

## PRODUCTS LIABILITY

# Fast Food Lawsuits

**T**HERE HAS BEEN a proliferation of articles predicting that fast food litigation will be the next Big Tobacco litigation. Even *Fortune* magazine jumped on the bandwagon, with the cover of its Feb. 3, 2003, issue asking, "Is Fat the Next Tobacco?" However, despite a few well-publicized lawsuits (some of which have had the effect of changing the content of some companies' food), there appears to be little basis for widespread and panic-inducing predictions. There have been few successes in litigation against Big Food, and most of the successes in obesity-related lawsuits have dealt with mislabeling or consumer fraud, which is unlikely to lead to damages awards akin to those seen in personal injury tobacco litigation.

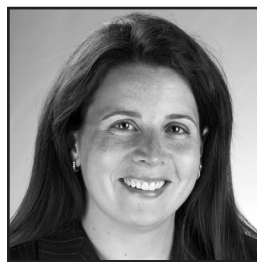
Tobacco companies and fast food restaurants are not treated the same way by the courts, and such disparate treatment is likely to continue. Attempts to use tobacco litigation as a model for fast food litigation have generally failed and will likely to continue to fail in the future.

### Few fast food cases have been brought so far

Despite the number of news stories about litigation against fast food companies,

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By Lianne S. Pinchuk



there have actually been very few cases. On Aug. 22, 2002, two minor plaintiffs became the center of much media attention (and a considerable amount of satire) when a complaint was filed on their behalf against McDonald's Corp. The plaintiffs alleged that McDonald's engaged in deceptive practices in violation of New York's Consumer Protection Act; that McDonald's was negligent in selling foods high in fat, sugar, salt and cholesterol; that McDonald's failed to warn customers about the ingredients in its food; and that McDonald's negligently marketed food products that were addictive. All of the plaintiffs' claims were initially dismissed, and after multiple appeals and amendments to the complaint, three claims remain against McDonald's. *Pelman v. McDonald's Corp.*, 2006 WL 2663214 (S.D.N.Y. Sept. 16, 2006).

In the remaining claims, the plaintiffs allege that McDonald's promotions and advertisements created the false impression that its food is nutritious; that McDonald's failed to disclose that its use of additives made its food less healthy than represented; and that McDonald's deceptively represented that it would provide nutritional information. *Id.* at \*2.

Because of the lengthy procedural path it took, *Pelman* has only now passed the motion-to-dismiss stage. Although it is impossible to know how the case will turn out, the *Pelman* court has discussed some of the hurdles the plaintiffs will face, including showing that McDonald's products played any role in causing their health problems. *Pelman v. McDonald's Corp.*, 2003 WL 22052778 (S.D.N.Y. Sept. 3, 2003). It noted that "[p]laintiffs have not made any attempt to isolate the particular effect of McDonald's foods on their obesity and other injuries." *Id.* at \*11.

Two other suits against McDonald's have dealt with deceptive practices, but not directly with obesity. McDonald's agreed to donate approximately \$10 million to charity to settle a suit alleging that McDonald's failed to disclose that its french fries contained beef fat. "McDonald's Settles Beef Over Fries," [www.cbsnews.com/stories/2002/06/05/national/main511109.shtml](http://www.cbsnews.com/stories/2002/06/05/national/main511109.shtml). McDonald's also donated \$7 million to the American Heart Association to settle a suit alleging that it reneged on its promises to remove trans fats from its foods. See [www.bantransfats.com/mcdonalds.html](http://www.bantransfats.com/mcdonalds.html). Thus, the settlements and awards so far in fast food class action litigation don't even begin to compare to the hundreds of millions of dollars in damages awarded to individual plaintiffs in tobacco litigation. And there is little reason to believe that such awards may significantly increase over time, given the significant evidentiary burdens faced by plaintiffs, as explained by the *Pelman* court.

Recent legislative activity has also provided restaurants and food distributors with more legal protections from obesity-related personal injury lawsuits. Twenty-

three states have enacted laws that provide at least some protection or immunity to food companies faced with the threat of obesity lawsuits.

Although there has not been any obesity-related litigation in most states, some have nevertheless enacted the statutes as protective measures. Louisiana started the trend by enacting legislation in 2003. La. Rev. Stat. § 9:2799.6: "Limitation of liability for damages from long-term consumption of food and nonalcoholic beverages." Such statutes generally provide some immunity from liability arising out of claims concerning weight gain, obesity and obesity-related health problems. Florida's statute, Fla Stat. ch. § 768.37, provides that no food manufacturer, distributor or seller "shall be subject to civil liability for personal injury or wrongful death to the extent such liability is premised upon a person's weight gain or obesity, or a health condition related to weight gain or obesity." Some laws mandate that food products may not be classified as defective and unreasonably dangerous for products liability purposes.

