Volume 107 | Issue 2 Article 10

January 2005

Want Fries with That - A Critical Analysis of Fast Food Litigation

Donald R. Richardson
Assistant State Attorney, Nineteenth Judicial Circuit, Okeechobee, Florida

"WANT FRIES WITH THAT?" A CRITICAL ANALYSIS OF FAST FOOD LITIGATION

I. INTRODUCTION

In August 2002, consumers filed a class action lawsuit against McDonald's, Burger King, Wendy's, and Kentucky Fried Chicken alleging that fast food was responsible for their obesity and poor health.[1] Predictably, a barrage of op-ed pieces denounced the lawsuits as "absurd"[2] and an attempt to "bilk burger joints for billions."[3] One Seattle restaurant even went so far as to require customers to sign a tongue-in-cheek waiver of liability when they ordered a popular dessert known as "The Bulge."[4]

Although public opinion ridiculed lawsuits against Big Fat, law professor John F. Banzhaf of George Washington University, famous for his involvement in the tobacco litigation, says that he has heard this argument before. "Everything's always called frivolous, but we just keep winning the damn things."[5] As a general proposition, Banzhaf's theory can be succinctly stated as follows: fast food companies have neglected to inform consumers about the dangers of their products, have made misleading health claims, and have exerted undue pressure on children in order to increase revenue. These infractions, the reasoning goes, have all played a causative role in the development of a number of health problems ranging from obesity to diabetes. Accordingly, plaintiffs are entitled to compensation in the form of economic and non-economic damages.

The issue has captured the attention of Congress, which has introduced three bills in direct response to the fast food litigation.[6] Two bills seek to preempt current and future lawsuits that allege injuries that arise from the consumption of a restaurant's food products.[7] Another bill would require restaurants to place nutritional information about their food products in plain view so that consumers can make well-informed decisions when they order their meals.[8]

---

1 *See* Pelman v. McDonald's Corp., 237 F. Supp. 2d 512 (S.D.N.Y. 2003), *dismissed by* 2003 U.S. Dist. LEXIS 15202 (S.D.N.Y. Sept. 3, 2003).

2 *Oh, temptation*, THE ECONOMIST, Aug. 3, 2002, at 12.

3 Joel Mowbray, *Sue McDonald's?*, NATIONAL REVIEW, Dec. 2, 2002, *available at* LEXIS, News Library, National Review file.

4 Blane Harden, *Fat-laden Dessert Mocks Obesity Suits*, WASH. POST., Sept. 21, 2003, at A11. (describing "The Bulge" as a "sugarcoated, deep-fried, ice cream swaddled, caramel-drizzled, whipped-cream-anointed banana").

5 Libby Copeland, *Snack Attack: After Taking On Big Tobacco, Social Reformer Jabs at a New Target: Big Fat*, WASH. POST., Nov. 3, 2002, at F1.

6 *See* Personal Responsibility in Food Consumption Act, H.R. 339, 108th Cong. (2003); Commonsense Consumption Act of 2003, S. 1428, 108th Cong. (2003); The Menu Education and Labeling Act, H.R. 3444, 108th Cong. (2003).

7 *See* Personal Responsibility in Food Consumption Act, H.R. 339, 108th Cong. (2003); Commonsense Consumption Act of 2003, S. 1428, 108th Cong. (2003).

8 *See* The Menu Education and Labeling Act, H.R. 3444, 108th Cong. (2003).

Whether these bills will become law is a question that will only be answered in time. It can be said however, that for better or worse, Professor Banzhaf and his lawsuits have already had an impact on the American political and legal landscape.

The analysis herein will subject Professor Banzhaf's novel theory to the rigorous contours of tort and product liability jurisprudence. Part II begins with a brief discussion of the current state of law surrounding fast food litigation and then presents the three issues that were discussed in the plaintiffs amended complaint when heard during the Rule 12(b)(6) motion to dismiss stage in the litigation process. Next, Part III focuses on providing clear distinctions between the fast food litigation and the previously successful tobacco litigation upon which the plaintiff's rely. Part IV considers the consequences of proposed legislation that will effectively preempt future lawsuits of this nature. Finally, Part V concludes by providing a brief and concise summation of the legal and social ramifications of fast food litigation.

II. A PLAINTIFF'S ROADMAP FOR SUCCESS: *PELMAN V. MCDONALD'S*

In the interest of brevity, the following summation serves to highlight only those allegations that were considered by the court in the plaintiffs' amended complaint. While the court spoke at considerable length on issues ancillary to these allegations when it rendered its opinion on the original complaint, the focus of this section is to provide the reader a brief background of the pertinent issues surrounding fast food litigation.

On January 22, 2003, the U.S. District Court in the Southern District of New York decided the first case involving fast food litigation.[9] As is always the case when reviewing a Rule 12(b)(6) motion to dismiss, "courts must 'accept as true the factual allegations of the complaint, and draw all inferences in favor of the pleader.'"[10] "The complaint may only be dismissed when 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled [sic] him to relief.'"[11]

The facts of *Pelman* are straightforward. The class action infant plaintiffs, Ashley Pelman and Jazlen Bradley, purchased and consumed fast food on a regular basis throughout their respective lives.[12] While the complaint did not specify the number of meals consumed at McDonald's, affidavits attached to the opposition papers suggest significant consumption.[13] One plaintiff stated that

---

9 *See* Pelman v. McDonald's Corp., 237 F. Supp. 2d 512 (S.D.N.Y. 2003), *dismissed by* 2003 U.S. Dist. LEXIS 15202 (S.D.N.Y. Sept. 3, 2003).

