Private Enforcement: Litigation as a Tool to Prevent Obesity

RICHARD A. DAYNARD, P. TIM HOWARD,
and CARA L. WILKING

IN the absence of meaningful government regulation of the United States food industry, public health advocates are turning to litigation as a means to curb the obesity epidemic. The private right of legal action has played a critical role in protecting United States consumers from harmful products by raising public awareness, increasing self-policing by industry, and ultimately curbing practices harmful to consumers. Asbestos litigation curtailed use of the material and compensated thousands of injured consumers. Tobacco litigation, generally ridiculed in its first four decades, helped turn public opinion against the tobacco industry in the mid-1990s, forcing manufacturers to stop denying the dangers of smoking, to end the use of cartoon characters, and to discontinue certain other unconscionable marketing practices, as well as contribute hundreds of millions of dollars to corrective advertising campaigns. The legal system of the United States provides several approaches to address, expose, and rectify corporate practices that have contributed significantly to the mounting obesity epidemic.

Unlike tobacco, which is harmful when consumed in any quantity, food is necessary for life. But successful tobacco litigation was based not on the dangers of the products but on the misdeeds of the manufacturers. Similarly, cases against food manufacturers are likely to be based on evidence that manufacturers misrepresented nutritional properties of products, took advantage of the credulity of children to sell them high calorie density products that helped launch them on a career of unhealthy eating, marketed addictive high calorie sodas to teenagers in their own school buildings, or otherwise violated consumer protection laws that prohibit “unfair or deceptive acts or practices in commerce.”

BENEFITS OF A LITIGATION APPROACH
TO REDUCING OBESITY

The mere prospect of obesity litigation has already sparked hundreds of media stories about the emerging obesity epidemic and its consequences, bringing these issues to public attention for the first time. Also, food companies have begun to talk about their own contributions to the epidemic and appropriate changes that can be made to their products and promotional policies. Lawsuits under state consumer protection laws prohibiting deceptive claims and unfair marketing practices may end some egregious behavior and discourage much more.

One of litigation's first benefits is access to industry documents through the discovery process.¹ Evidence essential to proving cases of unfair trade practices, negligence, or product liability, will undoubtedly flow from discovery requests made of food manufacturers and retailers, and information obtained through depositions and interrogatories answered under oath. The obligation to respond to discovery requests under court supervision could provide plaintiffs' attorneys and the public with documents related to unfair food industry marketing practices, manipulation of ingredients to maximize sales of minimally nutritious foods, and tactics used to entice school districts to enter into exclusive sugared-drink contracts. At a minimum, litigation and its resulting discovery will lead to more complete public information about what food manufacturers knew and failed to inform the public of concerning their contribution to the obesity epidemic. Judges, jurors, legislators, and regulators may be incensed to discover, for example, that food companies hired developmental psychologists and sponsored focus groups with young children to study their psychological vulnerabilities, or that they knew advertisements for high calorie "low fat" or "low carb" foods would be understood by customers as assuring their usefulness as part of a weight reduction diet.

An increase in industry self-policing is another benefit of litigation. Some food manufacturers and retailers already are responding to public concerns about obesity and their own concerns about litiga-

1. Discovery is a process in which both sides gather every piece of information and possible evidence that could prove relevant to the trial proceedings. This information can include the facts of the case, background information on all relevant parties to the proceedings, and documents that may be important to the case. In discovery proceedings of the major litigation against tobacco companies, internal tobacco company documents were revealed that greatly strengthened the case of the plaintiffs; there is often no other way to get access to such insider information other than discovery.

tion, and have chosen to modify certain business practices. McDonald's, for example, announced plans to eliminate "super-sized" portions of french fries and soft drinks (1). Taking its experience in tobacco product liability litigation to heart, Kraft, an affiliate of Philip Morris, has committed to reducing fat, sugar, and portion sizes. It has even moved to stop marketing snacks in schools (2). Coke has responded to research correlating soft drink consumption and obesity by announcing plans to introduce soft drinks with the same taste, but one-half the sugars (3). This self-regulation is not merely an incidental effect of litigation: consumer protection laws and product liability principles, like almost all law, are primarily designed to discourage the proscribed conduct, with the application of legal sanctions and compensatory damage awards reserved for the occasional instance where the legal standard was violated nonetheless.

