

**FROM BUTTS TO BIG MACS—CAN THE BIG  
TOBACCO LITIGATION AND NATION-WIDE  
SETTLEMENT WITH STATES’ ATTORNEYS  
GENERAL SERVE AS A MODEL FOR ATTACKING  
THE FAST FOOD INDUSTRY?**

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INTRODUCTION

In 1998, after decades of litigation, the major tobacco companies<sup>1</sup> negotiated a settlement reimbursing the Medicare expenses that forty-six states incurred to treat citizens suffering from the adverse effects of smoking.<sup>2</sup> This settlement, as well as its preceding litigation, introduced a new method through which unpopular industries could be persuaded, if not forced, to change their business practices as well as garner impressive fees for attorneys. Robert Reich, former Secretary of Labor under President Clinton, best termed this new era of attacking unpopular industries as “regulation through litigation.”<sup>3</sup> That is, the plaintiffs’ bar, perhaps

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<sup>1</sup> Hereinafter referred to as “Big Tobacco,” a common phrase for the major tobacco companies. These include American Brands, Inc.; R.J. Reynolds Tobacco Company; Brown & Williamson Tobacco Corporation; B&W, Inc.; Philip Morris Companies, Inc.; Lorillard Tobacco Company, Inc.; Loews Corporation; United States Tobacco Company; and Liggett Group, Inc. See *infra* Part I.

<sup>2</sup> See *A New Tobacco Deal*, N.Y. TIMES, Nov. 22, 1998, § 4, at 2 (stating that 46 states settled with tobacco companies for \$206 billion). For purposes of this Comment, adverse effects include lung cancer, throat cancer, mouth cancer, emphysema, and heart disease. Mississippi, Florida, Texas, and Minnesota reached their own respective settlements. W. Kip Viscusi, *Tobacco: Regulations and Taxation Through Litigation*, in REGULATION THROUGH LITIGATION 46 (W. Kip Viscusi ed., 2002). The tobacco industry settled with Mississippi for \$3.5 billion, Texas for \$15.3 billion, Florida for \$11.3 billion, and Minnesota for \$6.6 billion. *Id.* For complete details of each state settlement, see <http://www.stic.neu.edu> (last visited Mar. 10, 2004).

<sup>3</sup> Robert Reich, *Regulation is Out, Litigation is In*, USA TODAY, Feb. 11, 1999, at 15A. W. Kip Viscusi questions this approach. See Viscusi, *supra* note 2, at 23. In his view, taxation, rather than litigation, would bring about a more appropriate and efficient reform. See *id.* at 30. The difficulty, however, is that such a tax would be regressive and may reduce demand. *Id.* Under Viscusi’s economic analysis of

motivated by the profitability of settlement, targets industries such as asbestos manufacturers,<sup>4</sup> Big Tobacco,<sup>5</sup> HMOs,<sup>6</sup> lead paint manufacturers,<sup>7</sup> and gun manufacturers<sup>8</sup> through litigation to compensate consumers and end harmful business practices and production. Because of the massive amount of attorney's fees available in these lawsuits, plaintiffs' attorneys have become the new "watch dogs" for the American consumer.<sup>9</sup> Fast food companies<sup>10</sup> are the latest targets of plaintiffs' attorneys who hope to change the industry's practices of food preparation, marketing, and packaging of products. In addition, they also may hope to garner impressive fees that will equip them with the necessary resources to wage war against other industries.

On July 23, 2002, Caesar Barber<sup>11</sup> filed a class action suit against the nation's major fast food companies, McDonald's Corporation, Burger King Corporation, KFC Corporation, and Wendy's International Corporation, alleging their foods were responsible for

tobacco regulation, such a reduction in demand would be counterproductive. *Id.*

<sup>4</sup> See, e.g., *Amechem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

<sup>5</sup> See *infra* Part I.

<sup>6</sup> See, e.g., *In re Managed Care Litig.*, 150 F. Supp. 2d 1330 (S.D. Fla. 2001).

<sup>7</sup> See, e.g., *Brenner v. Am. Cyanimid Co.*, 699 N.Y.S.2d 848 (App. Div. 1999).

<sup>8</sup> See, e.g., *Hamilton v. Accu-tek*, 935 F. Supp. 1307 (E.D.N.Y. 1996).

<sup>9</sup> Joseph Nocera, *First, Who's Running This Country, Anyway? We, the Lawyers*, *FORTUNE*, Nov. 8, 1999, at 38-39. Not only have lawyers attacked the fast food industry, the film industry is launching its own attack. Morgan Spurlock produced, directed, and starred in a documentary about the effects of eating fast food. *SUPER SIZE ME* (Morgan Spurlock and The Con 2004). In the film, Spurlock eats exclusively at McDonald's for one month and documents the health effects he suffered. See <http://www.supersizeme.com/home.aspx?page=aboutmovie> (last visited Mar. 5, 2004).

<sup>10</sup> For purposes of this Comment, "fast food companies" include the McDonald's Corporation, Burger King Corporation, KFC Corporation, d/b/a Kentucky Fried Chicken, and Wendy's International Corporation. These are the parties named in the pending class action lawsuit filed in the Bronx, NY. For a complete copy of the Barber's complaint [hereinafter Barber Compl.], see <http://banzhaf.net/docs/nyccomp.html> (last visited Mar. 5, 2004).

<sup>11</sup> Mr. Barber is a resident of the Bronx in his late fifties suffering from various health conditions he claims resulted from his steady diet of foods marketed by the fast food industry. See *supra* note 10. He claims he did not realize that fast food products were unhealthy. Barber Compl. at ¶ 41. Recent contacts with attorney Samuel Hirsch revealed that he ceased pursuing the Barber class action, awaiting a ruling on a class action he filed against the fast food giants on behalf of obese children. E-mail from Samuel Hirsch, Managing Partner, Samuel Hirsch and Associates, to John Zefutie, J.D. Candidate, Seton Hall University Law School (Jan. 16, 2003, 13:29 EST) (on file with author). That subsequent action was dismissed. See *Pelman v. McDonald's Corp.*, No. CIV 02-7821, 2003 WL 22052778 (S.D.N.Y. Sept. 3, 2003) [hereinafter *Pelman II*]. Nonetheless, his complaint serves as a model for the type of claims plaintiffs' attorneys will bring against fast food companies both now and in the future. See *supra* note 10.

his related health problems.<sup>12</sup> This suit was one of two class actions filed in New York against these companies; the other class action was dismissed in January of 2003.<sup>13</sup> In *Pelman v. McDonald's Corp.*,<sup>14</sup> a class of obese teenagers brought suit against these same defendants alleging, *inter alia*, that defendants' failure to warn consumers of its food content contributed to their obesity and subsequent health problems.<sup>15</sup> Although the court held that the facts alleged in the complaint did not adequately specify a cause of action,<sup>16</sup> the court granted plaintiff's motion to amend.<sup>17</sup> The district court reasoned, "one necessary element of any potentially viable claim must be that McDonalds' products involve a danger that is not within the common knowledge of consumers"; an element the original complaint failed to specify.<sup>18</sup>

Mr. Barber suffers from a variety of health problems including high blood pressure and heart disease, which obesity may cause.<sup>19</sup> Relying on a recent study released by the United States Surgeon General, Mr. Barber alleged the fast food industry's business practices contribute to the increasing overweight/obesity epidemic in the United States.<sup>20</sup> He claimed he was not aware that fast food products were unhealthy,<sup>21</sup> and alleged negligent food preparation, failure to warn of the adverse health effects<sup>22</sup> of eating fast food, failure to post

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<sup>12</sup> Barber Compl., *supra* note 10, at ¶ 1.

<sup>13</sup> See *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003) [hereinafter *Pelman I*]. On January 22, 2003, Federal District Judge Robert Sweet for the District of New York dismissed the class action filed on behalf of all obese children. *Id.* He did not, however, dismiss the case as frivolous. *Id.* Rather, the judge stated that the arguments plaintiffs allege would be more compelling if they were explored in greater depth. *Id.* at 543. He allowed plaintiffs thirty days to amend their complaint to establish that the dangers of fast food were not commonly known, thus giving rise to a duty to warn on the part of McDonald's. *Id.* (citing *Foman v. Davis*, 371 U.S. 178 (1962)). Shortly after, on February 19, 2003, plaintiffs filed an amended complaint. *Pelman II*, 2003 WL 22052778, at \*1; see also *infra* Part II E. The court, after analyzing plaintiffs' allegations under the New York Consumer Fraud Statute, granted McDonald's Corporation's motion to dismiss. *Pelman II*, 2003 WL 22052778, at \*15 (citing N.Y. GEN. BUS. LAW §§ 349, 350 (Consol. 1999)).

<sup>14</sup> 237 F. Supp. 2d 512 (S.D.N.Y. 2003).

<sup>15</sup> See *id.*

<sup>16</sup> *Id.* at 543.

<sup>17</sup> *Id.*; see also FED. R. CIV. P. 15(a) (requiring that "leave [to amend] shall be freely given when justice so requires").

<sup>18</sup> *Pelman I*, 237 F. Supp. 2d at 518.

<sup>19</sup> Barber Compl., *supra* note 10, at 17 (citing U.S. DEP'T. OF HEALTH & HUMAN SERV. THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY (2001)).

<sup>20</sup> *Id.* ¶ 3.

<sup>21</sup> Barber Compl., *supra* note 10, at ¶ 41.

<sup>22</sup> Adverse health effects in the fast food context include coronary heart disease,

nutritional facts, and violation of New York's Consumer Protection Act.<sup>23</sup> The complaint further contended that the defendant fast food companies were responsible for his medical problems, as well as his ignorance that fast food is an unhealthy product.<sup>24</sup>

Legal and media commentators alike analogize this suit to Big Tobacco litigation and state attorney general settlement.<sup>25</sup> It is evident that this suit was inspired, in part, by the success of the Big Tobacco litigation and settlement, but the question still remains: Will the litigation tactics used in suits against Big Tobacco serve as an instructive model for fast food litigation? This Comment explores that question and proposes that while there are some similarities between fast food and Big Tobacco claims, essential elements that brought Big Tobacco to the negotiating table are missing.

Part I outlines the development of the Big Tobacco litigation, as well as the nation-wide settlement between Big Tobacco and states' attorneys general. Part II discusses the fast food industry and how its practices could potentially give rise to a cause of action within the tort litigation context. It also summarizes the current "obesity epidemic" and how the fast food industry may or may not have contributed to that epidemic. Part III offers suggestions as to how those bringing actions against the fast food industry can learn from the Big Tobacco settlement.

Fast food litigation is looking to compensate individuals for alleged unfair practices by the fast food industry. Plaintiffs, however, face formidable obstacles.<sup>26</sup> First, plaintiffs' attorneys seeking to attack the fast food industry on the bases of negligence or failure to warn will have difficulty in establishing causation. Second, neither

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type 2 diabetes, high blood pressure, gallbladder disease, and elevated cholesterol levels. See *id.* at ¶ 3; see also Aviva Must et al., *The Disease Burden Associated With Overweight and Obesity*, 282 JAMA 1523 (1999).

<sup>23</sup> Barber Compl., *supra* note 10, ¶ 35-56.

