a more democratic dining experience; one in which the consumer is less likely to be discriminated against based on race.

Additionally, fast food restaurants often serve items which are traditional in minority diets such as fried chicken and fish. They also actively court minority customers through targeted ad campaigns and omnipresent billboards in minority neighborhoods. For example, in the summer of 2000, McDonald's introduced a "Fiesta" menu in its stores in and around Los Angeles, California, in an attempt to appeal to Hispanics. Early in that same year, McDonald’s began an advertising and marketing campaign designed to target Latinos. The campaign, entitled "Points of Pride" featured Latino celebrities including Enrique Iglesias, Ricky Martin, Salma Hayek, Antonio Banderas, and Oscar de la Hoya. McDonald’s has even created large group seating layouts in some of its restaurants to better cater to Hispanic clienteles whose culture places particular emphasis on extended families and community.

Through institutional and marketing methods, fast food companies actively target minorities. The result is that minorities disproportionately eat fast food. As such, minorities also disproportionately suffer the health related consequences of eating fast food including obesity, diabetes, coronary heart disease, high blood pressure, and heart attack. McDonald’s and Burger King’s corporate offices, I was unable to obtain more current internal marketing data that would reflect minority consumption of fast food. Specifically of interest would be the percent of minorities among so-called “heavy users,” the 20% of fast food customers that account for about 60% of all fast food visits. Jennifer Ordonez, Heavy Users Keep Fast-Food Moving Fast, available at http://www.financialexpress.com/fe/daily/20000120/fst20105.html (Jan. 20, 2000). One would also imagine that the poor are also disproportionately represented among the best fast food customers. After all, one of the chief characteristics of fast food is that it is considered to be cheap. This assessment, of course, does not take into account the health costs that may result from its consumption.

33. Austin, supra note 24, at 228.
34. Id.
35. Id. at 229.
36. Id.
39. Id.
40. Id.
41. Id. (citing Maureen Minehan, Going Public with Diversity, HR MAG. 159 (Mar., 1999)).
pressure, strokes, elevated cholesterol intake,” cancer and other adverse health effects, as alleged in the Barber and Pelman/Bradley complaints.42 Roberto J. González hypothesizes in Latino Overweight and Obesity: Marketing Disease to Minorities that the fast food industry is particularly relevant to explaining the trends toward overweight and obesity in Latino (and other minority) communities. As evidence of this, he notes that “for more than a decade, marketing agencies, demographic researchers, and their critics have been interested in the rapid adoption of mass consumption patterns by Latinos, and other minority immigrant populations in the U.S.”43 During this decade of marketing attention, rates of overweight and obesity among minorities have increased dramatically.

2. Age: Getting Them While They Are Young44

In addition to marketing to minorities, the fast food industry heavily targets children and young adults in a variety of ways.45 Targeting children is particularly effective because they are among the most susceptible members of our society to advertising. Furthermore, eating habits developed as impressionable children are likely retained throughout one’s lifetime.46 Though children often do not directly control purchasing decisions, when fast food companies attract children as consumers, their parents often follow. After all, someone needs to transport the children to get their Happy Meals and pay for their purchases at the counter. In the words of Ray Kroc, founder of McDonald’s, “[a] child who loves our TV commercials and brings her grandparents to a McDonald’s gives us two more customers.”47 This targeting of our most vulnerable citizens, is both ethically, and potentially legally, problematic. After all, in the context of political and civil rights, children deserve and receive special protections under the law.

Certain environmental factors of the fast food business have particular appeal to children and their parents. Plastic chairs and tables, and tile floors minimize the damage that young children do by spilling and making messes with their food. Also, it is perfectly acceptable for both children and adults to eat with their hands at fast food establishments. Finally, many fast food restaurants feature specific play

44. In addition to the youngest of citizens, the fast food industry has targeted the oldest of consumers, as well. Austin, supra note 24, at 227 (citing Johnny Sue Reynolds, Lisa R. Kenyon, & Nancy L. Kniatt, From the Golden Arches to the Golden Pond: Fast Food and Older Adults, 28 MARRIAGE & FAM. REV. 213, 221 (1998)). For example, McDonald’s marketed their “Arch Deluxe” hamburger specifically to older adults. Id. Studies have shown that senior citizens and older adults also eat at fast food restaurants in large numbers “primarily because of their convenience, speed of service, inexpensiveness, and reduced prices and promotions.” Id.
45. Youth is the defining element that separates the plaintiff-class in Pelman from the plaintiff-class in Barber. For this reason, and because minors are afforded greater protection under the law than are people over the age of 18, the Pelman case probably has a greater chance of success than does Barber. See supra note 22 (discussing the likelihood that the Pelman/Bradley suit will be more successful than Barber).
47. SCHLOSSER, supra note 27, at 47.
areas for children. 48 McDonald’s operates over 8,000 playgrounds—more playgrounds than any other private entity in the United States. 49 Burger King operates more than two thousand playgrounds. 50

Eric Schlosser, author of *Fast Food Nation*, writes of McDonald’s’ initial marketing strategy, “McDonald’s soon loomed large in the imagination of toddlers, the intended audience for the[ir] ads. The restaurant chain evoked a series of pleasing images in a youngster’s mind: bright colors, a playground, a toy, a clown, a drink with a straw, [and] little pieces of food wrapped up like . . . present[s].” 51 This is still the case today.

It is clear that the fast food industry actively, methodically, and successfully targets children with their products. Because children are often incapable of understanding the ramifications of their decisions, they are rightly afforded special status and protection under our laws. To the extent that fast food is harmful, children are being disproportionately injured by the fast food industry. These children deserve to be protected by the law and not just by their parents who are often not fully aware of the significant health risks that go along with the consumption of fast food.

B. A Road Paved with the Lawsuits Against “Big Tobacco”

These lawsuits against the fast food industry did not develop in a vacuum. Rather, they have come down a path paved by plaintiffs’ lawyers with their suits against “Big Tobacco.” Specifically, these lawsuits against the fast food industry are the logical extension of the Pandora’s box that was opened by the Liggett Corporation’s initial settlement with five states on March 15, 1996. 52 As such, the long history of tobacco litigation provides guidance as to how the litigation against the fast food industry might progress.

After the success of the states’ Master Settlement Agreement in 1998, 53 there was much speculation about the precedent that had been set and the new frontier of litigation that was on the horizon. People worried about a “slippery slope.” 54 After all, cigarettes were and are a legal product; 55 their clientele is regulated by age and

48. Austin, supra note 24, at 227.
49. SCHLOSSER, supra note 27, at 4, 47.
50. Id. at 47.
51. Id. at 42.
52. On March 15, 1996, the Liggett Corporation broke from the rest of the tobacco industry which had, until that time, categorically refused to settle any claims against it. Liggett structured an initial settlement with Florida, Louisiana, Massachusetts, Mississippi, and West Virginia in which the states would drop Liggett from their lawsuits seeking reimbursement for Medicaid costs and Liggett would pay them 5 million dollars plus a percentage of profits over the next 25 years. Cliff Sherrill, Comment, Tobacco Litigation: Medicaid Third Party Liability and Claims for Restitution, 19 U. ARK. LITTLE ROCK L.J. 497, 500 (1997).
54. Sherrill, supra note 52, at 516.
their sales are taxed. While cigarettes are dangerous, for over thirty years everyone has known that cigarettes are bad for you; there is a warning label right on the package. People began to wonder which legal industry would be sued into submission next: guns, lead paint, alcohol, caffeine, fast cars . . . or fast food?57

Thus far, almost all of the press accounts and public sentiment regarding the class action lawsuits against the fast food industry have been critical of the plaintiffs.58 In general, the public is incredulous that anyone would have the gall to sue the fast food industry for “making them fat.” Fast food is perfectly legal and no one forced these plaintiffs to eat it. Besides, it is common knowledge that fast food is bad for you. “What happened to personal responsibility?,” people ask. However, the public’s reaction was similarly skeptical when lawsuits against the tobacco industry were initially filed in the 1950s.59

As John Banzhaf, a professor of law at the George Washington University and an architect of the plaintiffs’ strategies in both the tobacco and fast food litigation, said on National Public Radio:

> Every time we brought one of these suits [against the tobacco industry], people said they were ridiculous, frivolous, they wouldn’t go anywhere. When I first proposed that smokers would sue, two of the leading legal experts in the country sat across on a television program from me and said we’d never get one of those cases to a jury. When we got it to a jury, they said, “Well, you’d never get a verdict.” We got a verdict. They said, “It’ll never stand on appeal.” When it stood on appeal, they said we’d never get punitive damages. We got it. When we proposed non-smoker lawsuits under different legal theories, they laughed again. We’ve won $310 million so far and still going on that one. Then when we proposed that the states would sue for the cost of health care for lung cancer, heart attack[s] [sic] and so on, people thought the lawyers bringing those suits were crazy. They called them crazy. Today we call them . . . multimillionaires “cause . . . they won over $250 billion. . . . So the fact that some people think these suits aren’t going anywhere [is] déjà vu all over again.”60

56. Sherrill, supra note 52, at 513.
57. Jensen, supra note 55, at 1336; Sherrill, supra note 52, at 515.
58. See Our Opinion, supra note 9, at A06; Jennifer Heldt Powell, Fast-food suit gets heat; Experts say lawsuit will be hard to win, as well as to justify, BOSTON HERALD, July 29, 2002, at O19, available at 2002 WL 4082373; Oh, Temptation: If Only Fast Food Were Truly Addictive, THE ECONOMIST, Aug. 1, 2002. But see Adam Cohen, Editorial Observer, The McNugget of Truth in the Fast-Food Lawsuits, THE NEW YORK TIMES, Feb. 3, 2003, at A24 (stating “McDonald’s would position itself better in the fast-food market if it communicated more openly with its customers about what they were getting. A good start would be to listen to consumer advocates and post calorie content on menu boards”). This editorial ran in the New York Times in the wake of Judge Sweet’s decision dismissing Pelman with leave to amend the complaint. It is one of the first pieces of press that did not disparage the plaintiffs in the fast food litigation.
59. See Jensen, supra note 55, at 1338 (detailing a brief history of the tobacco litigation).
60. Banzhaf, supra note 46. A cynical view is that plaintiffs’ lawyers bring these suits out of the desire to earn large contingency fees and not out of a sense of helping a legitimately injured client or increasing the public good. It should be noted that these goals are not mutually exclusive. That said, specifically in light of the fact that there is no precedent of a plaintiff victory in fast food litigation of
People started suing the tobacco industry about fifty years ago and initially the American public could not believe it. In the beginning of the tobacco litigation, the defendant tobacco companies followed a “king of the mountain” legal strategy; they tried to bankrupt the plaintiffs.61 The disproportionate financial and legal might of the tobacco companies allowed them to demand exhaustive discovery and file excessive motions with the courts. This prolonged the litigation until the individual plaintiffs and plaintiffs’ lawyers working on contingency either went bankrupt, gave up, or died prematurely from the effects of smoking.62

In the 1950s and 1960s, even if these cases got to a jury, they turned on issues of foreseeability, not causation; at this point, a causal link between smoking and disease had not been officially established.63 In this way, even if the plaintiff managed to get the case heard in front of a jury, the tobacco companies always won because the plaintiffs could not prove that their health related damages were foreseeable to the defendants.64 These initial lawsuits against the tobacco industry were like David against Goliath, and David always lost.

