

# Combating Obesity in the Courts: Will Lawsuits Against McDonald's Work?

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*A proposed method of combating obesity in the United States is to hold food companies legally liable for obesity-related damages. Recent lawsuits against fast-food restaurants, such as Pelman v. McDonald's Corp., have tried to draw on the success of tobacco litigation by claiming that fast-food marketers provide misleading information about the nutritional value of their products, leading consumers to overconsume and, thus, become obese. The Pelman plaintiffs also allege that fast food is addictive and have asked to represent a class of children who have become obese as a result of McDonald's products. This article compares legal efforts against the aggressive marketing of fast food with those against the marketing of tobacco products and argues that, for several reasons, such legal efforts will face substantial hurdles. In particular, this article argues that to be successful, such lawsuits must show either that McDonald's acted deceptively or that it has a duty to warn consumers about the unhealthful nature of its products. In addition, they must show that they satisfy the requirements necessary to certify a class. Finally, they must gain public and legislative support for legal action. Without these lawsuits satisfying the necessary legal elements and gaining increased public support for legal action against the industry, it seems unlikely that the fast-food industry will be held responsible for obesity-related damages. Having concluded that the tobacco litigation experience does not offer a promising road map to combat obesity, the authors briefly consider the vulnerability of the food industry to alternative legal strategies and legislative actions.*

**O**besity is recognized as a leading cause of preventable death in the United States (U.S. Department of Health and Human Services 2001). Some critics point to the food industry's aggressive marketing practices as a primary culprit in the obesity crisis and recommend that the industry be held legally liable for its role in expanding the nation's waistline (e.g., Banzhaf 2005b). These commentators suggest that legal successes against the tobacco industry, including the 1998 settlement in which the 50 United States settled with the six largest tobacco companies for \$246 billion over 25 years (National Association of Attorneys General 1998), can provide a useful road map for obesity litigation (Banzhaf 2005b; Crister 2003; Schlosser 2002).

To date, only one case in which the plaintiffs sued specifically for obesity-related damages has resulted in a written decision (*Pelman v. McDonald's Corp.* 2003a, b, 2005), and the final outcome of this case has not been determined. However, several successful lawsuits have been brought against food companies that knowingly misrepresented the

contents of their products (see Bradford 2003; Higgins 2003). In addition, the threat of litigation and legislative action may encourage food companies to restrict some of their more aggressive marketing tactics "voluntarily." For example, the threat of lawsuits may discourage soft drink companies from entering into exclusive pouring contracts with school systems (Higgins 2003; Roberts 2003). Furthermore, efforts by state legislatures to consider requiring nutritional labeling in restaurants may encourage some chains to add more nutritional information to their menus.

At the same time, obesity lawsuits have been met thus far with public skepticism and new legislative initiatives designed to protect the food industry. A recent Gallup poll shows that 90% of the American public disapproves of efforts to sue fast-food restaurants for obesity claims (Saad 2003), and 14 states have passed so-called cheeseburger bills, which are designed to protect restaurants and food manufacturers from obesity lawsuits (e.g., Common-Sense Consumption Act 2004). In addition, recent federal legislation has limited class action lawsuits in state courts (Class Action Fairness Act 2005).

This article provides an analysis of the decisions in the one obesity case that has been brought to trial (*Pelman v. McDonald's Corp.* 2003a, b, 2005). In *Pelman*, New York City attorney Sam Hirsch filed suit on behalf of a proposed class of obese and overweight children who claimed that their obesity-related health problems were caused by their consumption of McDonald's foods. The *Pelman* lawsuit is the first to allege that food companies are responsible for

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damages suffered by those who consume so much of a product that they become obese. McDonald's is accused of deceiving consumers by failing to disclose particular ingredients or nutrients. The company is also accused of failing to warn that its products are unhealthy and that the consumption of these products may result in obesity. Finally, McDonald's is accused of knowingly selling addictive products without warning consumers of their addictive properties. Although the trial court dismissed each of these deception, failure to warn, and addiction claims (*Pelman v. McDonald's Corp.* 2003a, b), the United States Court of Appeals for the Second Circuit directed the trial court to allow the plaintiffs to discover and present evidence related to the deception claim (*Pelman v. McDonald's Corp.* 2005).