<sup>24</sup> *Id.* ¶ 1.

<sup>25</sup> See, e.g., Anthony J. Sebok, *The "Big Fat" Class Action Lawsuit Against Fast Food Companies: Is It More Than Just A Stunt?*, at <http://writ.news.findlaw.com/sebok/200220814.html>. (2002) (on file with author); see also Cindi Ross, *Warning: Super-Size Fries Make You Fat, Suing Over It Makes You A Jerk*, THE STATE, Aug. 13, 2002.

<sup>26</sup> In fact, the United States House of Representatives just recently passed the "Cheeseburger Bill," a law barring lawsuits brought against fast food companies. Liza Porteus & Brian Wilson, *House Passes 'Cheeseburger Bill'* (Mar. 10, 2004), at <http://www.foxnews.com/story/0,2933,113836,00.html>. The bill is officially entitled the "Personal Responsibility in Food Consumption Act." *Id.* The law prohibits actions by consumers who eat great quantities of fast food. *Id.* The bill does not, however, prohibit suits rooted in theories of mislabeling or tainting food products. *Id.* For a complete copy of the proposed bill, see <http://thomas.loc.gov/cgi-bin/query/D?c108:2:./temp/~c108ZmMMWv:> (last visited Mar. 10, 2004).

the scientific community, nor plaintiffs' attorneys, have offered conclusive evidence that fast food is addictive, that the industry manipulated any supposed addictive qualities, that the industry knew of the food's addictive qualities, and that the industry subsequently misled consumers regarding that fact. If such evidence existed, plaintiffs' attorneys would have a considerable advantage. Absent fraud, however, their task is quite difficult. Third, plaintiffs' attorneys do not, as of yet, have the assistance of states' attorneys general.

PART I—LITIGATION AND SETTLEMENT: A DISCUSSION OF  
THE BIG TOBACCO LITIGATION AND ATTORNEY GENERAL  
SETTLEMENT

A. *The First and Second Waves*

Scholars categorize the Big Tobacco litigation into three waves.<sup>27</sup> The "First Wave" occurred between the years of 1954 and 1973.<sup>28</sup> During this period, plaintiffs' attorneys brought suit under theories of negligence, breach of express and implied warranty, and deceit.<sup>29</sup> The litigation in this era followed the lung cancer scare in the early 1950s when scientists first released laboratory research linking smoking to cancer in mice.<sup>30</sup> The problem facing attorneys, however, was causation. During the First Wave, technology was obsolete, and, thus, plaintiffs could not establish any correlation between smoking and cancer in humans.<sup>31</sup> The tobacco companies adopted and clung to the "constitutional hypothesis" offered by biologist Clarence Cook Little.<sup>32</sup> Little argued that many factors contributed to cancer, and no one cause, especially smoking, could bear the blame.<sup>33</sup> Specifically, he argued that a damaged or defective gene was the most likely cause of cancer.<sup>34</sup>

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<sup>27</sup> See Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 88 STAN. L. REV. 853 (1992); Peter Pringle, *The Chronicles of Tobacco: An Account of the Forces that Brought the Tobacco Industry to the Negotiating Table*, 25 WM. MITCHELL L. REV. 387 (1999); Bryce A. Jensen, *From Tobacco to Healthcare and Beyond—A Critique of Lawsuits Targeting Unpopular Industries*, 86 CORNELL L. REV. 1334 (2001).

<sup>28</sup> Pringle, *supra* note 27, at 389.

<sup>29</sup> Graham E. Kelder & Richard A. Daynar, *The Role of Litigation in the Effective Control of the Sales and Use of Tobacco*, 8 STAN. L. & POL'Y REV. 63, 71 (1997).

<sup>30</sup> Pringle, *supra* note 27, at 389.

<sup>31</sup> *Id.*

<sup>32</sup> PETER PRINGLE, CORNERED, BIG TOBACCO AT THE BAR OF JUSTICE 114 (1998).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*; see also STANTON A. GLANTZ ET AL., THE CIGARETTE PAPERS 350 (1996). Sir Ronald Fisher developed the constitutional hypothesis. *Id.* He argued as well that certain people were pre-disposed to developing lung cancer. *Id.*

Courts were forced to dismiss most, if not all, of the claims filed in the 1950s, 60s, and 70s because of lack of scientific evidence.<sup>35</sup> Plaintiffs' attorneys were able to overcome this hurdle in the "Second Wave" of tobacco litigation.<sup>36</sup> Between 1983 and 1992, smokers were able to establish a causal link between smoking and lung cancer.<sup>37</sup> In addition, plaintiffs' attorneys were offering new theories of liability such as strict liability, "overpromotion," and breach of express warranty.<sup>38</sup> Big Tobacco, however, was able to ward off attacks by embracing an assumption of risk defense.<sup>39</sup> According to the tobacco industry, plaintiffs knew of the dangers of smoking when they consumed cigarettes because they had been adequately warned, pursuant to statutory mandate.<sup>40</sup> In 1965, Congress passed the Federal Cigarette Labeling and Advertising Act,<sup>41</sup> which specified in great detail the appropriate phrasing of warnings,<sup>42</sup> requirements for outdoor billboards,<sup>43</sup> and appropriate size fonts of each warning.<sup>44</sup>

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<sup>35</sup> See, e.g., *Green v. Am. Tobacco Co.*, 409 F.2d 1166 (5th Cir. 1969); *Hudson v. R.J. Reynolds Tobacco Co.*, 427 F.2d 541 (5th Cir. 1970); *Lartigue v. R. J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir. 1963); *Scott v. Herson*, 278 N.E.2d 259 (Ill. App. Ct. 1971); see also *Pringle*, see *supra* note 27, at 389.

<sup>36</sup> *Pringle*, see *supra* note 27, at 389.

<sup>37</sup> *Id.*

<sup>38</sup> Marc Z. Edell, *Cigarette Litigation: The Second Wave*, 22 TORT & INS. L.J. 90, 93-96 (1986).

<sup>39</sup> See, e.g., *Pennington v. Visitron Corp.*, 876 F.2d 414 (5th Cir. 1989) (holding that a wife of a cigarette smoker was not entitled to recover under a failure to warn theory absent a causal connection); *Gilboy v. Am. Tobacco Co.*, 572 So. 2d 289 (La. Ct. App. 1990) (holding that plaintiffs could not recover for illness allegedly caused by cigarettes due to widespread knowledge of the detrimental effects of smoking); *Brisboy v. Fibreboard Corp.*, 418 N.W.2d 650 (Mich. 1988) (holding that the risk of developing cancer fell within the risk assumed by a smoker); *Dewey v. Brown & Williamson Tobacco Corp.*, 542 A.2d 919 (N.J. Super. Ct. App. Div. 1988) (holding, *inter alia*, that plaintiff's claim for failure to warn was preempted by the Federal Cigarette Labeling and Advertising Act); see also *Pringle*, *supra* note 27, at 389; *Davenport v. Cotton Hope Plantation Horizontal Prop. Regime*, 508 S.E.2d 565 (S.C. 1998) (stating the elements of assumption of risk: "(1) the plaintiff must have knowledge of the facts constituting a dangerous condition; (2) the plaintiff must know the condition is dangerous; (3) the plaintiff must appreciate the nature and extent of the danger; and (4) the plaintiff must voluntarily expose himself to the danger. . . ." (emphasis added)).

<sup>40</sup> See *PRINGLE*, *supra* note 32, at 114.

<sup>41</sup> 15 U.S.C. § 1333 (2000).

<sup>42</sup> § 1333(a)(1). This section provides for four different warnings. *Id.* These warnings are preceded by the phrase, "Surgeon General's Warning." *Id.* The warnings prescribed are as follows: "Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy; Quitting Smoking Now Greatly Reduces Serious Risks to Your Health; Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight; Cigarette Smoke Contains Carbon Monoxide." *Id.*

<sup>43</sup> § 1333(a)(3). This section provides that similar warnings described in *supra*

Armed with the statute, Big Tobacco repeatedly won cases asserting that the smoker knew that the habit was dangerous and voluntarily chose to smoke knowing the risks.<sup>45</sup>

*B. Class Action Certification and de-Certification: Barnes, Castano, and the “Sons of Castano”*

Since lawsuits in the “Second Wave” failed to bring about any significant change in the manufacturing, marketing, and sale of cigarettes, plaintiffs’ attorneys made use of the class action in an attempt to shift the jury’s focus from the guilty plaintiff to a commonality of harm imposed by Big Tobacco’s products – namely cigarettes.<sup>46</sup> The first of these cases was *Castano v. American Tobacco Co.*<sup>47</sup> Plaintiffs brought their class action in the United States District Court for the Eastern District of Louisiana.<sup>48</sup> The class included “all nicotine dependent persons in the United States, its territories and possessions and the Commonwealth of Puerto Rico who have purchased and smoked cigarettes manufactured by the tobacco companies,”<sup>49</sup> which included approximately 40 million claimants.<sup>50</sup>

In *Castano*, the district court found that the requirements of Rule 23(a) of the Federal Rules of Civil Procedure were satisfied.<sup>51</sup>

note 42 apply to outdoor billboards. *Id.*

<sup>44</sup> Section 1333(b)(1) reads:

The phrase ‘Surgeon General’s Warning’ shall appear in capital letters and the size of all other letters in the label shall be the same as the size of such letters as of October 12, 1984. All the letters in the label shall appear in conspicuous and legible type in the contrast by typography, layout, or color with all other printed material on the package.

*Id.*

<sup>45</sup> See *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir. 1963); *Ross v. Philip Morris & Co., Ltd.*, 328 F.2d 3 (8th Cir. 1964); *Dewey v. R. J. Reynolds Tobacco Co.*, 577 A.2d 1239 (N.J. 1990); see also Pringle, *supra* note 27, at 392.

<sup>46</sup> Richard L. Antogini, *New U.S. Tort Litigation: To Go Warily Where No One Has Gone Before: Courts Now Are Being Used by Plaintiff’s Counsel to Change Industry-Wide Practices, To Enforce Self-Regulation and to Extract Large Punitive Damages Awards*, 67 DEF. COUNS. J. 454, 459 (2000).

<sup>47</sup> 160 F.R.D. 544 (E.D. La. 1995), *rev’d*, 84 F.3d 734 (5th Cir. 1996).

<sup>48</sup> *Castano*, 160 F.R.D. at 544.

<sup>49</sup> *Id.* at 549.