APPLICABLE LEGAL PRINCIPLES

Unfair and Deceptive Trade Practices

State and federal consumer protection laws prohibit manufacturers and retailers of food and other products from inducing consumers to purchase products through unfair, deceptive, and misleading trade practices. The Federal Trade Commission Act (FTCA) proscribes unfair and deceptive trade practices, but it can only be invoked by the Federal Trade Commission (4).

State consumer protection laws are largely modeled after the FTCA but, with the exception of one state, provide consumers with a private right of legal action (5). State consumer protection statutes are broadly drafted and deem unlawful such unfair and deceptive trade practices as direct misrepresentation and failure to disclose material information. State consumer protection jurisprudence, however, reflects disparities in the willingness of state courts to enforce consumer protection laws. State statutes, moreover, vary considerably with respect to the requirement that a plaintiff prove intent to deceive and/or induce reliance by consumers on false or misleading statements made (6). Proving intent and reliance can pose a considerable hurdle to prospective plaintiffs. Some states, however, allow for citizen suits that do not require that the unfair, deceptive and misleading acts directly cause injury to the specified plaintiff (7).

An early example of the use of consumer protection laws to counter practices that encourage childhood obesity is the 1983 California

Supreme Court decision *Committee on Children's Television v. General Foods* (8). The plaintiff NGO alleged that advertisements on children's television programs for high-sugar breakfast cereals made by General Foods and other manufacturers were unfair and deceptive because they were designed to make children believe these products would help make them strong and healthy, whereas they were minimally nutritious and tended to cause tooth decay (9). The Court permitted the claim to proceed, rejecting a number of arguments put forth by defendants, including an argument that the complaint was deficient because children and not the ultimate purchasers of the cereal, the children's parents, received the misrepresentations. The court rejected this argument, reasoning that "[defendants] are aware that the parents purchase the cereals, but they are also aware that parents do not exercise a totally independent judgment, but are influenced by the desires of their children. If such were not the case, defendants would not spend millions to advertise cereals on children's programs watched by very few adult purchasers" (10).

The strength of claims brought under *unfair and deceptive acts and practices statutes* is that while plaintiffs must show that the representations and/or omissions made by the defendant in the marketing of the food product was unfair and deceptive, they do not have to show that the consumption of the product caused obesity and its medical consequences. However, finding private counsel willing to take on a consumer protection case may be difficult. The financial losses to each consumer, measured by the money spent on unfairly or deceptively marketed products, are likely small. While consumer protection laws generally allow successful plaintiffs to recover their attorneys' fees, courts are not always sufficiently generous in awarding such fees to provide economic incentives commensurate with the enormous resources necessary to successfully litigate such a claim. Class action claims, which could combine the small financial losses suffered by each of tens or hundreds of thousands of consumers, may prove to be the most effective vehicle to make a case "large" enough to justify a large award in the minds of most judges.

Personal Injury Claims

Personal injury claims may also provide relief to consumers harmed by food products and can be brought either on the theory that there was something wrong with the product or the manufacturer improperly marketed the product (11). In general, for a *product liability* action

to be successful, a plaintiff must prove that: (1) the danger from the food was not apparent to the average consumer; (2) the food was unreasonably dangerous for its intended use; and (3) the harm would not have occurred had an adequate warning about the food been given.