The following section examines the similarities and differences between *Pelman* and tobacco litigation. This section also explains the rationale for the trial court's earlier dismissal and what evidence the plaintiffs would need to support their claims. We conclude that future lawsuits using the approach taken in the *Pelman* case would need to overcome substantial hurdles. Although the *Pelman* case is the main focus of this article, we briefly consider the likelihood of success of alternative legal strategies.

## Fast Food: The Next Tobacco?

Lawsuits against tobacco companies were successful in part because industry "whistleblowers" and investigations by the U.S. Food and Drug Administration (FDA), the U.S. House of Representatives, and private journalists revealed that tobacco companies' marketing efforts deceived consumers about the potential harms associated with consuming products that cause diseases such as emphysema and lung cancer (Hilts 1996; Kessler 1994; Rabin 2001). In addition, evidence presented in the tobacco cases showed that the industry targeted vulnerable children (Hilts 1996). Importantly, these revelations created an environment in which states' attorneys general believed that they had sufficient public support to seek damages (Campbell et al. 1994). In the tobacco cases, evidence was also presented that tobacco (nicotine) is addictive and that the tobacco companies knowingly manipulated the ingredients in their products to increase delivered levels of nicotine (Hilts 1996). Finally, tobacco plaintiffs were successful in achieving class certification suitable for "mass tort" class action litigation. Class action certifications shifted the balance of power from the tobacco companies to the plaintiffs and created incentives for claimants and their attorneys.

Although the *Pelman* plaintiffs have thus far been unable to support their deception claims, they (and any future plaintiff suing the food industry) have one advantage over those suing the tobacco industry. The 1965 federal labeling act (Public Health Cigarette Smoking Act 1969) protects tobacco companies from deceptive omission claims. Because the federal law preempts any state requirements, tobacco companies cannot be required to reveal the dangers of smoking beyond what is required by the federal government (*Cipollone v. Liggett Group* 1992). In contrast, the Nutrition Labeling and Education Act (1990) does not protect food manufacturers from state claims based on deceptive labeling (*Morelli v. Weider Nutrition Group Inc.* 2000). In addition, because the Nutrition Labeling and Education

Act specifically exempts restaurants from federally mandated labeling requirements, federal preemption doctrine does not protect restaurants from claims of deception based on state law (FDA, Food Labeling; General Requirements for Health Claims for Food 1993; *Pelman v. McDonald's Corp.* 2003a).

Despite not being subject to the preemption restrictions that protect the tobacco industry, plaintiffs against fast-food companies face several challenges. To be successful, plaintiffs will need to present evidence that shows either that McDonald's acted deceptively, including evidence that the products in question caused the negative health consequences and related injuries, or that McDonald's has a duty to warn consumers about the unhealthy nature of its products. The *Pelman* plaintiffs have also alleged that McDonald's had a duty to disclose that its products are addictive and, therefore, inherently dangerous. Because the *Pelman* plaintiffs have asked to be allowed to represent a class of children who have become obese as a result of consumption of McDonald's products, they must also show that their injuries (and those of the proposed class) are sufficiently similar to be recognized as constituting a "class" for mass tort action. Finally, public and legislative support for legal action must be generated. Without sufficient evidence to support at least one of the legal arguments and without increased public support for legal action against the industry, it seems unlikely that the fast-food industry will be held responsible for obesity-related damages. In the following sections, we discuss each of these elements.

## Deception

Although there are some cases in which food companies have acknowledged responsibility for deceptive acts under consumer protection statutes, to date, no plaintiff has successfully shown that a food company has deceived consumers about the potential for its products to cause obesity.

In *Pelman*, the plaintiffs broadly allege that McDonald's deceived them into believing that its products could be a healthful part of their diet if consumed every day; in particular, the plaintiffs allege that certain in-store nutrition disclosures and advertising claims were deceptive. The *Pelman* plaintiffs base their claims on Section 349 of the New York Consumer Protection Act, which prohibits deceptive acts or practices, and on Section 350, which prohibits false advertising (Consumer Protection Act, New York Gen. Bus. Law §§ 349 and 350, and New York City Administrative Codes, Chapter 5, 20-700 et seq.). The *Pelman* trial court outlined the elements that are necessary to show deception under Sections 349 and 350. Plaintiffs must first identify what McDonald's did (or failed to do) that caused the plaintiffs to believe wrongly that McDonald's products are more nutritious than they really are. In addition, the plaintiffs must show that they reasonably relied on that act or omission when deciding to consume McDonald's products and that the deceptive act or omission resulted in their obesity-related injuries.