<sup>50</sup> *Id.* at 550; see also Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DEPAUL L. REV. 331, 333 (2001). Rabin also argues that this certification fit nicely with the plaintiffs’ claim that tobacco executives engaged in a pattern of conduct that concealed nicotine’s addictive quality. *Id.*

<sup>51</sup> *Castano*, 160 F.R.D. at 550-51; see also FED. R. CIV. P. 23(a) (stating in relevant part that one can sue on behalf of others if: the class is so numerous making joinder of all of the members impracticable, there are common questions of law or fact to the class, the claims and/or defenses of the class representative are typical of those of the entire class, and “the representative parties will fairly and adequately protect” the class’

Though the court denied plaintiff's motion for class certification based on Rule 23(b)(2),<sup>52</sup> it granted certification based on Rule 23(b)(3),<sup>53</sup> finding that common issues of law and fact predominated the class. The district court held that the various state consumer protection statutes did not differ significantly as to preclude class certification.<sup>54</sup>

On appeal, the Fifth Circuit overturned the district court's holding.<sup>55</sup> It held that the lower court erred in two ways in granting class certification.<sup>56</sup> First, the district court did not consider variations in state consumer protection laws that could affect the predominance requirement.<sup>57</sup> Second, the lower court's "predominance inquiry did not include consideration of how a trial on the merits would be conducted."<sup>58</sup> Furthermore, the court of appeals held that class certification would have placed an undue burden on the tobacco companies because certification would lead to a flood of "unmeritorious claims."<sup>59</sup>

In *Barnes v. American Tobacco Co.*,<sup>60</sup> the Third Circuit Court of Appeals overturned another class action on similar grounds. The court found that "addiction, causation, the defenses of comparative and contributory negligence, the need for medical monitoring and the statute of limitations present too many individual issues to permit certification."<sup>61</sup> The court placed particular emphasis on the issue of addiction.<sup>62</sup> It reasoned that addiction was the main component of causation in these sorts of class actions: "[a]ddiction remains an

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interest) (emphasis added).

<sup>52</sup> *Castano*, 160 F.R.D. at 551-52; see also FED. R. CIV. P. 23(b)(2) (allowing a certification for a class that requests only equitable relief). The plaintiffs in *Castano*, however, requested legal relief as well. *Id.*

<sup>53</sup> *Castano*, 160 F.R.D. at 554-56; see also FED. R. CIV. P. 23(b)(3) (stating in relevant part that the court should grant class certification if it finds "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy").

<sup>54</sup> *Castano*, 160 F.R.D. at 554.

<sup>55</sup> *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

<sup>56</sup> *Id.* at 740.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 746 (citing *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 165 (2d Cir. 1987)). The court reasoned: "In the context of mass tort class actions, certification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims." *Id.*

<sup>60</sup> 161 F.3d 127 (3d Cir. 1998).

<sup>61</sup> *Id.* at 143.

<sup>62</sup> *Id.* at 144.

essential part of plaintiff's claim. In order to prevail on their medical monitoring claim—under any of their three theories of liability (negligence, strict products liability and intentional exposure to a hazardous substance)—plaintiffs must demonstrate defendants *caused* their exposure to tobacco.”<sup>63</sup>

*Barnes* is indicative of how courts struck down class actions filed in federal court. It was the *Castano* decision, however, that caused the plaintiffs' bar to refocus their efforts in state court.<sup>64</sup> Its strategy was to flood local state courts with class actions wherein the class members were state residents who were suffering from the adverse effects of smoking.<sup>65</sup> Massachusetts Congressman Martin Meehan termed these cases as the “sons of *Castano*.”<sup>66</sup> Since many of these claims are in the midst of litigation or have been dismissed, it is difficult to assess whether this was an effective strategy.

One case, however, suggested that this was a sound plan of attack. In *Engle v. R.J. Reynolds*,<sup>67</sup> a Florida superior court judge granted class certification.<sup>68</sup> After the court affirmed certification, the jury found that Big Tobacco engaged in deceptive conduct, that a causal relation existed between smoking and the diseases the class suffered, and that punitive damages were appropriate.<sup>69</sup> The jury then awarded \$12.7 million in compensatory damages and \$144.8 billion in punitive damages.<sup>70</sup> The Florida Appellate Court, however, overturned this award in *Liggett Group, Inc. v. Engle*.<sup>71</sup>

In *Liggett*, the court held, first, that the smokers' claims were too “uniquely individualized” to satisfy the predominance and superiority

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<sup>63</sup> *Id.*

<sup>64</sup> See Pringle, *supra* note 27, at 395.

<sup>65</sup> *Id.*

<sup>66</sup> Anthony Flint, *Court Derails Class-Action Tobacco Suit*, BOSTON GLOBE, May 24, 1996 at 1. See, e.g., *State v. Am. Tobacco Co.*, 772 So. 2d 417 (Ala. 2000); *Daniels v. Philip Morris Co., Inc.*, 18 F. Supp. 2d 110 (S.D. Cal. 1998); *Connecticut v. Philip Morris, Inc.*, No. X02 CV 960148414S, 1998 WL 800274 (Conn. Super. Ct. Oct. 27, 1998); *People v. Philip Morris, Inc.*, 759 N.E.2d 906 (Ill. 2001); *State ex rel. Miller v. R.J. Reynolds Tobacco Co.*, 577 N.W.2d 401 (Iowa 1998); *Scott v. Am. Tobacco Co.*, 725 So. 2d 10 (La. Ct. App. 1998); *State v. Philip Morris, Inc.*, No. 96122017, CL211487, 1997 WL 540913 (Md. Ct. Spec. App. May 21, 1997); *Massachusetts v. Philip Morris, Inc.*, No. 957378J, 1998 WL 1181992 (Mass. Super. Mar. 20, 1998); *Ren v. Philip Morris, Inc.*, No. 00-004035-CZ, 2002 WL 1839983 (Mich. Cir. Ct. June 11, 2002); *Walls v. Am. Tobacco Co.*, 11 P.3d 626 (Okla. 2000).

<sup>67</sup> 2000 WL 33534572 (Fla. Dist. Ct. App. Nov. 6, 2000), *rev'd*, *Liggett Group, Inc. v. Engle*, 853 So. 2d 434 (Fla. Dist. Ct. App. 2003).

<sup>68</sup> *Engle*, 2000 WL 3353472, at \*31.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> 853 So. 2d 434 (Fla. Dist. Ct. App. 2003).

requirements the Florida class action rule requires.<sup>72</sup> Second, the court took issue with the lower court's award of class-wide punitive damages before making any finding as to liability of or among the defendants.<sup>73</sup> Such an approach, the court reasoned, violated Florida law in that there was no method of determining whether there was a rational relationship between the liability imposed and the punitive damages awarded.<sup>74</sup> Also, the punitive damages award was so excessive that it violated both federal and state law and would bankrupt the defendants.<sup>75</sup> Finally, the court held that the attorney general's settlement with Big Tobacco barred any claims brought by these plaintiffs.<sup>76</sup>

The failure of *Castano* and the general ineffectiveness of the "sons of *Castano*" compelled plaintiffs' attorneys and other anti-smoking interest groups to develop a new strategy to regulate tobacco through the courtroom—thus, the "Third Wave."

### C. *The Third Wave—Attorneys General Join the Fray*

The "Third Wave" ushered in a new theory of recovery. In a new tactic, state attorneys general brought suit on behalf of the states to recover Medicare costs incurred to treat individuals suffering from tobacco-related illnesses.<sup>77</sup> Michael Moore, Attorney General for Mississippi, was the creator of this strategy.<sup>78</sup> The idea was to treat Big Tobacco like any other enterprise that hurts consumers through its

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<sup>72</sup> *Id.* at 444 (citing FL. CT. C.P.R. 1.220). According to the court, allowing certification of a class with significant individual issues would be unjust and unmanageable. *Id.* at 445. Furthermore, the court required "each claimant . . . to prove that his or her illness not only was caused by the smoking, but was also proximately caused by defendants' alleged misconduct." *Id.* at 446.

<sup>73</sup> *Id.* at 450. This "cart before the horse" award of punitive damages violated well-established Florida law, which requires that the defendant "be found liable before any punishment is imposed." *Id.* at 451 (citing *Ault v. Lohr*, 598 So. 2d 454, 457 (Fla. 1989) (Ehrlich, C.J., concurring)).

<sup>74</sup> *Liggett*, 853 So. 2d at 451 (citations omitted). "Without this prior assessment it is impossible to determine whether punitive damages bear a 'reasonable' relationship to the actual harm inflicted on the plaintiff . . ." *Id.*

<sup>75</sup> *Id.* at 456 (citing *Arab Termite & Pest Control of Florida, Inc. v. Jenkins*, 409 So. 2d 1039, 1043 (Fla. 1982); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001)).

<sup>76</sup> *Liggett*, 853 So. 2d at 467. The court stated that "Florida settled and released its claims in 1997, by entering into the Florida Settlement Agreement . . . which resolved with finality all of Florida's claims, 'including those for punitive damages.'" *Id.* at 467-68; *see also supra* note 2.

<sup>77</sup> *See* cases cited *infra* note 83.

<sup>78</sup> *See* Henry Weinstein, *Tobacco Industry Target of Taxpayer Suits Smoking: Litigants in 2 Massive Cases Want Federal Government Reimbursed for Health Care Costs*, L.A. TIMES, Oct. 17, 1997, at D3.

products.<sup>79</sup> In essence, the attorneys general attacked Big Tobacco as if they were companies who used asbestos or dumped toxic waste, forcing them to clean up the mess.<sup>80</sup> This proved advantageous for two reasons. First, Big Tobacco was no longer an insurmountable defendant when faced with the resources of the state.<sup>81</sup> Second, the states were viewed as innocent third parties; thus, Big Tobacco could not effectively use the assumption of risk defense.<sup>82</sup> The attorneys general of Minnesota, Florida, and West Virginia soon followed Mississippi's lead and filed suit in their respective state courts.<sup>83</sup>

One important component of the "Third Wave" was that the suit was not a section 402A<sup>84</sup> products liability claim.<sup>85</sup> The parties involved were the state and the tobacco manufacturers, rather than the consumers and tobacco manufacturers.<sup>86</sup> Another crucial factor of the Third Wave is that attorneys general hired plaintiffs' attorneys to bring suits on behalf of the states.<sup>87</sup> As such, the plaintiffs' bar began to pool their resources and coordinate their efforts. Scholars argue that the combination of state-forged Medicare recovery actions and the centralization of plaintiffs' attorneys' resources shifted the

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<sup>79</sup> PRINGLE, *supra* note 32, at 7.

<sup>80</sup> *Id.*

<sup>81</sup> Howard M. Erichson, *The End of the Defendant Advantage in the Tobacco Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 123, 132 (2001).

<sup>82</sup> *Id.*; *see also supra* note 39.

<sup>83</sup> *See* Florida v. Am. Tobacco Co., No. CIV-95-1446 (Fla. 15th Jud. Cir. 1995); Am. Tobacco Co. v. State, 697 So. 2d 1246 (Fla. Dist. Ct. App. 1997); Group Health Plan, Inc. v. Philip Morris Inc., et al., 621 N.W.2d 2 (Minn. 2001); State v. Philip Morris Inc., 551 N.W.2d 490 (Minn. 1996); Ludke v. Philip Morris Co., Inc., No. MC 00-1954, 2001 WL 1673791 (Minn. Dist. Ct. Nov. 21, 2001); McGraw v. Am. Tobacco Co., No. 94-C-1707, 1995 WL 569618 (W. Va. Cir. Ct. June 6, 1995); *see also* PRINGLE, *supra* note 32, at 7 (1998); Viscusi, *supra* note 2, at 42.

