

Obesity Liability: A Super-Sized Problem or a Small Fry in the Inevitable Development of Product Liability?

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“It would be safer if they told their children, ‘Go out and play in traffic.’”¹

I. INTRODUCTION

For most of us, food is the ultimate temptation. It has been since Biblical times, when Adam and Eve succumbed to the temptation of a forbidden fruit. According to Christian tradition, man remains personally responsible for Adam’s act of eating forbidden fruit with the knowledge that it was forbidden.² In the past few years, several federal and state courts have been asked to adjudicate who should be held responsible—fast-food restaurants or their consumers—for the health problems that result from restaurants’ success in tempting consumers to eat their products.³ The fast-food restaurants insist they should not be held responsible when their customers choose to consume these food products knowing the products could contribute to obesity.⁴ Nevertheless, some consumer advocates believe that

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¹ Irvin Molotsky, *Risk Seen in Saturated Fats Used in Fast Foods*, N.Y. TIMES, Nov. 15, 1985, at A20 (quoting Dr. Tazewell Banks, director of a heart program at D.C. General Hospital, on the subject of parents who allow their children to eat foods rich in unsaturated fats at fast-food restaurants).

² *Romans* 5:12-21.

³ *See, e.g.*, *Pelman v. McDonald’s Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003); Nathan K. Bierma, *Food Industry Cooks up Ways to Stymie Suits*, CHI. TRIB., Aug. 15, 2003, § 5, at 1 (discussing the food industry’s response to seven obesity suits); Geraldine Sealey, *Whopper of a Lawsuit: Fast-Food Chains Blamed for Obesity, Illnesses* (describing a lawsuit brought by a 270-pound man against McDonald’s and three other fast-food restaurant chains), <http://abcnews.go.com/sections/us/DailyNews/fatsuit020725.html> (July 26, 2002).

⁴ Press Release, National Restaurant Association, National Restaurant Association Supports Prevention of Abusive Lawsuits Against Food Industry (Jan. 28, 2003) (“Experts

these restaurants should be held responsible for the negative health effects these products create, especially when the negative effects impact children.⁵

Plaintiffs suing the fast-food industry for causing consumer obesity have been unsuccessful in the courts.⁶ For example, on January 22, 2003, a New York federal district court dismissed “obesity” claims against McDonald’s by the guardians of two obese children, stating:

[L]egal consequences should not attach to the consumption of hamburgers and other fast-food fare unless consumers are unaware of the dangers of eating such food If consumers know (or reasonably should know) the potential ill health effects of eating at McDonalds, they cannot blame McDonalds if they, nonetheless, choose to satiate their appetite with a surfeit of supersized McDonalds products.⁷

The court dismissed the complaint with leave to amend.⁸ Nine months later, after the plaintiffs had amended their complaint, the court determined that there was again insufficient evidence to resist McDonald’s motion to dismiss.⁹ The district court’s final dismissal without leave to amend constituted the first substantive defeat of the nascent campaign against the fast-food industry’s promotion of obesity.

Obesity is a costly reality of American life.¹⁰ In 2001, the Surgeon General described obesity as having “reached epidemic

agree that all food can be part of a healthy diet and maintaining a healthy lifestyle is more about balancing energy in and energy out, not chastising some of America’s favorite foods. Restaurants should not and will not be blamed for issues of personal responsibility and freedom of choice.”), <http://www.restaurant.org/pressroom/print/index.cfm?ID=549>.

⁵ Bierma, *supra* note 3. San Francisco attorney Stephen Joseph, who sued Kraft successfully for failing to disclose the danger of trans fats in Oreos, discussed the potential for litigation involving child plaintiffs. Mr. Joseph stated, “Should adults be suing because of obesity? No. In cases regarding children? There are certainly good arguments of liability in some situations.” *Id.* Even 2004 Democratic Presidential candidate Senator Joe Lieberman has supported the idea that children should be protected from the marketing practices of the fast-food companies. Ira Teinowitz, *Lieberman on Attack Against Fast-Food Ads*, ADVERTISING AGE, Dec. 8, 2003, at 4.

⁶ Bierma, *supra* note 3. “[N]one of the estimated seven obesity lawsuits nationwide has gained a major victory for plaintiffs” *Id.* On the other hand, success is not always measured by wins and losses in the court. Consumer advocates also claim success if they can point to changed behavior in the food industry. *See id.* (positing that the threat of litigation may change behavior).

⁷ *Pelman*, 237 F. Supp. 2d at 517-18, 543.

⁸ *Id.* at 543.

⁹ *Pelman v. McDonald’s Corp.*, No. 02 Civ. 7821, 2003 WL 22052778, at *14-15 (S.D.N.Y. Sept. 3, 2003).

¹⁰ *See* Marion Nestle & Michael F. Jacobson, *Halting the Obesity Epidemic: A Public Health Policy Approach*, 115 PUB. HEALTH REP. 12 (2000) (discussing the effects of obesity and arguing for increased attention to preventative measures); Anne M. Wolf, *The Health Economics of Obesity and Weight Loss*, in *EATING DISORDERS AND OBESITY: A COMPREHENSIVE HANDBOOK* 453 (Christopher G. Fairburn & Kelly D. Brownell eds., 2d ed. 2002) (comparing the economic impact of obesity to that of smoking).

proportions in the United States.”¹¹ He associated 300,000 deaths a year to obesity and warned that if “[i]f left unabated, . . . obesity may soon cause as much preventable disease and death as cigarette smoking.”¹² In 2004, his estimates were validated by a study published in the Journal of the American Medical Association on the causes of death in the year 2000. The study found that 400,000 deaths were attributable to obesity and 435,000 were attributable to smoking.¹³ The study also estimated that, absent a sudden reversal in the overweight trend, obesity will soon overtake tobacco as the leading cause of death in the United States.¹⁴ Death, however, is not the only cost of obesity. The Surgeon General estimated direct and indirect costs of obesity at approximately \$117 billion a year.¹⁵ Thus, most experts agree that the expenses and consequences linked to obesity are significant.

Therefore, the crux of the current debate on obesity is how to assign responsibility for the great harm it causes. Consumer advocates argue that individuals should not be assigned responsibility when their outside environment may be the determining factor that caused their obesity.¹⁶ The argument is set out by Yale psychology professor Dr. Kelly Brownell, who boldly asserted that “[i]n the absence of a ‘toxic’ food and physical activity environment, there would be virtually no obesity.”¹⁷ Dr. Brownell claims that genetic predisposition to obesity is not the cause of obesity. “[I]t is clear that genetics may *permit* obesity to occur but a ‘toxic’ environment *causes* it to occur.”¹⁸ Dr. Brownell cites a report as authoritative from the Institute of Medicine which concludes:

¹¹ David Satcher, *Foreword* to OFF. OF THE SURGEON GEN., U.S. DEP’T OF HEALTH AND HUMAN SERVS., THE SURGEON GENERAL’S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 2001, at XIII (2001). *But see* Jerome P. Kassirer & Marcia Angell, *Losing Weight—An Ill-Fated New Year’s Resolution*, 338 NEW ENG. J. MED. 52, 52 (1998) (arguing that the estimate of 300,000 deaths per year in the United States caused by obesity is not well established and that it may be “called into question by methodologic difficulties”).

¹² Satcher, *supra* note 11, at XIII.

¹³ Ali H. Mokdad et al., *Actual Causes of Death in the United States, 2000*, 291 JAMA 1238, 1238-40 (2004).

¹⁴ *Id.* at 1242.

¹⁵ OFFICE OF THE SURGEON GEN., U.S. DEP’T OF HEALTH AND HUMAN SERVS., THE SURGEON GENERAL’S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 2001, at 10 (2001).

¹⁶ For example, Ralph Nader likened cheeseburgers to weapons of mass destruction. David Wallis, *Questions for Ralph Nader: Give Them the Business*, N.Y. TIMES, June 16, 2002, § 6 (Magazine), at 13.

¹⁷ Kelly D. Brownell, *The Environment and Obesity*, in EATING DISORDERS AND OBESITY: A COMPREHENSIVE HANDBOOK 433, 433 (Christopher G. Fairburn & Kelly D. Brownell eds., 2d ed. 2002).

¹⁸ *Id.* at 434 (emphasis added).

Although it is clear that genetics has a modest influence on obesity on a population basis, by far the largest amount of variance in body weight is due to environmental influences The root of the problem, therefore, must lie in the powerful social and cultural forces that promote an energy-rich diet and a sedentary lifestyle.¹⁹

Ultimately, Dr. Brownell identifies two aspects of the American “toxic” environment that cause obesity. First, he faults the food industry for promoting over-consumption of inexpensive, unhealthful food.²⁰ Second, he cites American environmental factors that cause declining physical activity.²¹ The former cause is the issue that has recently been litigated in the courts.

The criticism of the American food industry’s contribution to an environment that promotes obesity is multifaceted. Nutritional experts have criticized the industry for influencing dietary and nutritional guidelines.²² Powerful lobbies have resisted efforts to clarify nutritional messages sent to the public that encourage them to limit sugars and fatty foods.²³ The food industry has “use[d] every means at their disposal—legal, regulatory, and societal—to create and protect an environment that is conducive to selling their products in a competitive marketplace.”²⁴ This influence has resulted in an environment in which food advertising disproportionately promotes unhealthful products.²⁵ Finally, the food industry has aggressively marketed fast-food products to children, the most vulnerable segment of society.²⁶

¹⁹ *Id.*; COMM. TO DEVELOP CRITERIA FOR EVALUATING THE OUTCOMES OF APPROACHES TO PREVENT & TREAT OBESITY, INST. OF MED., *WEIGHING THE OPTIONS: CRITERIA FOR EVALUATING WEIGHT-MANAGEMENT PROGRAMS* 53, 152 (Paul R. Thomas ed., 1995).

²⁰ Brownell, *supra* note 17, at 434, 436.

²¹ *Id.* at 436-37.

²² *E.g.*, MARION NESTLE, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH* 67-92 (2002).

²³ *Id.*

²⁴ *Id.* at 93.

²⁵ *See* Brownell, *supra* note 17, at 434.

The yearly marketing budget of McDonald’s is \$1.1 billion, and of Coca-Cola, \$866 million, and these are just two companies. The budget of the National Cancer Institute to promote healthy eating is \$1 million. Advertising for healthy [sic] foods versus that for fast foods, soft drinks, and so on, is a drop against a tidal wave. It is not a fair contest, and the outcome, a world with diets growing rapidly worse, cannot be considered surprising.

Id.

²⁶ *Id.* at 436; NESTLE, *supra* note 22, at 173-218. The fast-food industry has overtly targeted children. Justice Clarence Thomas took notice of this tactic as recently as three years ago by noting that the fast-food industry targeted children openly with success.

Although the growth of obesity over the last few decades has had many causes, a significant factor has been the increased availability of large quantities of high-calorie, high-fat foods. . . . Such foods, of course, have been aggressively

For the past few years, legal commentators have suggested that the many similarities between the tobacco and the fast-food industry would eventually expose the fast-food industry to liability.²⁷ They have identified several product liability theories that could be available to hold the fast-food industry responsible for causing obesity.²⁸ Meanwhile, in 2003 and 2004, Congress debated whether the fast-food industry should be protected from liability and proposed bills limiting the food industry's liability for causing obesity.²⁹ One of these bills, the Personal Responsibility in Food Consumption Act, has passed the House and awaits action by the Senate.³⁰ So, the question remains, can obesity lawsuits be successful, and, if so, should the fast-food industry be protected from liability? Given the bills' current status in Congress, the question of liability remains viable, but the potential causes of action are undetermined.

This comment explores the doctrinal basis for product liability for food that causes obesity. Part II provides a brief history of product liability. Part III discusses the recent litigation with McDonald's. Part IV explores the causes of action that may be brought against the fast-food industry and the individual potential for success of each. It also considers the barriers consumer advocates must overcome to hold the fast-food industry liable for causing obesity using any of these causes of action. Part V discusses the potential public policy implications of a law like that proposed by the Personal Responsibility in Food Consumption Act. Finally, this comment concludes that the food industry should not be exempted from liability by further Congressional action. An exemption will not benefit the industry, while the threat of liability benefits both the industry (by maintaining an environment with sufficient flexibility for the success of the fast-food industry) and society (by providing the impetus to fashion a remedy for this serious health problem).

marketed and promoted by fast food companies. . . . Moreover, there is considerable evidence that they have been successful in changing children's eating behavior.

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 587-88 (2001)(Thomas, J. concurring).