### Deceptive Acts and Omissions

McDonald's marketing activities must be shown to amount to a false claim with respect to the health effects of its products. The plaintiffs must identify either a specific action,

such as a misleading advertisement, or a failure to disclose product information necessary for consumers to make a fully informed choice.

There have been a few cases in which plaintiffs have successfully argued deception by food companies, though none of these cases involved allegations of deception leading to obesity. For example, in 2003, Robert's American Gourmet settled a class action that claimed that the firm misstated the calorie and fat content of its Pirate's Booty snack for more than \$3 million (Bradford 2003). Similarly, McDonald's paid \$12.5 million in 2001 and issued a public apology to settle a suit for advertising that its fries were cooked in vegetable oil, leading consumers to believe that they were vegetarian, when in fact they were also cooked in beef fat (Bradford 2003). Finally, a Florida ice-cream company that underreported saturated fat in its products settled the case for an undisclosed amount (Higgins 2003).

Thus far, the *Pelman* plaintiffs have been unable to identify any deceptive acts or omissions by McDonald's. They initially claimed that McDonald's falsely represented its products as nutritious and that the company encouraged consumers to "supersize" their meals without disclosing the negative health effects of doing so (*Pelman v. McDonald's Corp.* 2003a). Because they did not identify particular advertisements, the plaintiffs' claims were dismissed for vagueness. However, the court noted that even if the allegations did identify specific advertisements, advertising campaigns such as "McChicken Everyday!" and "Big 'n' Tasty Everyday!" amounted to "mere puffery." That is, because the ad campaigns did not claim that eating at McDonald's every day would result in a specific effect on health (*Pelman v. McDonald's Corp.* 2003a, pp. 529–30), they were not deceptive. The trial court also held that the fact that McDonald's did not post nutritional information in all of its stores was not a deceptive omission unless the nutritional information was solely within the control of the company (*Pelman v. McDonald's Corp.* 2003a, p. 512).<sup>1</sup> This deception-by-omission argument was also rejected on appeal to the trial court (*Pelman v. McDonald's Corp.* 2003b, 2005).

In their appeal to the trial court, the *Pelman* plaintiffs identified one specific allegedly deceptive act: Because McDonald's described its french fries and hash browns as being made with 100% vegetable oil and/or as cholesterol free when they contained some beef products, the plaintiffs claimed that they were led to believe that consuming the products would not raise blood cholesterol levels. However, the court ruled that these claims were not objectively misleading, because McDonald's did not claim that its fries or hash browns had any particular effect on blood cholesterol (*Pelman v. McDonald's Corp.* 2003b, p. 6).

### **Reasonable Reliance on Acts or Omissions**

To be successful under Section 350 of the New York Consumer Protection Act, plaintiffs must also show that they

relied on a deceptive act or omission in choosing to consume a product and that such reliance was reasonable given all the information available to consumers. For example, if plaintiffs could show that a McDonald's advertisement misrepresented the number of calories in a Big Mac, that McDonald's was the only one with this information, and that this led them to consume so many Big Macs that they became obese, this would be evidence of deception under Section 350. A Section 349 claim has no such reliance requirement, and plaintiffs do not need to claim that they saw any particular advertisement or that they were influenced by the advertisement. The mere fact that the advertisement was deceptive would be sufficient to support a Section 349 claim.

In the *Pelman* case, because the allegation with respect to the content of McDonald's oil was objectively not deceptive, the court ruled that plaintiffs could not claim that they relied on it in concluding that McDonald's products were good for their health. With respect to the claim that McDonald's failure to post nutrition information was deceptive, the trial court explained that because it is common knowledge that fast food is unhealthful and McDonald's did not have sole control over ingredient information, plaintiffs could not "reasonably rely" on the absence of nutritional information to conclude McDonald's products are healthful (*Pelman v. McDonald's Corp.* 2003a, b, 2005).