In 1964, the United States Surgeon General announced a causal link between smoking and disease.65 This recognition, which began the second phase of the tobacco litigation, called for a change in legal strategy.66 Ironically, the Surgeon General’s warnings, which Congress had forced tobacco companies to put on their cigarette packages in 1965,67 now became a chief legal weapon for the tobacco industry. The tobacco companies used these warnings to wield affirmative defenses of assumption of the risk and contributory or comparative negligence which preempted or limited the plaintiffs’ claims.68 The defendants claimed that

this sort, one must give credence to claims of plaintiffs’ lawyers being motivated by the public good. After all, if the plaintiffs lose these unprecedented lawsuits, under a contingency system, their lawyers will receive no compensation for their considerable time, effort and expertise.

61. Jensen, supra note 55, at 1339 (citing Richard A. Daynard & Graham E. Kelder, Jr., The Many Virtues of Tobacco Litigation, TRIAL, 34, 35 (Nov. 1998)).


63. Id. While the tobacco companies already knew of the causal link between cigarettes and disease, they kept their information secret from the public. Id.

64. Id.

65. Id. at 1340.

66. Id. The second wave of tobacco litigation lasted from 1964 through the 1980s. Id.

67. This was done under the Federal Cigarette Labeling and Advertising Act of 1965. 15 U.S.C. § 1333 (1996), Sherrill, supra note 52, at 498 n.7. The Federal Cigarette Labeling and Advertising Act was amended in 1969 when Congress passed the Public Health Cigarette Smoking Act. 15 U.S.C. § 1334(b) (1996), Sherrill supra note 52, at 498. In 1992, the United States Supreme Court ruled that due to the Act of 1969, the Surgeon General’s warnings effectively barred state causes of action such as failure to warn based on advertising or promotion of cigarettes. Id. (citing Cipollone v. Liggett Group, Inc., 505 U.S. 504, 524 (1992)).

68. Assumption of the risk is defined as:

The principle that one who has taken on oneself the risk of loss, injury, or damage consequently cannot maintain an action against the party having caused the loss. . . . Assumption of the risk was originally an affirmative defense, but in most jurisdictions it has now been wholly or largely subsumed by the doctrine of contributory or comparative negligence.

BLACK’S LAW DICTIONARY 121 (7th ed. 1999). “Contributory negligence” is when “[a] plaintiff’s own
because they had informed users of the dangers of smoking through the Congressionally mandated warning labels, the plaintiffs had contributed to the negligence of the defendants and had assumed the risks of their actions. In the 1980s, plaintiffs’ lawyers and legal theorists developed new causes of action such as “risk-utility theory” which made defendants strictly liable for injuries when the risks of their product outweighed its benefits. During this second wave of the tobacco litigation, from 1964 through the 1980s, tobacco companies maintained their success with the “king of the mountain” strategy and defenses of assumption of the risk and contributory negligence.

The period beginning in the 1990s constitutes a third wave of tobacco litigation. This present phase in the tobacco litigation is characterized by changing of public attitudes towards tobacco and consolidation of plaintiffs. Over time and through the discovery process, incriminating tobacco industry documents had surfaced which proved the tobacco companies’ deceit of the public. These documents showed that tobacco companies knew nicotine was addictive, that they failed to disclose this information to the public, and that the companies manipulated nicotine levels in cigarettes in order to control and increase smokers’ addiction. News of this discovery contributed to an increasingly low public opinion of “Big Tobacco.” This low public opinion of the tobacco industry was exploited by plaintiffs’ lawyers and health advocates.

Also, during this period, the millions of Davids began to team up. Plaintiffs banded together and filed class action lawsuits against “Big Tobacco.” This tactic was necessary to level the playing field against the Goliath of the tobacco industry and it has met with some success. In July 2000, for example, a Florida jury in Engle v. R.J. Reynolds Tobacco Co. awarded $12.7 million in compensatory damages and a whopping $145 billion in punitive damages to a class of 500,000 smokers who had sued the tobacco industry alleging strict liability, negligence, fraud and conspiracy.

negligence that played a part in causing the plaintiff’s injury . . . is significant enough (in a few jurisdictions) to bar the plaintiff from recovering damages. In most jurisdictions, this defense has been superseded by comparative negligence.” Id. at 1056. “Comparative negligence,” or “comparative fault” is when “a plaintiff’s own negligence . . . proportionally reduces the damages recoverable from a defendant.” Id.

69. Jensen, supra note 55, at 1341.
70. Id. at 1340-42.
71. Id. at 1343.
72. Id. at 1343-47.
73. Sherrill, supra note 52, at 512. Not only did tobacco companies conclusively know of the dangers and addictive qualities of smoking long before they acknowledged them to the public, but they intentionally worked to obfuscate the issue of addiction and keep it one of public and scientific debate through a “public relations disinformation policy.” Id. at 513 (citing Michael C. Moore & Charles J. Mikhail, The Fight Against Tobacco: A New Attack on Smoking Using an Old-Time Remedy, 111 DHHS PUB. HEALTH REP. 192 (May 1996)).
74. Jensen, supra note 55, at 1346. Attacks were also taken directly to Wall Street where investors were pressured to withdraw support and stock values were threatened. Id. at 1357-58.
75. Id. at 1343.
77. Id. See Jensen, supra note 55, at 1345-46 (citing Adam Cohen, Smoked!, TIME, July 24, 2000, at 44); see also Amber E. Dean, Comment, Lead Paint Public Entity Lawsuits: Has the Broad Stroke of
Also in the early 1990s, plaintiffs’ lawyers began their search for a “blameless plaintiff”—someone who suffered damages from cigarettes but had not made informed choices to smoke.78 Such a person would be impervious to the tobacco industry’s affirmative defenses of assumption of the risk and comparative negligence.79 Ultimately, plaintiffs’ lawyers found the definitive, blameless plaintiff: the State. On May 23, 1994, Michael Moore, the Attorney General of the State of Mississippi, sued the major tobacco companies80 for restitution of State Medicaid expenses under a claim of unjust enrichment.81 The complaint alleged that Medicaid, a state agency, had been forced to expend millions of dollars in increased health costs for individuals whose health suffered as a result of smoking the defendants’ products. And, of course, the State of Mississippi had done nothing affirmative to assume the risk or contribute to the negligence of the actual smokers.82 According to Moore, Mississippi’s lawsuit against the tobacco industry was “premised on a simple notion—you cause the health crisis, you pay for it.”83 Between 1994 and 1998, forty-two other states joined Mississippi in filing similar lawsuits against the tobacco industry.84

While all of the different states’ claims varied somewhat, they were predicated on similar equitable notions of unjust enrichment.85 The states’ theories flowed roughly as follows: (1) there was a conspiracy among tobacco companies to keep the addictive nature of nicotine secret from the public; (2) the addictive nature of nicotine caused increased usage of cigarettes; (3) the increased usage of cigarettes caused serious illness and disease among the residents of the state; and (4) the state bore the cost of treating these tobacco related illnesses and diseases through increased Medicaid costs.86 Thus, the states had conferred a benefit upon the tobacco companies by paying the increased medical costs of its customers due to the health problems caused by use of its product. As such, the state was entitled to restitution.


78. Jensen, supra note 55, at 1343.

79. The search for this “blameless plaintiff” led to lawsuits on behalf of “second hand smokers” such as airline flight attendants who did not smoke, themselves, but got sick from cigarette smoke inhaled from smoking passengers. Id. at 1343 n.73.


81. Sherrill, supra note 52, at 497. Unjust enrichment is a claim in equity based on the idea that “a beneficiary must make restitution or recompense” for “a benefit obtained from another, not intended as a gift and not legally justifiable.” BLACK’S LAW DICTIONARY 1246 (7th Ed. 2000).

82. Philip C. Patterson & Jennifer M. Philpott, Comment, In Search of a Smoking Gun: A Comparison of Public Entity Tobacco and Gun Litigation, 66 BROOK. L. REV. 549, 557 (Summer/Fall 2000).


84. Id. at 563. Alabama, Delaware, Kentucky, North Carolina, North Dakota, Tennessee, Virginia, Wyoming, and the District of Columbia did not file lawsuits against the tobacco industry during this period.

85. Sherrill, supra note 52, at 506.

86. Id.
In addition to claiming unjust enrichment, most of the states’ complaints alleged a range of causes of action including conspiracy, consumer fraud and fraudulent misrepresentation, breach of warranty, public nuisance, negligent undertaking of a voluntary duty, and product liability causes of action such as design defect.\textsuperscript{87} Texas and Utah even filed RICO claims.\textsuperscript{88} The conspiracy claims generally alleged a forty-year scheme in the tobacco industry to keep secret the dangers of tobacco use and to manipulate the nicotine levels in cigarettes in order to control addiction in smokers.\textsuperscript{89} The related fraud charges involved the tobacco companies’ research which allegedly made false statements of material fact regarding nicotine’s addictive nature.\textsuperscript{90} The public nuisance claims sought to define “health” as a “right common to the general public” according to the Restatement (Second) of Torts, which allows the state to protect its citizens from “an unreasonable interference” with any such right.\textsuperscript{91} The claim of negligent undertaking of a voluntary duty resulted from the tobacco companies’ failure to exercise due care in researching the health effects of smoking. These negligent-undertaking-of-a-voluntary-duty claims allege that the tobacco companies produced false and misleading “scientific” reports, suppressed research that found tobacco to be harmful and failed to develop a “safer” cigarette because doing so would implicitly acknowledge that cigarettes were not, in fact, “safe.”\textsuperscript{92}

At this point, the end game of plaintiffs—now, the states—had distinctly changed. With so many states suing the tobacco industry, the stakes were so high that the plaintiffs did not necessarily need to win in court; they just needed to force a settlement. Their goals had also changed; the plaintiffs wanted policy changes in addition to compensatory and monetary damages. They wanted changes in the companies’ pattern and practice of marketing to children and underage consumers, and, in an ironic twist, they wanted the tobacco companies to pay for advertisement campaigns informing the public of the grave dangers of smoking.

The tobacco industry’s impenetrable legal wall began to crumble when the Liggett Corporation broke from the pack and structured an initial settlement with five states on March 15, 1996.\textsuperscript{93} After years of politics and negotiations, on

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\textsuperscript{87} Id, see also Patterson & Philpott, supra note 82, at 558-60 (stating additional causes of action for restitution and antitrust violations).