²⁷ John Alan Cohan, *Obesity, Public Policy, and Tort Claims Against Fast-Food Companies*, 12 WIDENER L.J. 103, 110-16 (2003); Franklin E. Crawford, *Fit for Its Ordinary Purpose? Tobacco, Fast Food, and the Implied Warranty of Merchantability*, 63 OHIO ST. L.J. 1165, 1217-23 (2002).

²⁸ See Cohan, *supra* note 27, at 126-28; Crawford, *supra* note 27, at 1223.

²⁹ Commonsense Consumption Act of 2003, S. 1428, 108th Cong. (2003); Personal Responsibility in Food Consumption Act, H.R. 339, 108th Cong. (2003); Small Business Liability Reform Act of 2003, H.R. 2813, 108th Cong. (2003).

³⁰ The Personal Responsibility in Food Consumption Act was passed on March 10, 2003 by a vote of 276 to 139. *Final Vote Results for Roll Call 54*, <http://clerk.house.gov/evs/2004/roll054.xml> (last visited Apr. 5, 2004).

II. A BRIEF HISTORY OF PRODUCT LIABILITY

Product liability law is of relatively recent origin. One hundred years ago, consumers suing to recover damages caused by a defective product could recover only if they could prove the manufacturer was negligent and that they were in privity (i.e., they had personally purchased the product). In the landmark case of *MacPherson v. Buick Motor Co.*, then Judge Benjamin Cardozo of the New York Court of Appeals revolutionized product liability by substantially abolishing the privity rule when danger was foreseeable.³¹ *MacPherson* established that privity was not determinative of liability when there was negligence. According to Judge Cardozo, “If [the manufacturer] is negligent, where danger is to be foreseen, a liability will follow.”³² In addition, Judge Cardozo expanded product liability beyond the limitations imposed by contracts and based it on public policy.³³

Over the next forty years, courts further dissolved the contract limitations placed on product liability. No longer relying on express warranties, the courts allowed non-privity plaintiffs to recover on implied warranty claims. In the case of *Henningsen v. Bloomfield Motors, Inc.*, the court held manufacturers strictly liable under an “implied warranty that [the product] is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser.”³⁴ Under this theory, consumers were protected from defective products that did not meet their expectations.

Subsequently, many courts began interpreting product liability in terms of strict liability in tort rather than in the contract theory of implied warranty.³⁵ Dean William L. Prosser had a significant role in effecting this change by drafting section

³¹ 111 N.E. 1050, 1053 (N.Y. 1916). *MacPherson* involved a lawsuit against Buick for negligence in purchasing defective wheels which caused the plaintiff's accident. The plaintiff was not in privity because he purchased his Buick from a dealer rather than from a manufacturer. *Id.*; CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS, AND THE COMMON LAW 173-84 (2001) (giving a brief but insightful description of the *MacPherson* case).

³² *MacPherson*, 111 N.E. at 1053.

³³ *Id.* “We have put aside the notion that the duty to safeguard life and limb . . . grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.” *Id.* See also BOGUS, *supra* note 31, at 184.

³⁴ 161 A.2d 69, 84 (N.J. 1960). *Henningsen* involves the sale of a new Plymouth sedan that was driven for less than 500 miles before it inexplicably veered into a wall after an apparent failure of the steering mechanism. Although the contract contained warranty disclaimers and clauses indicating that the contract was the entire agreement, the court found the defendant liable under an implied warranty theory rather than negligence because the car had been so badly damaged that it was impossible to determine if the manufacturer had been negligent. *Id.* at 73-75, 84.

³⁵ BOGUS, *supra* note 31, at 185.

402A of the Restatement (Second) of Torts.³⁶ Section 402A stated in part: “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”³⁷ In essence, section 402A abolished privity and made manufacturers liable for physical injuries caused by their defective products regardless of fault.³⁸ Courts rationalized this change by emphasizing three theories—manufacturers could be held liable because they were enterprises that could: spread costs of liability, be encouraged to make safer products, and be held responsible because they had represented their products as safe.³⁹

As section 402A became accepted, courts assigned manufacturer liability for three types of defects: “(1) manufacturing defects or production flaws, (2) design defects, and (3) information or warning defects.”⁴⁰ The first type of defect, manufacturing, is the result of “flaws or irregularities in products arising from errors in production.”⁴¹ The seller is subject to liability if the “product’s condition is dangerous in a manner not intended by the seller nor expected by the consumer.”⁴² An example of a manufacturing defect is the Bridgestone/Firestone tire failures on Ford Explorers that “probably resulted in part from various irregularities in the production process.”⁴³ The second type of defect, design, “occurs when the intended design of the product line itself is inadequate and needlessly dangerous.”⁴⁴ The seller is liable for products with design defects because there is “an unreasonably dangerous aspect or feature of the product.”⁴⁵ The quintessential example of a design flaw is Ford’s infamous exploding Pintos with

³⁶ *Id.* at 186. “This *Restatement* section was to be cited in more than three thousand court opinions and, in one fashion or another, to become accepted by every American jurisdiction.” *Id.* at 185.

³⁷ RESTATEMENT (SECOND) OF TORTS § 402A (1965).

³⁸ DAN B. DOBBS, *THE LAW OF TORTS* § 353, at 974-75 (2000).

³⁹ *Id.* at 975-76.

⁴⁰ *Id.* § 354, at 979.

⁴¹ David G. Owen, *Manufacturing Defects*, 53 S.C. L. REV. 851, 852 (2002).

⁴² *Id.* at 893.

⁴³ *Id.* at 852-53 & n.6. See also *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002) (holding that a tire products liability action was not manageable as a nationwide class action); *In re Bridgeston/Firestone, Inc.*, 190 F. Supp. 2d 1125, 1156 (S.D. Ind. 2002) (refusing to dismiss a product liability suit on forum non conveniens grounds brough by victims of vehicular accidents in Venezuela and Columbia). See generally Public Citizen and Safetyforum.com, *Spinning Their Wheels: How Ford and Firestone Fail to Justify the Limited Tire Recall* (providing background information on the dispute), <http://www.citizen.org/documents/ACF266.pdf> (last visited May 29, 2004).

⁴⁴ DOBBS, *supra* note 38, § 355, at 980.

⁴⁵ Bogus, *supra* note 31, at 193.

unprotected rear gas tanks.⁴⁶ Liability is extended to protect society from the harmful effects of the unsafe features of these products. Finally, warning defects occur when products become unreasonably dangerous because “no information explains their use or warns of their dangers.”⁴⁷ Liability is extended to manufacturers because these products could be reasonably safe if accompanied by adequate information or warnings.⁴⁸ For example, a company may not manufacture full strength glucose in a bottle without a warning to parents to dilute the product because it is dangerous to babies without dilution.⁴⁹

In 1998, the American Law Institute promulgated the Products Liabilities section of the Restatement (Third) of Torts, which clearly defined these three types of defects.⁵⁰ In addition, it rejected the use of a “consumer expectation” test as the standard for determining design defectiveness except in cases involving food products.⁵¹ Instead, the risk-utility test was adopted,⁵² which requires courts to “attempt to balance the risks of the product as designed against the costs of making the product safer.”⁵³ When applying this test, courts often refer to the following seven factors listed by Dean John Wade:

- (1) The usefulness and desirability of the product . . .
- (2) The safety aspects of the product – the likelihood that it will cause injury, and the probable seriousness of the injury.
- (3) The availability of a substitute product . . .
- (4) The manufacturer’s ability to eliminate the unsafe character of the product . . .
- (5) The user’s ability to avoid danger by the exercise of care . . .
- (6) The user’s anticipated awareness of the dangers inherent in the product and their avoidability . . .
- (7) The feasibility, on the part of the manufacturer, of spreading the loss . . .⁵⁴

Because these factors so closely resemble negligence, product liability for design defects is often considered to be equivalent to liability for negligence.⁵⁵

⁴⁶ *Id.* at 190-93; *Grimshaw v. Ford Motor Co.* 174 Cal. Rptr. 348 (Cal. Ct. App. 1981).

⁴⁷ DOBBS, *supra* note 38, § 355, at 981.

⁴⁸ *Id.*

⁴⁹ *Id.*; *Ross Labs. v. Thies*, 725 P.2d 1076 (Alaska 1986).

⁵⁰ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2.

⁵¹ *Id.* § 2 cmt. g. “With regard to two special product categories [food products and used products] consumer expectations play a special role in determining product defect.” *Id.* § 2 cmt. h.

⁵² RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. a.

⁵³ DOBBS, *supra* note 38, § 357, at 985.

⁵⁴ John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L. REV. 825, 837 (1973).

⁵⁵ DOBBS, *supra* note 38, § 357, at 986-87.

Finally, one commentator argues that we are now reaching a new level of product liability called *generic liability* or *product category liability*.⁵⁶ *Generic product liability* results “[w]hen a product remains unreasonably dangerous despite the best possible design, construction, and warnings.”⁵⁷ Because the product “generically fail[s] a risk-utility test,” the manufacturer is made liable because the product’s risks outweigh its benefits.⁵⁸ The commentator asserts that liability imposed on gun and tobacco manufacturers falls under this concept.⁵⁹

This brief history demonstrates the breadth of perspectives that must be brought to a discussion of product liability for fast food. As noted above, product liability involves elements of contract, intentional torts, negligence, strict tort liability, and public policy. The following analysis of fast-food litigation explores the McDonald’s litigation within this context and then extends that analysis to future cases.

III. MCDONALD’S LITIGATION

In August 2002, McDonald’s Corporation was sued in the Supreme Court of New York, Bronx County, by the parents of two overweight children.⁶⁰ The parents claimed their children were “consumers who [had] purchased and consumed [McDonald’s] products and, as a result thereof, [had] become overweight and [had] developed diabetes, coronary heart disease, . . . and/or other detrimental and adverse health effects as a result of the [McDonald’s] conduct and business practices.”⁶¹ McDonald’s removed the action to federal court and then filed a motion to dismiss the complaint for failure to state a claim.⁶²

A. First Motion to Dismiss Complaint

The individual counts against McDonald’s were a mixture of both intentional and negligent torts. The first two counts were for intentionally violating the New York Consumer Protection Act (New York Gen. Bus. Law sections 349 and 350) among other statutes.⁶³ Count one alleged that McDonald’s misled its customers in marketing campaigns by representing their products as nutritious and by not disclosing both their

⁵⁶ BOGUS, *supra* note 31, at 193-96.

⁵⁷ *Id.* at 195.

⁵⁸ *Id.*

⁵⁹ *Id.* at 195-96.

⁶⁰ Pelman v. McDonald’s Corp., 237 F. Supp. 2d. 512, 519 (S.D.N.Y. 2003).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 520.

ingredients (products high in cholesterol, fat, salt and sugar) and the detrimental effects of these ingredients.⁶⁴ Count two alleged that McDonald's also used these same deceptive marketing techniques to target children.⁶⁵ The third and fifth counts were based on negligence. Count three alleged negligence for selling products causing obesity, and count five alleged McDonald's negligently marketed addictive food products.⁶⁶ Finally, count four was based on an allegation that McDonald's failed to warn of the addictive properties of its foods.⁶⁷

As to the first two counts, McDonald's argued that, because the Nutrition Labeling and Education Act of 1990 ("NLEA") exempts the restaurant industry from federal labeling requirements, McDonald's could not be held liable under New York state law for their failure to provide nutritional information.⁶⁸ Under the NLEA, most packaged foods must be labeled with nutritional information.⁶⁹ Thus, most food manufacturing industries are protected against claims that a food product caused their obesity because consumers had an explicit warning of the content of the food they ate. Restaurants, on the other hand, are specifically exempt from such labeling requirements.⁷⁰ Therefore, McDonald's argument runs, federal

⁶⁴ *Id.*

⁶⁵ *Pelman*, 237 F. Supp. 2d at 520.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 525-26. *See also* 21 U.S.C. § 343(q) (2003).

⁶⁹ 21 U.S.C. § 343(q)(1).

⁷⁰ 21 U.S.C. § 343(q)(5)(A)(i). The pre-exemption statute, 21 U.S.C. 343-1(a)(4), requires that the states not interfere directly or indirectly with the federal laws and regulations dealing with nutritional labeling of packaged food. Yet, the statute also allows the states to establish whatever nutritional labeling requirements they wish for those foods exempt under the act; in our case, restaurant food. The preemption section also applies to nutrient and health claims made by restaurants. Any cause of action based on a nutrient or health claim should have been preempted. According to the Code of Federal Regulations:

[t]he following foods are exempt from this section . . . (2) Food products which are: (i) served in restaurants, *Provided*, That the food bears no nutrition claims or other nutrition information in any context on the label or in labeling or advertising. Claims or other nutrition subject the food to the provisions of this section.