Although the trial court recognized that Section 349 does not require proof of reliance, it nonetheless dismissed the claims under Section 349, concluding that the plaintiffs failed to show that their consumption of McDonald's food caused their obesity-related injuries. In particular, the plaintiffs failed to address the possible role of other factors in causing their obesity-related damages. However, on appeal to the U.S. Second Circuit, the appellate court held that these factual questions about the presence of deceptive content in McDonald's advertisements are the appropriate subject of discovery, and it remanded the case to the trial court for further consideration of the Section 349 claim (*Pelman v. McDonald's Corp.* 2005).

### **Causation**

The final element in a successful Section 349 or 350 deception claim is also likely to be the most difficult hurdle for the *Pelman* plaintiffs to pass. They must show that consumption of McDonald's foods was a substantial factor that caused their obesity, in addition to the contribution of lifestyle practices and hereditary traits (*Pelman v. McDonald's Corp.* 2003a). Given that the medical profession has identified a myriad of factors contributing to obesity (Anderson, Butcher, and Levine 2003), it will be difficult for plaintiffs to show that any one factor (e.g., the consumption of McDonald's food) is a substantial cause of obesity and related damages.

A few jurisdictions impose a lower standard for proving causation. For example, until the law was amended by a ballot initiative in the 2004 election, California prohibited "any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising," regardless of whether the plaintiff or any other consumer suffered any injury (California Business and Professions Code 17200). Thus, in California, plaintiffs needed to prove only that the act or practice was deceptive, and they were

<sup>1</sup>In 1987, McDonald's entered into a settlement agreement with the New York State attorney general in which it agreed to "provide [nutritional] information in easily understood pamphlets or brochures which will be free to all customers so they could take them with them for further study [and] to place signs, including in-store advertising to inform customers who walk in, and drive through information and notices would be placed where drive-through customers could see them" (*Pelman v. McDonald's Corp.* 2003b, p. 3).

not required to show that it caused any particular injury or that other factors did not cause the injury. By adopting Proposition 64, California voters changed this standard to require that plaintiffs must show that they are actually harmed by a company's deceptive business practice. Given the Second Circuit's decision (*Pelman v. McDonald's Corp.* 2005) to allow the *Pelman* case to proceed in the absence of any factually based allegations linking the alleged deception and the alleged harm, some critics suggest that the court seems to be applying a lower standard, similar to that previously applied in California (Copland 2005).

### Duty to Warn: Targeting Vulnerable Consumers

When a particular group of consumers cannot reasonably be expected to understand that a product poses a serious risk, the manufacturer of that product may have a heightened obligation to warn those consumers. Although federal pre-emption doctrines limit tobacco litigants' ability to allege failure-to-warn claims (*Cipollone v. Liggett Group* 1992), food companies enjoy no such protection. To win a failure-to-warn claim, plaintiffs must show that products are (1) inherently dangerous because they are so high in cholesterol, fat, salt, and sugar, even though studies show that such foods cause obesity and detrimental health effects; (2) so extensively processed that they are more dangerous than a reasonable consumer would expect; or (3) likely to provoke consumers to "misuse" the products by overconsuming them (*Pelman v. McDonald's Corp.* 2003a). In general, plaintiffs must show that the absence of a warning renders consumers unable to consider all information relevant to the consumption decision and unable to comprehend fully the level of risk associated with consuming the products. If the elements of a failure-to-warn claim are satisfied, the plaintiff must still show that the failure to warn caused their injury, raising the same difficulties associated with proving a deception claim.

In the *Pelman* case, because the plaintiffs failed to show that the products they consumed were dangerous in any way that was not obvious to a reasonable consumer, the court stated that McDonald's had no duty to warn consumers about those dangers. Even vulnerable consumers, such as children, were considered free to choose to eat other foods and, therefore, not in need of legal protection. Although the court acknowledged that a reasonable consumer may not know what goes into a Chicken McNugget or that a Chicken McNugget contains more than twice the fat of a hamburger, the plaintiffs needed to establish that these dangers are not commonly known. Otherwise, given that product contents are available to the public, the lack of a warning does not prevent a consumer from making a fully informed choice when deciding whether to consume these products (*Pelman v. McDonald's Corp.* 2003a).