\textsuperscript{88} Sherrill, supra note 52, at 506 (citing Pls.’ Am. Compl. ¶ 1, Florida v. American Tobacco Co., No. CL 95-1455-AO (Fla. Cir. Ct. Palm Beach County Aug. 7, 1996)). The Racketeer Influenced and Corrupt Organizations Act (RICO) was intended to be used to fight organized crime. Alan R. Ross, RICO Rights for ERISA Wrongs: Can Plaintiffs find Relief Despite ERISA Preemption of State-Law Claims?, 75 Wash. L. Rev. 313, 325 (2002).

\textsuperscript{89} Id. at 507 (citing Henry Weinstein & Jack Nelson, Untested Theory Becoming Tobacco Firms’ Top Threat, L.A. Times, Aug. 4, 1996, at A1).

\textsuperscript{90} “The basic elements of fraud common to most jurisdictions are a false statement of material fact, knowledge that the statement is false, intent to induce reliance on the statement, and reliance on the statement resulting in injury.” Id. at 508 (citing Lance v. Wade, 457 So. 2d 1008, 1011 (Fla. 1984)).

\textsuperscript{91} Patterson & Philpott, supra note 82, at 559 (citing RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979)).

\textsuperscript{92} Sherrill, supra note 52, at 508 (citing Pls.’ Am. Compl. ¶¶ 173-79 and ¶¶ 63-75, Florida v. American Tobacco Co., No. CL 95-1455-AO (Fla. Cir. Ct. Palm Beach County Aug. 7, 1996)).

\textsuperscript{93} In return for Florida, Louisiana, Massachusetts, Mississippi, and West Virginia dropping Liggett from their lawsuits seeking reimbursement for Medicaid costs, Liggett was to pay five million dollars
November 16, 1998, a Master Settlement Agreement was reached between the tobacco companies and forty-six states, the District of Columbia, and five United States Territories. Under this framework, the tobacco companies agreed to make annual multi-billion dollar payments to the states in perpetuity, pay for a five year, $1.5 billion anti-smoking “education and advertising campaign,” and create a $250 million foundation to reduce teen smoking. During the first twenty-five years, from 1998 to 2023, payments from the Master Settlement Agreement will amount to approximately one quarter of a trillion dollars. Additionally, the Master Settlement Agreement created new restrictions on the advertising and promotion of cigarettes. It prohibited the tobacco industry from “targeting youth in ads and marketing” through the use of cartoon characters or other means, it prohibited selling advertising on billboards and transportation vehicles, and it prohibited selling or distributing apparel or merchandise through which people became “walking billboards.” For all of these concessions, the agreement only settled those lawsuits between the tobacco industry and the states. It did not bar or limit future lawsuits brought by individual smokers.

Because the tobacco industry settled these cases with the states rather than litigating them to completion, no new legal precedent was created. However, the societal and political precedent that arose through this settlement is, perhaps, as powerful as any ruling handed down by the courts: states can band together through legal action against powerful companies and force a settlement in the public interest. This is the lesson taken from the tobacco settlement: the Davids can band together and out-Goliath the Goliaths.

plus a percentage of profits over the next twenty-five years. Id. at 500.

94. Mississippi, Florida, Texas, and Minnesota had already reached individual settlements with the tobacco companies by May, 1998. DeBow, supra note 53, at 567.

95. Id. at 568.


97. Id. at 568 (emphasis added).

98. Id. at 569.

99. Id. (citing Press Release, supra note 96).

100. DeBow, supra note 53, at 569.

101. Id. at 564.

102. Ironically, the settlement resulted in an effective tax (in the form of higher cigarette prices) levied by a group of state attorneys general on a particular segment of the general population (smokers). Furthermore, the Master Settlement Agreement now gives the plaintiff-states a particular financial interest in the tobacco industry, in that they stand to receive yearly payments from that industry for twenty-five years.
II. DISCUSSION

A. Political Issues: Separation of Powers

Professor John Banzhaf has said the following:

I think my colleagues and I would much prefer appropriate legislation [to litigation], but as in the tobacco area, where the legislatures did not act, we were forced to litigate, and we were able to use that weapon very successfully. So here we’re using litigation, hoping, however, that the legislatures will legislate.\(^{103}\)

Professor Banzhaf’s candid comments illuminate the serious political issues that underlie these litigation strategies.

The doctrine of separation of powers outlined in the United States Constitution provides for three separate and distinct branches of government: the legislative, the executive and the judicial. Generally speaking, the legislative branch, made up of the Senate and the House of Representatives, makes the laws, the executive branch enforces the laws, and the judicial branch—which is traditionally appointed and not elected—interprets the laws. As implicitly acknowledged in Banzhaf’s comment, this system has begun to break down.

In addition to suing for legitimate monetary damages, the plaintiffs’ suits against the fast food industry effectively seek the type of change that, under the Constitution, is supposed to be achieved through legislative and regulatory means, not through the courts. Specifically, the Barber and Pelman/Bradley complaints demand that the defendants put warnings on their products and pay for a nutrition education program. What Banzhaf acknowledges is that plaintiffs make these demands through the court system because Congress has failed to require such behavior through proper legislation.\(^{104}\) However, we live in a representative democracy. Neither Barber, Pelman or Bradley, nor their lawyers, nor the judges, nor the juries were elected by the people to decide these matters. Something has gone awry.

What has gone awry is not Caesar Barber. Nor is it Ashley Pelman, Jazlen Bradley, or the lawsuit against the fast food industry. Rather, it is the legislative and elective processes that first went out of control. The political lobbies of the tobacco and restaurant industries are so powerful and influential with our elected officials that it has become politically difficult, if not impossible, for the legislative and executive branches of government to regulate them in a serious and effective manner. The corporate special interests now control Washington, D.C., and the ordinary people are disorganized, disenfranchised and out of the political loop. While this is not how our government was meant to work, this is the current


\(^{104}\) A cynic might suggest that plaintiffs make these demands in order to *seem* as if their motivations are altruistic so they will maximize their potential jury award.
political reality.

For example, in the election cycle for 2000, the tobacco industry made $8,448,038 in campaign donations to politicians.\(^{105}\) In the same cycle, restaurants and bars gave $8,517,453 to politicians.\(^{106}\) A large portion of this money came from the fast food industry. McDonald’s gave $479,537,\(^{107}\) Burger King gave $150,725,\(^{108}\) and Tricon Global Restaurants, a conglomerate including Pizza Hut, KFC and Taco Bell gave $201,579.\(^{109}\) One can imagine that regulatory and legislative decisions such as the FDA’s failure to regulate nicotine as a drug (as was contemplated during the Clinton administration) and Congress’s specific exemption of restaurants in the Federal Nutritional Labeling and Education Act of 1990 might be influenced by these political contributions.\(^{110}\) By contrast, ordinary consumers such as Caesar Barber, Ashley Pelman, and Jazlen Bradley give little if any money to politicians. For this reason, individual citizens do not have anything approaching the influence over our elected government that the fast food corporations can afford.

What started as a distortion in the legislative and executive branches of government has necessarily spread to the judicial branch. However, given the present political climate in which the legislative and executive branches of government are increasingly beholden to special interests, this strategy of legislation through the judiciary is not necessarily a bad thing. In many ways, courts are a more appropriate place for this type of law-making than the legislature.

Because judges are generally appointed, and not elected, they are not directly accountable to “the people” through the ballot box.\(^{111}\) However, this also means that their judgments are not swayed by large political contributions from corporate interests such as those in the tobacco and fast food industries. An appointed judge, unfettered by political contributions, does not need to please his or her contributors

\(^{105}\) The Center for Responsive Politics, opensecrets.org, http://www.opensecrets.org/indust.asp?Ind=A02 (last visited Oct. 23, 2003). Eighty-three percent of this money went to Republicans and 16% went to Democrats. \(\text{Id.}\)

\(^{106}\) \text{Id. at http://www.opensecrets.org/industs/ contrib.asp?Ind=G2900&Cycle=2000 (last visited Dec. 21, 2003). Sixty-nine percent of this money went to Republicans and 30% went to Democrats. \(\text{Id.}\)}

\(^{107}\) \text{Id. Seventy-nine percent went to Republicans and 21% went to Democrats. \(\text{Id.}\) McDonald’s was the third largest political contributor in the restaurant and bar industry behind the National Restaurant Industry (an industry-wide lobbying group that gave $869,534; eighty-six percent to Republicans and 13% to Democrats) and Outback Steakhouse (which gave $684,265; ninety-six percent to Republicans and 4% to Democrats). \(\text{Id.}\)}

\(^{108}\) \text{Id. Burger King was the eleventh largest political contributor in the restaurant and bar industry. \(\text{Id.}\) Ninety-seven percent of its donations went to Republicans and 3% went to Democrats. \(\text{Id.}\)}

\(^{109}\) \text{Id. Tricon Global Restaurants was the seventh largest political contributor in the restaurant and bar industry. Eighty-six percent of its donations went to Republicans and 14% went to Democrats. \(\text{Id.}\)} On May 16, 2002, Tricon Global Restaurants changed its name to Yum! Brands, Inc. http://www.triconglobal.com/ (last visited Feb. 9, 2003). In addition, in 2000, the Pizza Hut Franchisees Association gave $163,500 and was the tenth largest political contributor in the restaurant and bar industry. Eighty-one percent of its donations went to Republicans and 19% went to Democrats. \(\text{Id.}\)


\(^{111}\) While all federal judges are appointed, some states, such as Pennsylvania, do elect, rather than appoint, their judges.
in order to get reelected. The end result is that the judge, once appointed, is more independent and impartial than are our elected so-called representatives.

Furthermore, our adversarial court system, with its conventions of discovery, submissions of amicus curae briefs, and possibilities of class action certification can be more effective and fair than the legislative and executive branches of government for handling these types of regulation-based cases. Particularly in class action cases like these, the adversarial system ensures that each side of the litigation has equally zealous representation so the facts on both sides of an issue are fairly brought out and considered. In the judicial branch, affected groups can submit amicus curae briefs to be read and considered by the court and other involved and injured parties can be included in the litigation process through class action certification. In this way, there is something oddly democratic about our judicial branch of government. This is not true in Congress, where hearings are political in nature such that only certain voices, often those with the most money and lobbying power behind them, are heard. Given the present state of our government regarding the power of special interests, this type of regulatory litigation does not seem like such a bad option.

B. Policy Issues: Health Problems and Growing Obesity

Obesity has become a national epidemic and the prevalence of fast food in

112. Because plaintiffs lawyers work on contingency and are paid upwards from a third of the monetary award, they have a particular, personal vested interest in the case that ensures zealous advocacy of their clients.