Defining the “average consumer” depends on the age and sophistication of the consumer. Courts may be more receptive to claims brought on behalf of children because they lack the ability to analyze critically advertising claims and promotions directly targeted at them. After all, even sophisticated consumers are hard-pressed to discern the dangers of modern, complex food ingredients found in common fast-food restaurant fare (12), and are surely unlikely to know the calorie content of the foods they buy (13). In order to prove that a food product is “unsafe for its intended use,” a plaintiff must prove a manufacturer knew or should have known that, for example, the average consumer would have consumed it in sufficient quantities to cause harm. The critical “failure to warn” element hinges on proof that the plaintiffs would have avoided the health problems if adequate warnings about the food were given. The burden is on the plaintiffs to prove that they would have avoided the food or consumed less of it had they been properly warned.

The *improper marketing theory*, which can be based either on consumer protection laws or on traditional common law negligence or fraud, requires that the seller deceived the consumer in a material way about the health effects of eating the food, and that this deception caused the consumer to consume the food. If a seller explicitly or implicitly represented, for example, that one could eat a typical McDonald’s meal every day without putting on weight, and a customer reasonably relied on this representation, such a case could be brought. The consumer, however, would have to prove that his reliance on these misrepresentations continued to be reasonable even as he put on weight and his waistline expanded.

Under either a product liability or improper marketing theory, the plaintiff must prove that his obesity and its sequelae were caused by consuming the food in question. This requires the plaintiff to show, at a minimum, that the defendant’s food was a “substantial factor” in causing the obesity, and that the obesity was a “substantial factor” in causing the subsequent medical condition. The latter link can frequently be proven through ordinary etiological evidence—studies in the public health or medical literature. Establishing a causal link between a particular food product and an individual’s weight gain,

while more difficult, may not be impossible. For example, one 12-ounce soft drink daily increases calorie consumption by 180 calories a day. High-fructose corn syrup sweetened drinks fail to trigger satiety, so the consumer does not compensate for the increase in calorie intake by reducing consumption of other foods (14). Added consumption of only fifty calories per day puts on about five pounds of new weight a year (15). While other factors may have contributed to the plaintiff's obesity—sedentary lifestyle, other foods, and genetics—it may be plausible to conclude that soft drink consumption was a substantial factor in the weight gain (16).

A Federal District Court in Manhattan considered the elements of a personal injury claim rooted in negligence in a case brought on behalf of children who allegedly became fat as a result of eating regularly at McDonald's (17). The lawsuit was dismissed in its entirety and *with prejudice*² in part because the plaintiffs failed to allege properly the element of causation. The court found that in light of the numerous factors related to an individual's weight gain, a "[c]omplaint at a minimum must establish that the plaintiffs ate at McDonalds on a sufficient number of occasions such that a question of fact is raised as to whether McDonalds' products played a significant role in the plaintiffs' health problems" (18). Thus, the causation element was a key factor in the failure of the lawsuit.

A successful personal injury case would force a food producer to compensate victims for the harm caused by its products and would create an incentive to develop safer products and to curtail aggressive marketing tactics. Such actions also put into sharp focus for the public and government regulators the actual costs of obesity-related disease and death.

Personal Responsibility of the Plaintiff

Resistance to obesity-related litigation is consistently couched in personal responsibility terms—responsibility for the injury should lie entirely on the afflicted consumer. This argument was frequently used to discredit attempts to hold the tobacco industry responsible for harms to consumers, and, while an initially attractive argument, does not withstand analysis. Various factors mitigate consumers' blameworthi-

2. A suit that is "dismissed with prejudice" is one that has been procedurally removed from the court's consideration in a manner that bars the plaintiff from re-filing the same claims. Dismissal with prejudice is contrasted to a "dismissal" generally, which allows the plaintiff to re-file once the defect in the complaint has been corrected.

ness. Predictable over-consumption on the part of a consumer does not excuse decisions by food marketers to exploit this consumer behavior for their own benefit and to the detriment of consumers' health.