As to the argument that McDonald's was negligent because it should have foreseen and warned against the "misuse" of its products from overconsumption, the court ruled that the plaintiffs had failed to show misuse "in the sense that it was outside the scope of the apparent purpose for which the [menu] items were manufactured" (*Pelman v. McDonald's Corp.* 2003a, p. 537). In other words, McDonald's makes its food to be eaten, which is what the plaintiffs did. To succeed on this claim, the plaintiffs would need to show that there is a threshold over which using a product for

its intended use becomes a "misuse," an argument which they failed to support with any case law.

### Addiction

In addition to their deception and failure-to-warn claims, the *Pelman* plaintiffs argued that McDonald's products are both physically and psychologically addictive and, therefore, inherently dangerous, because a reasonable consumer would not suspect that fast food is addictive. Thus, McDonald's should have provided a warning if consumers were to make a fully informed choice. Current definitions of addiction suggest that plaintiffs may have a difficult time establishing that McDonald's products are addictive. The American Psychiatric Association (APA; 1968) identifies three classic signs of addiction: intoxication, tolerance, and withdrawal. Although the APA also recognizes that people may be substance dependent without exhibiting signs of addiction (APA 1994), these three elements are required before a person is considered an addict. Thus, although consumers might claim to be unable to control their consumption of fast food and might, under certain interpretations of "substance dependence," be dependent on the product, the medical community differentiates between such dependence and true addiction.

Nevertheless, there are those who continue to argue that fast food has addictive properties, demanding that warnings of this risk be posted in restaurants (Banzhaf 2005b). Among the studies cited in support of this argument are four experiments reported in the British popular science magazine, *New Scientist* (Martindale 2003). In these studies, rats fed a diet high in fat and sugar demonstrated brain patterns that were similar to those associated with morphine. However, the authors of at least two of the four studies have stated that the article mischaracterized their research (*Obesity Policy Report* 2003). These authors assert that their work had nothing to do with addiction and that the brain activity they observed does not equal addiction.<sup>2</sup>

<sup>2</sup>"Whoever did the story has exaggerated the research being done by our scientists," said a spokesperson for Rockefeller University. "There's research being done by [Dr.] Sara Leibowitz, who's looking at the effects of dietary fat on the brain. Apparently she was at a meeting in Great Britain over the weekend" and spoke to a reporter, the spokesperson said. But her research "has nothing to do with addiction.... [H]er research does not show that dietary fat is addictive. There's been a misunderstanding somewhere." Researchers at the University of Wisconsin had a similar reaction when they learned that at least two British newspapers claimed the scientists had discovered that rats behaved like drug addicts once their high-fat diet was taken away. "Not quite," said postdoctoral fellow Matthew Will, a co-author of the yet-to-be-published study. While he said he was correctly quoted as saying that the research "suggests that a high-fat diet alters brain biochemistry with effects similar to those of powerful opiates such as morphine," the conclusion the story draws from that statement—that fatty foods are addictive—wasn't even a focus of the study. "We gave rats a chronic diet of a high-fat chocolate drink for two weeks and then looked at their brains afterwards," Will said. They found that a certain gene in the striatum of the brain was "down-regulated," or operating at a lower level of activity than it had previously. The same down-regulation was found after rats were given morphine for two weeks, as well. But a less active brain gene doesn't necessarily equal addiction, Will stressed. "Addiction is kind of a vague term, and we obviously can't say that we've proven that you can become addicted to food," he told [*Obesity Policy Report*]. "All we found is that there are similar findings between this high-fat diet we gave the rats and what you see after similar schedules of morphine in rats. We have no idea what it does to their behavior necessarily," he added. "We're exploring that in the future. All we have right now are the parallel changes in the biochemistry" (*Obesity Policy Report* 2003, p. 10).