113. In theory, if Congress did not like the judicial outcome of certain litigation, it could always pass laws to legislatively overrule the courts, thereby correcting what it perceives as the court’s error.

our society certainly does not help matters. On December 13, 2001, only eight months before Caesar Barber filed the first class action lawsuit against the fast food industry, the United States Surgeon General released a report entitled: *The Surgeon General’s Call to Action to Prevent and Decrease Overweight and Obesity*.\(^{115}\) This document was an important “spark” in the lawsuits against the fast food industry.\(^{116}\)

In his report, Surgeon General David Satcher directly compared the health effects of obesity to those caused by smoking cigarettes.\(^{117}\) He predicted, “[o]verweight and obesity may soon cause as much preventable disease and death as cigarette smoking.”\(^{118}\) According to health economist, Roland Sturm, who conducted the relevant study, “[o]besity appears to have a stronger association with the occurrence of chronic medical conditions, reduced health-related quality of life, and increased health care and medication spending than smoking or problem drinking has.”\(^{119}\) Coming on the heels of the State settlement with “Big Tobacco,” the publication of the Surgeon General’s report set the stage for Caesar Barber’s first class action lawsuit against the fast food industry.

Since 1980, the rate of obesity in adults has doubled and the number of overweight adolescents has tripled.\(^{120}\) According to the Surgeon General’s report, in 1999, sixty-one percent of United States adults and thirteen percent of children and adolescents were overweight.\(^{121}\) This is the group most targeted by fast food marketing. As of March 2000, twenty percent of all Americans were clinically obese.\(^{122}\)

The increase in overweight and obese people has serious medical consequences. According to epidemiological studies, the obese have up to double

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117. Id. note 115.
118. Id. In medical terms, *overweight* and *obesity* are two distinct but related terms.

The National Institutes of Health defines obesity and overweight using a Body Mass Index (BMI), which is a calculation of a person’s weight in kilograms divided by the square of their height in meters. An overweight adult is defined as one with a BMI between twenty-five and 29.9, while an obese adult has a BMI of thirty or higher. In children and adolescents, overweight is defined as a sex-and-age specific BMI at or above the ninety-fifth percentile, based on revised growth charts by the Centers for Disease Control and Prevention. There is no generally accepted definition for *obesity* for children and adolescents. The risk of death, although modest until a BMI of thirty is reached, increases with an increasing BMI. Obese adults have a fifty to one hundred percent increased risk of premature death compared to adults with a BMI of twenty to twenty-five. But even moderate weight excess (ten to twenty pounds for a person of average height) increases the risk of death, particularly among adults aged thirty to sixty-four years.

Id. (emphasis added).
120. Press Release, supra note 115.
121. Id.
122. This obese fifth of the population had a body mass index (BMI) of above thirty. Critser, supra note 114.
the risk of premature death as compared to the non-obese. Specifically, overweight classification and obesity are associated with an increased risk for coronary heart disease; type 2 diabetes; endometrial, colon, postmenopausal breast and other cancers; and certain musculoskeletal disorders such as knee osteoarthritis. Furthermore, studies have shown correlation between weight gain and increased risk of disease. Gaining eleven to eighteen pounds doubles an adult’s chance of developing type two diabetes and a weight gain of forty-four pounds or more quadruples this chance. Men who gain twenty-two pounds increase their risk of contracting coronary heart disease by 1.75 times and women who gain forty-four pounds increase their same chance by 2.65 times. Three hundred thousand people die each year as a result of being overweight or obese.

The young and poor are most susceptible to overweight and obesity in the United States. Of these, children are most at risk. Perhaps not coincidentally, these groups proportionately consume the most fast food. As of March 2000, the obesity rate of Americans under age nineteen was twenty-five percent. There have also been “dramatic increases” in health problems such as asthma and type two diabetes among overweight children.

Obesity among Mexican-Americans is higher than almost all ethnic groups. Twenty-seven percent of Mexican-American girls and twenty-three percent of Mexican-American boys between the ages of five and eleven are clinically obese. By the time these children reach fourth grade, thirty-two percent of girls and forty-three percent of boys—almost half—are obese.

These problems with overweight and obesity are not only genetic in nature; they are environmental as well. The surge in rates of overweight and obesity since 1980 has been too dramatic to be accounted for by a change in genetics.

According to Roberto J. González, “'genes related to obesity are clearly not responsible for the epidemic of obesity because the gene pool in the United States did not change significantly’ from 1980 to 1998. . . . [W]e can assume

124. Id. at ¶ 2 (citing NIH, NHLBI, Clinical Guidelines on the Identification, Evaluation, and Treatment of Overweight and Obesity in Adults, HHS, PHS (1998)).
126. Press Release, supra note 115 (citing Willett WC, Manson JE, Stampfer MJ, Colditz GA, Rsoner B, Speizer FE, Hennekens CH, Weight, Weight Change, and Coronary Heart Disease in Women: Risk Within the 'Normal' Weight Range, JAMA, 273(6), 461-65 (Feb. 8, 1995); Galanis DJ, Harris T, Sharp DS, Petrovitch H, Relative Weight, Weight Change, and Risk of Coronary Heart Disease in the Honolulu Heart Program, Am. J. Epidemiol. 147(4), 379-86 (Feb. 2, 1998)).
127. By comparison, 400,000 deaths each year are associated with the smoking of cigarettes. Press Release, supra note 115.
128. Critser, supra note 114, at 1.
129. Id.
130. Id.
132. Critser, supra note 114, at 1.
133. Id.
134. González, supra note 38, at 12.
environmental changes probably have a great deal to do with [it].”

González cites three environmental changes that are of critical importance: a drop in physical activity; “the rapid spread of fast food restaurants and other franchises; and the effects of 'supersizing' in the fast food industry.”

This epidemic of obesity in the United States is not only an issue for those who develop health problems; it should concern all Americans. Problems associated with being overweight and obese cost Americans $117 billion in the year 2000. By 2020, the economic cost of obesity in terms of public health will be hundreds of billions of dollars. As with tobacco, much of these increased medical costs are paid for by the states and federal government through Medicaid and Medicare. Given these similarities, the situation is ripe for state entities to sue fast food companies for unjust enrichment and restitution of these funds just as the states sued “Big Tobacco.”

III. ANALYSIS

A thorough analysis of the recent class action lawsuits against the fast food industry requires more than a mere assessment of the legal claims. Rather, in order to understand the full ramifications of these lawsuits, one must also consider their social and political contexts. In addition to assessing the merits of the case, one must also ask the greater questions: does it even matter how good the legal case is? And what defines success for those bringing the lawsuits and for the American public in general? After all, the tobacco industry’s settlement with the states was a settlement. The case was built on a novel use of restitution theory that may have never prevailed in court, but the legal case was never tried. The risk of a crippling plaintiffs’ verdict was simply too high for the tobacco industry to bear.

Professor Banzhaf has outlined a four-tiered strategy to suing the fast food companies. First, sue the food companies that misrepresent the content of their products. This has already taken place in successful suits against McDonald’s, for failure to disclose beef by-products in their french fries, and against Pizza Hut, for failure to disclose the presence of beef fat in their “Veggie Lover’s Pizza.” Talk of the Nation: Fast Food on Trial (National Public Radio Broadcast, Aug. 8, 2002) (transcript available at http://banzhaf.net/docs/npr.html). See Sharma v. McDonald’s. No. 01-2-12267-3SEA (Wash. Sup. Ct. filed May 1, 2001) (case was settled by McDonald’s for $12.5 million). The Man Who is Taking Fat to Court, supra note 139. Updated article originally published in the S.F. DAILY J. (Feb. 4, 2002). Additionally, there have been class action lawsuits against “Pirate’s Booty” so-called reduced fat snack food which settled when it was found to contain almost 3.5 times the amount of fat claimed on the nutritional label (Berkman v. Robert’s American Gourmet Food, Inc., No. 02107441 (N.Y. Sup. Ct. filed April 11, 2002)) and for a low-calorie, low-fat “diet” ice cream that contained at least 3 times more fat than the label suggested. Id.

Second, sue for making misleading claims regarding their products’ health or nutrition. Third, sue for failing to warn consumers of material facts

135. Id.
136. Id.
137. Press Release, supra note 115.
138. Critser, supra note 114, at 1.
140. Id. This has already taken place in successful suits against McDonald’s, for failure to disclose beef by-products in their french fries, and against Pizza Hut, for failure to disclose the presence of beef fat in their “Veggie Lover’s Pizza.” Talk of the Nation: Fast Food on Trial (National Public Radio Broadcast, Aug. 8, 2002) (transcript available at http://banzhaf.net/docs/npr.html). See Sharma v. McDonald’s. No. 01-2-12267-3SEA (Wash. Sup. Ct. filed May 1, 2001) (case was settled by McDonald’s for $12.5 million). The Man Who is Taking Fat to Court, supra note 139. Updated article originally published in the S.F. DAILY J. (Feb. 4, 2002). Additionally, there have been class action lawsuits against “Pirate’s Booty” so-called reduced fat snack food which settled when it was found to contain almost 3.5 times the amount of fat claimed on the nutritional label (Berkman v. Robert’s American Gourmet Food, Inc., No. 02107441 (N.Y. Sup. Ct. filed April 11, 2002)) and for a low-calorie, low-fat “diet” ice cream that contained at least 3 times more fat than the label suggested. Id.
141. The Man Who is Taking Fat to Court, supra note 139. One example of such a claim would be
about their products such as fat, caloric, and nutritional content.\textsuperscript{142} Fourth, make a broad legal case seeking restitution of money spent on health problems caused by fast food.\textsuperscript{143} This final step is analogous to the case that the tobacco companies settled with the states.

\textbf{A. The Legal Case: How Good is it?}

Other than the Master Settlement Agreement between the states and the tobacco industry, tobacco companies have never settled a single legal case against a smoker. They have categorically refused to do so. Likewise, there is no indication that the fast food industry would settle cases like those filed by Barber and Pelman/Bradley. Thus, at the present, these cases stand solely on their legal merits and must realistically be analyzed as such.

The current cases are, at their roots, mass tort actions. The causes of action outlined in the \textit{Barber} and \textit{Pelman/Bradley} lawsuits boil down to the following basic torts: negligence,\textsuperscript{144} failure to warn,\textsuperscript{145} deceptive trade practices, and fraud. The negligence charges in the \textit{Barber} and \textit{Pelman/Bradley} cases are broadly stated. They include “negligently, recklessly, carelessly, and/or intentionally engag[ing] in the distribution, ownership, retail, manufacture, sale, marketing and/or production” of fast food.\textsuperscript{146}

Using the tobacco cases as models, depending on what facts come to light through the discovery process, other conceivable causes of action in the future include breach of warranty, conspiracy to misrepresent material facts, and concert of action among fast food companies. If the states ultimately choose to enter the legal fray, as they did with “Big Tobacco,” they could levee charges of public nuisance and unjust enrichment against the fast food industry. All of these causes of action have been claims against the tobacco industry.