10 *Id.* at 524 (citing Mills v. Polar Molecular Corp., 12 F.3d 1170, 1174 (2d Cir. 1993)).

11 *Id.* (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

12 *Id.* at 519.

13 *Id.* at 538 n.28.

between the ages of five and twelve, she visited McDonald's "approximately three to four times a week."[14] Another explained, "on . . . [her] way to school and during school lunch breaks, . . . [she] mostly ate at McDonalds [sic] restaurants."[15] As a result of this consumption, the plaintiffs alleged that they "have become overweight and have developed diabetes, coronary heart disease, high blood pressure, elevated cholesterol intake, and/or other detrimental and adverse health effects as a result of the defendants' conduct and business practices."[16]

On August 22, 2002, suit was filed in the State Supreme Court of New York, Bronx County, but it was subsequently removed to the Federal District Court in the Southern District of New York.[17] The plaintiffs alleged the following five claims against McDonald's:[18] 1) McDonalds's deceptively advertised their food as healthy, and failed to adequately disclose nutritional information, 2) McDonald's induced children to eat their products through deceptive marketing techniques, 3) McDonald's negligently sold "food products that are high in cholesterol, fat, salt and sugar when studies show that such foods cause obesity and detrimental health effects," 4) McDonald's failed to warn consumers of the unhealthy attributes of McDonald's products, and 5) McDonald's negligently marketed food products that were "physically and psychologically addictive."[19] None of these counts survived 12(b)(6) scrutiny.[20]

In the *Pelman* opinion, Judge Robert W. Sweet went to great lengths to create a roadmap for the plaintiff's success when he described in detail the showing needed to survive a 12(b)(6) motion to dismiss. After the court sustained McDonald's motion to dismiss, the plaintiff amended the complaint to include only three causes of action.[21] After considering these arguments, the court again sustained the motion to dismiss with prejudice.[22] The following section will summarize Judge Sweet's analyses on each of the three counts.

---

14 *Id.*

15 *Id.*

16 *Id.* at 519.

17 *Id.*

18 Note that the first two counts are based on deceptive acts and practices in violation of the Consumer Protection from Deceptive Acts and Practices Act, N.Y. GEN. BUS. §§ 349, 350 (2004), and the NEW YORK CITY ADMINISTRATIVE CODES §§ 20-700-06 (2003). *Id.* at 520.

19 *Id.*

20 *Id.* at 543.

21 *See* Pelman v. McDonald's Corp., 2003 U.S. Dist. LEXIS 15202, *6 (S.D.N.Y. 2003) [hereinafter *Pelman II*].

22 *Id.* at *1.

III. JUDGE SWEET'S ANALYSES OF THE PLAINTIFFS' AMENDED COMPLAINT

The plaintiffs' amended complaint focused on the following three counts, all of which were alleged to be in violation of New York's Consumer Protection from Deceptive Act and Practices Act ("Consumer Protection Act"):[23] 1) that McDonald's misled the public through advertising campaigns that purported to sell nutritious food products, 2) that McDonald's failed to adequately disclose pertinent health information, and 3) that McDonald's engaged in unfair and deceptive activities by stating that it provided adequate nutritional information to consumers when in fact it did not.[24] The plaintiffs again alleged that these deceptive acts all resulted in debilitating health conditions such as obesity, diabetes, coronary heart disease, high blood pressure, elevated cholesterol levels, and the like.[25]

A. A Procedural Hurdle: The Statute of Limitations

The court began its analysis with an evaluation of whether the plaintiffs' claims were time barred by the statute of limitations.[26] In both the original and amended complaints, the plaintiffs relied on a 1987 McDonald's advertising campaign in which the New York Attorney General's Office conducted an investigation of deceptive advertising practices.[27] Under New York law, however, a three-year limitations period on deceptive practices has been recognized.[28] While the plaintiffs made several attempts to convince the court that this period did not apply under these particular facts, only one argument was successful: that the statute of limitations did not run because several members of the plaintiffs' class action suit were "infants" (i.e., those plaintiffs under the age of eighteen).[29] New York law recognizes that the statute of limitations does not begin to accrue until an infant plaintiff reaches the age of eighteen.[30] In this case,

---

23 N.Y. GEN. BUS. §§ 349, 350 (2004). Note that section 349 makes unlawful "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." *Id.* § 349. Note also that section 350 prohibits "false advertising in the conduct of any business." *Id.* § 350.

24 *Pelman II*, 2003 U.S. Dist. LEXIS 15202 at *6.

25 *Id.* at *7.

26 *Id.* at **12-18.

27 *Id.* at *12.

28 *Id.* at **12-13 (citing Morelli v. Weider Nutrition Group, Inc., 712 N.Y.S.2d 551 (N.Y. App. Div. 2000)).

29 *Id.* at **17-18.