Like the other states' statutes, Florida's does not limit liability if a food company fails to provide legally required nutritional information or has provided materially false or misleading information. Claims of deceptive practices, consumer fraud or mislabeling against food companies are traditionally allowed under state deceptive trade practices statutes and are explicitly carved out of the laws that otherwise immunize food companies from obesity-related claims.

Following the various state statutes, the federal government sought to jump on the bandwagon. Republicans in Congress have thrice proposed federal legislation protecting the food industry from "frivolous" suits. The Personal Responsibility in Food Consumption Act, H.R. 339 (commonly referred to as the "Cheeseburger Act"), was first introduced in 2004 and was passed by the House in March 2004. Its purpose was "to prevent legislative and regulatory functions from being usurped by civil liability actions brought or continued against food manufacturers, marketers, distributors, advertisers, sellers, and trade associations for claims of injury relating to a person's weight gain, obesity, or any health condition associated with weight gain or obesity." The Bush administration issued a statement of support, stating that "[f]ood manufacturers should not be held liable for injury because of a person's consumption of legal, unadulterated food and a person's weight gain or obesity." Statement of

Administration Policy, March 10, 2004, available at [www.whitehouse.gov](http://www.whitehouse.gov). H.R. 339 passed, 276-139.

The bill was reintroduced by Representative Ric Keller, R-Fla, in 2005 as H.R. 554 and on Oct. 19, 2005, was again passed by the House, this time with a vote of 306-120. The White House again issued a Statement of Administration Policy supporting H.R. 554. Neither bill was passed by the Senate. Prior to H.R. 554's vote in the House, the Senate introduced the Commonsense Consumption Act, S. 908. S. 908 was introduced by Senator Mitch McConnell, R-Ky., in April 2005. It never made it out of committee. Given the recent shift of power in the federal government, it is unlikely that additional statutory protections will be provided to the fast food industry.

## Attempts to use tobacco litigation as a model for fast food litigation have generally failed and will likely continue to fail.

### Inherent-danger standard would not apply to fast food

The state "cheeseburger bills," however, provide protections to fast food companies that were not afforded to tobacco companies. Unlike tobacco, which is dangerous even when used as intended and in moderation, fast food is not inherently dangerous. Even Philip Morris has agreed that cigarette smoking is inherently dangerous. *Haglund v. Philip Morris*, 446 Mass. 741 (2006). Thus, most courts facing fast food litigation have not allowed personal injury claims seeking large damage awards.

Anyone who saw documentary filmmaker Morgan Spurlock's 2004 movie *Super-Size Me* in which he gorges himself on McDonald's food daily for 30 days to demonstrate its

dangers may argue that McDonald's food can be, like tobacco, dangerous even when used as intended. However, following *Super-Size Me*, the documentary *Me and Mickey D* was released, showing a filmmaker who lost 36 pounds by eating at McDonald's three times a day, but choosing lower-calorie foods than those chosen by Spurlock. Moreover, most of us have snacked periodically at a McDonald's without any negative health effects, whereas smoking even periodically has demonstrably detrimental effects to one's health. Because the actual differences between cigarettes and fast food will be known to jurors (and judges), the legal landscape faced by fast food companies is clearly more favorable than that faced by tobacco companies.

The state laws immunizing food companies from obesity lawsuits also provide a different legal landscape than the one in tobacco cases. That difference does not mean that fast food companies will be forever immune from all liability; the protections against personal injury suits mean that plaintiffs are likely to transform their claims into false labeling and consumer fraud claims. Big Food is likely to face increasing claims under some state consumer fraud laws, but damages under such laws are unlikely to match or surpass those awarded in tobacco cases.

Despite the lack of success of obesity-related personal injury cases thus far, it is important to remember that when allegations were first made against tobacco companies, the possibility of large verdicts seemed remote. It was only once the litigation reached the discovery phase and negative internal documents were revealed that large plaintiffs' verdicts became possible. The Big Food cases to date have generally not led to discovery, and only Big Food itself knows what damning documents may exist. If they do exist and are discovered by plaintiffs' lawyers, they may provide ammunition for more suits and increasing verdicts. Right now, however, fast food companies are enjoying more protections than tobacco companies ever did, and it appears that Big Food is not the next Big Tobacco. **NLJ**

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