As with any negligence case, one must assess the four elements of a tort: duty, breach, causation, and damages. It is clear on its face, that fast food companies have at least some duties to their customers. After all, these companies sell products to the public. Depending on how these duties are defined, it might be reasonable for a jury to find that the fast food chains breached some of these duties such as duties to inform and warn. By definition of the class, there is also little doubt the plaintiffs are damaged: they “have become obese, overweight, developed diabetes, coronary heart disease, high blood pressure, elevated cholesterol levels and/or other detrimental and adverse health effects and/or diseases.”\textsuperscript{147}

However, of the four elements of a tort, causation, is the most overtly problematic in the plaintiffs’ cases against the fast food industry. Actual determination of causation might be difficult. Many of these plaintiffs eat at

\begin{footnotesize}
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\item \textsuperscript{144} Pls.’ Compl., supra note 2, at ¶ 35.
\item \textsuperscript{145} Id. at ¶¶ 39-40.
\item \textsuperscript{146} Id. at ¶ 35; Pls.’ Am. Compl., supra note 17, Third Cause of Action ¶ 2.
\item \textsuperscript{147} Id. at ¶ 2.
\end{itemize}
\end{footnotesize}
several of the defendants’ restaurants but some might only eat at one fast food
favorite. Though courts are generally reluctant to do so, and some states do not
recognize it at all, a court could use a market share theory of liability to assess
causation. Under such a theory, defendants would have to pay a portion of the
damages awarded commensurate with the share of the fast food market they
control.

But, were the plaintiffs’ very real injuries truly caused by consumption of the
fast food companies’ products at all? If so, were there any intervening or
proximate causes? Did plaintiffs assume the risks inherent in eating fast food or
even contribute to the risk through their behavior? In most cases, the answer to
these latter questions is almost certainly, “yes.” What if a plaintiff eats pints of ice
cream, bags of high fat chips, and bars of candy each day in addition to his or her
Big Mac? What if this same plaintiff never exercises and has a genetic history of
obesity in his or her family? Is fast food really the cause of this person’s injuries?
If so, it is certainly not the only cause. Defenses such as assumption of the risk and
proximate cause may well be offered in the fast food litigation just as they were by
the tobacco industry.

The average American consumer eats most of his or her meals at home, not at
fast food restaurants. While fast food is a significant part of many Americans’
diets, in most cases, fast food makes up only part of a plaintiff’s food intake.148 In
addition to diet, exercise and genetics are factors in the damages that the plaintiffs
suffer. Rate of exercise, a factor in being overweight or obese, is in steady decline
as children and adults have been adopting more sedentary lifestyles. For these
reasons, it is clear that determining causation will be a significant, and perhaps
insurmountable, hurdle for the plaintiffs in their lawsuits against the fast food
industry.

1. Product-Related Claims

The specific duty involved in a tort varies depending on the cause of action
alleged. In this case, each charge results from the sale of fast food. Legally, a
product is “[s]omething that is distributed commercially for use or consumption . . .
that is usu[ally] . . . the result of fabrication or processing . . . .”149 Fast food clearly
fits into this category. Thus, many of the causes of action arise under the umbrella
of products liability law.150

According to the Restatement Third of Torts: Products Liability, liability
arises from the sale or distribution of a defective product when persons or property
are harmed as a result of the defect.151 Section Two of the Restatement provides

148. However, due to the high calorie-content of fast food, these meals may provide a
disproportionate part of the consumer’s caloric intake when considered in terms of numbers of calories
and not numbers of meals.

149. BLACK’S LAW DICTIONARY, 7th Edition at 1225.

150. Anthony J. Sebok, The “Big Fat” Class-Action Lawsuit Against Fast Food Companies: Is It
20020814.html (last visited Dec. 29, 2003).

151. MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES, CASES AND
MATERIALS 556 (7th ed. 2001) (citing RESTATEMENT (THIRD) OF PRODUCTS LIABILITY (1998)).
three types of defects: manufacturing defects, design defects, and defects in warnings. Assessment of design defect and inadequate warning claims necessitates some risk-utility balancing.

a. Defects in Manufacturing

In the cases against the fast food industry, the plaintiffs make no charge of manufacturing defect. All of the hamburgers, nuggets, and fries—all of the supersized soft drinks and fatty fried chicken—work fine. They work in the way they are supposed to: they are cheap, they are satisfying, and they taste good. Though not particularly healthy, they are food and we love them. This is a similar situation to the suits against the tobacco industry. Both industries make legal products that work the way they are supposed to.

b. Defect in Design

Even when a product works in the way that is intended, there is still a cause of action under products liability. For example, even if a product works in the intended manner, it might still be designed in a negligent manner. This would be a “design defect,” and it is one of the causes of action in the plaintiffs’ suits against the fast food industry.

There are several different tests for determining whether products are defectively designed. These tests include: “ordinary consumer expectations,” “excessive preventable danger,” “reasonable alternative design,” and “manifestly unreasonable design.”

In jurisdictions that apply the “ordinary consumer expectations” test, a plaintiff must prove that the product did not “perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.” Under this approach, the key issue would be whether fast food is more dangerous than the ordinary consumer would expect it to be.

Judge Sweet states that his opinion in Pelman v. McDonald’s “is guided by the principle that legal consequences should not attach to the consumption of hamburgers and other fast foods unless consumers are unaware of the dangers of eating such food.” Sweet continues:

If consumers know (or reasonably should know) the potential ill health effects of eating at McDonalds [sic], they cannot blame McDonalds [sic] if they, nonetheless, choose to satiate their appetite. . . . On the other hand, consumers cannot be expected to protect against a danger that was solely within McDonalds’ [sic] knowledge. Thus, one necessary element of any potentially viable claim must be that McDonalds’ [sic] products

152. Id.
153. Id. (citing RESTATEMENT (THIRD) OF PRODUCTS LIABILITY § 2 cmt. a).
154. Id.
155. FRANKLIN & RABIN, supra note 151, at 559, 567.
156. Id. at 559 (citing Barker v. Lull Engineering Co., Inc., 573 P.2d 443 (Cal. 1978)).
involve a danger that is not within the common knowledge of consumers.  

This awareness of the danger is the crucial concept. Anthony Sebok, in his article The “Big Fat” Class-Action Lawsuit Against Fast Food Companies: Is It More Than Just a Stunt?, states that the “ordinary consumer expectations” test is “unlikely to help the plaintiff . . . [because] consumers have fairly low expectations of the healthfulness of fast food.” However, Sebok fails to appreciate just how unhealthy fast food is for the consumer. While it is true that consumers know what they are eating is not good for them, the question is one of degree. For example, McDonald’s intends for the consumer to “supersize” his or her Big Mac meal. This would include a Big Mac, supersized french fries and supersized soft drink. When this supersized meal is finished, not including ketchup for the french fries, the customer has consumed 1,600 calories and sixty-two grams of fat. According to the Daily Values this is eighty percent of a person’s recommended daily caloric intake and ninety-five percent of a person’s recommended daily fat intake. All of this is in only one meal. What does McDonald’s expect the consumer to eat for the rest of the day? 

Sebok may be correct that consumers know that fast food is not good for them, however, the “ordinary consumer” arguably would not expect his or her one meal to contain eighty percent of a person’s recommended daily caloric intake and ninety-five percent of a person’s recommended daily intake of fat. The ordinary consumer may well be shocked. For this reason, it is possible that the plaintiffs would prevail on a ordinary consumer expectations test. 

158. Id. at 517-18.  
159. Sebok, supra note 150.  
160. According to the “Nutritional Facts” that are posted on McDonald’s web site, one Big Mac contains 590 calories and 33 grams of fat, which is 51% of the national recommended Daily Value based on a 2,000 calorie diet according to McDonald’s. McDonald’s, Nutrition Facts, available at http://www.mcdonalds.com/countries/usa/food/nutrition/categories/nutrition/index.htm (n.d.). One order of supersized french fries contains 610 calories and 29 grams of fat, which is 45% of the recommended Daily Value. Id. (last visited Jan. 25, 2003). The 42 ounce supersized Coca-Cola Classic adds another 410 calories and no fat.  
161. Id. Calculations based on numbers from the McDonald’s web site.  
162. Id. Calculations based on numbers from the McDonald’s web site, and the recommended daily values for a two thousand calorie diet.  
164. McDonald’s, Nutrition Facts, supra note 160. Calculations based on numbers from the McDonald’s web site.  
165. Additionally, Justice Sweet, in his opinion dismissing the plaintiffs’ complaint with leave to amend, cites the example of the chicken McNugget, which he refers to as “a McFrankenstein creation of various elements not utilized by the home cook.” Pelman 257 F. Supp. 2d at 535. While an ordinary consumer would expect a chicken McNugget to contain bits of chicken, breading, and some oil, in reality, a chicken McNugget contains upwards of 40 ingredients and “twice the fat per ounce as a [McDonald’s] hamburger.” These facts are certainly beyond the ordinary consumer’s expectations. Id.
An “excessive preventable danger” or “risk/utility” test is applicable when the ordinary consumer has “no idea how safe the product could be made.”166 This test requires a risk-benefit analysis if the jury decides that the product’s design represents an “excessive preventable danger.”167 In this case, the following factors are considered: (1) gravity of injury, (2) likelihood of injury, (3) “feasibility of a safer alternative design,” (4) cost of the improved safer alternative, and (5) “the adverse consequences to the product and to the consumer that would result from an alternative design.”168

This analysis would require expert witnesses to testify as to alternative designs. For example, for years, the tobacco industry failed to seriously develop a “safer cigarette.” To have done so successfully would effectively have established liability under the “reasonable alternative design” test. While it might seem strange to consider changing the “design” of hamburgers and french fries, it is feasible, and it has been done. Fast food restaurants have changed oils and extracts in their french fries to make them more appealing to consumers.