30 *Id.* (citing Henry v. City of New York, 724 N.E.2d 372 (N.Y. 1999)).

seven members of the class fit the definition of an "infant."[31] Accordingly, the court ruled that all claims by adult plaintiffs based on the 1987 McDonald's advertising campaigns were time-barred by the statute of limitations.[32] On the other hand, all claims brought by infant plaintiffs were allowed to proceed.[33]

B. *Substantive Hurdles: Causation & Deceptive Advertisements*

After ruling that only the infant members of the plaintiffs class could survive the statute of limitations analysis, the court next turned to the following three issues: 1) whether the plaintiffs were justifiable in their reliance on McDonald's deceptive advertising campaign, 2) whether the consumption of McDonald's food products caused the plaintiffs' injuries, and 3) whether the McDonald's advertising campaigns were objectively misleading.[34] The court found against the plaintiffs on two of the issues and dismissed the complaint with prejudice.[35]

1. Plaintiffs Can Establish Reliance on Deceptive Advertising Claim

The plaintiffs were able to successfully state a false advertising claim in their amended complaint.[36] Section 350 of New York's Consumer Protection Act prohibits "false advertising in the conduct of any business."[37] New York common law also makes clear that in order to state a claim under section 350, the plaintiff must allege "reliance on the allegedly false advertisement."[38]

To meet this burden, the plaintiffs cited as evidence a McDonald's advertising claim in which it stated that the ingredients in french fries and hash browns would be "switched to 100 percent vegetable oil," when in fact, those products contained "beef or extracts and trans fatty acids."[39] Drawing all rea-

---

31 *Id.* at **17-18.

32 *Id.* at *18.

33 *Id.*

34 *Id.* at **19-39.

35 *Id.* at *39.

36 *Id.* at **19-27.

37 N.Y. GEN. BUS. § 350; *see also* Stutman v. Chem. Bank, 731 N.E.2d 608, 611-12 (N.Y. 2000) (stating that a plaintiff, to bring a claim under section 349, must prove: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act).

38 *See* Andre Strishak & Assoc., P.C. v. Hewlett Packard Co., 752 N.Y.S.2d 400, 403 (N.Y. App. Div. 2002).

39 *Pelman II*, 2003 U.S. Dist. LEXIS 15202 at *25.

sonable inferences in favor of the plaintiffs, the court ruled that the infant plaintiffs were aware of this advertising claim and would not have purchased or consumed McDonald's products but for the false advertising claim.[40] As will be discussed later, however, this claim was unable to survive additional procedural hurdles because the plaintiffs were unable to establish causation of injuries and that the advertising campaign was objectively misleading.

2. Plaintiffs Cannot Establish Causation of Injuries

One of the reasons that the plaintiffs were unable to survive 12(b)(6) scrutiny in their claims for false advertising is because they could not establish the element of causation.[41] At the outset of its discussion, the court noted that this element was the "most formidable hurdle for [the] plaintiffs" to overcome.[42] In order to proceed under section 350 of the New York Consumer Protection Act, the plaintiffs needed to show that the consumption of McDonald's food products caused identifiable injuries "'as a result of a deceptive act.'"[43] While the amended complaint did provide evidence of the plaintiffs enormous appetite for McDonald's food products,[44] it did not address other variables, such as exercise and genetic history, that also play a causative role in the outcome of a person's overall physical condition.[45] Without such evidence, the court noted, it is impossible to determine if McDonald's food products caused the plaintiffs' obesity, or if those food products were only a contributing factor.[46] Accordingly, the plaintiffs were unable to establish causation in their claims that they had suffered injuries as a result of the over-consumption of McDonald's food products.[47]

3. Reliance on Advertisement Was Not Objective

The plaintiffs were also unable to survive 12(b)(6) scrutiny in their claims for false advertising because they could not sufficiently establish that the

---

40 *Id.* at *26.

41 *Id.* at ** 26-34.

42 *Id.* at 26.

43 *Id.* (quoting Smith v. Chase Manhattan Bank USA, N.A., 741 N.Y.S.2d 100, 102 (N.Y. App. Div. 2002)).

44 *Id.* at *31 (quoting the plaintiffs' amended complaint, the court stated as an example that Jazlyn Bradley is alleged to have "'consumed McDonald's foods her entire life . . . during school lunch breaks and before and after school, approximately five times per week, ordering two meals per day'").

45 *Id.* at **31-32.

46 *Id.* at *33.

47 *Id.* at *34.

advertisements were objectively misleading.[48] In order to demonstrate that an advertisement is misleading under section 349 of the New York Consumer Protection Act, the plaintiff must show that "a reasonable consumer would have been misled by the defendant's conduct."[49]

In this case, the plaintiffs contended that McDonald's made two misrepresentations to consumers in its advertisements.[50] First, the plaintiffs alleged that McDonald's misrepresented the cholesterol content of its french fries and hash browns when it stated that these products contain "zero milligrams of cholesterol."[51] In point of fact, however, this assertion was flatly wrong. The court immediately noted that the plaintiffs' amended complaint was factually incorrect concerning the language of the advertisement in question because the McDonald's advertisement actually states that "a regular order of french fries is surprisingly low in cholesterol and saturated fat: only 9 mg of cholesterol and 4.6 grams of saturated fat."[52]

Having fallen well short of the mark in their first allegation, the plaintiffs next turned to a McDonald's advertisement that stated that its fries are cooked in "100 percent vegetable oil" which thus rendered its fries cholesterol-free.[53] The plaintiffs allege that McDonald's never disclosed to the public that its cooking process includes a substance known as "beef tallow," which is "believed to be a source of cholesterol."[54] In its brief analysis of this issue, the court stated that this allegation cannot be considered under a Rule 12(b)(6) motion because it was made within the plaintiffs' opposition brief and not within the amended complaint.[55] Had the plaintiffs alleged in their amended complaint that the beef tallow contained cholesterol, it is at least possible that this allegation would have survived the court's scrutiny. Unfortunately for the plaintiffs, however, this allegation was not made, which left the court no other option but to sustain McDonald's motion to dismiss because the plaintiffs' failed to sufficiently allege that the McDonald's advertisements were objectively misleading.[56]

In sum, the plaintiffs were unable to survive McDonald's motion to dismiss because they failed to state a claim upon which relief can be granted.