Nutrition Labeling of Food, 21 C.F.R. § 101.9(j) (2003). The court later addresses a potential claim that customers could maintain a well-balanced diet eating at McDonald's everyday. If interpreted as a health claim, this claim *should have been preempted*. The court's citation to the Federal Register indicating states were allowed to regulate "under their own consumer protection laws . . . menus [from] provid[ing] false or misleading information" was true but slightly misleading. *Pelman*, at 526 (citing Food Labeling; General Requirements for Health Claims for Food, 58 Fed. Reg. 2478, 2517 (Jan. 6, 1993)). Just three years after the court's citation, the court would have found a clearer exposition of the preemptive provisions in the Federal Register.

The provision on nutrition labeling . . . includes an exemption for foods that are served or sold in restaurants . . . (section 403(q)(5)(A)(i)). This exemption, however, is contingent on there being no claims or other nutrition information

law preempts any state law regulating the labeling of food products. The court did not agree. The NLEA permits states to impose labeling requirements for certain food industries that are exempt under the act, including the restaurant industry.⁷¹ In fact, the Food and Drug Administration has interpreted the NLEA as permitting the states to enact laws protecting consumers from menus with “false or misleading information.”⁷² Consequently, the court held that the federal labeling laws did not protect McDonald’s from plaintiffs’ New York state law claims.⁷³

The court, therefore, addressed the first two counts of misleading advertisements by following the interpretive requirements for New York statutes.⁷⁴ The New York Consumer Protection Act⁷⁵ requires the plaintiff plead with specificity any “deceptive acts or practices that form the basis of a claim.”⁷⁶ The court cited as examples of deceptive acts or practices public statements made by the tobacco industry in which they denied: that there is a causal link between disease and tobacco, that cigarettes are addictive, and that they manipulated nicotine to regulate cigarette addictiveness.⁷⁷ Ultimately, the plaintiffs were not successful because they did not provide equivalent examples of such practices by McDonald’s. Their complaint did not identify one single deceptive act toward consumers or their children.⁷⁸ The complaint also failed to show that McDonald’s decision not to post its nutritional information was a deceptive omission.⁷⁹ Accordingly, these plaintiffs failed to provide any evidence of deception to the court.⁸⁰

The court then considered whether additional advertisements and McDonald’s statements on their website were deceptive.⁸¹ These advertisements either encouraged the

on the label or labeling, or in the advertising, for the food. The use of nutrient content claims, health claims, or other nutrition information on the label or labeling of a food sold in a restaurant or other establishment in which food is served for immediate consumption will subject that food to the nutrition labeling provisions of the act (see sections 403(q) and (r) of the act and §101.9(j)(2)(i) through (j)(2)(iii) (21 CFR 101.9 (j)(2)(i) through (j)(2)(iii))).

Food Labeling; Nutrient Content Claims and Health Claims; Restaurant Foods, 62 Fed. Reg. 40320 (1996).

⁷¹ 21 U.S.C. § 343-1(a)(4).

⁷² *Pelman*, 237 F. Supp. 2d at 526.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ N.Y. GEN. BUS. LAW §§ 349-50 (2004).

⁷⁶ *Pelman*, 237 F. Supp. 2d at 526.

⁷⁷ *Id.* at 526-27.

⁷⁸ *Id.* at 527, 530.

⁷⁹ *Id.* at 529.

⁸⁰ *Id.* at 527, 530.

⁸¹ *Pelman*, 237 F. Supp. 2d at 527-28.

public to eat at McDonald's every day or asked the public to make McDonald's meals part of a balanced diet.⁸² Although claims based on these statements could have survived the motion to dismiss for lack of specificity, the court noted that the statements were likely not deceptive.⁸³ According to the court, a reasonable consumer would not have been misled by McDonald's conduct.⁸⁴ Furthermore, the statements were not made in conjunction, so McDonald's never asserted that eating their products every day would constitute a well-balanced diet.⁸⁵ The court contrasts this practice with that of Subway, which has made some implied health claims.⁸⁶ McDonald's advertisements "encouraging consumers to eat its products 'everyday' is mere puffery . . . in the absence of a claim that to do so will result in a specific effect on health."⁸⁷ As a result, the court concluded that these statements were not misleading.⁸⁸

Conversely, the court did characterize some older McDonald's advertising as deceptive.⁸⁹ This, however, was not helpful to the plaintiffs because the court was careful to note that these advertisements would likely be barred by statutes of limitations.⁹⁰ For instance, one advertisement claimed that "sodium is down *across* the menu," when it was not.⁹¹ Another advertisement did not disclose the presence of preservatives when it discussed the ingredients in its shakes. The advertisement finished by saying "that's all," implying there were no additional ingredients.⁹² Each of these ads is deceptive on its face. Nonetheless, the court considered them only to assist the

⁸² *Id.* at 527.

⁸³ *Id.*

⁸⁴ *See id.* at 525, 528.

⁸⁵ *Id.* at 527-28.

⁸⁶ *Pelman*, 237 F. Supp. 2d at 528 n.15 (describing Subway's advertising campaign claiming that its product is a "healthier alternative to fatty fast food" and highlighting the dietary accomplishments of Jared Fogle, who lost 235 pounds on a diet of two daily meals at Subway for a year and has been featured in Subway commercials). Yet Subway's press releases do not specifically endorse Jared's diet nor do they explicitly claim that a Subway diet is a healthy diet. For example, one press release indicated that "Subway Corporate Dietician Lanette Roulier stresses that the chain does not endorse the 'Jared Diet.'" Press Release, Subway, (December 2000), <http://www.subway.com/Publishing/PubRelations/PressRelease/pr-011101j.pdf> (last visited Mar. 27, 2004). Furthermore, Subway's website contains a disclaimer that Jared's weight loss program included exercise and that his results are not typical. Subway website, Jared's Statistics, <http://subway.com/subway/root/MenuNutrition/Jared/jaredStats.aspx> (last visited Mar. 27, 2004) ("Individuals lost weight by exercising and eating a balanced, reduced-calorie diet that included SUBWAY® sandwiches with 6 grams of fat or less. Their results are not typical.").

⁸⁷ *Pelman*, 237 F. Supp. 2d at 528.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Pelman*, 237 F. Supp. 2d at 529.

plaintiffs in shaping any future claim.⁹³

The court emphasized that McDonald's could only be held liable for failing to post nutritional labeling on its products if that omission was deceptive.⁹⁴ According to the court, businesses do not have a duty to inform each individual customer of information relevant to that consumer's use of the product unless the business alone possesses "material information."⁹⁵ The plaintiffs had never alleged that nutritional content "was solely within McDonalds' [sic] possession or that a consumer could not reasonably obtain such information."⁹⁶ Absent a claim that McDonald's held nutritional information the public could not access, McDonald's failure to post nutritional information was not deceptive.⁹⁷

B. Common Law Claims

In count three, the plaintiffs claimed that McDonald's negligently manufactured and sold products causing obesity and failed to warn its consumers of the inherent danger of their products. The court dismissed the claim holding that the plaintiffs had neither established a duty of the defendants nor shown that the defendant's actions were the proximate cause of their children's obesity.⁹⁸

The court first addressed plaintiffs' failure to show a duty. The plaintiffs alleged that McDonald's products were inherently dangerous as formulated, with "high levels of cholesterol, fat, salt and sugar," and that McDonald's, therefore, had a duty to warn its consumers of these dangers.⁹⁹ McDonald's countered—framing the issue as one of misuse through over-consumption rather than inherent danger—claiming that it had no duty to protect consumers from dangers caused by the over-consumption of its food when the public is well aware of such dangers.¹⁰⁰ McDonald's based its claims on a comment to section 402A of the Restatement (Second) of Torts:

Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is

⁹³ *Id.* at 528.

⁹⁴ *Id.* at 529.

⁹⁵ *Id.*

⁹⁶ *Pelman*, 237 F. Supp. 2d at 529.

⁹⁷ *See id.*

⁹⁸ *Id.* at 530-40.

⁹⁹ *Id.* at 531.

¹⁰⁰ *Id.* at 531-32.

meant by “unreasonably dangerous” in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. . . . Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.¹⁰¹

The court agreed with McDonald’s over-consumption analysis and concluded that any product liability “based on over-consumption is doomed if the consequences of such over-consumption are common knowledge.”¹⁰² On the other hand, he noted that tobacco was also mentioned in the comment as a product with well-known dangers and this did not bar tobacco liability because tobacco companies had intentionally altered nicotine levels to induce addiction.¹⁰³ Thus, McDonald’s could be liable only if its products were “so extraordinarily unhealthy that they are outside the reasonable contemplation of the consuming public or that the products are so extraordinarily unhealthy as to be dangerous in their intended use.”¹⁰⁴ The plaintiffs’ claims could not pass this bar.

The court then turned to the question of proximate cause. The court reasoned that based on the complaint, a jury would be required to engage in “wild speculation” to find that McDonald’s caused the obesity.¹⁰⁵ The complaint did not specify how often the child plaintiffs ate at McDonald’s.¹⁰⁶ McDonald’s products would cause the plaintiffs’ obesity only if the plaintiffs ate at McDonald’s frequently enough to establish a “significant role in the plaintiffs’ health problems.”¹⁰⁷ In addition, the complaint included articles that identified other factors that contributed to plaintiffs’ obesity.¹⁰⁸ To successfully prove proximate cause, the plaintiffs would have to address or eliminate these factors.¹⁰⁹ Since the plaintiffs did not address these deficiencies, the court

¹⁰¹ RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

¹⁰² *Pelman*, 237 F. Supp. 2d at 532.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 538.

¹⁰⁶ *Pelman*, 237 F. Supp. 2d. at 538. However, in a footnote the court noted that the plaintiffs later attached affidavits stating how often the plaintiffs ate at McDonald’s. *Id.* at 538 n.28.

¹⁰⁷ *Id.* at 538-39.

¹⁰⁸ *Id.* at 539.

¹⁰⁹ *Id.*

held proximate cause was a barrier that prevented negligence liability.¹¹⁰

According to the court, its decision to dismiss the claims based on negligence was consistent with some basic policy principles. Primarily, “it is not the place of the law to protect [the consumers] from their own excesses.”¹¹¹ Furthermore, it is not the court’s role to interfere when the “consumer exercises free choice with appropriate knowledge” as long as the manufacturer does not intentionally “mask[] . . . information necessary to make the choice.”¹¹²

The court also addressed four additional common law arguments raised outside the complaint to assess whether the plaintiffs could make an adequate argument for duty in an amended complaint, and identified two that could have potential.¹¹³ First, the plaintiffs had argued that McDonald’s processed their products to the point that they were more dangerous than what a reasonable consumer could expect from an unprocessed product.¹¹⁴ This argument had potential because any additional danger would be latent rather than patent unless the public was also aware of the danger of this additional processing.¹¹⁵ Second, a modified argument based on McDonald’s knowledge of consumers’ potential misuse could have merit.¹¹⁶ The modified argument would have merit if McDonald’s should have been aware that its consumers intended to eat at McDonald’s “for every meal of every day” and if McDonald’s was also aware that this frequency of consumption was unreasonably dangerous.¹¹⁷ On the other hand, a claim based on over-consumption rather than exclusive consumption at McDonald’s would likely fail due to the court’s prior analysis.

Counts four and five were based on McDonald’s failure to warn its consumers. Count four alleged that McDonald’s failed to warn of the unhealthy attributes of its products and failed on the same principles as count three. To prove McDonald’s failed to warn, the plaintiffs had to prove the defendant had a duty to warn. However, the plaintiffs neglected to establish such a duty

¹¹⁰ *Id.* at 539-40.

¹¹¹ *Pelman*, 237 F. Supp. 2d at 533.

¹¹² *Id.*

¹¹³ *Id.* at 533.

¹¹⁴ *Id.* at 534-35. “For instance, Chicken McNuggets, rather than being merely chicken fried in a pan, are a McFrankenstein creation of various elements not utilized by the home cook.” *Id.* at 535.

¹¹⁵ *Id.* at 534.

¹¹⁶ *Id.* at 537.