McDonald’s has even changed its hamburger meat, proving that there may well be a reasonable alternative design to their hamburgers. In 1991, McDonald’s introduced a new hamburger called the McLean Deluxe, which was made from a special type of ground beef called AU Lean.169 It had only 320 calories and ten grams of fat170 as opposed to the 430 calories and twenty-one grams of fat in a McDonald’s Quarter Pounder.171 Though it seems hard to believe, in blind taste

(citing PIs.’ Mem. 23) (citing McDonald’s ingredient list) and (citing SCHLOSSER, supra note 27, at 140). According to the opinion:
A Chicken McNugget is comprised of, in addition to chicken: water, salt, modified corn starch, sodium phosphates, chicken broth powder (chicken broth, salt and natural flavoring (chicken source)), seasoning (vegetable oil, extracts of rosemary, mono, di- and triglycerides, lecithin). It is then battered and breaded with water, enriched bleached wheat flour (niacin, iron, thiamine, mononitrate, riboflavin, folic acid), yellow corn flour, bleached wheat flour, modified corn starch, salt, leavening (baking soda, sodium acid pyrophosphate, sodium aluminum phosphate, monocalcium phosphate, calcium lactate), spices, wheat starch, dried whey, corn starch. Batter set in vegetable shortening. Cooked in partially hydrogenated vegetable oils, (may contain partially hydrogenated soybean oil and/or partially hydrogenated corn oil and/or partially hydrogenated canola oil and/or cottonseed oil and/or corn oil). TBHQ and citric acid added to help preserve freshness. Dimethylpolysiloxane is added as an anti-foaming agent.

Id. See also Pls.’ Mem.. 23 (citing McDonald’s ingredient list).

166. FRANKLIN & RABIN, supra note 151, at 559 (citing Barker v. Lull Engineering Co., Inc., 573 P.2d 443 (Colo. 1978)).
167. Id.
168. Id.
169. Stone, supra note 163.
170. Id.
171. Richard Gibson, McDonald’s Trims McLean From Menu, SOUTHCOAST TODAY, Feb. 7 1996; McDonald’s, Nutrition Facts, supra note 160. This beef was engineered by food scientists Dale Huffman and Gene Stevenson at Auburn University. Malcolm Gladwell, The Trouble With Fries, available at http://www.gladwell.com/2001/2001_03_05_a_fries.htm (Mar. 5, 2001). These scientists replaced much of the 20% of fat that is found in McDonald’s’ hamburgers with .2% hydrolyzed vegetable protein, .4% salt, 10% water, and a mixture of .5% carrageenan, a seaweed derivative which kept the hamburger moist. Id; Dale Huffman and Gene Stevenson, AU Lean: Low-Fat Hamburger, SCIENCE OF FOOD AND AGRICULTURE, July 1991, available at http://www.cast-science.org/
tests, the AU Lean ground beef patties cooked on a McDonald’s grill were preferred to actual twenty percent fat, McDonald’s “all beef patties.” However, the McDonald’s McLean Deluxe flopped in restaurants and was taken off the market in early 1996.

According to an astute observation by Malcolm Gladwell:

People liked AU Lean in blind taste tests because they didn’t know it was AU Lean; they were fooled into thinking it was regular ground beef. But nobody was fooled when it came to the McLean Deluxe. It was sold as the healthy choice—and who goes to McDonald’s for health food?

Gladwell’s observation may yield clues for maintaining the sales of successfully re-designed products in the future. However, one thing is certain: some products at fast food restaurants can be redesigned and made safer.

Assuming the gravity and likelihood of damage from current fast food were determined to be substantial enough, and the feasibility and cost of safer alternative designs were reasonable, factor five of the excessive preventable danger test, “the adverse consequences to the product,” may present a high hurdle for the plaintiffs. If the defendants changed the design of many of their menu items, the adverse consequences to the products and to the business of fast food could be substantial. Fast food is an industry where uniformity is king; people go to fast food restaurants because they know what they are going to get. At least in theory, a Big Mac in Philadelphia tastes the same as a Big Mac in Phoenix, or a Big Mac in Frankfurt. Significant changes to the design or ingredients of the items on the menu motivated by state products liability laws could be devastating to this uniformity and could shatter consumer expectations with regard to taste.

Though changes to individual items on the menu could be substantial, courts might define the “product” as the entire fast food menu. In this case, “the adverse consequences to the product” (i.e.: the whole fast food menu) might be less severe because only a few items were changed. Also, fast food restaurants have made major product changes on their own, such as changes to french fries. Consumers might even like, or grow to like, the re-designed, healthier fast food. After all, in blind taste tests, consumers did prefer AU Lean to McDonald’s ground beef. For these reasons and uncertainties, an excessive preventable danger test would be a close call for the plaintiffs. But it is possible that they would prevail on this test.

The “reasonable alternative design” test is codified in the Restatement Third of Torts: Products Liability. This test requires that the plaintiff “prove that a reasonable alternative design would have reduced the foreseeable risk of harm” in
order to establish liability. This proposed alternative design must not, however, destroy the original utility of the product.

Similar to the excessive preventable danger test, this test would require plaintiffs to re-design fast food menus in a healthier form without having the product lose its “fast food-ness.” Taken as a whole, this seems unlikely; while fast food is meant to be fast and cheap, there is also something about the very notion of “fast food” that seems incongruous with eating healthy. However, healthy eating is a matter of degree. Certainly particular items could be altered to make them less harmful to the consumer without making them lose their fast food nature. French fry oils have been and could continue to be changed. And of course, there’s the McLean Deluxe.

According to the Restatement Third of Torts: Products Liability some products, even though they cannot be made safer through a reasonable alternative design, are still too dangerous for the public. These products have what the Restatement calls, a “manifestly unreasonable design.” Such products cannot be used without injury, even with proper warnings; they are, ipso facto, defective. Again, this judgment is a matter of balancing the social risk against the social utility of a product. In theory, the stereotypical manifestly unreasonably designed product is the cigarette. Cigarettes have little-to-no social utility, but they cause great harm; they cannot be (or have not been) made safer, and even with the best warnings, consumers of cigarettes still get hurt.

It is possible that the plaintiffs will try to apply this theory of liability to fast food. Plaintiffs could argue, for example, that for McDonald’s to market a supersized Big Mac Meal that contains 80.5% of a person’s recommended daily caloric and ninety-eight percent of a person’s daily fat intake in one sitting is necessarily and manifestly unreasonable. However, it is unlikely that this argument will be successful because it is the most extreme in products liability and fast food certainly offers some utility to the consumer. Fast food does satisfy hunger and give the consumer calories, for example, whereas cigarettes offer nothing other than social pleasure for all of the risk. Furthermore, the theory of manifestly unreasonable design has been adopted by precious few jurisdictions and courts loathe to use it in mass torts cases. Even if plaintiffs argued the theory of manifestly unreasonable design before the courts, it is predicated on the ideas that

178. FRANKLIN & RABIN, supra note 151, at 567 (citing RESTATEMENT (THIRD) OF PRODUCTS LIABILITY § 2 cmt. f).
179. Id.
180. Id.
181. RESTATEMENT (THIRD) OF PRODUCTS LIABILITY, § 2 cmt. e. Sebok, supra note 150.
182. Id.
183. Id.
184. Id.
185. Sebok, supra note 150.
186. Id.
187. McDonald’s Nutrition Facts, supra note 160 and recommended daily values for a 2,000 calorie diet. Calculations based on numbers from the McDonald’s web site.
188. Sebok, supra note 150.
189. Id.
(1) the product cannot be made safer and (2) warnings will not help. However, we know that fast food can be made safer. The questions are: how much safer can fast food be made? And would warnings help ameliorate the injury from its consumption? In any event, an argument that fast food is of manifestly unreasonable design would almost certainly fail.

c. Defects in Warnings

One of the plaintiffs’ charges in their complaint is failure to warn. This cause of action was levied against the tobacco industry until 1992 when the United States Supreme Court finally ruled that the Congressionally mandated warnings pre-empted plaintiffs’ failure to warn claims against the tobacco industry. Restatement Third of Torts: Products Liability states that “commercial product sellers must provide reasonable . . . warnings about risks of injury posed by products.” However, comment j says that these warnings are not necessary if the risks are or should be “obvious and generally known” to the consumer. The question then becomes, is the health risk inherent in consumption of fast food obvious or generally known to the consumer? According to comment j of the Restatement, this is an issue for the trier of fact.

Though there is a legitimate question as to whether or not the general public is aware of the extent of the health risk that fast food poses, the fast food industry currently puts neither warnings, nor content labels on its products or advertisements in the United States. Despite this, Anthony J. Sebok estimates that the plaintiffs in the fast food litigation have a “pretty weak” failure to warn claim. He writes, “[t]he risks of eating foods that are high in fat are well known, even by laypeople who lack a sophisticated understanding of the relationship between diet and health.” However, this matter is not so cut and dry.

While it is true that consumers are generally aware that fast food is “bad for you,” this general awareness does not necessarily lead to the conclusion that the ordinary or reasonable consumer knows the extent of the danger that fast food products pose. Awareness of the extent of harm is a significant issue because in order for a warning (or lack thereof) to be “reasonable,” it must be adequate to communicate the danger to the consumer. The ordinary consumer of fast food may know that fast food is “bad for you” but he or she does not know that a supersized Big Mac meal contains 80.5% of a person’s daily caloric intake and ninety-eight percent of a person’s daily fat intake. The ordinary consumer of fast

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192. RESTATEMENT (THIRD) OF PRODUCTS LIABILITY § 2 cmt. i.
193. Id. at cmt. j.
194. Id.
195. Sebok, supra note 150.
196. Id.
197. RESTATEMENT (THIRD) OF PRODUCTS LIABILITY, § 2 cmt. i.
198. McDonald’s, Nutrition Facts, supra note 159, and the recommended daily values for a 2,000 calorie diet. Calculations based on number from the McDonald’s web site.
food does not know that too many Big Mac meals may kill him or her.

Furthermore, nutritional information on fast food products is not easy for the consumer to find out. While, such information has recently become available in brochures at McDonald’s restaurants and on their web site, this information is not presented in an easy-to-use fashion. The nutritional information is listed by product and not by the meal, which is how it is usually sold and consumed. Thus, even if the consumer can access the information on a computer or can find a brochure in a restaurant and decipher the small font in the numeric tables, he or she still needs a calculator and some understanding of mathematical concepts such as adding percents in order to truly determine the nutritional content of what he or she is eating. However, consumers do not bring calculators and magnifying glasses with them when they go out to eat, and many fast food consumers do not have access to computers. Surely, this difficulty in determining nutritional content is no accident; fast food companies are certainly capable of disseminating nutritional information in a meaningful manner, if they so desire.

This issue of warnings and labeling is a major difference between lawsuits against the tobacco industry and lawsuits against the fast food industry. Printed warnings on cigarettes made it easier for the industry to claim that everyone who started smoking after 1965, knew and assumed the risk of smoking cigarettes; it was printed clearly on the product packaging. Because the fast food industry currently puts no warnings or content labels on its products, it is much more vulnerable to failure to warn claims than the tobacco industry has been since 1965.

However, there may be serious business consequences to attaching a voluntary health warning to fast food. Cigarettes are chemically addictive. For this reason, printed warnings do not necessarily lead consumers to stop smoking in large numbers. Many consumers are addicted to smoking cigarettes; they can’t quit. To the extent that consumers’ craving for fast food is less difficult to overcome than smokers’ addiction to nicotine, companies might decide that warnings on fast food products and marketing are a little “too effective” at getting consumers to cut down on their use of fast food. In any event, given just how bad fast food actually is for the consumer’s health, the plaintiffs’ may well be successful with their claims that the fast food industry fails to warn consumers or adequately label its products.