---

48 *Id.*

49 *Id.* (citing Marcus v. AT&T Co., 138 F.3d 46, 64 (2d Cir. 1998)).

50 *Id.* at **35-39.

51 *Id.* at *35.

52 *Id.* at **35-36.

53 *Id.* at 36.

54 *Id.* at 37 n.6.

55 *Id.*

56 *Id.* at 39.

While the plaintiffs were able to show that they relied on McDonald's advertising campaigns to purchase vast quantities of its products, it simply could not be established that the consumption of McDonald's food products was the primary cause of the plaintiffs' health problems or that the McDonald's advertisement campaign was objectively deceptive.

IV. DELINEATING THE DISTINCTIONS BETWEEN FAST FOOD LITIGATION AND TOBACCO LITIGATION

It is generally recognized that "tobacco litigation"[57] has been a virtual cash cow for the legal profession over the past ten years.[58] The plaintiff's bar has successfully argued a variety of issues including claims relating to the harmful effects of cigarette smoking and smokeless tobacco, secondhand smoke, advertising, and the failure to warn consumers of hazardous effects.[59] Most remarkable was the famous "Master Settlement Agreement" that was signed in 1998 between five tobacco companies and attorney generals from forty-six states.[60] In that agreement, the tobacco companies agreed to pay over $246 billion to the states as a result of the costs incurred by the states from treating tobacco-related illness.[61] Private legal fees incurred as a result of this agreement border on the miraculous: eleven Florida law firms raked in $3.4 billion, six Texas law firms collected $3.3 billion, and thirteen Mississippi law firms took in $1.4 billion.[62]

Numbers like these give a considerable economic incentive to enterprising lawyers seeking to broaden the marketplace by finding deep-pocketed defendants who are alleged to have caused a variety of social ills.[63] Among these defendants are highly profitable fast food companies that sell fatty foods with little nutritional value. As mentioned earlier, the plaintiff's bar, relying on

---

[57] For purposes of this Note, the term "tobacco litigation" refers to the myriad legal tactics the plaintiff's bar has employed to successfully sue tobacco companies over the effects of their products.

[58] *See generally*, WALTER K. OLSON, THE RULE OF LAWYERS (2003) (discussing the social, economic, and legal ramifications of class action lawsuits in general, and tobacco lawsuits, in particular); *see also* Dwight J. Davis et al., *"Fast Food": The Next Tobacco?*, 4 ENGAGE 121 (2002) (providing a general overview of the major issues involved in fast food litigation).

[59] *See generally* Bryce A. Jensen, Note, *From Tobacco to Health Care and Beyond--A Critique of Lawsuits Targeting Unpopular Industries*, 86 CORNELL L. REV. 1334 (2001) (discussing mass tort litigation tactics used by plaintiffs).

[60] *See High Cost of Litigation*, THE DAILY TELEGRAPH (London, U.K.), Oct. 29, 2003, at D2.

[61] *See* Janice Billinglsy, *Cancer Report Cites Issues with Cigarette Filters*, CHI. TRIB., May 26, 2002, at D4.

[62] *See* Saundra Torry, *Huge Fees for Anti-Tobacco Lawyers*, WASH. POST, Dec. 12, 1998, at A1, A10.

[63] *See generally infra* note 64 and accompanying text.

precedent established by tobacco litigation, is now targeting these companies in an effort to hold them liable for the poor physical condition of millions of unhealthy Americans. This section will attempt to delineate several distinctions between tobacco and fast food litigation by taking the following issues in turn: A) procedural distinctions, B) substantive distinctions, and C) factual distinctions.

A. Procedural Distinctions

Critical to the analysis of fast food litigation is the issue of class action certification. Because plaintiffs have a considerable economic incentive to file their claims as a class action,[64] the issue of certification will likely play a central role in any future litigation. This section addresses the issue of whether the fast food litigation plaintiffs can meet the requirements necessary to achieve class action certification. The first subsection discusses the specific parameters set forth in Rule 23 of the Federal Rules of Civil Procedure, while the second subsection applies the history of the tobacco-related case law to the facts of the fast food litigation.

1. Class Action Certification: Requirements of Rule 23

In order to certify a class action lawsuit, a plaintiff must meet the specific requirements of Rule 23 of the Federal Rules of Civil Procedure.[65] That rule contains the following four specific prerequisites.[66] First, Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable."[67] Second, the rule requires that "there are questions of law or fact com-

---

[64] *See generally* Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179 (2001) (describing the efficacy of Rule 23 as it relates to mass tort class actions).

[65] FED. R. CIV. P. 23. For an excellent discussion of the class action device used in the context of mass tort claims, see generally John Starnes, Note, *Class Certification in Mass Product Liability Litigation: Argument for a Pragmatic Approach*, 31 U. MEM. L. REV. 175 (2000). The article advocates the increased usage of the class action device in mass tort claims. *See id.*

[66] FED. R. CIV. P. 23(a). Subsection (a) of the rule provides:

> Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Id.