¹¹⁷ *Id.*

in the complaint.¹¹⁸ The court cited a number of factors involved in assessing whether there was a duty to warn including: the “feasibility and difficulty of issuing a warning . . . ;” the “obviousness of the risk from actual use of the product;” the “knowledge of the . . . user; and proximate cause.”¹¹⁹ The court also recognized that proximate cause would be precluded if a danger was obvious.¹²⁰ Therefore, the court dismissed this count because the complaint failed to allege “McDonald’s products . . . were dangerous in any way other than that which was open and obvious to a reasonable consumer.”¹²¹

Finally, the court addressed count five, which alleged that McDonald’s failed to warn of the addictive properties of its products. The court noted that the complaint did not specify that the plaintiffs themselves were addicted nor did it explain how McDonald’s products were involved in causing this addiction.¹²² As it stood, the complaint was “overly vague.”¹²³ The court dismissed this count for its failure to allege the “addictive nature of McDonald’s foods” and its failure to allege that their food was the proximate cause of the plaintiffs’ obesity.¹²⁴

In summary, the plaintiffs’ initial complaint was dismissed for lack of specificity. In the first counts, the plaintiffs’ failed to allege specific acts of deception toward consumers or toward child plaintiffs. In the subsequent claims, the plaintiffs were unable to specify why the defendants owed a duty to the plaintiffs to not make products that were dangerous if over-consumed, or why the defendant owed a duty to warn of obvious dangers.

The decision in this case was guided by the principle that McDonald’s should be held liable only if its “products involve a danger that is not within the common knowledge of consumers.”¹²⁵ However, the court also recognized that government has a responsibility to protect individuals “in those situations where individuals are somehow unable to protect themselves and where society needs to provide a buffer between the individual and some other entity—whether herself, another individual or a behemoth corporation that spans the globe.”¹²⁶ Ultimately, the court determined that these principles “require the complaint to be dismissed for lack of specificity,” with leave to

¹¹⁸ *Id.* at 540-41.

¹¹⁹ *Pelman*, 237 F. Supp 2d. at 540.

¹²⁰ *Id.*

¹²¹ *Id.* at 541.

¹²² *Id.* at 542.

¹²³ *Id.*

¹²⁴ *Pelman*, 237 F. Supp 2d. at 542-43.

¹²⁵ *Id.* at 518.

¹²⁶ *Id.* at 516.

amend,¹²⁷ which was essentially a public policy decision based on personal responsibility.

C. Amended Complaint

After the first complaint was dismissed, the plaintiffs re-filed an amended complaint with claims dealing exclusively with the New York Consumer Protection Act.¹²⁸ The three counts were constructed to conform to the dicta in the prior dismissal. For example, count one alleged that the plaintiffs were misled into believing McDonald's products "were nutritious . . . and/or easily part of a healthy lifestyle if consumed on a daily basis."¹²⁹ Count two alleged that McDonald's failed to disclose that their foods were substantially less healthy than they appeared because of additives and further processing.¹³⁰ Count three alleged that McDonald's claimed that it provided nutritional information adequately, which in reality it did not.¹³¹ Ultimately, this amended complaint was likewise dismissed because the plaintiffs' allegations still did not demonstrate that the defendant's actions or deception caused them injury.¹³²

Unfortunately, much of the plaintiffs' case for deception rested on old advertisements; thus, the claims were barred by the statute of limitations.¹³³ The plaintiffs attempted to argue a variety of theories to toll the statute of limitations, including the "continuing practice exception,"¹³⁴ the "separate accrual rule,"¹³⁵ the "diligence-discovery accrual rule,"¹³⁶ and infancy tolling.¹³⁷ However, the court discarded the first three of these theories, leaving only infancy tolling.¹³⁸ This presented its own difficulty

¹²⁷ *Id.* at 519.

¹²⁸ *Pelman v. McDonald's Corp.*, No. 02 Civ. 7821, 2003 WL 22052778, at *3 (S.D.N.Y. Sept. 3, 2003).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at *14.

¹³³ *Pelman*, 2003 WL 22052778, at *4-6.

¹³⁴ The continuing practice exception requires a tolling after "each successive deceptive statement in furtherance of [an] overall scheme." *Id.* at *5.

¹³⁵ The separate accrual rule creates a limitation period every time "a plaintiff discovers, or should have discovered a new injury caused by the . . . violations." *Id.* (citation omitted).

¹³⁶ Under the diligence-discovery accrual rule, "accrual may be postponed until the plaintiff has or with reasonable diligence should have discovered the critical facts of both his injury and its cause." *Id.* at *5 (citation omitted).

¹³⁷ *Id.* at *6. Under infancy tolling, a cause of action is tolled while a person is "under a disability because of infancy." *Id.* (citation omitted).

¹³⁸ *Pelman*, 2003 WL 22052778, at *5-6. The court discarded the first of these theories as disfavored; found the second theory did not apply because no new injuries were alleged which did not result from the initial injury; and found the third theory did not apply because the facts about McDonald's products were "well known" such that the plaintiffs should have known the "critical facts of their injury." *Id.*

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since the court refused to consider advertisements observed only by the parents, allowing only those actually seen by the children.¹³⁹

This led to the second difficulty faced by the plaintiffs. Because the child plaintiffs had not seen many of the advertisements, they could not prove they relied on the advertisements.¹⁴⁰ As a result, the plaintiffs failed to “allege in general terms that plaintiffs were aware of the false advertisement, and that they relied to their detriment on the advertisement.”¹⁴¹ The only “deceptive act” of which the infant plaintiffs were even aware was McDonald’s statement that they were switching to 100% vegetable oil to fry their potatoes and hash browns and that these products would contain zero milligrams of cholesterol.¹⁴² After an analysis of this advertisement, the court found the complaint sufficient to allege reliance on this alleged misrepresentation.¹⁴³

The court then addressed causation, the more difficult obstacle to the plaintiffs’ case. Although the plaintiffs did not need to prove proximate cause as they would in a negligence case, they did have to prove that the deceptive act caused their injuries.¹⁴⁴ Although the plaintiffs had, “albeit just barely,” established a causal connection between the “deceptive acts” and the decision to eat at McDonald’s, the court held that they did not establish an “adequate causal connection between their consumption of McDonald’s food and their alleged injuries.”¹⁴⁵ Unfortunately, yet again, the plaintiffs had failed to eliminate other factors that could have caused their obesity.¹⁴⁶ For example, they did not address such questions as, “What else did the [minors] eat? How much did they exercise? Is there a family history of the diseases?”¹⁴⁷ Therefore, the court concluded that there was insufficient information to determine whether McDonald’s alleged deception caused the plaintiffs’ injuries or if it was only a contributing factor.¹⁴⁸

In the final analysis, from the court’s opening statement focusing on plaintiffs’ knowledge, it was clear that *Pelman* would be decided in McDonald’s favor. Ultimately, the plaintiffs’ case

¹³⁹ *Id.* at *6.

¹⁴⁰ *Id.* at *8.

¹⁴¹ *Id.*

¹⁴² *Id.* at *9.

¹⁴³ *Pelman*, 2003 WL 22052778, at *9.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at *11.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Pelman*, 2003 WL 22052778, at *11.

unraveled because they were unable to produce specific incidences of recent deception and because the dangers of over consumption were obvious. Beyond even these difficulties, they provided no evidence that McDonald's actions caused their injury.

IV. THE FUTURE OF FAST-FOOD LITIGATION

Proponents of liability for the fast-food industry will not give up so easily. Professor John Banzhaf III, one of the leading proponents, has expressed a willingness to continue to litigate against the fast-food industry even after *Pelman*.¹⁴⁹ In June of 2003, Professor Banzhaf chided Congress for considering a bill restricting fast-food liability.¹⁵⁰ He boldly asserted that fast-food companies should be found liable under "a wide variety of different legal theories, different pieces of evidence, many of which you have not seen."¹⁵¹ Professor Banzhaf joins others who believe the fast-food industry will one day be held liable under a currently non-existent theory.¹⁵² While this may be true, traditional theories should not be abandoned yet. The next section focuses on known theories and policy implications. Specifically, it explores product liability causes of action currently used to hold manufacturers liable for harm caused by their products. It details the barriers common to most of these theories and discusses how those barriers might be problematic in the context of fast-food litigation. Finally, it suggests some new theories that may be used in the future to hold the food industry liable for its actions.

A. Potential Causes of Action: Product Liability

Modern plaintiffs can sue under a number of product liability

¹⁴⁹ See John F. Banzhaf III, *Dismissal of McDonald's Obesity Law Suit was Expected: Four Wins, One Loss, and Several Legal Theories Yet to Go*, at <http://banzhaf.net/docs/mcd2no.html> (last visited Mar. 8, 2004). See generally John F. Banzhaf III, *Using Legal Action to Help Fight Obesity*, at <http://banzhaf.net/obesitylinks> (last visited Mar. 8, 2004). For example, one of the lead headlines at this website is "Flash: McDonald's Case Dismissed, But Anti-Fat Lawyers Aren't Discouraged."

¹⁵⁰ "With all due respect, shame on you. If it ain't broke, don't fix it, especially until Congress is prepared to step in and adopt comprehensive legislation and save taxpayers some 50 billion annually in obesity costs." *Personal Responsibility in Food Consumption Act: Hearing Before the Subcomm. on Commercial and Admin. Law of the Comm. on the Judiciary*, 108th Cong. 9 (2003), available at <http://www.house.gov/judiciary> (statement of Professor John Banzhaf, George Washington University School of Law).

¹⁵¹ *Id.* at 10.

¹⁵² "And the public, according to recent surveys, is about willing to hold them liable. There is liability now. Juries are about to hold them liable as they are in tobacco suits." *Id.* See also, Cohan, *supra* note 27, at 131 ("The fate of obesity litigation may rest at least in part upon the ability of judges to fashion new tort doctrines, a phenomenon that has progressed steadily throughout the past century.").

theories.¹⁵³ The basis for the suit may be intentional torts, contract, strict liability, or negligence. Intentional torts cover product liability for misrepresentation, while the rules of contract liability cover claims based on express or implied warranty. Tort liability for unreasonably defective products falls under strict liability. Negligence encompasses defects in manufacturing, negligent marketing and selling, and failing to warn of dangers. While the theories are similar in some aspects, each presents its own obstacles to plaintiffs.

1. Intentional Tort: Misrepresentation

Pelman was essentially decided under a theory of misrepresentation based on the New York Consumer Protection Act. Misrepresentation is usually a fact-intensive inquiry and requires that the plaintiff allege reliance upon the misrepresentation.¹⁵⁴ In *Pelman*, the plaintiffs failed to show personal reliance, and this difficulty is likely to recur in future fast-food litigation based on misrepresentation, given the relatively slow onset of obesity¹⁵⁵ and the difficulty of pinpointing the specific advertisements that caused plaintiffs to eat particular products. The slow onset of obesity further presents problems with statutes of limitations. Therefore, the success of such cases, may—as proponents have suggested—be dependent on finding a theory approved by the court that will toll the statute of limitations.

These obstacles are significant. However, plaintiffs should not wholly abandon the theory of misrepresentation. It is possible in some cases to allege misrepresentation based upon intentional omissions, although the original complaint in *Pelman* shows the hazards of such an approach. In *Pelman*, the court dismissed misrepresentation claims because the public had access to the same nutritional information as McDonald's.¹⁵⁶ An allegation based on failing to disclose a substance that consumers do not expect is likely to find more success in courts. For example, in California, fast-food companies were sued for failing to disclose the presence of acrylamide, a substance linked to

¹⁵³ See *Denny v. Ford Motor Co.*, 662 N.E.2d 730, 731 (N.Y. 1995) (holding it was possible to find a plaintiff liable for a breach of an implied warranty when a claim of strict products liability was not satisfied); *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 668 (Tex. 1999) (holding that “[p]laintiffs are generally entitled to obtain findings that will support alternative theories of recovery” in strict product liability and implied warranty claims).

¹⁵⁴ See Dobbs, *supra* note 38, § 352, at 971.

¹⁵⁵ Scott M. Grundy, *Multifactorial Causation of Obesity: Implications for Prevention*, 67 AM. J. CLIN. NUTR. 563S, 565S (1998).

¹⁵⁶ *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d. 512, 529 (S.D.N.Y. 2003).

cancer.¹⁵⁷ Courts recognize a distinction between obvious natural components of food and those that the consumers would not reasonably expect to find in their food.¹⁵⁸ Yet, absent a conclusive showing that fast-food companies added a “secret” ingredient that causes obesity, an obesity claim based on misrepresentation by a deceptive omission will most likely fail.