Attributing primary causal responsibility to the individual consumer denies the power of the new food environment—ubiquitous and inexpensive food with little nutritional value. Junk food marketers maintain nothing is wrong with eating these foods. In the United States, government assists in food promotion while limiting food regulation to immediate safety issues. It makes no specific criticisms of particular food items (19). Three earlier papers in this special section—*The Obesity Epidemic in the United States, Regulating the Environment to Reduce Obesity, and Legislation*—discuss the relationship between personal responsibility and the current food environment and suggest what might be done to counter the argument for the culpability of individuals in the obesity epidemic.

DIRECT RESPONSES TO THE THREAT OF LITIGATION: PROPOSED IMMUNITY FOR THE FOOD INDUSTRY

In the United States, widespread media attention to the threat of obesity-related litigation has inspired federal and state *tort reform* legislation that would grant the food industry blanket immunity from obesity-related lawsuits. In the spring of 2004, proposed federal legislation, entitled the “Personal Responsibility in Food Consumption Act,” seeking to grant the food industry immunity from “claims of injury relating to a person’s weight gain, obesity, or any health condition associated with weight gain or obesity” passed the House of Representatives (20). And at least nineteen states have considered or are considering similar legislation (21). Dubbed “cheeseburger bills” by the popular media, state-level legislation would bar lawsuits by consumers alleging harm in the form of obesity and obesity-related illness. Louisiana is the only state that has passed legislation to make restaurants immune from obesity-related lawsuits (22). The governor of Wisconsin vetoed a bill that would limit liability of the food industry, but in other states legislation has been reported to be close to passing (23).

CONCLUSION

Food producers and restaurants argue that obesity-related litigation is inherently frivolous, and that they will be bankrupted from the legal costs of defending against such litigation. Defendants, they cer-

tainly know, can quickly get genuinely frivolous litigation dismissed, and may even obtain their attorneys' fees from the plaintiffs if the lawsuit is found to be frivolous. Plaintiffs' lawyers in the United States, on the other hand, receive compensation only if the cases are settled or won: they have no incentive to bring frivolous cases. There has not been and there will not be a flood of frivolous obesity-related lawsuits. The industry's real fear, rather, is of well-founded lawsuits, amply supported by compromising memos, obtained in discovery from company files that would demonstrate how many food companies engage in unfair or deceptive acts and practices that substantially contribute to the obesity epidemic.

REFERENCES

1. Grimes W. Supersize, We Knew Thee Too Well. *The New York Times*. 2004 March 7;Sect. 4: (col. 2).
2. Barboza D. Kraft Plans to Rethink Some Products to Fight Obesity. *The New York Times*. 2003 July 2;Sect. C:6.
3. Coca-Cola, Co. [homepage on the Internet]. New York: Coca-Cola, Co.; c2003 [updated 2004 May 24; cited 2004 May 26]. Press Release, Coca-Cola Company: Coca-Cola Unveils U.S. Launch Plans for its New Lower-Carb, Lower-Cal Cola, Coca-Cola C2. Available from: http://www2.coca-cola.com/presscenter/nr_20040524_americas_c2_launch.html
4. Unfair methods of competition unlawful; prevention by Commission, 15 U.S.C.A. Sect. 45(a)(2) (2004).
5. The Supreme Court of Iowa has ruled that the state's consumer frauds statute, Iowa Code Sect. 714.16, does not create a private right of action. See: *Molo Oil Co. v. River City Ford Truck Sales*, 578 N.W.2d 222, 228 (Iowa 1998).
6. For an exhaustive discussion of the different intent and reliance standards under state consumer protection statutes see: National Consumer Law Center. *Unfair and Deceptive Acts and Practices*. 5th ed. Boston: NCLC; 2001. p. 42.4.
7. Actions for Relief; Prosecutors, West's Ann.Cal.Bus. & Prof.Code Sect. 17204 (2004). The code allows actions for relief pursuant to the state's consumer protection act "by any person acting for the interests of itself, its members or the general public."
8. *Comm. on Children's Television, Inc. v. General Foods Corp.*, 673 P.2d 660 (Cal. 1983).
9. *Ibid.* at 665.