[67] *Id.* at 23(a)(1).

mon to the class."[68] The third prerequisite found in Rule 23(a) is that "the claims or defenses of the representative parties are typical of the claims or defenses of the class."[69] The final prerequisite requires that "the representative parties will fairly and adequately protect the interests of the class."[70]

Should the plaintiff provide sufficient evidence to meet these prerequisites, he then must satisfy the conditions of a least one of the subsections of Rule 23(b).[71] These three subsections represent the three types of certification that may be granted to a class. Under Rule 23(b)(1) and (b)(2), class action certification is appropriate when claims require a single adjudication that would bind all class members.[72]

---

68 *Id.* at 23(a)(2).

69 *Id.* at 23(a)(3).

70 *Id.* at 23(a)(4).

71 FED. R. CIV. P. 23(b). The rule provides:

> Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Id.

72 *Id.* at 23(b)(1)-(2).

The third subsection that grants class certification is found in 23(b)(3).[73] This subsection requires certification when common questions of law or fact predominate over individual issues and when a class action is superior to other methods of adjudication.[74] Rule 23(b)(3) provides a list of the following four factors that help courts determine whether the class action is in fact a superior method of adjudication: A) class member interest in individually controlling the litigation, B) amount of litigation already commenced by class action members, C) desirability of centralizing litigation in one forum, and D) any management difficulties likely to be encountered.[75]

Even a cursory examination of this rule suggests that the typicality prerequisite is immediately called into question when it is applied to the facts of the fast food litigation. In fact, the court mentioned in a footnote in the first *Pelman* opinion that obtaining class action certification would be difficult, if not impossible, for the plaintiffs to show.[76] The court noted in its analysis that the plaintiff would probably not even be able to bear its burden to meet the prerequisite requirement of typicality when it stated that it is "difficult to imagine how the typicality requirement would be satisfied, as any named plaintiff's injuries would necessarily be a product of the particular variables surrounding the plaintiff, whether social, environmental, or genetic."[77]

While Judge Sweet's argument is facially reasonable, it is necessary to compare it with the previously successful tobacco litigation. The following subsection briefly outlines the history of the tobacco class action lawsuit and then applies those rules to the facts in *Pelman*.

2. Tobacco Class Certification: A History of Failure

In making their initial arguments for the decertification of a plaintiffs' class, fast food companies are likely to rely upon tobacco-related case law that applies Rule 23 of the Federal Rules of Civil Procedure.[78] Three significant cases that address the issue of class certification are discussed below.

---

73 *Id.* at 23(b)(3).

74 *Id.*

75 *Id.*

76 Pelman v. McDonald's, 237 F. Supp. 2d 512, 539-40 n.30 (S.D.N.Y. 2003).

77 *Id.*

78 *See generally* Mark C. Weber, *Thanks for Not Suing: The Prospects for State Court Class Action Litigation over Tobacco Injuries*, 33 GA. L. REV. 979 (1999) (discussing the significant barriers to the use of the federal class action lawsuit to redress tobacco-related injuries); *see also* Susan E. Kearns, Note, *Decertification of Statewide Tobacco Class Actions*, 74 N.Y.U. L. REV. 1336 (1999) (describing the plaintiffs' repeated failures at certifying a class).

a. *Castano v. American Tobacco Co.*

A leading federal case concerning the decertification of a tobacco-related class is *Castano v. American Tobacco Co.*[79] In *Castano*, the Fifth Circuit Court of Appeals reversed the district court's certification of a nationwide class of nicotine-addicted persons who had used tobacco to the detriment of their own health.[80] The district court certified the class under Rule 23 on several key issues that satisfied Rule 23's requirements of predominance and superiority because variations in state laws did not threaten predominance, and that the efficiency of the class action device outweighed any manageability concerns.[81] Writing for a unanimous court, Judge Jerry Smith decertified the class because the plaintiffs had alleged an "immature tort," which did not meet Rule 23's superiority requirement for several reasons.[82] First, the court was not convinced that the plaintiffs demonstrated that a single proceeding would yield judicial economy benefits.[83] Also, the economic circumstances of the plaintiffs' class did not require the usage of the class action device because "a consortium of well-financed plaintiffs' lawyers . . . [could] develop the expertise and specialized knowledge sufficient to beat the tobacco companies at their own game."[84]

While several commentators have devoted entire articles to the ramifications of *Castano*,[85] an extensive discussion of that case is unnecessary for the purposes of this Note. As one commentator suggests however, *Castano* stands for the proposition that courts should strictly apply Rule 23's commonality, predominance, and superiority requirements.[86]

---

79 84 F.3d 734 (5th Cir. 1996).

80 *Id.* at 740-41.

81 Castano v. Am. Tobacco Co., 160 F.R.D. 544, 552-56 (E.D. La. 1995), *rev'd*, 84 F.3d 734 (5th Cir. 1996).

82 *See Castano*, 84 F.3d at 746-47.

83 *Id.* at 747-48.

84 *Id.* at 747-48 n.25.

85 *See* Michael H. Pinkerton, Note, *Castano v. American Tobacco Company: America's Nicotine Plaintiffs Have No Class*, 58 LA. L. REV. 647 (1998) (describing *Castano's* analytical nuances and its application to future cases); *see also* Dean Malone, Comment, *Castano v. American Tobacco Co. and Beyond: The Propriety of Certifying Nationwide Mass Tort Class Actions Under Federal Rule of Civil Procedure 23 When the Basis of the Suit Is a "Novel" Claim or Injury*, 49 BAYLOR L. REV. 817 (1997) (outlining *Castano's* implications).