Even if it were established that fast food has addictive qualities, it is not clear that marketing such products would lead to liability. In the tobacco litigation, plaintiffs were ultimately able to show not only that nicotine was addictive within the meaning of the APA's definition but also that the industry knowingly manipulated that addictive ingredient to increase delivered levels of nicotine, which may have increased consumer acceptance of lower-tar products. Conversely, the *Pelman* plaintiffs did not introduce any evidence that fast food contains any addictive ingredients, much less evidence that the industry concealed or manipulated such ingredients (*Pelman v. McDonald's Corp.* 2003a, b). Unless plaintiffs can show that fast food is addictive and that fast-food companies purposely manipulated ingredients to capitalize on this addiction or concealed information about addictive ingredients, this line of argument is unlikely to be successful.

The *Pelman* trial court has not yet ruled on the addiction argument, but it noted that the plaintiffs needed (1) to show how their addiction affects their behavior and (2) to explain how they became addicted to McDonald's products, including what frequency of use leads to addiction. In a parallel to the tobacco litigation, the court also hinted that it would look for allegations that McDonald's purposefully manufactured products with addictive qualities (*Pelman v. McDonald's Corp.* 2003a, p. 542). Furthermore, the court suggested that it would be amenable to arguments that as minors, the plaintiffs were more susceptible to addiction than adults (*Pelman v. McDonald's Corp.* 2003a, p. 542).

As in its treatment of the *Pelman* plaintiffs' failure-to-warn claims, the trial court noted that McDonald's had not masked the nutritional information that consumers needed to make an informed choice. The *Pelman* court commented that if evidence showed that McDonald's food was addictive, given that "such information is not available to the public," this might support a deception claim (*Pelman v. McDonald's Corp.* 2003a, p. 542). Plaintiffs did not raise this claim in their appeal to the trial court or at the Second Circuit, but they are likely to present evidence on this issue when it returns to the trial court (Banzhaf 2005a), which suggests that they will attempt to show that McDonald's has deceived consumers about the addictive nature of its products.

### Suitability for Class Action Treatment

By grouping a large number of plaintiffs together as a class, class action certification increases the payouts and, therefore, incentives for attorneys for filing claims. To be certified as a class, (1) potential plaintiffs must be so numerous that it would be impossible for each class member to actively participate, (2) there must be questions of law or fact common to the class, (3) the claims of the representative parties must be typical of the claims of the class, and (4) the representative parties must be able to protect the interests of the class fairly and adequately (Federal Rules of Civil Procedure 23[b]).

An important lesson from *Pelman v. McDonald's Corp.* (2003a, b) is the difficulty fast-food plaintiffs face in attempting to obtain class certification. The *Pelman* court noted that because each plaintiff's injuries would be the products of individual hereditary and lifestyle variables, the plaintiffs would be unlikely to satisfy the "typicality

requirements" needed to be certified as a class. If the *Pelman* plaintiffs cannot sue as a class, each plaintiff must bring his or her claims individually, thereby forfeiting the economies available in a class action suit. Recent federal law may make class certification even more difficult and reduce attorneys' incentives to bring class action lawsuits (Class Action Fairness Act 2005).

### Public Support and Policy Concerns

By the time plaintiffs began to achieve some success against the tobacco industry, years of disclosure of industry deception had turned public opinion against the industry. Not only did this make it easier to pass legislation restricting tobacco marketing, but it also resulted in jury pools that were much more sympathetic to plaintiff claims and more willing to impose liability on the tobacco industry. In contrast, Gallup (Saad 2003) reports that approximately 90% of Americans oppose lawsuits such as *Pelman*. Those who describe themselves as overweight are no more likely than others to blame the fast-food industry for obesity-related health problems or to favor lawsuits against the industry (Saad 2003). Unless damaging evidence is revealed that shows that fast-food companies manipulated their products and concealed information in a manner similar to that of the tobacco companies, public opinion seems unlikely to turn against the fast-food industry as it has against the tobacco industry.

In addition, a court's ability to identify a manageable number of defendants and craft appropriate damages is an important policy concern. There are exponentially more potential defendants affected by fast-food litigation than by the tobacco litigation. The courts have an obligation to limit the legal consequences of wrongs to a controllable degree and to protect the industry against crushing exposure to liability. The *Pelman* court was hesitant to encourage a suit that might result in innumerable "McLawsuits," even if the court was able to define and limit the impact of its decision to restaurants serving "fast food" (*Pelman v. McDonald's Corp.* 2003a, p. 516).