<sup>84</sup> RESTATEMENT (SECOND) OF TORTS § 402A (1965). Section 402A provides in pertinent part:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule of subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

*Id.*

<sup>85</sup> Panel Discussion, *The Tobacco Industry Settlement: Practical Implications and the Future of Tort Law*, 67 MISS. L.J. 847, 870 (1998).

<sup>86</sup> *Id.* at 870.

<sup>87</sup> Erichson, *supra* note 81, at 130.

balance of power from Big Tobacco, and its seemingly unlimited resources, to plaintiffs—both states and smokers.<sup>88</sup>

Two other important factors in the Third Wave were issues of causation. First, the courts recognized the link between smoking and risks to one's health in the 1990s. Specifically, attorneys in the Third Wave relied heavily on the 1962 Surgeon General's Report that smoking was indeed related to lung cancer in both men and women.<sup>89</sup> This report, however, failed to establish a causal link between smoking and chronic bronchitis/emphysema.<sup>90</sup> Second, economic effects of smoking began to make themselves apparent in the Third Wave. Plaintiffs' attorneys, on behalf of the state, emphasized that smoking cost the nation approximately \$100 billion dollars per year—\$50 billion in doctors fees, drugs, hospital bills, etc., and \$50 billion in lost working hours and income taxes.<sup>91</sup> The Third Wave proved to be the key to regulating Big Tobacco and its practices. The intervention of state attorneys general and the assistance of the plaintiffs' bar led to discovery of key documents and inside information integral to Big Tobacco's defeat.

#### D. *Fraud and Settlement*

Generally, the attorneys general in the Third Wave hoped to use the courtroom as a forum to expose the tobacco industry's business practices and the detrimental effects of smoking. In other words, though people chose to smoke, they did not know of the harmful effects of cigarettes or the addictive quality of nicotine.<sup>92</sup> The existence of fraud<sup>93</sup> on the part of Big Tobacco, however, was the key factor in the settlement between tobacco companies and the forty-six states.<sup>94</sup> Attorneys general and the plaintiffs' bar were able to

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<sup>88</sup> *Id.* at 131.

<sup>89</sup> PRINGLE, *supra* note 32, at 135-36 (citing the 1962 Surgeon General's Report). The report states in relevant part: "Cigarette smoking is causally related to lung cancer in men; the magnitude and effect of cigarette smoking far outweighs all other factors. The data for women, though less extensive, points in the same direction." *Id.*

<sup>90</sup> *Id.* at 135-36 (citing the 1962 Surgeon General's Report).

<sup>91</sup> See David Greising & Linda Himmelstein, *Does Tobacco Pay Its Way?*, BUS. WK., Feb. 19, 1996.

<sup>92</sup> Panel Discussion, *supra* note 85, at 870.

<sup>93</sup> See *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985) (stating elements of common law fraud: "(1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to rely on it; and (4) consequent injury by the party acting in reliance on the representation").

<sup>94</sup> Mississippi, Minnesota, Florida, and West Virginia were not part of the settlement since they filed and settled separate actions on behalf of the citizens in

establish fraud through two principal actions of Big Tobacco – namely whistle-blowers and attorney-client privilege.<sup>95</sup>

Whistle-blowers are a relatively new phenomenon in mass tort litigation.<sup>96</sup> They have proved especially useful in litigation targeting an unpopular industry. In the 1960s and 1970s, for example, whistle-blowers were instrumental in cases involving chemical dumping, asbestos diseases, and unsafe drugs.<sup>97</sup> Like the “muckrakers” of the industrial revolution, whistle-blowers were often labeled as “left wing trouble-makers.”<sup>98</sup> Merrell Williams was the first of such whistle-blowers in the tobacco litigation.<sup>99</sup> He served as a paralegal for the law firm representing Brown and Williamson.<sup>100</sup> During his time there, he had photocopied hundreds, if not thousands, of documents showing that Brown and Williamson knew of the addictive qualities of tobacco.<sup>101</sup> Williams’ activity proved to be problematic for Big Tobacco for two reasons.

First, because attorneys general could now prove nicotine was addictive, their allegations of fraud became stronger.<sup>102</sup> Furthermore, seven tobacco CEOs testified before a congressional committee formed to investigate the detrimental health effects of smoking, claiming they did not believe nicotine was addictive.<sup>103</sup> Their testimony made Big Tobacco’s position even less credible. Second, because the documents demonstrated nicotine’s addictiveness, Big Tobacco could no longer assert that smokers voluntarily “chose” to smoke.<sup>104</sup>

Furthermore, Williams provided attorneys general and the plaintiffs’ bar with documentation showing that attorneys took part in many of Big Tobacco’s cover-ups.<sup>105</sup> With each document Williams provided, the charge of fraud resounded with even more resonance.

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their respective states. *See supra* note 2.

<sup>95</sup> PRINGLE, *supra* note 32, at 57.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 60.

<sup>101</sup> CARRICK MOLLENKAPM ET AL., THE PEOPLE V. BIG TOBACCO: HOW THE STATES TOOK ON THE CIGARETTE GIANTS 38 (1998). Williams also provided memoranda requesting scientific documents be filtered through Brown and Williamson’s attorneys so as to give them appearance of being prepared in anticipation of litigation. *Id.* at 132.

<sup>102</sup> PRINGLE, *supra* note 32, at 60.

<sup>103</sup> *Id.* at 78-81.

<sup>104</sup> *Id.* at 68.

<sup>105</sup> *Id.*

Big Tobacco's lawyers had set up a secret fund "enabling them to sponsor, and monitor, tobacco research that would be especially useful in defending liability suits. They also suggested ways that scientific reports could be censored to remove facts embarrassing to the industry."<sup>106</sup> Attorneys for Big Tobacco also took the time to label "sensitive research documents" as privileged or work product in an attempt to shield them from public release.<sup>107</sup>

Jeffrey Wigand was another key whistle-blower.<sup>108</sup> Known as the ultimate insider, Wigand, head of Research and Development for Brown and Williamson, breached his confidentiality agreement with the company and disclosed that Big Tobacco was aware of the addictive quality of nicotine.<sup>109</sup> Because the company was aware of its product's effect on smokers, they manipulated nicotine levels to keep their "customers" coming back.<sup>110</sup> In other words, Brown and Williamson, as well as the other Big Tobacco giants, knew of the health risks of smoking and took affirmative steps to keep smokers hooked.<sup>111</sup> Wigand demonstrated that:

[a] large number of chemicals end up in cigarette tobacco besides the ones that come naturally in the tobacco plant. They include not only the residue of pesticides and insecticides, but also compounds added as flavorings in the factory. Still more are produced by the burning of tobacco.<sup>112</sup>

The final whistle-blower was Bennett LeBow, a Big Tobacco CEO.<sup>113</sup> As part of a settlement with the attorneys general and the plaintiffs' bar, LeBow, CEO of the Liggett Group, admitted that he knew nicotine was addictive and that the other companies also knew as much.<sup>114</sup> LeBow was the first CEO to admit that he and Big Tobacco knew nicotine was addictive and caused cancer.<sup>115</sup> This effectively brought an end to Big Tobacco's defense that it was not aware of nicotine's addictive quality. LeBow was willing to negotiate a

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<sup>106</sup> *Id.* at 60.

<sup>107</sup> *Id.* at 154; *see also supra* note 101.

<sup>108</sup> PRINGLE, *supra* note 32, at 178. Touchstone Pictures presented a feature film about Jeffrey Wigand and the CBS 60 Minutes presentation of the information he had about Brown and Williamson's fraud. *See THE INSIDER* (Touchstone Pictures 1998).

<sup>109</sup> PRINGLE, *see supra* note 32, at 179.

<sup>110</sup> *See id.* at 182.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 181.

<sup>113</sup> *Id.* at 227.

<sup>114</sup> Glen Collins, *Tobacco's Broken Line; A Dealer's Boldest Play May Reshape the Game*, N.Y. TIMES, Mar. 14, 1996, at A1.

<sup>115</sup> PRINGLE, *supra* note 32, at 229.

settlement between the plaintiffs' bar (namely the attorneys involved with *Castano*) and his company, the Liggett Group.<sup>116</sup> The settlement itself, however, never reached fruition because its terms required certification of the *Castano* class action. Nevertheless, plaintiffs and the attorneys general obtained a sworn statement from a Big Tobacco CEO affirming that the industry knew nicotine was addictive, and that it used that information to its advantage.

Because the evidence of fraud was indisputable, settlement became the tobacco industry's most attractive option. In February of 1998, the industry settled for a total amount of \$368.5 billion:

\$10 billion in the first year, of which \$7 billion would go to the states and \$3 billion to the federal Department of Health and Human Services to fund a smoking cessation campaign, enforce a ban of sales to minors, and set up a compensation fund for smokers who win court cases. Thereafter the industry would pay \$8.5 billion rising to \$15 billion annually in perpetuity.<sup>117</sup>

The \$368.5 billion would suffice for the first twenty-five years of the settlement.<sup>118</sup> Finally, the industry settled attorneys' fees at approximately \$8 billion.<sup>119</sup> This settlement sent a message not only to Big Tobacco, but also to other unpopular industries. Litigation proved to be an effective tool to regulate companies that caused direct and indirect harm to the American populace. In addition, the monetary rewards that accompanied settlement encouraged plaintiffs' attorneys to initiate similar actions against other industries. One of the overarching questions the Big Tobacco battle left open was: Who was next?

## PART II—FAST FOOD: THE NEXT STEP?

### A. *The Complaint*

Against the backdrop of the Big Tobacco litigation and the state settlement, fast food has become the next target of the plaintiffs' bar. In his complaint, Caesar Barber named popular fast food chains such as McDonald's, Burger King, Wendy's, and KFC as defendants.<sup>120</sup> Perhaps borrowing from the claims brought against Big Tobacco, Barber alleged that the fast food industry's business practices led to

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<sup>116</sup> *Id.* at 228.

<sup>117</sup> For a complete copy of the Master Settlement Agreement ("MSA"), see <http://stic.neu.edu/settlement/6-20-settle.htm>.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Barber Compl., *supra* note 10, at ¶ 1.

his health problems, which, in turn, had direct and indirect negative socio-economic effects.<sup>121</sup> Direct effects included “healthcare costs for preventive, diagnostic, and treatment services related to obesity.”<sup>122</sup> Indirect effects included “the value of wages lost by individuals who are unable to work because of illness or disability, as well as the value of earnings lost by premature death.”<sup>123</sup> Barber’s focus on these socio-economic effects is significant because he was most likely attempting to gain the attention of states’ attorneys general. If plaintiffs are able to show an effective link between high fat, salt, and cholesterol content in fast food and the costs of health care, that connection could encourage states’ attorneys general to initiate suits against fast food companies.

Barber has brought this lawsuit as a class action.<sup>124</sup> As such, he was hoping to sue on behalf of all Americans suffering from the adverse health effects allegedly caused by consuming fast food. The common issues raised in the complaint were whether the defendants’ products caused, exacerbated, or induced overweight, obesity, and other health effects, whether the defendants knew of these harmful effects, and whether the defendants adequately warned consumers.<sup>125</sup> In addition to stating that the requirements for a class action were satisfied,<sup>126</sup> Barber alleged that millions of Americans would be affected by this lawsuit, thus making joinder<sup>127</sup> impracticable.<sup>128</sup> The use of the class action in this context is significant not only because it joins parties who share common issues, but also because it is a vehicle to bring about settlement quickly, offering global resolution.<sup>129</sup> As such, the class action has become, and was utilized as, another weapon in the arsenal of the plaintiffs’ bar.