2. Conduct-Related Claims

In addition to the plaintiffs’ product-related claims, there are numerous potential causes of action that relate to the fast food industry’s conduct. These conduct-related claims extend the notion of “failure to warn” beyond one specific product and apply it to the greater process of selling fast food; they focus not on what the defendants sell, but on how they sell it. These claims include charges such as: negligent marketing, deceptive trade practices, fraud, conspiracy to misrepresent material facts, and, if discovery or litigation produces incriminating documents or evidence of an industry wide conspiracy like it did in the smoking litigation, potentially a charge of concert of action among fast food companies. This would surely lead to an award of punitive damages. It is not difficult to imagine fast food

199. Economically speaking, this is referred to as inelastic demand.
documents being discovered that are similar to those documents that swayed the public tide against the tobacco industry. In any event, the extent of any successes on conduct-related claims will depend on the documents and other information that comes to light through the discovery process before trial.

Based on what is currently known about the way the fast food industry does business, conduct-related claims against the fast food industry would likely focus on both deceptive trade practices such as the manipulation of food content, and marketing techniques such as “supersizing,” and the targeting of children and other “vulnerable” groups. At this point, there is insufficient evidence to sustain a legitimate concert of action charge.

a. Manipulation of Content

Studies show that people crave fat and salt.\textsuperscript{200} With this knowledge, McDonald’s lowered the frying temperature of its french fries so that the fries would absorb more fat and people would crave them more.\textsuperscript{201} This practice is similar to the way the tobacco industry manipulated nicotine in cigarettes to control and increase consumer use of cigarettes.\textsuperscript{202} The manipulation of the fat content in french fries to increase craving could be a basis for a charge of negligent marketing, deceptive trade practices, fraud, or conspiracy to misrepresent material facts.\textsuperscript{203}

Originally, McDonald’s and many other fast food restaurants cooked their french fries in beef tallow.\textsuperscript{204} This gave them a special taste, texture, and flavor that appealed to consumers.\textsuperscript{205} In addition to great taste, McDonald’s special blend of seven percent cottonseed oil and ninety-three percent beef tallow infused its french fries with more saturated beef fat by weight than its hamburgers.\textsuperscript{206} However, in 1990, due to public concern over the health effects of cholesterol, McDonald’s, along with other major fast food chains, changed from using animal oils to vegetable oils.\textsuperscript{207}

In order for french fries to be cooked in vegetable oil, however, as they were until February 2003, the oil must first be hydrogenated.\textsuperscript{208} This chemical process

\textsuperscript{200} See Banzhaf, supra note 46.
\textsuperscript{201} Id.
\textsuperscript{203} This concept of increasing the fat in french fries is consistent throughout the fast food industry. Harvested potatoes contain about 80% water. Gladwell, supra note 171. What makes them into french fries is when most of this water is removed and replaced with fat. Id. According to Elisabeth Rozin, “[t]he french fry is a near perfect enactment of the enriching of a starch food with oil or fat.” Id. (quoting Elisabeth Rozin, The Primal Cheeseburger). Americans, on average, eat thirty pounds of these fat-enriched, french fried potatoes per year. Id.
\textsuperscript{204} Gladwell, supra note 171.
\textsuperscript{205} Id.
\textsuperscript{206} SCHLOSSER, supra note 27, at 120.
\textsuperscript{207} Gladwell, supra note 171. Even during this period, however, McDonald’s injected “natural” beef flavoring into their french fries in order to maintain their characteristic taste which was so appealing to consumers. Banzhaf, supra note 46. Mark Cotter is the senior vice president of The Food Group, which advises the restaurant industry on new products and marketing strategies.
\textsuperscript{208} Gladwell, supra note 171.
creates trans-unsaturated fat (“trans fat”) which frustrates the body’s attempts to regulate cholesterol.\textsuperscript{209} In a recent medical study of 80,000 women, it was found that a mere increase of two percent in the consumption of “trans fats” increases a woman’s risk of heart disease by ninety-three percent.\textsuperscript{210} At no point in time have the major fast food companies informed the public of the increased health risk caused by their decision to change frying oils in 1990.\textsuperscript{211}

Furthermore, like the “natural” beef flavor that is currently injected into McDonald’s’ french fries, much of the tastes and smells of fast food are not found in nature; they are produced in chemical plants along the New Jersey Turnpike.\textsuperscript{212} Such manipulations go far beyond mere marketing. Rather, this adulteration of product content to increase consumer desire is similar to tobacco companies’ manipulation of nicotine to increase the addictive qualities of their cigarettes.\textsuperscript{213} Like the manipulations in tobacco, these changes in the oils, smells and flavors of fast food have had deleterious health effects for consumers.

Internal company lingo confirms this disturbing parallel between fast food and chemical addiction. Rather than referring to someone who eats at fast food restaurants often as a “frequent customer,” those in the fast food business use the term “heavy user.”\textsuperscript{214} Though “heavy users” represent only twenty percent of all fast food customers, they account for sixty percent of all visits to such restaurants.\textsuperscript{215} These valued customers, who are usually single and male, spent approximately sixty-six billion of the $110 billion dollars that Americans spent on fast food in 1999.\textsuperscript{216}

b. “Supersizing”

Another marketing technique of the fast food industry is “supersizing.” Fast food restaurants almost always ask customers if they would like to “supersize their meal.”\textsuperscript{217} When a consumer accepts this invitation at McDonald’s, for example, their sixteen ounce, “small” Coke gets almost tripled to a forty-two ounce behemoth vessel of cola (plus free refills) and the order of regular french fries more than doubles in weight.\textsuperscript{218} While this appears to be a real culinary value, the true cost of supersizing a meal is far more than the additional seventy-nine cents, or so, reflected on the menu.\textsuperscript{219} There are hidden health costs to “supersizing” a meal in terms of diabetes, heart attacks, and obesity.

\textsuperscript{209} Id.
\textsuperscript{210} Id.
\textsuperscript{211} Id.
\textsuperscript{212} SCHLOSSER, supra note 27, at 7.
\textsuperscript{213} John F. Banzhaf, supra note 46.
\textsuperscript{215} Id.
\textsuperscript{216} Id. (quoting National Restaurant Association).
\textsuperscript{217} Critser, supra note 114, at 2. Sometimes, fast food restaurants even post signs reading: “If we don’t recommend a supersize, the supersize is free!” Id.
\textsuperscript{218} Id.
\textsuperscript{219} Id.
If a consumer orders a supersized hamburger meal, for example, the number of calories nearly doubles from 680 to 1,340.220 Even worse, the added calories are not from proteins, but from additions of fats and carbohydrates which are less healthy.221 In the words of Eric Schlosser, “[t]he real price [of these fast foods] never appears on the menu.”222 There is a good case to be made that the marketing tactic of “supersizing” is an example of negligent marketing or deceptive trade practices.

c. Marketing to Children

According to David Lau, an endocrinologist, professor of medicine, and president of the non-profit organization Obesity Canada, “[w]here the food industry is now, is what tobacco faced 10 to 15 years ago... [These lawsuits against the fast food industry are] a wake-up call that corporations have to be more cautious in their marketing.”223 By being “more cautious in their marketing,” Lau is likely referring to the marketing of fast food to children. The fast food companies know that their product is unhealthy, and yet they actively and aggressively market these products to children and teenagers. This certainly presents problems of decency and ethics. It may present legal problems, as well, as children are granted special protections under the law. Many of the tobacco industry’s concessions in the Master Settlement Agreement dealt with its marketing cigarettes to teenagers.224

Fast food restaurants market directly to children with an eye on future as well as present consumption.225 Advertisers believe that “[b]rand loyalty may begin as early as the age of two,”226 and that when children become fast food eaters in their youth, it is likely that they will retain these eating habits throughout their lifetimes.227 For these reasons, the advertising campaigns of fast food restaurants actively court children and young adults with cartoons,228 free toy promotions, and tie-ins to movies that appeal to the young.229 There are Happy Meals, Kids Meals, and Big Kids Meals. Advertisements for these products are concentrated in television programming targeted at children, and publications of the marketing industry specifically counsel as to how to develop brand loyalty in children.230

220. Id. at 3.
221. Id.
222. SCHLOSSER, supra note 27, at 9.
225. SCHLOSSER, supra note 27, at 42-43.
227. Banzhaf, supra note 46.
228. Nader, supra note 226.
229. Austin, supra note 24, at 227.
230. SCHLOSSER, supra note 27, at 43. At least three marketing industry publications, Youth Market Alert, Selling to Kids, and Marketing to Kids Report, speak of creating childhood nostalgia which may ensure brand loyalty into the future. Id.
Marketing fast food to children can also be quite a bit more intrusive than mere television advertisements. In 1993, Burger King became the first fast food chain to market directly to children in schools by placing ads in school hallways and on school busses. Other fast food companies followed suit in this now nationwide practice. In addition to static print ads, fast food chains now market their products in schools through classroom television ads on Channel One, branded classroom teaching materials, and actual franchises at school lunch counters.

These marketing strategies are more than just child’s play; they have met with tremendous success nationwide. When Burger King created its “Kids Club” in 1991, sales of children’s meals tripled. Ninety percent of children aged three to nine eat at a McDonald’s at least once per month and ninety-six percent of American schoolchildren can identify Ronald McDonald—the highest rate of recognition for any fictional character other than Santa Claus. In the process of marketing their products to children, McDonald’s restaurant has also become “one of the nation’s largest distributors of toys.”

Kelly Brownell, a psychology professor at Yale University says, “[w]e take Joe Camel off the advertising billboard because it is marketing bad products to our children, . . . but Ronald McDonald is considered cute. How different are they in their impact, in what they are trying to get kids to do?” In terms of society’s goals of protecting children from harm they cannot understand, Joe Camel and Ronald McDonald may turn out to be, legally, quite similar.

Conduct related claims such as manipulation of content and negligent marketing through “supersizing” and marketing to children are ultimately likely to be successful both in legal courtrooms and in the courtroom of public opinion. More than product-related claims based on manufacturing, design and warnings, it was these claims of negligent conduct that were so persuasive in turning public opinion against the tobacco industry. And, of course, it is members of this public that sit on juries. As more concrete information on the common practices of the fast food industry is discovered and released to the public, these fast food executives may turn out to be “villains” quite similar to the tobacco industry executives.