## What Is Next?

### More Lawsuits

Although the *Pelman* plaintiffs have thus far been unsuccessful in their efforts to hold McDonald's responsible for their injuries, food companies should expect more legal challenges. Other legal approaches and theories could be used (Higgins 2004; Riley 2003), and there are those who believe that lawsuits, or the threat of them, can motivate the industry to do more on its own to combat obesity (Higgins 2004).

Food companies may be particularly vulnerable to lawsuits with respect to exclusive contracts in schools, which require the school to sell only a single manufacturer's products. Indeed, at least one school district and its individual school board members have been threatened with a lawsuit alleging "violation of fiduciary duty" if the district renewed an exclusive pouring contract with Coca-Cola (Banzhaf 2005b). Although no such lawsuit was filed, the mere threat of a lawsuit may lead schools to reconsider money-making contracts with food companies and effectively limit student access to fast-food products.

In addition, given the difficulty in certifying a class action based on personal injury, future plaintiffs might pursue different bases for class certification. For example, a class of plaintiffs in *Price v. Philip Morris Inc.* (2003) was certified on the basis of similar economic harms rather than similar personal injuries. These smokers claimed that advertisements for Marlboro Lights and Cambridge Lights as “lights” and as having “lowered tar and nicotine” were deceptive because the advertisements created the false impression that the products were safer or less harmful than regular cigarettes. The plaintiffs claimed that they overpaid in reliance on these misrepresentations and obtained compensatory class damages of \$7.1 billion. Although Philip Morris has appealed this decision, future lawsuits against food companies might use this approach to avoid the requirement of showing injuries common to the class members. For example, claims following the *Price v. Philip Morris* model might target advertisements emphasizing “low-fat,” “high-fiber,” or “low-sodium” foods that fail to disclose the actual high-calorie or sugar counts of those foods. To be successful, future plaintiffs would need to show that these health claims led them to believe that the products were healthier than their “regular” counterparts, when indeed they were no safer.

As these alternative legal strategies are developing, federal and state legislatures have proposed legislation that would protect the food industry from legal liability. In 2004, the U.S. House of Representatives passed the Cheeseburger Bill—officially called the Personal Responsibility in Food Consumption Act (2004). This legislation, which would have protected food companies from any claims alleging that consumption of their products resulted in weight gain, obesity, or any related health condition, failed to pass the Senate in 2004. However, 14 states have already adopted similar legislation, and 10 more are considering their own cheeseburger bills (e.g., Common-Sense Consumption Act 2004). Furthermore, given the Second Circuit’s willingness to allow the *Pelman* case to continue, it seems likely that a federal cheeseburger bill will be considered by the 109th Congress. Note that these laws do not protect food companies from deception claims, only from damages based on obesity-related injuries.

Congress has also considered several other tort and court reforms that might limit suits such as *Pelman*, including the recently enacted Class Action Fairness Act (2005). The Class Action Fairness Act is likely to make suits such as *Pelman* more difficult to win and to discourage attorneys from bringing such suits before the court. The act provides federal oversight of many class actions and increased judicial scrutiny of settlements and plaintiffs’ counsel fees. Corporate defendants often prefer federal courts because they believe that such courts tend to apply more consistent standards with respect to class action certification and settlement than do so-called magnet state courts (Copland 2003). Under prior law, however, class actions were restricted to state court unless (1) each class member sought damages of at least \$75,000 (though some courts modified this requirement to apply only to the named plaintiffs), (2) all named plaintiffs were citizens of states different from all named defendants, and (3) all defendants consented to transfer the case to federal court.

Any defendant who otherwise meets the Class Action Fairness Act’s diversity requirements may transfer a class action to federal court when (1) the aggregate amount of the claims of all class members exceeds \$5 million and (2) any defendant is a citizen of a state different from any member of the plaintiff class. The bill also allows so-called mass actions, in which a large number of individual claims are heard at once without having to meet the requirements of class certification, to be moved to federal court. However, truly local actions will still be heard in state courts. Federal jurisdiction is not available when two-thirds of the class members and the primary defendants are from the state in which the action is brought. Likewise, a judge may refuse transfer to federal court if a certain portion of the class and the defendants are from the state in which the action is brought.