86 *See* Pinkerton, *supra* note 85, at 657.

b. Liggett Group Inc. v. Engle

While the tobacco plaintiffs struck out in the above case and others,[87] they were able to register a judgment of an astounding $144.8 billion in *Engle v. R.J. Reynolds*,[88] which was the largest jury award in United States history.[89] That decision, however, was recently reversed and remanded in *Liggett Group Inc. v. Engle* because the plaintiffs' class was improperly certified.[90]

Citing more than twenty cases throughout the United States that concluded that certification of smokers cases is "unworkable and improper," the court synthesized the substance of these decisions when it stated that the "plaintiffs smokers' claims are uniquely individualized and cannot satisfy the 'predominance' and 'superiority' requirements imposed by Florida's class action rules."[91] In its analysis, the court noted that these requirements cannot be met in cases where "claims involve factual determinations unique to each plaintiff."[92]

The court also cited *Castano* when it stated, "Rule 1.220 [of the Florida Rules of Civil Procedure, which is based upon Federal Rule of Civil Procedure Rule 23][93] also requires that class representation be superior to other available methods of fairly and efficiently adjudicating the claims presented."[94] It reasoned that class representation is not "superior" to individual suits when significant individual issues of fact exist.[95] After a discussion of doctrinal issues regarding choice of law and punitive damages, the court held that class decertification was the only proper option available.[96]

---

87 *See generally* Gilbert Birnbrich, Comment, *Forcing Round Classes into Square Rules: Attempting Certification of Nicotine Addiction-As-Injury Class Actions under Federal Rule of Civil Procedure 23(b)(3)*, 29 U. TOL. L. REV. 699 (1998) (providing a synopsis of additional tobacco-related class decertification cases).

88 672 So. 2d 39 (Fla. Dist. Ct. App. 1996), *rev'd sub nom.*, Liggett Group Inc. v. Engle, 853 So. 2d 434 (Fla. Dist. Ct. App. 2003). For a general discussion of *Engle*, see Brian H. Barr, Note, *Engle v. R.J. Reynolds, The Improper Assessment of Punitive Damages for an Entire Class of Injured Smokers*, 28 FLA. ST. U. L. REV. 787 (2001).

89 *See* George Bennett, *Tobacco Industry Told to Pay $145 Billion*, PALM BCH. POST, July 15, 2000, at A1.

90 Liggett Group Inc. v. Engle, 853 So. 2d 434, 440 (Fla. Dist. Ct. App. 2003), *rehearing granted sub nom.*, Engle v. Liggett Group Inc., 873 So. 2d 1222 (Fla. 2004).

91 *Id.*

92 *Id.* at 445.

93 *Id.* at 445 n.5.

94 *Id.* at 445.

95 *Id.*

96 *Id.* at 470.

Taken together, *Castano* and *Engle* both suggest that the fast food plaintiffs will not be able to meet the requirements of Rule 23 because the class action device simply does not afford a court the opportunity to fairly analyze all legal issues related to the case. It would be unfair to find against one plaintiff when his injury, or the cause of his injury, is unrelated to that of another plaintiff. In short, each plaintiff represents a unique set of facts on which to provide relief. To subject thousands of class members to a single standard begs for a rigid application of an unjust rule.

c. *General Telephone Co. of Southwest v. Falcon*

Since the *Pelman* court mentioned Rule 23's typicality requirement in a footnote,[97] it is worthwhile to briefly analyze the hallmark U.S. Supreme Court case that deals with the typicality issue. In *General Telephone Co. of Southwest v. Falcon*,[98] the Court considered whether a Mexican-American was a proper plaintiff class representative in a class action under Title VII of the Civil Rights Act of 1964 on behalf of other Mexican-American employee applicants who were not hired.[99] In evaluating the typicality requirement, Justice Stevens provided the following guidance:

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.[100]

The Court then held that the plaintiff did not meet the typicality requirement because he failed to identify "the questions of law or fact that were common to the claims of respondent and of the members of the class he sought to represent."[101] This burden was not met because the plaintiff could not sub-

---

97 *See supra* notes 76-77.

98 457 U.S. 147 (1982).

99 *Id.* at 150; *see also* Annotation, Gary Knapp, *Supreme Court's Construction and Application of Rule 23 of Federal Rules of Civil Procedure, Concerning Class Actions*, 144 L. ED. 2D 889, § 6 (2004).

100 *Falcon*, 457 U.S. at 158 n.13.

101 *Id.* at 158.

stantiate his claim that all other Mexican-American employees and applicants were the victims of the same racial discrimination that he alleged.[102] If that were the case, the Court noted that "every Title VII case would be a potential company-wide class action."[103] "We find nothing in the statute to indicate that Congress intended to authorize such a wholesale expansion of class-action litigation."[104] The Court continued its analysis in a footnote when it stated the following: "The mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer."[105]

While the facts of *Falcon* involve a Title VII employment discrimination claim, the parallels with fast food litigation are nonetheless striking. Both *Falcon* and the plaintiffs' claims in the fast food litigation involve "across the board" allegations that a single entity is responsible for damages incurred by hundreds of claimants, without regard to specific evidentiary identifications of tortious harms. In other words, the fast food plaintiffs can all correctly say that they are obese and suffer from poor health. However, they cannot sufficiently allege that these health conditions all categorically flow from the consumption of fast food. Other variables (such as lack of exercise, alternative sources of food, and patient health history) all play a causal role in the development of these conditions, and each variable has a different impact on each individual. As a result, it would be error for a court to assume that one plaintiff's health condition is typical of hundreds of others.