2. Contract: Express Warranty

Under the law of contracts, plaintiffs may claim that a merchant breached an express or implied warranty.¹⁵⁹ Liability for a breach of warranty on the sale of goods is governed by Article 2 of the Uniform Commercial Code.¹⁶⁰ Claims for breach of an express warranty would be similar to claims of misrepresentation and would arise where the fast-food producer made claims that the food had specific health benefits. For example, as described in *Pelman*, an advertisement that represented that patrons could lose weight or receive certain health benefits by eating at certain restaurants every day would be an express warranty.¹⁶¹ However, success under this theory is questionable because fast-food companies rarely represent that eating their food would not cause obesity or would provide such benefits (and they are certainly less likely to do so after *Pelman*). Furthermore, the federal government regulates health and nutrient claims made by restaurants.¹⁶² A consumer who sues a

¹⁵⁷ Cohan, *supra* note 27, at 122-23. Acrylamide is relevant to obesity liability because it was initially shown to be present in high levels in fast foods such as fried potatoes. However, recent research has found acrylamide present not only in fast foods but also in other nutritious foods. Thus, it is probably impossible at this time to avoid acrylamide. In a meeting convened to discuss acrylamide, Deputy FDA Commissioner, Dr. Lester Crawford noted that fast foods are not the only foods to contain acrylamide. “The exposure assessment has found that many foods contribute to acrylamide exposure. No single food accounts for the majority of acrylamide exposure for the U.S. population.” Lester Crawford, Transcript of Proceedings Food Advisory Committee, February 24-25, 2003 Meeting Acrylamide, <http://www.cfsan.fda.gov/~dms/acrytra2.html> (last visited Mar. 8, 2004). Further data for acrylamide in food can be found at either the World Health Organization web site, <http://www.who.int/foodsafety/chem/chemicals/acrylamide/en/>, or its infonet on acrylamide, <http://www.acrylamide-food.org/>. See also Center for Food Safety and Applied Nutrition, U.S. Food and Drug Administration, *Pesticides, Metals, Chemical Contaminants & Natural Toxins*, at <http://www.cfsan.fda.gov/~lrd/pestadd.html> (last visited Mar. 8, 2004).

¹⁵⁸ Owen, *supra* note 41, at 897-98.

¹⁵⁹ Dobbs, *supra* note 38, § 352, at 971.

¹⁶⁰ U.C.C. §§ 2-313, -314, -315 (2003) (providing for an express warranty, implied warranty of merchantability, and implied warranty of fitness for a particular purpose for both merchants and consumers in particular circumstances).

¹⁶¹ In *Pelman*, the plaintiffs contended that McDonald’s encouraged its customers to eat everyday as part of a balanced diet. Apparently, this claim did not rise to the level of a warranty. See *supra* notes 90-97 and accompanying text.

¹⁶² Food and Drugs, 21 C.F.R. § 101.10 (2003) (“Nutrition labeling in accordance with § 101.9 shall be provided upon request for any restaurant food or meal for which a nutrient content claim . . . or a health claim . . . is made . . .”). See also Food and Drugs,

restaurant for an unsupported health or nutrient claim must show that the restaurant did not comply with the NLEA.¹⁶³ Therefore, many, if not all, express warranty claims based on restaurant nutrient or health claims would be preempted by the NLEA. Given these difficulties, it is unlikely that consumers seeking to hold fast-food restaurants liable based on breach of an express warranty would be successful unless the restaurant failed to comply with the NLEA.

3. Contract: Implied Warranty

Fast-food companies could also be held liable for breaching the implied warranty of merchantability. Essentially, the implied warranty of merchantability defined in U.C.C. section 2-314 is “the seller’s implied promise that the goods sold in a contract of sale will work.”¹⁶⁴ Claims based on the breach of the implied warranty depend heavily on a court’s interpretation of merchantability because the U.C.C. provides only a list of “minimum qualities goods must possess in order to be merchantable.”¹⁶⁵

The recent tobacco litigation provides an instructive analogy. In the tobacco cases, courts defined merchantability in two manners. Some courts found cigarettes unmerchantable if plaintiff could prove cigarettes were “commercially unfit or unsuitable for smoking.”¹⁶⁶ Other courts held that cigarettes were unmerchantable simply because their use could result in great personal injury.¹⁶⁷ In *American Tobacco Co. v. Grinnell*, the Supreme Court of Texas went further.¹⁶⁸ There the court held that the product would only be unmerchantable if it contained a health danger that was not in the common knowledge.¹⁶⁹ The court held that the danger of nicotine addiction was not in the common knowledge of most consumers in 1952 when the plaintiff began smoking.¹⁷⁰ However, that danger was within the knowledge of the tobacco industry and, therefore, was sufficient to prove the unmerchantability of the product and the subsequent liability of the industry.¹⁷¹

21 C.F.R. §§ 101.13-.14 (2003).

¹⁶³ Food and Drugs, 21 C.F.R. § 101.9 (j) (2003).

¹⁶⁴ Crawford, *supra* note 27, at 1170.

¹⁶⁵ *Id.* at 1173.

¹⁶⁶ *Id.* at 1199-1200 (quoting *Spain v. Brown & Williamson Tobacco Corp.*, 230 F. Supp. 2d 70, 94 (N.D.N.Y. 2000) (internal quotation marks omitted)).

¹⁶⁷ *Id.* at 1200.

¹⁶⁸ 951 S.W.2d 420 (Tex. 1997).

¹⁶⁹ *Id.* at 435. Crawford, *supra* note 27, at 1201.

¹⁷⁰ 951 S.W.2d at 435.

¹⁷¹ *Id.* at 429- 31 (“Addiction is a danger apart from the direct physical dangers of smoking because the addictive nature of cigarettes multiplies the likelihood of and

In light of these theories of merchantability, assignment of liability to the fast-food industry under an implied warranty theory will only apply if: (1) courts use a definition of merchantability that focuses only on the danger of obesity from fast foods; (2) plaintiffs are able to show present research showing that fast food is addictive;¹⁷² and (3) the court's interpretation of merchantability is broader than the seller's promise that the goods will function as expected by an ordinary consumer.¹⁷³ Therefore, only an interpretation of warranty that "merely requires goods to fulfill the basic functional purpose for which such goods are used" will prevent liability from following.¹⁷⁴ In today's present environment, in which regardless of all the hype about fitness and weight loss, the nation appears to be unwilling to effectively address the dangers of obesity,¹⁷⁵ and with no *conclusive* showing that fast food is addictive, it is highly unlikely that a suit based on an implied warranty of merchantability will be successful.

4. Strict Liability: Strict Product Liability

Under a strict product liability theory, the fast-food industry might be strictly liable for the harm caused by any defective product sold. However, according to the Restatement (Second) of Torts, the plaintiffs would be successful only if the product was in a "defective condition *unreasonably dangerous*."¹⁷⁶ As noted in *Pelman*, comment i to section 402A of Restatement (Second) of Torts clearly addresses and negates the argument that the danger from over-consumption of high fat food was so unreasonably dangerous that fast food was defective.¹⁷⁷ The Restatement (Third) of Torts defines food defects in terms of a

contributes to the smoker's ultimate injury, in Grinnell's case, lung cancer.").

¹⁷² In an article discussing the implied warranty of merchantability, one author suggests that if fast food is shown to be addictive and if the public perception of the addictive nature of fast food changes, it will enable plaintiffs to "analogize their U.C.C. section 2-314 claims to those of plaintiffs injured by cigarettes." Crawford, *supra* note 27, at 1220. Evidence of fast food's addictive qualities is not far-fetched. First, fast food is generally high-fat and served in larger portions. Researchers have also identified hormonal changes that "remove some element of free will" and have shown similarities between drug addiction and sugar addiction. Diane Martindale, *Burgers on the Brain*, NEW SCIENTIST, Feb. 1, 2003, at 27-29. "However, the idea that food is addictive is far from mainstream." *Id.* at 29. See also Jiali Wang et. al., *Overfeeding Rapidly Induces Leptin and Insulin Resistance*, 50 DIABETES 2786 (2001); Carlo Colantuoni et. al., *Evidence that Intermittent, Excessive Sugar Intake Causes Endogenous Opioid Dependence*, 10 OBESITY RESEARCH 478 (2002), <http://www.obesityresearch.org/cgi/content/abstract/10/6/478>.

¹⁷³ See Crawford, *supra* note 27 at 1223-24.

¹⁷⁴ *Id.* at 1224.

¹⁷⁵ This is my own opinion based on evidence that obesity and its effects are growing rather than retreating.

¹⁷⁶ RESTATEMENT (SECOND) OF TORTS § 402A (1965) (emphasis added).

¹⁷⁷ *Id.* § 402A cmt. i.

consumer expectation test.¹⁷⁸ Under this test, manufacturers would not be liable for causing obesity if consumers were aware of fast food's dangerous qualities. In simple terms, consumers know that if they eat too much high fat food they get fat. Therefore, under these definitions of defectiveness, no liability would likely follow.

On the other hand, courts could use a risk-utility test for defectiveness. Under that test, "courts attempt to balance the risks of the product as designed against the costs of making the product safer."¹⁷⁹ The problem with this test is that food is essential for life, and the risk comes largely from over-consumption. Therefore, any attempt to make food safer is counter-productive if the food continues to be over-consumed. The only way to skirt this argument is to claim that "a product is simply so dangerous that it should not have been made available at all."¹⁸⁰ This difficulty was highlighted in *Pelman* when plaintiffs were unable to meet the burden of proving that fast food is "so extraordinarily unhealthy that they are outside the reasonable contemplation of the consuming public or that the products are so extraordinarily unhealthy as to be dangerous in their intended use."¹⁸¹ Obviously, this is a heavy burden to prove, and, therefore, the risk-benefit test becomes mostly a policy choice on whether dangerous products should be sold at all.

5. Strict Liability: Product Liability, Duty to warn

Under strict product liability in tort, the plaintiff may also argue that the fast-food industry has a duty to warn of the unhealthy attributes of their products. But as noted in *Pelman*, the duty to warn depends on a variety of factors such as: the feasibility and difficulty of issuing a warning, the obviousness of a risk, the knowledge of the users, and proximate cause.¹⁸² Again, although a warning may be both feasible and easy to issue, the risk from eating fast foods is obvious and in the common knowledge of most consumers relieving the producer of the duty to warn. On the other hand, a plaintiff may complain that portions are super-sized at fast-food restaurants, thus the danger of over-consumption is concealed. The difficulty with this argument is that portion size is also obvious and within the common knowledge of the consumer. Consumers are usually

¹⁷⁸ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 7 (1997).

¹⁷⁹ Dobbs, *supra* note 38, § 357, at 985.

¹⁸⁰ Banks v. ICI Ams., Inc., 450 S.E.2d 671, 674 (Ga. 1994).

¹⁸¹ *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 532 (S.D.N.Y. 2003).

¹⁸² *Id.* at 540.

provided with a range of sizes, and they will make the choice to continue eating or not.¹⁸³ For these reasons it seems unlikely that allegations based in a strict liability duty to warn will be successful.

6. Negligence

Finally, plaintiffs may argue that the fast-food industry is negligent. Negligence is “unreasonable conduct, as measured against the conduct of a reasonable prudent manufacturer in the same or similar circumstances.”¹⁸⁴ Modern courts hold food manufacturers to a duty of reasonable care for manufacturing and design defects.¹⁸⁵ However, in the obesity context, plaintiffs may find it difficult to identify the duty manufacturers have to consumers to make healthier products. In cases involving gun manufacturers, courts used a multiple-factor balancing test to determine whether the defendant owed a duty to consumers injured by their products.¹⁸⁶ These factors were enumerated in *Rowland v. Christian* and are: the foreseeability of the plaintiffs’ harm, the certainty of the plaintiffs’ injury, the closeness of the connection between the defendant’s actions and the plaintiffs’ injury, the culpability of the defendant’s conduct, the desirability of preventing future harm, and the burdens and benefits of imposing such a duty.¹⁸⁷ It is interesting to note that the *Pelman* decision held that no duty existed without resorting to these factors because it determined that over-consumption was out of the control of the manufacturer.¹⁸⁸ However, an analysis of the factors is instructive.

For example, the foreseeability of harm to an individual plaintiff is attenuated. All people eat, but not all become fat. Only a certain proportion of the population is susceptible to obesity.¹⁸⁹ The closeness of the connection between fast-food restaurants and obesity for a majority of its customers is limited by the frequency of their visits to fast-food restaurants. Also,

¹⁸³ Some research has shown that non-obese children will stop their total percentage of calorie input at lower levels than obese children when provided with larger portion sizes. Obese people continue to eat. This research suggests that the size of the portions does not cause obesity; what the obese children lack is control. *Pediatric Obesity; Fast Food is Lure to Overweight Children*, OBESITY, FITNESS & WELLNESS, Nov. 8, 2003, at 30.

¹⁸⁴ Owen, *supra* note 41, at 861.