Another major effect of the Class Action Fairness Act is to diminish attorneys’ incentives to take class action suits by requiring heightened judicial scrutiny of proposed settlements involving coupon payments. Class action defendants are often required to make restitution to the plaintiff class by offering them relatively nominal coupons applicable to a future purchase of the defendants’ products. Attorneys’ contingency fees are based on the value of the coupons issued. The Class Action Fairness Act alters this structure by determining attorneys’ fees on the basis of the amount of coupons redeemed rather than the value of coupons issued. Because only a small fraction of coupons issued are ever redeemed (Bloom and Gerson 1987), this change may reduce attorneys’ incentives to bring class action suits when the value to the consumer is nominal.

## Regulation

An alternative to lawsuits is regulation requiring new nutritional disclosures. For example, some commentators have suggested that all chain restaurants be required to post nutritional information on their menus. The first such legislation was proposed in 2003 in Maine (L.D. 391) and would have required chain restaurants to list nutrition information on menus and menu boards. Fast-food restaurants that use menu boards would be required to list calorie counts and expand nutrition information for standard menu items. Table-service chain restaurants with printed menus would be required to list calories, saturated fat, sodium, and other nutrition facts for standard menu items. Several other states are considering similar legislation, though none has been enacted. Skeptics argue that such legislation would be unmanageable and unenforceable (Berman 2003). For example, how would a restaurant ensure that each steak served was exactly the same size, or that each baked potato was the same size and topped with exactly the same amount of sour cream? Such legislation might also lead to lawsuits by consumers if they find that the nutritional content of the food served does not precisely match the nutritional information provided.

In addition to regulation requiring fast-food companies to provide more nutritional information, certain parallels between the tobacco litigation and elements of *Pelman v. McDonald’s Corp.* (2003a, b) suggest the possibility of a Federal Trade Commission (FTC) investigation of the fast-food industry based on unfair advertising. The FTC

attempted to regulate tobacco advertising, particularly R.J. Reynolds's "Joe Camel" campaign after evidence suggested that both Camel's brand share of underage smokers and the incidence of new smoking were rapidly increasing (Calfee 2000; Cohen 2000). Similarly, the FTC might argue that children are more vulnerable to aggressive fast-food advertising (Smith and Cooper-Martin 1997) and that such messages will influence lifelong eating habits (American Dietetic Association, Society for Nutrition Education, and American School Food Service Association 2003). However, given that the *Pelman* court rejected the argument that children could not understand the risks of consuming fast food and therefore were more vulnerable to fast-food marketing, it seems unlikely that a federal statutory claim of unfairness would succeed.

In the FTC's (1994) action with respect to the Joe Camel campaign, it explained that "intuition and concern for children's health" are "not a sufficient basis under the law for bringing a case." Although the proper standard for showing that advertisers take advantage of vulnerable consumers is not fully established (see Calfee 2000; Cohen 2000), showing a link between fast-food advertising and an increase in consumption is likely to be at least as difficult as proving a link between the Joe Camel campaign and an increase in smoking. In the case of fast food, that consumers can choose not to consume such products likely prevents FTC regulation of fast food under unfairness principles (Beales 2003). In a recent article, the director of the Bureau of Consumer Protection of the FTC stated that "the concept of reasonable avoidance prevents the FTC from substituting its paternalistic choices for those of informed consumers" and noted that if a product such as fast food is to be regulated, it should be by Congress, not by the FTC (Beales 2003, p. 196).

## Conclusion

Few people would argue that obesity is not a serious public health issue. At the same time, those who try to hold food companies legally liable for the costs associated with obesity have a difficult road ahead. The *Pelman* plaintiffs have been given an opportunity to discover evidence of deception on the part of the food industry; however, the standards set forth by the trial court make it unlikely that the suit, or any subsequent similar suit, will succeed on the merits. Although increased regulation of the industry has been proposed, legislative momentum seems to be moving in the opposite direction, that is, toward protecting the industry. Those who are interested in alleviating the serious and complex issue of obesity might consider how other public health initiatives using approaches such as social marketing could encourage consumers to prevent obesity through lifestyle changes.

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