B. Substantive Distinctions

The plaintiff's bar has used a variety of tactics aimed at the tobacco industry to recover damages for injuries incurred as a result of tobacco usage. The most prominent legal theories employed in the plaintiff's arsenal focus on the principle of strict liability. Claims typically involve allegations of design and manufacturing defects, the failure to warn, and fraudulent concealment.[106] These claims will be taken in turn.

---

102 *Id.*

103 *Id.* at 159.

104 *Id.*

105 *Id.* at 159 n.15.

106 *See generally* Sandra L. Gravanti, Note, *Tobacco Litigation: United States Versus Big Tobacco - An Unfiltered Attack on the Industry*, 52 FLA. L. REV. 671 (2000) (summarizing a history of tobacco-related litigation).

1. Design Defects

Suits filed against the tobacco industry typically involve the claim that tobacco products cause injury because they have defects in their design. These suits allege that the addictive nature and carcinogenic effects of tobacco products constitute a design defect.[107] These "defects," the reasoning goes, warrant a finding of liability because the tobacco products in question are unreasonably dangerous in their design.[108]

In making the determination of whether a tobacco manufacturer is liable for manufacturing a defective product, courts typically look to the Restatement (Second) of Torts § 402A that states:

> Special Liability of Seller of Product for Physical Harm to User or Consumer
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relations with the seller.[109]

In interpreting this section, courts had difficulty determining the exact nature of proof the plaintiff had to show in order to recover damages.[110] Does

---

107 *See id.* at 674.

108 *Id.*

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

110 *See* Thomas C. Galligan, Jr., *Litigation and Compensation: A Primer on Cigarette Litiga-*

the product have to be defective or unreasonably dangerous? Note here that the reliance on this subsection of the Restatement allows the plaintiff to frame the suit as a strict liability action.

The determination of whether a product is defectively designed is generally evaluated under one of the following two tests: 1) the "danger-utility" test and 2) the "consumer-contemplation" test.[111] A brief discussion of those respective tests follows.

a. Danger-Utility Test

One test frequently invoked by the plaintiff's bar is the "danger-utility test."[112] That test, which provides for liability if the risks of injury accompanying a product's use outweighs the utility or social value favoring the continued availability of the product,[113] is a difficult standard for a plaintiff to meet because courts often require the plaintiff to establish the existence of an alternative design that could have reduced the risk of harm.[114] While plaintiffs' victories are rare in this area, they do exist and have become more prevalent with the discovery of tobacco industry documents that detail specific examples of fraudulent actions over the previous forty years that were committed by the tobacco industry in an effort to misrepresent the dangers of their products.[115]

An application of this standard to any set of facts concerning the consumption (and over-consumption) of fast food reveals that the plaintiff simply cannot proffer a cognizable case. There is no evidence that the nutritional value (or lack thereof) of fast food is a result of the deficiencies related to its design. In fact, fast food is dangerous precisely because its design may work too well. The Big Mac is not designed to be a healthy meal—it is designed to be a tasty one. Accordingly, the usage of the "danger-utility" test would fail to provide the plaintiff a meaningful and successful course of action.

---

tion Under the Restatement (Third) of Torts: Products Liability, 27 SW. U. L. REV. 487, 492 (1998).

111 *See* Gravanti, *supra* note 106, at 675-77.

112 *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS 699 (5th ed. 1984).

113 *Id.*

114 *See* Annotation, *Burden of Proving Feasibility of Alternative Safe Design in Products Liability Action Based on Defective Design*, 78 A.L.R. 4TH 154 (1990).

115 *See generally* Tucker S. Player, Note, *After the Fall: The Cigarette Papers, the Global Settlement, and the Future of Tobacco Litigation*, 49 S.C. L. REV. 311 (1998).

b. *The Consumer-Contemplation Test*

The second test employed by courts when evaluating section 402A is the "consumer-contemplation" test.[116] This test is found in a comment to the above-quoted language of section 402A which states that a product is "unreasonably dangerous" when it is dangerous "to an extent beyond that which would be contemplated by the ordinary consumer."[117] This test was recently applied in a federal district court in Wisconsin.[118] In that case, the plaintiffs alleged that the cigarettes were defective because the ordinary consumer did not understand the health risks that flow from the continual usage of tobacco products.[119] Finding for the defendant, the court held that the "consumer expectations" test was not met because the "habit forming nature of cigarettes" was common knowledge to the ordinary American consumer.[120]

Under this standard, the plaintiffs cannot state a claim because a reasonable consumer is fully aware of all risks that will be encountered during the typical foray into Burger King. Consumers have known for years that fast food contains large amounts of ingredients that are not beneficial to the average person's health (particularly when consumed in large quantities). Moreover, there is no evidence that the fast food industry has engaged in a deceitful campaign to trick the American public into the belief that their products are healthy. Accordingly, the plaintiff cannot meet the "consumer-contemplation" test under section 402A that would afford the opportunity to state a successful claim.