231. Id. at 51.
232. Id. at 51-52.
233. Id. at 56. Channel One is an educational television “station” that features programming developed for children in the school classroom. Id.
234. Id. at 52. For example, about 20 million elementary school children participated in Pizza Hut’s “Book It!” promotion during the 1999-2000 school year. Id. at 56. This program, which rewards children with a free “Personal Pan Pizza” if they meet reading goals, was thereafter extended to one million preschool age children. Id. at 55.
235. Id. at 45.
236. Id. at 47.
237. Id. at 4.
238. Id.
B. The Legal Case: Does it Even Matter How Good it is?

The biggest success in the tobacco litigation did not occur through monetary verdicts in courtrooms. The real success of the tobacco litigation has been the changing of the behavior of the tobacco industry. Warnings on cigarette packages, changes in marketing strategies that targeted children, and public service announcements to educate about the dangers of smoking were a result of congressional regulation, legal settlement, and public pressure. The fast food industry and its lawyers are well aware of this history of the tobacco litigation.

It is quite clear that at least part of the plaintiffs’ goal is to change the behavior of the fast food industry through litigation, much in the way that the behavior of the tobacco industry was changed. Remember that in addition to seeking monetary damages, according to the Barber and Pelman/Bradley complaints, the plaintiffs seek both an order forcing the defendants to label their products with nutritional content and health warnings, and money to fund an educational program warning the public about the dangers of eating fast food.240

If changes in the behavior of the fast food industry are some of the plaintiffs’ goals, the mere filing of their lawsuits may already be the catalyst for some successes. In August 2001, McDonald’s announced that it would provide updated nutritional information on its web site and in brochures at its over 13,000 restaurants.241 This information promised to specify if a “natural flavor” came from meat, dairy, or vegetarian origins.242 While this announcement followed the lawsuit of a coalition of Hindus, Jews, and vegetarians alleging that McDonald’s used beef products in its french fries,243 the company maintains that its action was not taken in response to the lawsuit.244

In September 2002, less than two months after Caesar Barber filed his lawsuit, and only days after Ashley Pelman and Jazlen Bradley filed their lawsuit, McDonald’s announced that it would start using a new cooking oil to decrease the fat in its french fries.245 This change cut in half the amount of trans fatty acids and increased the amount of more healthful polyunsaturated fats in an order of french fries.246 A market test of McDonald’s restaurants started using the new oil in October 2002 and by February 2003, the new oil was in use at all 13,000 McDonald’s restaurants in the United States.247 While McDonald’s again denies that this change was in response to the lawsuits against the fast food industry, the timing is certainly curious.

There have been other recent and related changes in the behavior of the fast

242. Id.
243. Sharma v. McDonald’s, No. 01-2-12267-3SEA (Wash. Sup. Ct. filed May 1, 2001).
244. McDonald’s to Give, supra note 241.
245. Schoen, supra note 116. McDonald’s french fries had been previously fried in beef tallow which led them to be sued by a coalition of Hindus, Jews, and vegetarians for failure to disclose a material fact in Sharma. The suit settled for $12.5 million and an apology that is listed on the McDonald’s web site. Peters, supra note 239.
246. Schoen, supra note 116.
247. Id.
food industry. McDonald’s has begun testing a healthier menu in Canada called “Lighter Choices”\(^\text{248}\) and in France, McDonald’s recently began running magazine ads with cigarette-like health warnings.\(^\text{249}\) This voluntary health warning may foreshadow future developments in the fast food industry.

Even if the plaintiffs’ ultimately lose their initial claims in court, they will have succeeded in achieving many of their goals. Part of the rationale for the plaintiffs’ lawsuits is to force changes in the behavior of the fast food industry. In this case, merely filing these lawsuits seems to have resulted in the achievement of many of their goals. Product changes have taken place and warnings have been published. Certainly, through a significant media campaign, the plaintiffs’ lawsuits have raised awareness about the adverse health effects of the consumption of fast food. Also, the plaintiffs’ actions have increased the costs of doing business for the fast food industry because it has had to mount aggressive legal and publicity defenses. In this way, no matter what the legal end game, the plaintiffs have already won and the public is better off for their efforts. A verdict in the courtroom offering injunctive and monetary relief, or a settlement outside of court would sweeten the victory and offer the plaintiffs some monetary compensation for their personal losses.

Furthermore, in an economic sense, these lawsuits will increase efficiency no matter how they are resolved. The present lawsuits against the fast food industry and the others that are sure to follow will increase the costs of doing business for the industry. These increases in the costs of doing business will presumably be passed on to the consumer in the form of higher prices.\(^\text{250}\) According to the laws of supply and demand, fewer consumers will choose to buy and consume fast food at the increased price.\(^\text{251}\) Thus, fewer consumers will suffer the health risks associated with such consumption. This increase in cost to the consumer will, thereby, reflect more of the “true cost” of fast food.

\(^{248}\) Id.
\(^{249}\) The Man Who is Taking Fat to Court, supra note 139.
\(^{250}\) This is what happened as a result of the tobacco industry litigation and settlement.
\(^{251}\) This is presumably less true in the case of cigarette users, as addiction creates an inelastic demand that is less responsive to changes in price. A heroin addict, for example, may steal in order to pay high prices for drugs rather than choose not consume. Cigarette smokers who are addicted to nicotine will pay as much as five dollars per pack for their fix. Depending on the comparative addictive powers of fast food, consumers will eventually choose not to consume when the price reaches a certain point.
CONCLUSION

While not the direct subject of the fast food litigation, issues of political and civil rights undergird and inform the underlying problem that these lawsuits present. Fast food companies actively market their products to children and pitch them such that fast food is disproportionately consumed by minorities and the lower socio-economic classes. Because of this marketing and its results, issues of the protection of the most “vulnerable” members of our society and the government’s responsibilities to its citizens permeate the legal problems with fast food. Furthermore, the fact that plaintiffs have sought remedies such as nutritional labeling and education through the legal system rather than through legislative law-making or administrative regulation implicates the efficacy of the government and politics of our nation. As such, these suits may be an indication or result of a greater problem with our legislative process.

It is clear that the recent class action litigation against fast food companies such as McDonald’s is modeled after the previous and ongoing litigation against the tobacco industry. For this reason, analysis of the different phases of tobacco litigation allows one to see more clearly into what the future may hold for the fast food industry. However, this vision must first be corrected regarding several factors: addiction, causation, product design, and failure to warn. Differences regarding addiction and causation make the lawsuits against the fast food industry less likely to succeed than the tobacco cases, while issues of product design and failure to warn make the fast food cases stronger relative to the lawsuits against “Big Tobacco.”

The issue of addiction is paramount among these differences. While fast food does create a “craving” among users, there is no evidence that this desire amounts to the chemical addiction that nicotine instills in cigarette smokers. Scientists and expert witnesses will argue as to the degrees of difference between craving and addiction, and certainly plaintiffs’ experts will testify that fast food is addictive. However, despite the fast food companies’ attempts to control fat and salt in their products in order to increase craving, juries will be hard-pressed to find fast food to be “addictive” according to the common, current understanding of the word. For this reason, a legal case against the fast food industry is less likely to succeed than a similar case against the tobacco industry on the issue of addiction.

The issue of causation is also much harder to isolate among fast food users than in smokers. While some individual smokers may have alternative complicating risk factors for cancer such as a family genetic history or a history of working with asbestos, the issue of causation will certainly be a more substantial hurdle for the plaintiffs in the fast food lawsuits. One would imagine that almost all plaintiffs in the fast food lawsuits have complicating risk factors for overweight, obesity, and the problems that are associated with them. If plaintiffs are eating a significant number of their meals at fast food restaurants, it is likely they are also not health conscious at their other meals, not exercising as recommended, and/or not getting adequate healthcare. In other words, the Big Macs were not the sole cause of their damages; there were other complicating factors. Even if courts decide fast food cases on a comparative fault basis, the jury’s allocation of damages
to the fast food companies might be a relatively small percentage of the total verdict.

The two issues of product design and failure to warn claims in the fast food litigation may be stronger than in the tobacco cases. While it is generally agreed that cigarettes, as a product, cannot be made significantly safer for the consumer, this is decidedly not the case for fast food. Frying oils can and have been changed to make them more healthy for the consumer. Fast food restaurants could continue to make changes to ingredients, such as a complete substitution of AU Lean ground beef for the twenty percent fat “all beef patties” that fast food restaurants generally use, and the standard use of light mayonnaises and cheeses in lieu of their full fat counterparts. Any product changes should be mandatory for the consumer and made across-the-board such as McDonald’s’ recent change in frying oil for its french fries. Consumers cannot ask for their fries to be cooked in the old, less healthy oil; McDonald’s has made that choice for them.252

From a legal and public health standpoint, fast food products could easily carry warnings just as cigarettes now do. Each french fry container, sandwich wrapping, and cola cup should be imprinted with nutritional information including calories, fat grams, and percent of the recommended daily values for each. Furthermore, this information should be published on the well-lit wall menus “by the meal” which is how the products are most often sold and consumed.253 If the fast food industry was serious about informing their consumers of the nutritional content of their meals, this is what they would do.254

The fast food industry would be wise to make these product design, warning, and labeling changes voluntarily and on their own terms before they are compelled to alter their products by law, regulation, or legal settlement. If truly determined to do so, through threats of litigation, legislation, regulation, or pure goodwill, fast food companies could certainly devise a host of changes to make their products safer for consumers. Such changes could be implemented in such a way as to minimize any adverse impact in terms of sales. Healthful changes might even increase sales, as they would surely increase consumer confidence.

Ultimately, whether through some combination of judicial verdict, legal settlement, legislative action, executive regulation, and public pressure, the way the fast food industry does business will change. Because tobacco plaintiffs paved the way, this process will take considerably less time than the fifty years that change took in the tobacco industry. Some fast food products will become healthier and

252. Remember that given the healthier option of a McLean Deluxe, consumers opted for the original, full-fat favorite. But what if AU Lean was used in all of McDonald’s’ hamburger patties as the new healthier oil is used in all of McDonald’s’ french fries? The experience with the McLean Deluxe suggests that consumers will not opt for the low fat alternative if it is marketed specifically as the healthier option; consumers do not go to fast food restaurants for health food; they want what they are used to getting.

253. For example, next to the picture of the supersized Big Mac Meal: “1,610 calories, sixty-three grams of fat, 80.5% of the recommended daily caloric intake, and 98% of the recommended daily intake of fat.” Calculations based on numbers from the McDonald’s web site. McDonald’s, Nutrition Facts, supra note 160 and the recommended daily values for a two thousand calorie diet.

254. Of course these is some question as to whether or not consumers would actually read and heed these warnings.
the health-related risks of harmful products will be more fully and honestly disclosed to consumers. Prices for fast food will rise and consumption will fall. As a result, people will be healthier. Though Caesar Barber, Ashley Pelman, Jazlen Bradley, and their plaintiff-classes may never recover personal monetary compensation in their specific lawsuits, many of the reforms sought by them will become a reality. And from their actions, the American public will benefit.

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