Barber brought several causes of action in his complaint. First, he alleged that the defendants’ agents, servants, and/or employees “negligently, recklessly, carelessly and/or intentionally engaged in distribution, ownership, retail, manufacture, sale, marketing and/or

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<sup>121</sup> *Id.* at ¶ 23.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at ¶ 25-34; *see also supra* notes 51-53.

<sup>125</sup> Barber Compl., *supra* note 10, at ¶ 28.

<sup>126</sup> *See supra* notes 51-53.

<sup>127</sup> “Joinder” refers to multiple plaintiffs suing together if their asserted claims arise “out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.” FED R. CIV. P. 20(a).

<sup>128</sup> Barber Compl., *supra* note 10, at ¶ 26.

<sup>129</sup> *See* Erichson, *supra* note 81 (citing Richard A. Nagareda, *Punitive Damage Class Actions and the Baseline of Tort*, 36 WAKE FOREST L. REV. 943, 944 (2001)).

production of food products that are high in fat, salt, sugar and cholesterol.”<sup>130</sup> Barber also tailored an action under a failure to warn theory.<sup>131</sup> In his complaint, he asserted that “the defendants”<sup>132</sup> failed to warn and/or adequately warn the users and consumers of the aforesaid food products of the quantity and levels of fat, salt, sugar, and cholesterol content . . . .”<sup>133</sup> The third cause of action alleged the fast food industry’s failure to post nutritional facts.<sup>134</sup> Barber claimed the defendants<sup>135</sup> failed “to label and/or adequately label, represent, warn or properly account to the users and consumers of nutritional values, including but not limited to, the quantities and qualities of fat, salt, sugar and cholesterol content, of their respective food products.”<sup>136</sup> Finally, Barber alleged a violation of New York’s Consumer Fraud Statute.<sup>137</sup> The pleading stated:

defendants engaged in unfair and deceptive acts and practices, in violation of the consumer fraud statutes and provisions of the New York Consumer Fraud Act by failing to adequately disclose the health effects of ingestion of certain respective food products with high levels of fat salt, sugar, and cholesterol content, which have or can be shown to cause obesity, diabetes, coronary heart disease, high blood pressure, elevated cholesterol intake, related cancers, and/or other detrimental and adverse health effects.<sup>138</sup>

Barber sought compensatory damages, injunctive relief requiring defendants to label their products, funding of an educational program for children, and attorney’s fees and costs.<sup>139</sup>

*B. Intentional/Negligent Preparation?*

Fast food has become a common staple of American culture.<sup>140</sup>

<sup>130</sup> Barber Compl., *supra* note 10, at ¶ 36.

<sup>131</sup> *Id.* at ¶ 40.

<sup>132</sup> *See supra* note 10.

<sup>133</sup> Barber Compl., *supra* note 10, at ¶ 40.

<sup>134</sup> *Id.* at ¶ 49.

<sup>135</sup> *See supra* note 10.

<sup>136</sup> Barber Compl., *supra* note 10, at ¶ 49.

<sup>137</sup> N.Y. GEN. BUS. LAW §§ 349, 350 (Consol. 1999).

<sup>138</sup> Barber Compl., *supra* note 10, at ¶ 54 (internal citations omitted).

<sup>139</sup> *Id.* at ¶ 57.

<sup>140</sup> *See* ERIC SCHLOSSER, FAST FOOD NATION 70 (2002). Americans spend approximately \$110 billion on fast food. *Id.* at 3.

The McDonald’s Corporation has become a powerful symbol of America’s service economy, which is now responsible for 90 percent of the country’s new jobs. In 1968, McDonald’s operated about one thousand restaurants. Today it has about thirty thousand restaurants worldwide and opens almost two thousand . . . each year. An estimated one of every eight workers in the United States has at some point been

The crux of any claim for negligence or intentional tort resides in the fast food industry's policies of food preparation. Many fast food companies have established a "zero training" policy to reduce the cost of training employees.<sup>141</sup> In effect, this policy is intended to simplify the equipment and processes used in food preparation.<sup>142</sup> It also allows employees of a fast food restaurant little latitude to abuse or commit error in the food preparation process.<sup>143</sup> Such a policy could benefit plaintiffs' attorneys. First, it would show that fast food executives want to maintain a certain level of control over the operations of its franchises. Second, the court may view a "zero training" policy as a breach of "reasonable care" in any negligence action for obesity, and the adverse health effects that stem from obesity, or for simply inadequately training employees.<sup>144</sup>

The fast food industry has also engaged in several practices that courts could deem intentional. The Chicken McNugget is one of the most popular products marketed by the McDonald's corporation.<sup>145</sup> Introduced to the market in 1983, the McNugget proved to be a success among American consumers.<sup>146</sup> Harvard researchers, however, uncovered that the Chicken McNugget was more "beef extract" than chicken.<sup>147</sup> Shortly after this study, McDonald's altered

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employed by McDonald's. The company annually hires about one million people, more than any other American organization, public or private. McDonald's is the nation's largest purchaser of beef, pork, potatoes – and the second largest purchaser of chickens.

*Id.* at 4.

<sup>141</sup> *Id.* at 72. Burger King Corporation, the McDonald's Corporation, and Tricon Global Restaurants (owner of Taco Bell, Pizza Hut, and KFC) implemented this policy. *Id.* at 71-72.

<sup>142</sup> *Id.* "The management no longer depends upon the talents or skills of its workers—those things are built into the operating system and machines." *Id.* at 70.

<sup>143</sup> *Id.* at 72.

<sup>144</sup> See *Brown v. Kendall*, 60 Mass. (1 Cush.) 292, 296 (1850). "In general, it [reasonable care] means that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger." *Id.* Courts recognize causes of action for negligent hiring and supervision of employees. See *Miller v. Wal-Mart Stores, Inc.*, 580 N.W.2d 233, 261 (Wis. 1998) (stating that there is a duty to properly hire, train, and supervise employees); see also *M.L. v. Magnuson*, 531 N.W.2d 849 (Minn. Ct. App. 1995); *Castillo v. Gared, Inc.*, 1 S.W.3d 781 (Tex. Ct. App. 1999).

<sup>145</sup> SCHLOSSER, *supra* note 140, at 139-40.

<sup>146</sup> *Id.* at 140.

<sup>147</sup> *Id.*

A chemical analysis of McNuggets by a researcher at Harvard Medical School found that their "fatty acid profile" more closely resembled beef than poultry. They were cooked in beef tallow, like McDonald's fries. The chain soon switched to vegetable oil, adding "beef extract" to McNuggets during the manufacturing process in order to retain their

its preparation formula for the McNugget, and replaced the “beef extract” with vegetable oil.<sup>148</sup> This change was intentional so as to reduce the product’s level of fat content.<sup>149</sup> In addition to the chicken, a Chicken McNugget is comprised of:

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). 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 is set in vegetable shortening. Cooked in partially hydrogenated vegetable oil, (may contain partially hydrogenated soybean oils 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 added as an anti-foaming agent.<sup>150</sup>

In other words, the “old” Chicken McNugget contains levels of saturated fat and chemical additives most consumers would not expect to find in a “chicken” nugget. Plaintiff’s attorneys view such a process of food preparation as overly processed to the point of being dangerous to one’s health.<sup>151</sup>

Similarly, almost all Americans are aware of the familiar sales pitch, “Would you like to super-size that?” What many consumers may not realize is that they are consuming approximately 50% more calories by super-sizing their meal.<sup>152</sup> In essence, the fast food

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familiar taste. Today Chicken McNuggets are wildly popular among young children – and contain twice as much fat per ounce as a hamburger.

*Id.*

<sup>148</sup> *Id.*; see also *infra* note 246. Indeed, McDonald’s has launched new advertising campaigns promoting its “new all white meat nuggets.” Associated Press, *McDonald’s to Introduce All White-Meat Nuggets* (Oct. 8, 2003), available at <http://dailybeacon.utk.edu/article.php/11995>. These new and improved nuggets, however, still contain 250 calories and 15 grams of fat in every six-piece serving. Nicci Micco, *The New Fast Food: Health or Hype?* SELF, Mar. 2004, at 146. This is only a slight departure from McDonald’s old McNugget, which contained 310 calories and 20 grams of fat. *Id.*

<sup>149</sup> See *infra* note 246.

<sup>150</sup> *Pelman I*, 237 F. Supp. 2d at 535 (citing McDonald’s ingredient list).

<sup>151</sup> *Id.*

<sup>152</sup> See Maggie Fox, *Jumbo-Sized Junk Food*, June 18, 2002, at <http://www.cbsnews.com/stories/2002/06/18/health/main512649.shtml>. “It costs

industry is encouraging its customers to consume more calories by offering them at a cheaper price.<sup>153</sup>

In addition to the direct acts of both fast food executives and local franchises, the meat packing industry may share some of the blame for the spread of diseases related to consuming processed meat.<sup>154</sup> This industry efficiently supplies McDonald's and other fast food enterprises with most, if not all, of its ground beef.<sup>155</sup> Researchers, specifically the Centers for Disease Control and Prevention, estimate that more than three-quarters of food-related diseases originate in the food processing/meatpacking process.<sup>156</sup> Furthermore, through effective lobbying to Congress, the meatpacking industry has managed to avoid the same liability posed on other manufacturers of consumer products.<sup>157</sup> Thus, "[t]oday the U.S. government can demand the nationwide recall of defective softball bats, sneakers, stuffed animals, and foam-rubber toy cows. But it cannot order a meatpacking company to remove contaminated, potentially lethal ground beef from fast food kitchens and supermarket shelves."<sup>158</sup>

These facts offer several alternatives for plaintiffs' attorneys. First, they can make a separate claim against the meatpacking industry for its practices. However, the strong lobbying in which the meatpacking industry engages is a significant problem. Second, they could argue that a causal link exists between the practices of the meatpacking industry and the fast food industry's policy of buying its meat mainly from these manufacturers. This argument, however, gives rise to various legal principles of agency that are beyond the

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eight cents more to purchase McDonald's Quarter Pounder with Cheese, small French fries and a small Coke (890 calories) separately than to buy the Quarter Pounder with Cheese large Extra Value Meal, which comes with a large fries and a large Coke (1,380 calories)." *Id.*

<sup>153</sup> *Id.* McDonald's, however, has now decided to suspend its super size policy. Associated Press, *Say Goodbye To Those Super-Size Fries – McDonald's Is Slimming Down Its Menu*, available at <http://www.foxnews.com/story/0,2933,113105,00.htm>. (Mar. 2, 2004) (on file with author). McDonald's spokesperson, Walt Riker, said that the company will no longer super-size its meal choices come the end of 2004. *Id.* While health and a well-balanced diet are concerns, the main reason for this change, according to Riker, is to simplify the menu for both consumers and workers. *Id.* Richard Adams, an independent franchising consultant also says this policy will help improve McDonald's service and increase work crew efficiency. *Id.*; see also *supra* notes 141-43.