10. *Ibid.* at 674.
11. Liability Of Commercial Product Seller Or Distributor For Harm Caused By Misrepresentation, Restatement (Third) of Torts Sect. 9 (1998). Also: Liability Of Commercial Seller Or Distributor For Harm Caused By Defective Products, Restatement (Third) of Torts Sect. 1 (1998).
12. For example, a Federal District Court recently referred to McDonald's Chicken McNuggets as "McFrankenstein" creations because they include such ingredients as TBHQ and dimethylpolysiloxane. See *Pelman v. McDonald's Corp.*, 237 F.Supp.2d 512, 535 (S.D.N.Y. 2003).
13. Misbranded Food, 21 U.S.C. Sect. 343(a)(5)(A)(i) (2004). While some restaurants in the United States have voluntarily chosen to make nutritional information available to consumers, food served for immediate consumption in restaurants is not subject to federal nutritional labeling requirements.
14. Bray GA, Nielsen SJ, Popkin BM. Consumption of high-fructose corn syrup in beverages may play a role in the epidemic of obesity. *Am. J. Clin Nutr.* 2004 April;79:537-543.
15. Nestle, M. *Food Politics: How the Food Industry Influences Nutrition and Health*. Berkeley: University of California Press; 2002.
16. James J, Thomas P, Cavan D, Kerr D. Preventing Childhood Obesity by Reducing Consumption of Carbonated Drinks: Cluster randomized controlled trial. *BMJ.* 2004 May 22;328(7450):1237.
17. *Pelman v. McDonald's Corp.*, 237 F.Supp.2d 512 (S.D.N.Y. 2003) (dismissing complaint in its entirety and granting leave to amend); *Pelman ex rel. Pelman v. McDonald's Corp.*, 2003 WL 22052778 (S.D.N.Y. Sept. 3, 2003) (dismissing amended complaint with prejudice).
18. *Pelman*, 237 F.Supp.2d at 538-539.
19. Nestle M. *Food Politics: How the Food Industry Influences Nutrition and Health*. Berkeley: University of California Press; 2002.
20. Personal Responsibility in Food Consumption Act, H.R. 339, 108th Cong., 2nd Sess. (2004).
21. Tort reform bills focused on obesity-related claims have been introduced in California, Colorado, Florida, Georgia, Idaho, Illinois, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, New Hampshire, Ohio, Rhode Island, South Dakota, Tennessee, Utah, Washington and Wisconsin. See: Obesity Policy Report [homepage on the Internet]. Washington, DC: OPR; c2004 [cited 2004 July 14]. State Legislation Tracker [several pages]. Available from: www.obesitypolicy.com
22. Limitation of liability for damages from long-term consumption of food and nonalcoholic beverages, LSA.-R.S. 9:2799.6 (2004). The statute prohibits lawsuits "for personal injury or wrongful death based on an individual's consumption of food or nonalcoholic beverages in cases where

liability is premised upon the individual's weight gain, obesity, or a health condition related to weight gain or obesity and resulting from his long-term consumption of a food or nonalcoholic beverage."

23. WIS S.B. 289, 2003 Leg., 96th Sess. (vetoed by Gov. Jim Doyle on March 17, 2004).

SUMMARY

Private enforcement, or litigation, has played a historic role in protecting public health in the United States. Litigation is often employed as a means to protect public health when government regulation is absent or ineffectual. Litigation has been successfully employed to control both asbestos and tobacco and is poised for success in combating the obesity epidemic. Litigation is effective because it makes public industry practices and increases industry self-policing. Litigation related to obesity would likely employ theories of "unfair and deceptive trade practice" or general "personal injury" or tort claims. While opponents to the use of litigation often cite personal responsibility and the individual as the true locus of liability, these arguments fail to take into account the context of an individual's choice. While litigation can be effective, media attention and current political discourse on "tort reform" has engendered a set of legislative actions that would foreclose litigation as a public health strategy.