¹⁸⁵ *Id.* at 889.

¹⁸⁶ Richard C. Ausness, *Tort Liability for the Sale of Non-defective Products: An Analysis and Critique of the Concept of Negligent Marketing*, 53 S.C. L. REV. 907, 952-54 (2002).

¹⁸⁷ 443 P.2d 561, 564 (Cal. 1968).

¹⁸⁸ See *supra* note 111 and accompanying text.

¹⁸⁹ James O. Hill, *An Overview of the Etiology of Obesity*, in EATING DISORDERS AND OBESITY, A COMPREHENSIVE HANDBOOK 460, 463 (Christopher G. Fairburn & Kelley D. Brownell eds., 2002).

unless fast-food restaurants deceive consumers, feeding hungry people is not a culpable act. Furthermore, although there are certainly many desirable benefits to preventing unhealthy eating habits, placing the burden of improving the nation's eating habits on the fast-food industry by making them liable for obesity would not necessarily accomplish that aim. Most likely, the fast-food industry would react by either providing warnings or by providing healthier alternatives. In that case, the public would most likely just turn to the abundance of unhealthy alternatives in the grocery stores or disregard the warnings and continue their unhealthy diets. Such a reaction is likely, however, when one observes that the addition of nutritional information on food products has hardly seemed to change people's eating habits. Thus, these factors do not clearly indicate that the burden in creating a duty and imposing liability on the fast-food industry would necessarily benefit society.

Even if plaintiffs established a duty, to prove negligence the plaintiffs must also prove that the fast-food industry breached that duty and that that breach caused the plaintiffs' damages.¹⁹⁰ In *Pelman*, the court found that the plaintiffs could not establish a prima-facie case for causation.¹⁹¹ A further analysis of causation in the obesity context will be continued below. However, unless the plaintiffs can establish this causation, negligence will likely fail.

B. Barriers to Fast-food Liability

To find fast-food corporations liable for their contribution to the nation's obesity, plaintiffs must overcome three significant obstacles under any theory of product liability. They must prove that: the product was defective and unreasonably dangerous as sold; the defendant had a duty to prevent the danger from the product even when the plaintiff was aware of its harmful properties; and the product caused them injury.

To put it simply, eating high fat, carbohydrate rich fast foods can be extraordinarily unhealthy and dangerous. Does that make this food defective? The Restatement (Third) of Torts suggests that courts consider a "harm-causing ingredient of the food product . . . a defect if a reasonable consumer would not expect the food product to contain that ingredient."¹⁹² Under this standard, fast foods are not defective because the public generally expects them to be high fat and carbohydrate rich.

¹⁹⁰ Dobbs, *supra* note 38, § 114, at 269.

¹⁹¹ See *supra* notes 98-117 and accompanying text.

¹⁹² RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 7 (1997).

This barrier, however, can be overcome if courts adopt a risk-benefit test. Fast foods generally fail this test because these foods have significant negative health effects and are of suspect nutritional value. Unfortunately, the difficulty with the risk-benefit test is in articulating a universal standard to measure the nutritional benefits of specific food products against their negative health effects. Given the constantly changing information as to appropriate nutritional choices, it is doubtful that such a standard would be accepted by the public.¹⁹³

It is even more difficult to establish that the fast-food industry has a duty to its customers when there is an extensive legal history suggesting that plaintiffs are personally responsible for the harm caused by products they purchase with knowledge of their dangerous qualities. The Restatement (Second) of Torts, the Restatement (Third) of Torts, Products Liability section, and an overwhelming majority of jurisdictions have indicated that plaintiffs must take responsibility for their actions. As noted in *Pelman*, the Restatement (Second) of Torts exempted the food industry from taking responsibility for over-consumption of food.¹⁹⁴ The Restatement (Third) of Torts: Products Liability, comment j also adopts the position of section 402A of the Restatement (Second) of Torts on over-consumption.¹⁹⁵ Finally, an overwhelming number of jurisdictions have held that there is no duty to warn consumers of obvious risks.¹⁹⁶

The most difficult barrier to ascribing liability to the fast-food industry is causation. Plainly, obesity is caused by many factors. For example, one study identified the following short lists of factors that cause weight gain with aging: a decline in resting metabolic rate; a decline in physical activity; an increase in food intake; high fat diets; family, social, and cultural attitudes toward weight; and genetic factors.¹⁹⁷ Furthermore, Dr. Brownell, Yale psychology professor and director of the Yale Center for Eating and Weight Disorders, also blamed the rise in obesity on a toxic environment for physical exercise.¹⁹⁸ Any successful claim against the fast-food industry must provide a

¹⁹³ See e.g. *NESTLE*, *supra* note 22, at 67-110.

¹⁹⁴ See *supra* notes 101-102 and accompanying text.

¹⁹⁵ See *RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB.* § 2 cmt. j (“In general, a product seller is not subject to liability for failing to warn or instruct regarding risks and risk-avoidance measures that should be obvious to, or generally known by, foreseeable product users.”).

¹⁹⁶ When the Products Liability restatement was issued in 1997, an “overwhelming majority of jurisdictions” supported the rule that there was no duty to warn of obvious and generally known dangers. *Id.* Annotations of the restatement do not reflect a significant shift from that position.

¹⁹⁷ Grundy, *supra* note 155, at 566S-67S.

¹⁹⁸ Brownell, *supra* note 17, at 436-37.

causation theory to overcome these other factors in order to show that the fast-food industry is the sole or primary cause of the plaintiff's obesity.

As in the gun manufacturing context, courts would have to allow plaintiffs to use easier tests for causation to prove their case in order for cases against the fast-food industry to be successful.¹⁹⁹ The usual test for causation is the "but for" or "sine qua non" test that requires plaintiffs prove that they would not be injured if the defendant's act had not occurred.²⁰⁰ In the obesity cases based on negligent marketing, the plaintiff would have to comply with this test by showing that the defendant's advertising induced their consumption and the consumption caused their obesity.²⁰¹ In *Pelman*, this was an insurmountable barrier.²⁰² In some states a solution to this obstacle may be the use of a "substantial factor" test.²⁰³ This theory is used when two factors join and either could have independently caused an injury.²⁰⁴ Because the decision whether a cause is substantial is given to the jury, this theory could potentially allow plaintiffs to establish causation if the fast-food industry became unpopular.²⁰⁵ However, the burden to prove that the fast-food industry caused obesity would be on the plaintiffs, and it still would not relieve the plaintiffs from detailing how the other factors interacted with the fast-food industry actions to cause obesity.

Even if plaintiffs were able to establish that fast foods caused their obesity, they would have the additional problem of establishing which restaurants were specifically responsible. Again, in the case of gun manufacturing, some courts allowed plaintiffs to solve this problem by using enterprise or market share liability.²⁰⁶ In the fast foods context, the use of either of these theories will have important implications and specific difficulties in application.

Enterprise liability imposes "strict liability [on] business enterprises for harms perceived to be recurrently associated with their operation."²⁰⁷ This would allow plaintiffs to sue a trade association "on the theory that promulgating standards, or some other action by the association, contributed to his injuries."²⁰⁸

199 See Ausness, *supra* note 186, at 946.

200 Dobbs, *supra* note 38, § 168, at 409.

201 See Ausness, *supra* note 186, at 946-47.

202 See *supra* notes 140-45 and accompanying text.

203 Ausness, *supra* note 186, at 947.

204 *Id.*

205 See *id.* at 948.

206 *Id.* at 948-49.

207 Dobbs, *supra* note 38, at 908.

208 Ausness, *supra* note 186, at 948.

The rationale behind this theory is that the members of the industry “cooperate[d], tacitly or expressly, in particular conduct . . . [and] are said to be acting in concert. Each of those acting in concert is liable jointly and severally for all the intended or foreseeable resulting harm.”²⁰⁹ In the fast food context, this theory would be justified either if members of the industry had worked together, intentionally or unintentionally, to deceive consumers²¹⁰ or if juries accepted the argument that the costs of obesity could be passed on by the industry through insurance and higher prices.²¹¹

Market-share liability is a theory created to assign responsibility when there is delay in the onset of damages and when it is difficult to identify the original manufacturer of a product. It “enables plaintiffs to recover from each member of an entire industry based on its market share of the products sold.”²¹² This theory reached notoriety in diethylstilbesterol “DES” cases, in which the plaintiffs faced the insurmountable barrier of finding which manufacturer among 300 provided their parents a fungible drug that caused their birth defects.²¹³ There are some parallels and differences between DES and fast-food liability. Like DES, food is a fungible product, but unlike DES, it is not difficult to establish where plaintiffs ate when there is a pattern of consumer choices. In this respect, liability for the fast-food industry is more analogous to liability in gun manufacturing. In *Hamilton v. Beretta*,²¹⁴ a main case on gun manufacturer liability, the New York Court of Appeals decided that market share was inappropriate because it was possible to identify the manufacturer and because different guns had different levels of risk.²¹⁵ Fast food plaintiffs may face the same obstacle because different foods have different inherent risks based on their preparation and because it is much easier to identify where the plaintiffs have eaten.

An additional obstacle to the use of these causation theories may be other industries that contribute to obesity. The decline in physical exercise due to an increase in the popularity of sedentary activities is a “substantial factor” causing obesity that

²⁰⁹ Dobbs, *supra* note 38, at 936.

²¹⁰ See *Hall v. E. I. Du Pont De Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972) (holding a whole industry liable because they jointly controlled the risk created by inadequate standards for dynamite caps).

²¹¹ Dobbs, *supra* note 38, § 353, at 975. See also, Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266 (1997).

²¹² Ausness, *supra* note 186, at 949.

²¹³ Frank J. Giliberti, *Emerging Trends for Products Liability: Market Share Liability, Its History and Future*, 15 TOURO L. REV. 719, 723-25 (1999).

²¹⁴ 750 N.E.2d 1055 (N.Y. 2001).

²¹⁵ *Id.* at 1066-67; Ausness, *supra* note 186, at 949.

makes these theories less workable. If, as Dr. Kelley Brownell notes, “[t]he computer, television, and video games have made sedentary behavior very appealing and engaging, especially for children,” these industries should also be included in the formula that assigns responsibility for obesity.²¹⁶ Ultimately, the share of responsibility becomes excessively large and unworkable.

C. Surmounting Barriers to Fast-food Liability; Negligent Marketing and Advertising

Some courts may not find these barriers to fast-food liability insurmountable. They may apply the theories developed to hold gun manufacturers liable for how they marketed and promoted guns. In that context, plaintiffs have alleged that the manufacturer’s “marketing practices . . . affirmatively created a risk of harm to others.”²¹⁷ In a series of cases, courts found that gun manufacturers’ “special ability to detect and to guard against the risks associated with [their] products gave rise to a ‘protective relationship’ with those who might be injured.”²¹⁸ This was especially true when there was a relationship “between a defendant and a third party, such as a parent and child,” and when the “defendant affirmatively enhanced an inherent risk.”²¹⁹ Furthermore, the duty arose because the risk from the defendant’s conduct was foreseeable and therefore, the defendant’s conduct was “morally blameworthy.”²²⁰

Fast-food liability fits neatly into this theory, generally called negligent marketing or advertising. Under this theory, plaintiffs would claim that the risk of childhood obesity is affirmatively enhanced by the marketing and advertising campaigns of the fast-food industry. Additionally, plaintiffs would claim that fast-food companies target children and induce them to eat dangerous foods. This conduct is foreseeable and intentionally increases the risk children will become obese.

However, cases espousing this theory have been overturned by higher courts in the past few years.²²¹ This led one commentator to cast doubt as to the future viability of this theory.²²² Nonetheless, the theory has recently risen from ashes

²¹⁶ Brownell, *supra* note 17, at 437.

²¹⁷ Ausness, *supra* note 186, at 952.

²¹⁸ *Id.* at 925 (discussing the following case using this theory: *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999); *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146 (Cal. Ct. App. 1999) *rev'd*, 28 P.3d 116 (Cal. 2001).

²¹⁹ Ausness, *supra* note 186, at 925-26, 932.

²²⁰ *Id.* at 932-33.

²²¹ See *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001); *Merrill v. Navegar, Inc.*, 28 P.3d 116 (Cal. 2001).