<sup>154</sup> SCHLOSSER, *supra* note 140, at 196.

<sup>155</sup> *Id.* at 196.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

scope of this Comment. Furthermore, if the meatpacking industry can avoid liability, it is unlikely that plaintiffs' attorneys would find victory against the fast food industry.

*C. Failure to Warn?*

Barber's cause of action for failure to warn takes its cue from legislation passed in 1965 regarding the placement of warning labels on cigarette packages.<sup>159</sup> A failure to warn claim is rooted in traditional negligence principles.<sup>160</sup> The Restatement (Third) of Torts: Products Liability states that a product is defective "because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or distributor."<sup>161</sup> Thus, the overarching question is whether Barber and/or other potential plaintiffs could have avoided the potential health risks that fast food may or may not have caused. As explained below, this is a weak argument.

Several facts illustrate that the fast food industry should be required to place nutritional facts on their products. For example, most, if not all, consumers do not realize what a typical strawberry milkshake contains.<sup>162</sup> A Burger King strawberry shake contains the following:

amyl acetate, amyl butyrate, amyl valerate, anethol, anisyl formate, benzyl acetate, benzyl isobutyrate, butyric acid, cinnamyl isobutyrate, cinnamyl valerate, cognac essential oil, diacetyl, dipropyl ketone, ethyl acetate, ethyl amylketone, ethyl butyrate, ethyl cinnamate, ethyl heptanoate, ethyl heptylate, ethyl lactate, ethyl methylphenylglycidate, ethyl nitrate, ethyl propionate, ethyl valerate, heliotropin, hydroxyphenyl-2-butanone (10 percent solution in alcohol), . . . isobutyl anthranilate, isobutyl butyrate, lemon essential oil, maltol, 4-methylacetophenone, methyl anthranilate, methyl benzoate, methyl cinnamate, methyl heptine carbonate, methyl naphthyl ketone, methyl salicylate, mint essential oil, neroli essential oil, nerolin, neryl isobutyrate, orris butter, phenethyl alcohol, rose, rum ether, •-undecalactone, vanillin, and solvent.<sup>163</sup>

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<sup>159</sup> See *supra* notes 41-44 and accompanying text.

<sup>160</sup> Joachim Zekoll, *Liability for Defective Products and Services*, 50 AM. J. COMP. L. 121, 124 (2002).

<sup>161</sup> RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).

<sup>162</sup> See SCHLOSSER, *supra* note 140, at 125-26.

<sup>163</sup> *Id.* (citing FENAROLI'S HANDBOOK OF FLAVOR INGREDIENTS 831 (George A. Burdock, Ph.D. ed., 4th ed. 2001)).

While consumers may realize they are consuming a fattening food product, they may not be aware that a “shake” contains a high amount of unpronounceable additives and chemicals. Additionally, the McDonald’s Corporation has refused to disclose the ingredients of its French fries.<sup>164</sup> “The McDonald’s Corporation will not reveal the exact origin of the natural flavor added to its French fries. In response to inquiries from *Vegetarian Journal*, however, McDonald’s did acknowledge that its fries derive some of their characteristic flavor from ‘animal products.’”<sup>165</sup>

Barber and other potential plaintiffs will face two hurdles when suing fast food companies under a failure to warn theory. First, the Food and Drug Administration generally “does not require flavor companies to disclose the ingredients of their additives, so long as all the chemicals are considered by the agency to be GRAS (generally regarded as safe).”<sup>166</sup> Thus, flavor companies, such as those that include additives in many of the fast food industry’s products, are able to maintain a certain level of secrecy.<sup>167</sup> In order to overcome this obstacle, plaintiffs’ attorneys must allege that any warnings the fast food industry may post regarding its products are inadequate.<sup>168</sup> That is, these warnings fail to notify consumers of the dangers of consuming fast food.

The second hurdle is not as formidable as it may seem. The Federal Nutritional Labeling and Education Act<sup>169</sup> specifically exempts restaurants from posting food contents.<sup>170</sup> According to federal law, the following should be posted on food meant for human consumption: “total fat, saturated fat, cholesterol, sodium, total carbohydrates, complex carbohydrates, sugars, dietary fiber, and total protein contained in each serving size or other unit of measure . . .

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<sup>164</sup> SCHLOSSER, *supra* note 140, at 128.

<sup>165</sup> *Id.*; see also *infra* note 246.

<sup>166</sup> SCHLOSSER, *supra* note 140, at 125.

<sup>167</sup> *Id.*

<sup>168</sup> See *Edwards v. Basel Pharmaceuticals*, 933 P.2d 298 (Okla. 1997). The court held in pertinent part that:

[T]he manufacturer’s duty to warn the consumer is not necessarily satisfied by compliance with FDA minimum warning requirements. The required warnings must not be misleading, and must be adequate to explain to the user the possible dangers associated with the product. Whether that duty has been satisfied is governed by the common law of the state, not the regulations of the FDA. . . .

*Id.* at 303; see also *Hubbard-Hall Chem. Co. v. Silverman*, 340 F.2d 402, 405 (1st Cir. 1965) (holding that since farm laborers are of limited education, mere compliance with Department of Agriculture regulations was not enough to avoid liability).

<sup>169</sup> 21 U.S.C. § 343 (2000).

<sup>170</sup> § 343(q).

.<sup>171</sup> Restaurants, however, are specifically exempted from this statutory requirement.<sup>172</sup> This statute specifically states that “[s]ubparagraphs (1), (2), (3), and (4) shall not apply to food (i) which is served in *restaurants* or other establishments in which food is served for *immediate human consumption* or which is sold for *sale or use in such establishments . . .*.”<sup>173</sup> At least one court, however, has reasoned that a pre-emption defense is unavailing if plaintiffs seek relief under New York’s Consumer Fraud Statute.<sup>174</sup> That court held that “[s]ubsection 4 of the pre-emptive provision specifically permits states to require nutrition labeling of food that is exempt under subclause (i) or (ii) of 21 U.S.C. § 343 (q) (5) (A).”<sup>175</sup>

*D. Pelman v. McDonald’s Corp. (Pelman II)*

Indeed, in *Pelman II*, the class action brought on behalf of obese children, plaintiffs, in their amended complaint, plaintiffs sought relief under the New York Consumer Protection Act.<sup>176</sup> The complaint involved three counts. First, plaintiffs alleged that McDonald’s violated New York’s Consumer Protection Act through misleading “advertising campaigns,” citing advertisements proclaiming McDonald’s foods were of “a beneficial nutritional nature.”<sup>177</sup> Second, they alleged that McDonald’s failed to adequately disclose that certain food products were less healthy than its publicity campaigns represented.<sup>178</sup> Third, plaintiffs claimed that McDonald’s violated the Consumer Protection Act by “representing to the New York Attorney General and to New York consumers that it provides nutritional brochures and information” regarding the health content of its food, when, in fact it did not.<sup>179</sup>

McDonald’s countered these claims, alleging: (1) the statute of limitations barred actions for alleged misrepresentations; (2) plaintiffs failed to allege they actually observed those misrepresentations; (3) plaintiffs did not prove the alleged misrepresentations caused plaintiffs’ injury; and (4) the alleged misrepresentations were either non-deceptive or puffery.<sup>180</sup>

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<sup>171</sup> § 343(q)(1)(D).

<sup>172</sup> § 343 (q) (5) (A) (i).

<sup>173</sup> *Id.* (emphasis added).

<sup>174</sup> *Pelman I*, 237 F. Supp. 2d at 526 (citing § 343-1(a)(4)).

<sup>175</sup> *Id.*

<sup>176</sup> *Pelman II*, 2003 WL 22052778, at \*2.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at \*4.

First, the court held that as a result of a 1980 settlement with the New York Attorney General, the statute of limitations barred any claim that McDonald's advertising campaigns were never removed.<sup>181</sup> Plaintiffs argued that McDonald's admitted through trial testimony in the United Kingdom that it never ceased that campaign.<sup>182</sup> David Green, Vice-President of Marketing for McDonald's, testified that following the attorney general's investigation and settlement, McDonald's "continued the campaign for not only a number of months but for a few years."<sup>183</sup> The court held, however, that his "use of the past tense that the campaign had ended by 1994, [was] well outside of the statute of limitations period for a complaint filed in 2002."<sup>184</sup> Furthermore, the court rejected plaintiffs' argument that the statute of limitations was tolled under either the "continuing violations doctrine"<sup>185</sup> or a "special accrual rule."<sup>186</sup> It held, however, that the statute of limitations had not run for infant plaintiffs.<sup>187</sup>

Next, the court held that the infants did not successfully state a claim under New York's Consumer Protection Act.<sup>188</sup> Plaintiffs cited the Supreme Court of California in *Committee on Children's Television, Inc. v. General Foods Corp.*,<sup>189</sup> in an attempt to argue that "[a]llegations of actual deception, reasonable reliance and damages are unnecessary."<sup>190</sup> The *Pelman* court rejected this argument stating "[t]hat [the California] decision is based entirely on California . . .

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<sup>181</sup> *Pelman II*, 2003 WL 22052778, at \*4.

<sup>182</sup> *Id.* at \*5.

<sup>183</sup> *Id.* (citing *Pelman II* Am. Compl. ¶ 40 (No. 02 CV 7821)).

<sup>184</sup> *Id.*

<sup>185</sup> *Cornwell v. Robinson*, 23 F.3d 694 (2d Cir. 1994) (stating that "when a plaintiff experiences a 'continuous practice and policy of discrimination, . . . the commencement of the statute of limitations may be delayed until the last discriminatory act in furtherance of it'" (emphasis added)). The *Pelman II* court held that the Second Circuit has "disfavored" such a test, and the test's proper context lies within employment discrimination cases. *Pelman II*, 2003 WL 22052778, at \*5.

<sup>186</sup> *Bingham v. Zolt*, 66 F.3d 553, 559 (2d Cir. 1995) (reasoning that under this rule, "a new claim accrues, triggering a new four-year limitations period, each time a plaintiff discovers, or should have discovered, a new injury caused by the predicate RICO violations"). The *Pelman II* court, however, held that plaintiffs failed to allege any new injuries. *Pelman II*, 2003 WL 22052778, at \* 5. Furthermore, additional injuries that grow from an original injury do not satisfy this test. *Id.*

<sup>187</sup> *Pelman II*, 2003 WL 22052778, at \*6 (stating "McDonald's has made no showing as to why the statute of limitations should not be tolled as to the infant plaintiffs").

<sup>188</sup> *Id.* at \*7.

<sup>189</sup> 673 P.2d 660 (Cal. 1983).

<sup>190</sup> *Pelman II*, 2003 WL 22052778, at \*7 n.4 (citing *Children's Television*, 673 P.2d at 668).

law.<sup>191</sup> The fact that California's consumer protection statutes lack a reliance requirement does not change the settled law in New York.<sup>192</sup> The court held that New York's Consumer Protection Act contains such a requirement, and plaintiffs' "vague allegations of reliance on a 'long-term deceptive campaign' are insufficient to fulfill the reliance requirement of [section] 350 for otherwise unspecified advertisements."<sup>193</sup> Furthermore, plaintiffs failed to demonstrate that McDonald's entire campaign was fraudulent.<sup>194</sup>

Third, the court found that plaintiffs failed to prove causation.<sup>195</sup> Generally, cases brought under the Consumer Protection Act must satisfy a less stringent standard of proximate causation.<sup>196</sup> Though the causation element is essential, *Pelman I* only required that the plaintiffs show *some* injury as a result of the McDonald's advertising campaign.<sup>197</sup> The purported class representatives specified how many times they ate at McDonald's;<sup>198</sup> however, they did not address a host of other relevant factors which may or may not have led to their health problems such as other foods plaintiffs may have consumed, plaintiffs' amount of exercise, and any family history of diseases McDonald's products allegedly caused.<sup>199</sup>

Finally, the court held the advertisements that plaintiffs cited in their pleading were not inherently deceptive.<sup>200</sup> "In order to

<sup>191</sup> *Pelman II*, 2003 WL at 22052778, at \*7 n.3.

<sup>192</sup> N.Y. GEN. BUS. LAW § 350 (Consol. 1999). "[F]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful." *Id.* The statute further defines false advertising as: [A]dvertising, including labeling, which is misleading in a material respect; and in determining whether any advertising is misleading, there shall be taken into account (among other things) not only representations made by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertising fails to reveal facts material in the light of such representations with respect to the commodity to which the advertising relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.

*Id.*

<sup>193</sup> *Pelman II*, 2003 WL 22052778, at \*8 (internal citation omitted).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at \*9.

<sup>196</sup> See generally *Blue Cross & Blue Shield of N.J. v. Philip Morris, Inc.*, 178 F. Supp. 2d 198 (E.D.N.Y. 2001).

<sup>197</sup> *Pelman I*, 237 F. Supp. 2d at 530 (emphasis added).

<sup>198</sup> In their amended complaint, plaintiffs alleged Jazlyn Bradley "consumed McDonald's foods her entire life . . . during school lunch breaks and before and after school, approximately five times per week, ordering two meals per day." *Pelman II*, 2003 WL 22052778, at \*11 (quoting *Pelman II* Am. Compl., ¶ 17).

<sup>199</sup> *Pelman II*, 2003 WL 22052778, at \*11.

<sup>200</sup> *Id.* at \*12.

demonstrate . . . that a practice or advertisement is deceptive or misleading, it must be shown objectively that a reasonable consumer would have been misled by the defendant's conduct."<sup>201</sup> The court felt this test was not satisfied since the advertisements actually contained the relevant saturated fat and cholesterol level of both McDonald's hash browns and Chicken McNuggets.<sup>202</sup>

As such, the court granted McDonald's motion to dismiss while denying plaintiffs' motion to amend a second time.<sup>203</sup> The court reasoned that

[t]here is no indication that granting plaintiffs leave to amend a second time would provide an opportunity to correct the failings in the amended complaint. The plaintiffs have been warned that they must make specific allegations about particular advertisements that could have caused plaintiffs' injuries, and to provide detail on the alleged connection between those injuries and the consumption of McDonald's foods. They have failed to remedy the defects of the initial complaint in the face of those warnings. Granting leave to amend would therefore be futile.<sup>204</sup>

#### E. *The Obesity Epidemic*

Despite the *Pelman II* court's willingness to dismiss the latest lawsuit against the fast food industry, there is no doubt that America is in the midst of an obesity epidemic. In the 1990s, the United States developed a heightened awareness of the growing number of Americans dealing with health problems related to obesity.<sup>205</sup> On average, Americans spend \$238 billion per year on obesity-related health problems.<sup>206</sup> In addition, over 39 million Americans are considered "obese."<sup>207</sup> A person is considered "obese" if his or her body mass index [BMI] is 30.0 or above.<sup>208</sup> In 1999, approximately 61 percent of adults in the United States were obese as well as 13

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<sup>201</sup> *Id.*

<sup>202</sup> *See id.* at \*13 (citing *Pelman II* Am. Compl., at Exhibit G-17).

<sup>203</sup> *Pelman II*, 2003 WL 22052778, at \*14; *see also* FED. R. CIV. P. 15(a), *supra* note 17.

<sup>204</sup> *Pelman II*, 2003 WL 22052778, at \*14.

<sup>205</sup> *See infra* notes 209-10. Since 1991, the prevalence of obesity among U.S. adults has increased 74 percent. Center for Disease Control, *Obesity Trends: 1991-2001 Prevalence of Obesity Among U.S. Adults By State*, available at [www.cdc.gov/nccdphp/dnpa/obesity/trend/prev\\_reg.htm](http://www.cdc.gov/nccdphp/dnpa/obesity/trend/prev_reg.htm) (last visited Mar. 5, 2004) (on file with author).

<sup>206</sup> *New Study Finds Obesity Costs Over \$200 Billion*, PR NEWS WIRE, Sept. 14, 1999.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* "BMI is the ratio of person's weight (in kilograms) to height (in meters squared)." *Id.*

percent of children and adolescents.<sup>209</sup> As such, “[a]pproximately 300,000 deaths a year in this country are currently associated with overweight and obesity. *Left unabated, overweight and obesity may soon cause as much preventable disease and death as cigarette smoking.*”<sup>210</sup>

The above statistics are part of a recent report issued by the Surgeon General, David Satcher. Plaintiffs’ attorneys have used this report to establish that obesity is an epidemic facing the American populace.<sup>211</sup> Furthermore, they hope to show that the federal government and local state governments are spending in excess of \$100 billion combined on the prevention of and care for diseases related to obesity.<sup>212</sup> In response to this increasing epidemic, the Surgeon General recommends nutritional information be made available for foods that are prepared and consumed away from the home.<sup>213</sup> Finally, the Surgeon General places some of the burden of preventing this epidemic on the food industry.<sup>214</sup>

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<sup>209</sup> U.S. DEP’T. OF HEALTH & HUMAN SERV., THE SURGEON GENERAL’S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY XIII (2001).

<sup>210</sup> *Id.* (emphasis added).

<sup>211</sup> See, e.g., Barber Compl., *supra* note 10; see also *supra* note 209, at 10.

In 1995, the total (direct and indirect) costs attributable to obesity amounted to an estimated \$99 billion. In 2000, the total cost attributable to obesity was estimated to be \$117 billion (\$61 billion direct and \$56 billion indirect). Most of the cost associated with obesity is due to type 2 diabetes, coronary heart disease, and hypertension.

*Id.*

<sup>212</sup> See Barber Compl., *supra* note 10, at ¶ 24. A recent study by the Center for Disease Control in Atlanta, GA reveals that individual states’ Medicare and Medicaid costs are increasing.

State-level estimates range from \$87 million (Wyoming) to \$7.7 billion (California). Obesity-attributable Medicare estimates range from \$15 million (Wyoming) to \$1.7 billion (California), and obesity-attributable Medicaid expenditures range from \$23 million (Wyoming) to \$3.5 billion (New York). The state differences in obesity-attributable expenditures are partly driven by the differences in the size of each state’s population.

Center for Disease Control, *Overweight and Obesity: Economic Consequences*, available at [www.cdc.gov/nccdphp/dnpa/obesity/economic\\_consequences.htm](http://www.cdc.gov/nccdphp/dnpa/obesity/economic_consequences.htm) (last visited Mar. 5, 2004) (on file with author). New Jersey, alone, spends over \$1 billion in Medicare and Medicaid to treat diseases associated with obesity. *Id.*

<sup>213</sup> See *supra* note 209, at 16-25.

<sup>214</sup> *Id.* at 28.

Industry has a vital role in the prevention of overweight and obesity. Through the production and distribution of food and other consumer products, industry exerts a tremendous impact on the nutritional quality of the food we eat and the extent of physical activity in which we engage. Industry can use that leverage to create and sustain an environment that encourages individuals to achieve and maintain a healthy or healthier body weight.

PART III—WILL THE TOBACCO LITIGATION AND  
SETTLEMENT SERVE AS A MODEL FOR FAST FOOD  
LITIGATION?

Thus far, the court has given two sets of instructions to plaintiffs' attorneys attacking the fast food industry.<sup>215</sup> In both cases, the court requires more specific evidence of causation and reliance on deceptive advertising.<sup>216</sup> The Big Tobacco litigation and settlement, however, provide other avenues that the plaintiffs may be able to pursue.

The common thread weaving the Big Tobacco settlement with the current fast food litigation is plaintiffs' attorneys using litigation as a way to tame, if not destroy, an unpopular industry as well as garner significant monetary awards for both plaintiffs and themselves. There are, however, significant obstacles. First, although it is well established that high-fat foods contribute to heart disease, hypertension, and diabetes,<sup>217</sup> there is no scientific evidence that fast food itself is addictive.<sup>218</sup> Not only does this serve as a substantial hurdle for Caesar Barber's particular case, but would also almost certainly bar class certification.<sup>219</sup> As the *Barnes* court instructed, establishing addiction for these sorts of class actions is essential for claims based on negligence, product liability, or intentional exposure to a hazardous substance.<sup>220</sup> Furthermore, if the Big Tobacco litigation serves as a model, it demonstrates that plaintiffs in the fast food litigation must show that the industry *caused* their supposed addiction to fast food.<sup>221</sup>

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*Id.*

<sup>215</sup> See generally *Pelman I*, 237 F. Supp. 2d 512; *Pelman II*, 2003 WL 22052778.

<sup>216</sup> *Pelman II*, 2003 WL 22052778, at \*11.

<sup>217</sup> See Must et al., *supra* note 22.

<sup>218</sup> No authoritative study has been released establishing an addictive quality in fast food. *But see* Jeremy Laurance, *Fast Food is Addictive in Same Way as Drugs, Say Scientists*, THE INDEPENDENT, Jan. 30, 2003, (stating a Princeton University scientist fed rats a diet containing 25 percent sugar, and those rats developed withdrawal symptoms) available at <http://www.independent.co.uk/story.jsp?story=373884> (last visited Mar. 5, 2004) (on file with author). However, medical experts are in stark disagreement over this issue. *Id.* In the case of Big Tobacco, the Surgeon General stated that nicotine was addictive. See *supra* notes 90-91.

<sup>219</sup> See *supra* notes 61-65 and accompanying text.

<sup>220</sup> See *Barnes*, 161 F.3d at 143-44.