²²² Ausness, *supra* note 186, at 965. “However, two cases decided last year, *Hamilton*

in the Ninth Circuit Court of Appeals. In *Ileto v. Glock*, a Ninth Circuit panel based liability on a claim that a gun manufacturer's "affirmative actions in distributing their products [created] an illegal secondary market for guns that targets illegal purchasers."²²³ The *Ileto* court did *not* characterize the issue as one of product liability.²²⁴ Instead, the court held that the defendant's possible negligence in allowing its products to produce a nuisance could survive the defendant's Rule 12(b)(6) motion. This case rests on an interpretation of California nuisance law that suggests that certain occupations can become a nuisance "when . . . business is performed in a manner that unreasonably infringes on a public right."²²⁵ This allows plaintiffs to avoid the difficult proof issues for defectiveness in product liability by focusing solely on the effect of negligent marketing on the ability of the product to create a nuisance. Under this reasoning in *Ileto*, fast-food liability becomes more viable.

By approaching the issue from the angle of negligent marketing, the *Ileto* court was able to find a duty on the part of the defendants and breach of that duty. The court found a duty because Glock purposefully targeted and oversupplied states with less restrictive gun laws, increasing the probability that their guns would fall into the hands of illegal purchasers.²²⁶ An analogy to the fast-food industry's excessive targeting of children may be just as persuasive. It is just as foreseeable that, by targeting children, the fast-food industry has affirmatively increased the risk of obesity. Furthermore, in *Ileto*, the court found a breach of duty because "[t]he social value of manufacturing and distributing guns without taking basic steps to prevent these guns from reaching illegal purchasers and possessors cannot outweigh the public interest in keeping guns out of the hands of illegal purchasers and possessors who in turn use them in crimes."²²⁷ It is but a short step to make the argument that the social value of selling high fat, carbohydrate rich foods without taking the basic steps to inform parents of the unhealthy characteristics of this food cannot outweigh the public interest from keeping dangerously unhealthy food from vulnerable children.

Only time will tell if the *Ileto* decision will stand or if its

v. Beretta U.S.A. Corp. and Merrill v. Navegar, Inc., cast serious doubt about the future of negligent marketing as a viable legal theory." *Id.* (internal citations omitted).

²²³ 349 F.3d 1191, 1201 (9th Cir. 2003).

²²⁴ *Id.* at 1201-02.

²²⁵ *Id.* at 1214.

²²⁶ *Id.* at 1204-05.

²²⁷ *Id.* at 1205.

reasoning will ever be extended to claims against the fast-food industry. *Ileto* relies on a substantial factor test to prove causation, and its extension of nuisance beyond real property was controversial in California.²²⁸ As noted earlier, the substantial factor test raises its own difficulties in the fast food context. Furthermore, the *Ileto* dissent took issue with the majority's characterizations that it was not a product liability action and that nuisance created by a product could be extended in California beyond real property.²²⁹ It is difficult to predict whether this extension of nuisance law will be beneficial to fast-food litigation plaintiffs.²³⁰ In spite of these difficulties, it is possible that some courts may find the fast-food industry liable for causing obesity by using the reasoning of *Ileto* and other lawsuits against gun manufacturers.²³¹

V. PUBLIC POLICY IMPLICATIONS FOR OBESITY LIABILITY

A. The Root of the Public Policy Debate

The McDonald's litigation was about choices made by plaintiffs in response to an environment in which they were encouraged to consume fast foods by major corporations. The reason plaintiffs seek to find these corporations liable is obvious—the fast-food industry has a powerful role in controlling what we eat. According to the United States Department of Agriculture, in 2000 the nation's 844,000 food service eating establishments sold over \$358 billion worth of meals and snacks.²³² Fast-food sales accounted for \$125 billion of these sales.²³³ Food service sales are projected to account for 49% of total food sales by the year 2010.²³⁴ The fast-food industry

²²⁸ *Id.* at 1206, 1213-14.

²²⁹ *Id.* at 1220, 1223-24 (Hall, J. dissenting). "But to assert that this action is not about products borders on the absurd. . . . The nature of appellees' conduct cannot be analyzed apart from the *product* they are selling." *Id.* at 1220.

²³⁰ Presently, there is a substantial split of authority nationally over whether a public nuisance theory should be allowed in the gun context. See *City of Gary ex rel. King v. Smith & Wesson, Corp.*, 801 N.E.2d 1222, 1232 & n.8 (Ind. 2003) (citing recent decisions either dismissing or allowing public nuisance action to proceed against gun manufacturers). Therefore, it is even more difficult to predict whether the courts would find such a theory persuasive for claims based on obesity.

²³¹ *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E. 2d 1136, 1143 (Ohio 2002) (holding gun manufacturer can be "held liable for creating [a] nuisance."); *White v. Smith & Wesson*, 97 F. Supp. 2d 816, 828-29 (N.D. Ohio 2000) (finding a duty of care for gun manufacturers to children and other unauthorized users of handguns as well as municipalities who suffer both physical and economic injury through unauthorized gun use).

²³² Charlene Price, *Food Service*, in ECON. RESEARCH SERV., U.S. DEPT AGRIC., THE U.S. FOOD MARKETING SYSTEM, 2002, at 34, <http://www.ers.usda.gov>.

²³³ *Id.* at 35.

²³⁴ *Id.* at 34.

heavily advertises to maintain its proportion of the food dollar.²³⁵ For example, McDonald's is the largest fast-food advertiser at \$1.3 billion in 2002, ranking 15th among the top 100 national advertisers.²³⁶ Therefore, plaintiffs could have a significant impact on the nation's health if they are successful in changing the practices of these corporations.

The power of the food industry to influence eating behaviors especially impacts children's health. One recent report commissioned by the Henry J. Kaiser Family Foundation summarized many of the current studies on the role of the media in influencing childhood obesity. Based on these studies, it concluded that:

[I]t appears likely that the main mechanism by which media use contributes to childhood obesity may well be through children's exposure to billions of dollars of food advertising and cross-promotional marketing year after year, starting at the very youngest ages, with children's favorite media characters often enlisted in the sales pitch. Research indicates children's food choices—and parents' food purchases—are significantly impacted by the advertising they see. The number of ads children see on TV has doubled from 20,000 to 40,000 since the 1970s, and the majority of ads targeted to kids are for candy, cereal, and fast food.²³⁷

From this perspective, the importance of the public policy debate becomes clearer. In our society, children are born into this obesity-conducive environment encouraged by these powerful corporations. However, it does not necessarily follow that these corporations should be held liable for the resulting obesity and its effects. Aside from the fact that eating is an individual act of free choice, Congress's attempt to create a federal exemption for fast-food liability has both positive and negative consequences to the fast-food industry and to our ability to address the causes of obesity.

B. The Rationale for an Exemption for Fast-food Liability

Many commentators have criticized the American legal system for allowing plaintiffs to bring "frivolous" suits against the fast-food industry, arguing that consumers should be personally responsible for their actions.²³⁸ The Personal

²³⁵ *Id.* at 79 app. tbl. 30. In 1999, restaurant advertising was 3.4 million.

²³⁶ R. Craig Endicott, *100 Leading National Advertisers*, 74 *ADVERTISING AGE*, June 23, 2003, at S-1.

²³⁷ THE HENRY J. KAISER FAMILY FOUND., *THE ROLE OF MEDIA IN CHILDHOOD OBESITY* 10 (2004), <http://www.kff.org/entmedia/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=32022>.

²³⁸ See *CTR. LEGAL POLICY MANHATTAN INST., TRIAL LAWYERS INC.: A REPORT ON THE*

Responsibility in Food Consumption Act would prevent plaintiffs from holding the fast-food industry liable for obesity.²³⁹ The National Restaurant Association has asked Congress to recognize that consumers should be personally responsible for their actions.²⁴⁰ This is the industry's strongest argument against these lawsuits. One reporter summarized the argument as: "[y]ou're fat, your fault. . . . [P]eople can make their own choices about food and exercise."²⁴¹ Therefore, one of the negative consequences to fast-food liability, so the argument runs, is the policy implication of not holding people personally responsible for the harms caused by the exercise of their own free will.

Another consequence of extending liability would be the damage to the public perception of the judicial system. If plaintiffs were to be successful, undoubtedly there would be a strong public reaction to the outcome of the suit.²⁴² It would be cited as another example of judicial activism that interferes with the proper role of the legislature. It would be criticized as a blatant misuse of judicial resources. Ultimately, it could lead to damaging public skepticism of the justice of our legal system.

Of course, there are also economic consequences to imposing liability on the fast-food industry. The restaurant industry could suffer from decreased sales from negative publicity, increased insurance costs arising from the exposure to liability and the burden of litigation expenses.²⁴³ And, the fast-food industry is

LAWSUIT INDUSTRY IN AMERICA 2003, at 18-19, at <http://www.triallawyers.com>

²³⁹ Personal Responsibility in Food Consumption Act, H.R. 339, 108th Cong. (2003).

²⁴⁰ "Not only do the lawsuits we are discussing this morning fail to acknowledge the voluntary nature of the choices customers make, they also do not address the fundamental issue of personal responsibility." *Personal Responsibility in Food Consumption Act: Hearing on H.R. 339 Before Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 108th Cong. 35 (2003) [hereinafter *Personal Responsibility Hearing*] (statement of Christianne Ricchi, on behalf of the National Restaurant Association), available at <http://www.house.gov/judiciary/87814.PDF>.

²⁴¹ Siobhan McDonough, *Weighty Issues: Americans' Flab Spurs War Along Political Lines*, SEATTLE TIMES, Sept. 23, 2003, at A3.

²⁴² According to a 2003 Gallup Poll:

[N]early 9 in 10 Americans (89%) oppose holding the fast-food industry legally responsible for the diet-related health problems of people who eat that kind of food on a regular basis. Just 9% are in favor. Those who describe themselves as overweight are no more likely than others to blame the fast-food industry for obesity-related health problems, or to favor lawsuits against the industry.

Lydia Saad, *Public Balks at Obesity Lawsuits*, GALLUP POLL: TUESDAY BRIEFING, July 21, 2003, at 109, available at <http://www.gallup.com/poll/releases/pr030721.asp>.

²⁴³ INS. INFO. INST., OBESITY, LIABILITY & INSURANCE (arguing that the insurance industry should take the threat of liability seriously). "Given the increasing cost and even scarcity of certain types of liability coverage, the recent obesity-related litigation against the fast-food industry is of special concern." *Id.* at 16. *Personal Responsibility Hearing*, *supra* note 240, at 34-35 (arguing that liability for obesity could damage small businesses including her own). See also Meg Green, *Food Fright*, BEST'S REV., Aug. 2003, at 24 (discussing the repercussions for insurers caused by recent fast-food lawsuits).

certainly not the only one that could be held liable for obesity. The costs of future litigation and liability in industries across the board could potentially explode having a detrimental impact on the national economy.²⁴⁴ Although large corporations such as McDonald's may have the resources to absorb these additional costs and the capacity to defend themselves, smaller companies would be less able to sustain these costs and more vulnerable to such lawsuits.²⁴⁵

C. The Rationale Against an Exemption for Fast-food Liability

Health commentators nationally and internationally have demonstrated that advertising by the food industry, and specifically the fast-food industry, has influenced the foods that children eat.²⁴⁶ By taking away the threat of liability for their actions, Congress would be implicitly supporting the actions of these corporations. There should be a point where company action in search of sales and profitability at the expense of the public health becomes culpable. This culpability will be forever evaded if liability against these companies is foreclosed.

Congress should not interfere with the state's prerogative in exploring this culpability. The control of state courts is the province of the states, and federalism and comity suggest that states should be allowed to control their own product liability law. Recent experience shows that some individual states are

²⁴⁴ The ice cream industry has also been notified it is a potential target! Marguerite Higgins, *Lawyers Scream About Ice Cream*, WASH. TIMES, JULY 25, 2003, at A1. One study identified the following industries that could be targeted: agriculture, food processors & manufacturers, beverage makers, food distributors, grocers, restaurants & franchises, advertising agencies, TV networks/magazines/newspapers, toy manufacturers, and sporting/entertainment organizers. INS. INFO. INST., *supra* note 243, at 16. There have been many articles and studies written as to the negative effect of litigation on the economy. *E.g.* DAVID DIAL ET AL., TORT EXCESS: THE NECESSITY FOR REFORM FROM A POLICY, LEGAL AND RISK MANAGEMENT PERSPECTIVE 8 (2003) (discussing the economic impact of tort abuse on the states and national economies), available at http://server.iii.org/yy_obj_data/binary/727182_1_0/tortreform.pdf.

²⁴⁵ See *Personal Responsibility Hearing*, *supra* note 240, at 34.

²⁴⁶ Shawna L. Mercer, et al., *Possible Lessons from the Tobacco Experience for Obesity Control*, AM. J. CLINICAL NUTRITION 1073S, 1075S (2003)

Television appears to be directly and causally related to the prevalence of obesity among children Televised food advertisements have a major influence on the dietary intake of children. . . . [A] recent study found that food products account for more than 60% of the products advertised on Saturday morning television programs for children.