<sup>221</sup> See *supra* notes 61-65 and accompanying text for a discussion of *Barnes*. Plaintiffs could argue that the court should adopt the reasoning of *Stubbs v. Rochester*, 226 N.Y. 516 (1919). There, the court reasoned:

If two or more possible causes exist, for only one of which a defendant may be liable, and a party injured establishes facts from which it can be said with reasonable certainty that the direct cause of injury was the

Second, any class action must be narrowly tailored to those that frequented fast food establishments. Despite the *Pelman* court's instruction, current class actions include those who could have eaten at such restaurants only once in their lifetime.<sup>222</sup> As seen in the *Barnes*, *Engle*, and *Liggett*, such broad classes have reportedly been decertified.<sup>223</sup>

Finally, there are a host of factors that contribute to obesity.<sup>224</sup> These include foods other than fast food, lack of exercise, and heredity.<sup>225</sup> In addition, plaintiffs attorneys, following the instructions offered in *Pelman II*, should specify these facts in order to prove that, under more relaxed standards of proximate cause under the New York Consumer Protection Act, consuming fast food caused the defendant's health problems.<sup>226</sup>

Since the Big Tobacco settlement, many attorneys general see themselves as bridging the gap between regulatory agencies and consumers.<sup>227</sup> There are several advantages to states' attorneys general leading the charge in an attack on any unpopular industry. First, their involvement softens the corporate defense of assumption of the risk.<sup>228</sup> The states would serve as the innocent third party the fast food industry injured through its actions.<sup>229</sup> Undoubtedly, the adverse health affects have contributed significantly to state Medicare and Medicaid costs.<sup>230</sup> Examining the first complaint filed against the fast food industry, plaintiffs' attorneys may be attempting to recruit states' attorneys general to join the fast food fight.<sup>231</sup> This begs the question: what is the likelihood states attorneys general will join? It is

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one for which the defendant was liable the party has complied with the spirit of the rule.

*Id.* at 526. Obesity, however, has many different sources. *See supra* note 208. In short, the evidence has not developed to support the prevailing argument in *Stubbs*.

<sup>222</sup> *Pelman I*, 237 F. Supp. 2d at 538.

<sup>223</sup> *See Barnes v. Am. Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998); *Engle v. R.J. Reynolds Tobacco*, 2000 WL 33534572 (Fla. Dist. Ct. App. Nov. 6, 2000), *rev'd*, *Liggett Group, Inc. v. Engle*, 853 So. 2d 434 (Fla. 2003).

<sup>224</sup> Aviva Must et al., *The Disease Burden Associated With Overweight and Obesity*, 282 JAMA 1523, 1528-29 (1999).

<sup>225</sup> *Id.* at 1529.

<sup>226</sup> *See Pelman II*, 2003 WL 22052778, at \*11.

<sup>227</sup> Richard L. Cupp, Jr., *State Medical Reimbursement Lawsuits After Tobacco: Is the Domino Effect for Lead Paint Manufacturers and Others Fair Game?*, 27 PEPP. L. REV. 685, 688 (2000).

<sup>228</sup> *Id.* at 689; *see supra* note 39.

<sup>229</sup> Cupp, *State Medical Reimbursement Lawsuits After Tobacco*, 27 PEPP. L. REV. at 689; *see also* Erichson *supra* note 81.

<sup>230</sup> *See supra* note 212.

<sup>231</sup> Barber Compl., *supra* note 10, at ¶ 1.

difficult to speculate the answer to this question. It should be noted, however, that obesity related diseases cost states comparable amounts as diseases related to smoking.<sup>232</sup> Furthermore, the amount of deaths (approximately 400,000) that result from obesity each year is similar to those that result from smoking.<sup>233</sup>

Second, the causation element, which is sorely lacking in the action against fast food companies, is not as strong a barrier.<sup>234</sup> As Professor Cupp explains, “[l]awsuits brought by states rather than individuals may also allow for looser causation rulings, particularly regarding the use of statistical evidence.”<sup>235</sup> The more statistical evidence showing not only state costs incurred as a result of obesity, but the link between fast food and adverse health effects, the greater the possibility the causation requirement will be satisfied. Finally, states attorneys general would facilitate the coordination of resources against the industry.<sup>236</sup> This approach is already underway in lawsuits against other unpopular industries.<sup>237</sup>

Plaintiffs’ attorneys attacking the fast food industry, alone, will meet two inevitable obstacles. First, they must establish causation. The difficulty here is that many factors contribute to heart disease, diabetes, and other diseases that result from obesity.<sup>238</sup> While studies show that there is a clear link between obesity and health risks, the causal link breaks when one is seeking the root of obesity. Studies show that lack of exercise, among other things, is a common factor as to why people become obese.<sup>239</sup>

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<sup>232</sup> See *supra* note 212 and accompanying text. Tobacco related diseases cost states approximately \$100 billion in the early 1990s. Today, diseases related to obesity cost states approximately \$117 billion. *Id.*

<sup>233</sup> Each year, approximately 400,000 Americans die from diseases associated with tobacco use. Robert A. Levy, *Estimating the Numbers of Smoking-Related Deaths*, 284 JAMA 1319 (2000). Approximately 300,000 Americans die each year from diseases related to obesity. See *supra* note 210 and accompanying text.

<sup>234</sup> Cupp, *supra* note 227, at 689.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 690.

Governmental litigation against firearms manufacturers and lead paint producers has already begun. Some of the industries discussed in the media as additional potential post-tobacco targets include alcohol producers, health insurers, prescription drug manufacturers, nursing home operators, sweepstakes distributors, car rental companies, gambling establishments, and fast food restaurants serving fatty foods.

*Id.* (emphasis added).

<sup>238</sup> See *supra* note 209.

<sup>239</sup> *Id.*; see also Must et al., *supra* note 223, at 1529. But see Center for Disease Control, *Obesity and Genetics: What We Know, What We Don’t Know and What it Means*, (indicating that obese individuals have genetic similarities, and individuals with a

Despite the lack of evidence establishing causation, plaintiffs could allege that consuming fast food was a “substantial factor” in causing their obesity. Under the “substantial factor” test, every defendant who is a substantial factor in the alleged harm is treated as a cause in fact.<sup>240</sup> If plaintiffs fail to establish the requisite causation for purposes of various states’ consumer protection statutes, they may have some recourse under this theory. Plaintiffs could argue that, while there are other causes of obesity, (such as hereditary traits, lack of exercise, and other foods) consistent consumption of fast food was a substantial factor in the plaintiffs’ obesity and related health problems; thus, treating one, or all, of the fast food companies as the cause in fact.

The second obstacle attorneys will find is whether the fast food industry committed fraud against consumers. There is scant evidence that suggests fast food companies knowingly and willfully encourage consumers to absorb more calories.<sup>241</sup> None of that evidence, however, rises to the level of fraud committed by the major American tobacco companies.<sup>242</sup> States’ attorneys general may solve these problems by presenting the state as an innocent third party since states’ healthcare costs incurred in treating obesity and its associated health problems are staggering.<sup>243</sup>

In *Pelman I*, the court reasoned that a “necessary element of any potentially viable claim must be that McDonald’s products involve a danger that is not within the common knowledge of the consumers.”<sup>244</sup> However, as noted above, a more important element to any claim against a fast food giant is fraud. Excluding state attorney general involvement, fraud was the crucial element in winning the attack against Big Tobacco.<sup>245</sup> The absence of fraud does

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family history of obesity may be predisposed to gaining weight) *available at* [http://www.cdc.gov/genomics/oldWeb01\\_16\\_04/info/perspectives/files/obesknow.htm](http://www.cdc.gov/genomics/oldWeb01_16_04/info/perspectives/files/obesknow.htm). (last visited Mar. 5, 2004) (on file with author).

<sup>240</sup> Cause in fact “requires the plaintiff to prove that the defendant’s conduct caused legally recognized damages.” DAN B. DOBBS, *THE LAW OF TORTS* § 166 (2001). The substantial factor test has often been explained utilizing the hypothetical of two fires destroying the plaintiff’s property. *See id.* at § 171 (citing *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry.* 179 N.W. 45 (Minn. 1920)). In that hypothetical, if one fire was caused by lightning, and the other by the tortfeasor, the judge could find that the tortfeasor liable for the resulting damages. *Id.*

<sup>241</sup> *See* Fox, *supra* note 152; *see also* Micco, *supra* note 148 (indicating that the new and improved products some fast food companies are offering, are still unhealthy if eaten in large quantities).

<sup>242</sup> *See supra* notes 92-116 and accompanying text.

<sup>243</sup> *See supra* note 212 and accompanying text.

<sup>244</sup> *Pelman I*, 237 F. Supp. 2d at 518.

<sup>245</sup> *See supra* notes 92-119 and accompanying text.

not completely foreclose plaintiffs' odds of emerging victorious in any future battle with fast food. Indeed, science may reveal that fast food is addictive.<sup>246</sup> Furthermore, whistleblowers may come forth and reveal the inside operations of the industry. In light of *Pelman*, however, it seems to be the "theory of last resort" for plaintiffs.

### CONCLUSION

Analyzing the framework the Big Tobacco litigation and attorney general settlement provides, as well as the merits of current claims against fast food, it seems that absent state attorney general involvement and/or allegations of fraud, these suits will be dismissed.<sup>247</sup> First, although there might be some evidence that the fast food industry has injured the public, there still is a need for whistle-blowers to show fraud on the part of the fast food industry.<sup>248</sup> As of yet, no corporate insiders have come forth to reveal what has occurred behind the closed doors of the fast food industry. Such insiders were essential to the success of the Big Tobacco settlement.<sup>249</sup>

Second, the factors that barred class action certification in the tobacco litigation—namely, causation and comparative and contributory negligence—will most likely preclude class certification in the current litigation. Such individualized issues will most likely lead courts either to bar certification, or to de-certify on appeal class actions against fast food companies. In addition, courts will most likely consider whether allowing such class actions would lead to the proverbial flood of unmeritorious claims. Finally, while the Big Tobacco litigation and settlement offer an appropriate and helpful background in analyzing future mass tort claims against unpopular industries, it set forth no new law. There was no court ruling or finality, absent the settlement. "If it changes anything, it's going to make plaintiff's attorneys more willing to take chances and be more innovative in the approaches that they take in lawsuits. But this was a settlement. It did not make any law."<sup>250</sup>

Even if fast food lawsuits are continually dismissed, the litigation

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<sup>246</sup> See *supra* note 218.

<sup>247</sup> See *Pelman I*, 237 F. Supp. 2d 512; *Pelman II*, 2003 WL 22052778.

<sup>248</sup> George Washington Law Professor, John Banzhaf, and his students recently received a 12.1 million dollar settlement from McDonald's for mislabeling its French fries as vegetarian when in fact they were prepared in beef extract. As part of the settlement, McDonald's offered an apology. John W. Schoen, *McDonald's to Offer Lower-Fat Fries*, at <http://www.msnbc.com/news/802676.asp> (last visited Mar. 5, 2004) (on file with author); see also *supra* notes 96-116.

<sup>249</sup> See *supra* notes 96-116 and accompanying text.

<sup>250</sup> Panel Discussion, *supra* note 85, at 869.

against the fast food industry will not disappear. If the Big Tobacco war demonstrated anything, it was the resolve of the plaintiffs' bar to attack industries that injure American consumers. Even now, some in the fast food industry have altered its business practices by offering healthier foods such as the all white meat McNugget, terminating its "super size" policy, and promoting healthier foods such as salads and pizza with less amounts of cheese. Thus, some may argue, these lawsuits have some value.

Eventually, corporate insiders may come forth and reveal what is inside the franchises of fast food. Such revelations are dependent on the number of claims filed, and the number of Americans inflicted with diseases related to obesity that lead to death. As these statistics rise, more pressure is placed on the industry and states' attorneys general to bring suit on behalf of American consumers. But until then, most of these suits will be dismissed in the courts of law and public opinion.