Id. (internal citations omitted). Andrew Oliver, Note, *The Proposed European Union Ban on Television Advertising Targeting Children: Would it Violate European Human Rights Law?*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 501 (2000). "Swedish law bans all television advertising that specifically targets children under the age of twelve. This prohibition . . . affects not only toy advertisements, but covers advertising for sweets and fast foods as well." *Id.* at 501. Sweden attempted to extend this ban to all of Europe to protect children from the effects of such advertising. *Id.*

moving toward restricting liability,²⁴⁷ and there is a real value in allowing the states to be a “laboratory of experimentation”²⁴⁸ to find the best solution to deal with the public policy issues presented by obesity. In the same vein, respect for the appellate process suggests that there is no need for the federal government to step in. The appellate process worked to overturn lawsuits brought against the gun industry,²⁴⁹ and therefore, it is probably even more likely that the appellate process would be quicker to overturn suits for obesity. Without at least some evidence the states cannot handle the issues arising from obesity liability, Congress should allow the states to make their own individual decisions.

By foreclosing liability, Congress would also prevent other important functions of product liability litigation. Our product liability system “brings into public view decisions balancing the utility and the hazards of the products we use and depend on, [and] it allows the people to pass judgment on those decisions.”²⁵⁰ It also influences the behavior of corporate executives who make decisions whether to market an unreasonably dangerous product or risk the discovery process and exposure to the media.²⁵¹ Congress would also take away the incentive product liability provides the fast-food industry to display warnings and nutritional information and promote healthier alternatives.²⁵²

Of course, the food industry could take voluntary actions to curb its “obesity-encouraging practices” without an exemption

²⁴⁷ Louisiana has already passed legislation preventing liability for obesity and “[n]ineteen other state legislatures—Arizona, California, Colorado, Florida, Georgia, Idaho, Illinois, Kentucky, Mississippi, Missouri, Nebraska, New Hampshire, Ohio, Pennsylvania, South Dakota, Tennessee, Utah, Washington and Wisconsin – were considering similar bills as of March 1,” according to the National Conference of State Legislatures. CBSNEWS.com, *House Passes ‘Cheeseburger Bill’*, at <http://www.cbsnews.com/stories/2004/03/10/health/printable605157.shtml> (March 10, 2004). See also, National Conference of State Legislatures, Excerpt from Issue Brief on Nutrition and Obesity, at <http://www.ncsl.org/programs/health/IBIntro.htm> (Apr. 1, 2002) (detailing current state legislation dealing with obesity).

²⁴⁸ In the context of gun control, Justice Kennedy emphasized these values. “In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.” *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

²⁴⁹ See e.g. *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001); *Merrill v. Navegar, Inc.*, 28 P.3d 116 (Cal. 2001).

²⁵⁰ Bogus, *supra* note 31, at 219.

²⁵¹ *Id.*

²⁵² See Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 MO. L. REV. 1, 51-52, 62, (discussing how the tort system has provided incentives for safety in the firearms and auto industries as a “[c]omplement to [l]egislative and [a]dministrative [r]egulation.”).

from liability.²⁵³ However, if it did not change these practices and Congress prevented liability, the fast-food industry would no longer be exposed to both litigation and regulation. The threat of litigation (and its subsequent effect on stock prices) is one of the most powerful tools available to change corporations' behavior.²⁵⁴ As noted by Professor Cass Sunstein, "lawsuits are a form of regulation," but they make up "for a shortfall of regulation by government agencies."²⁵⁵ Without the threat of litigation, Congress will find itself facing the pressure for resolving these problems, and any shortfall in the regulation of these industries would likely be remedied by either federal legislation or regulation.

Undoubtedly, the fast-food industry's exposure to product liability has costs,²⁵⁶ but at this time those costs are not significant as compared to potential costs of future regulation or legislation. As addressed earlier, no present cause of action adequately supports liability, so an actual liability cost does not presently exist.²⁵⁷ But what of the argument that small restaurants will be forced out of business if liability is extended? Even if liability were imposed, it is unlikely that the costs shouldered by the small restaurants would be significant. The small businesses will likely not be the first targets. It is more likely that the \$125 billion-strong fast-food industry, dominated by large corporations (who, as shown in *Pelman*, are well-able to defend themselves) would be the first target. The cost equation must also be evaluated by taking into account the effect regulation may have on the corporate bottom-line. Liability costs are felt after a corporation has committed misdeeds. This allows the market to control costs by allowing the fast-food corporations to choose their level of self-regulation.²⁵⁸ If liability is foreclosed, the only governmental control of these corporations' obesity-promoting behavior will be through government regulation or taxation. In the past few years, public health commentators have been calling for taxation of fast foods and for increased

²⁵³ Ben Kelley, *Fair Warning for Fat Peddlers*, WASH. POST, Aug. 13, 2003, at A27.

²⁵⁴ Samuel Loewenberg, *Are Lawyers the New Regulators?*, 2003 NAT'L J. 2640, 2640-41.

²⁵⁵ *Id.* at 2641 (internal quotation marks omitted).

²⁵⁶ Bogus, *supra* note 31, at 218.

²⁵⁷ Congressional Budget Office, Cost Estimate: H.R. 339 (Feb. 10, 2004) at <http://ftp.cbo.gov/50xx/doc5037/hr339.pdf>.

²⁵⁸ Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 Mo. L. Rev. 1, 82 (1995) (arguing that the "products liability system compensates for the shortcomings of administrative regulation" and "[i]t stimulates self-regulation, giving manufacturers a strong incentive to learn as much as possible about potential hazards and reduce risk."). See Lytton, *supra* note 252, at 52 (concluding that the "threat of tort liability provides incentives for the [gun manufacturing] industry to police itself").

regulation.²⁵⁹ The Food and Drug Administration has responded and recently unveiled its strategy to reduce obesity by strongly encouraging restaurants to begin including nutrient information in menus.²⁶⁰ Such encouragement could turn into regulation or taxation without the external controls of restaurant behavior from product liability. In order to avoid potentially crippling federal regulations, the fast-food restaurants themselves should welcome the opportunity to state their case in the courts.

Finally, in the aggregate, the costs do not outweigh the benefits provided by our product liability system as demonstrated by fast-food corporations' response to threatened litigation. The relatively few unsuccessful cases and their media exposure have brought beneficial changes to the way the fast-food industry does business. The fast-food companies have responded to the incentives to self-regulate and have reduced their exposure to litigation. The fast-food companies are now competing to show they can provide healthier alternatives and nutritional advice.²⁶¹ The success of companies demonstrating a commitment to supplying healthier alternatives and providing nutritional advice has spurred these changes across the industry.²⁶² Even McDonald's is changing its behavior and benefiting from that change. In October 2003, McDonald's named a director of worldwide nutrition and then in January 2004, launched an initiative called "Real Life Choices" in New York to provide nutritional education programs.²⁶³ In April 2004, McDonald's

²⁵⁹ KELLY D. BROWNELL & KATHERINE BATTLE HORGAN, FOOD FIGHT 217-35 (2004) (arguing that a good approach toward eliminating obesity would be to "subsidize all fruits and vegetables with revenue generated by a tax on soft drinks, snack foods, and fast foods" and by making obesity a "priority in the four main [federal] food programs").

²⁶⁰ Press Release, United States Department of Health & Human Services, HHS Unveils FDA Strategy to Help Reduce Obesity (March 12, 2004). "Encouraging the restaurant industry to launch a national, voluntary effort to include nutritional information for consumers at the point of sale." *Id.*

²⁶¹ Elizabeth Lee, *Fast Food Goes on a Diet*, ATLANTA J. CONST., Sept. 19, 2003, at A1. Consider what's happened in just the past week. McDonald's announced it was teaming up with Bob Greene to promote a Go Active meal for adults, with a salad, a pedometer to count steps and a bottle of water . . . Wendy's revamped the nutrition section of its Web site to provide more information on meal choices, including recommendations for people who are dieting . . . Burger King unveiled its grilled sandwiches with 5 grams of fat, and a light combo meal made up of one of those sandwiches, bottle water and a salad.

Id. Nancy Dillon, *McD's Goes Healthy in NY: But Nutritionists Query Program's Real Impact*, N.Y. DAILY NEWS, Oct. 7, 2003, available at, 2003 WL 65395464 (describing how McDonald's, Blimpie, and Burger King provide new products or nutritional advice on how to lower calories while eating at their restaurants).

²⁶² Lee, *supra* note 261. Fast-food companies are changing their behavior because of the "success of chains that have heavily promoted healthier choices, such as Subway and Wendy's." *Id.*

²⁶³ Press Release, McDonald's Corp., McDonald's Corporation Announces Worldwide Nutrition Director (Oct. 8, 2003), available at <http://164.109.33.187/content/corp/news/corppr/cpr10082003.html>; Press Release, McDonald's Corp., McDonald's Real Life Choices Teaches Consumers How to Eat the McDonald's Food They Love and Stay on Track with

came out with a national campaign to provide "Adult Happy Meals" with salads, pedometers, and health advice for its customers.²⁶⁴ Perhaps the most striking change, however, is McDonald's recent decision to stop "super-sizing" its meals.²⁶⁵ This change appears to be in direct response to potential liability problems and shows the potential deterrent effect of the threat of litigation.²⁶⁶ Furthermore, McDonald's new menus, offering salad as a healthier alternative, has driven the company to even higher profits.²⁶⁷

VI. CONCLUSION

As product liability law presently stands, the fast-food industry will most likely not be held liable for influencing the public's eating behavior. The existing theories of product liability do not appear to support such an action. *Pelman* demonstrates the difficulty courts have in assigning responsibility to the fast-food industry when plaintiffs have made choices with obvious risks. *Pelman* also presents the difficulty plaintiffs will have in establishing that fast food is a defective product, in creating a duty toward the plaintiff, and in finding that fast food caused their injuries. In the near future, these obstacles may be insurmountable.

Yet one is left with the unsettling feeling that obesity is not strictly a personal choice. It is undisputed that the food industry markets to children to influence both their behavior and, through them, their parents' behavior. Children are incapable of making these choices, and it is questionable that parents should shoulder all the blame for these actions when there are such powerful forces working against them. Whether the fast-food industry has

Their Diets (Jan. 6, 2004), available at http://164.109.33.187/usa/news/current/conpr_01062004.html.

²⁶⁴ Dave Carpenter, *McDonald's Rolls Out Adult Happy Meals*, ORANGE COUNTY REG., Apr. 16, 2004, at B1.

²⁶⁵ Press Release, McDonald's Corp., McDonald's Media Response to Core Menu and Super Sizing (Mar. 2, 2004), available at http://164.109.33.187/usa/news/current/conpr_030120040.html.

²⁶⁶ Albeit McDonald's has implied it is only a business decision based entirely on sales! Press Release, McDonald's Corp., McDonald's Sales Momentum Continues; Reports Record February Sales, Up 23% (Mar. 5, 2004), available at http://www.mcdonalds.com/corp/news/fnpr/fpr_03052004.RowPar.0001.ContentPar.0001.ColumnPar.0006.File.tmp/MCD%20Sales%20Update%20February%202004.pdf.

²⁶⁷ See *McDonald's Healthier Menu Brings Back Profits*, DAILY EXPRESS, Oct. 24, 2003 (describing the effect McDonald's healthier menus have had on profits in the United States), available at 2003 WL 65920716. See Press Release, McDonald's Corp., McDonald's Sales Momentum Continues; Reports Record February Sales, Up 23% (Mar. 5, 2004) (indicating that one of the drivers of its tenth consecutive month of improved sales was enhanced menu variety), available at http://www.mcdonalds.com/corp/news/fnpr/fpr_03052004.RowPar.0001.ContentPar.0001.ColumnPar.0006.File.tmp/MCD%20Sales%20Update%20February%202004.pdf.

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created a public nuisance by promoting unhealthy products and whether courts should ever interfere in this area of personal choice are difficult questions. Ultimately, these issues are not completely answered by existing theories. Thus, it is wise to allow the federal government, state legislatures and state courts to grapple with these issues without a foreclosure of product liability for obesity. History has shown that the laws of product liability have adapted to hold manufacturers responsible for culpable conduct. Fast-food litigation should stand or fall depending on whether the public finds the industry's conduct culpable through both the litigation and the regulation process. The current pervasive presence of obesity in the United States suggests that this problem will not be reduced nor eliminated soon without continued attention to these issues.