2. Failure to Warn

Another common lawsuit against the tobacco industry involved the failure to warn consumers of the inherent dangers of prolonged tobacco usage. Under this theory, a plaintiff must show that a reasonable manufacturer would have warned of the product's dangerous effects that were known during the time the product reached the consumers.[121] Note, however, that this cause of action has been largely preempted by the Federal Cigarette Labeling and Advertising

---

116 *See* KEETON ET AL., *supra* note 112, at 698-99.

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

118 *See* Insolia v. Phillip Morris, Inc., 53 F. Supp. 2d 1032, 1039 (W.D. Wis. 1999), *aff'd in part, rev'd in part*, 216 F.3d 596 (7th Cir. 2000), *remanded to* 128 F. Supp. 2d. 1220 (W.D. Wis. 2000).

119 *Id.* at 1040.

120 *Id.*; *see also* Tompkins v. American Brands, Inc., 10 F. Supp. 2d. 895 (N.D. Ohio 1993), *aff'd in part, rev'd in part, and remanded*, 219 F.3d 566 (6th Cir. 2000), *appeal filed*, 362 F.3d 882 (6th Cir. 2004) (stating that "it was common knowledge even in the 1950s that cigarette smoking was linked to lung cancer.").

121 *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. j. (1965).

Act, which required health warnings to be placed conspicuously on each cigarette package.[122]

Any claim involving the failure to warn consumers of the dangers of consuming fast food is likely to fail because fast food is not an unreasonably dangerous product that would merit a warning. As stated throughout this Note, ordinary consumers are well-versed on the dangers of the over-consumption of fast food. A judicially-created mandate that requires a warning that fatty foods could cause health problems when consumed in vast quantities would be the height of redundancy. As will be discussed later, however, Congress is contemplating legislation that would mandate restaurants with twenty or more outlets to conspicuously place pertinent nutritional information of every food item on each menu.[123]

3. Fraudulent Concealment

The final weapon in the plaintiff's arsenal concerns fraudulent concealment and is based on the assertion that the tobacco industry intentionally withheld scientific evidence of the hazardous health effects of tobacco consumption.[124] While some plaintiffs have been successful with these allegations,[125] many of these claims have been dismissed because the dangers flowing from the continual usage of tobacco were common knowledge and thus no duty existed to provide consumers such information.[126]

An application of the fraudulent concealment action to the fast food industry would fail simply because there is no evidence of fraud perpetuated on the public regarding the healthiness of fast food. Short of a specific set of facts that would indicate fraud on the part of the fast food industry, this claim does not seem to be a worthwhile avenue on which plaintiff's counsel will choose to travel.

In sum, the typical claims used in lawsuits against the tobacco industry will not (without a spectacular set of facts) survive a defendant's motion to dismiss when used against the fast food industry for health-related injuries.

---

122 15 U.S.C. §§ 1331-41 (2000).

123 *See infra* Part V.C.

124 *See* Jones v. Am. Tobacco Co., 17 F. Supp. 2d 706, 710-13 (N.D. Ohio 1998).

125 *See id.* at 721 (holding that plaintiffs did provide sufficient evidence to survive defendant's motion to dismiss).

126 *See* Allgood v. R.J. Reynolds Co., 80 F.3d 168, 172 (5th Cir. 1996); *see also* Gravanti, *supra* note 106, at 677-78.

C. *Factual Distinctions*

A clear distinction can be made between fast food and tobacco—that is, fast food is not an inherently dangerous product when consumed every day. As the Office of the Surgeon General points out, individual foods, standing alone, are not unhealthy.[127] Moreover, unlike tobacco, there is no ingredient analogous to nicotine that is found in fast food which is addictive. While many tobacco users became addicted to a substance and suffered injury through the continued use of the product, the same cannot be said for fast food which is consumed, and in the plaintiff's case, over-consumed, entirely through the unobstructed free will of the consumer.

Another distinction that can be drawn is one that deals with the overall economic demand of the respective products. This line of reasoning states that the overwhelming number of Americans that consume fast food products every day will not stand idle while the government or the court system takes affirmative steps to prohibit, tax, or otherwise regulate the usage of a product they frequently use and enjoy. This rationale is perhaps best stated by several commentators that currently represent Wendy's International Inc.:

> Whereas smokers have been a minority of the total population for decades, the same cannot be said of consumers of fast food products. Unlike tobacco, there is no minority user that government might seek to unfairly oppress. Because smoking currently only affects a minority, it has been easier to pass legislation that prohibits smoking in public places, regulates advertising, and to levy confiscatory taxes on the product through attorney general suits and punitive verdicts. In contrast, it would be a near-impossible task to find a person who has not eaten some form of fast food. It is a product consumed and enjoyed by the vast majority of consumers who are not likely to sit back and suffer through its regulation, indirect taxation or prohibition.[128]

In sum, the plaintiffs are forced to bridge a tremendous chasm when reconciling the factual differences between tobacco products and fast food products. First, the plaintiffs can point to no addictive substance found in fast food that compels a consumer to eat vast quantities of those products. Consumers eat, and in many cases, overeat, fast food solely on the basis of free will. It is within the exclusive province of the consumer, and not a court, to decide

---

[127] *See* U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 2001, *available at* http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf (last visited Nov. 10, 2004).

[128] *See* Davis et al., *supra* note 58, at 125.

whether to eat fast food products, and the extent to do so. Second, the overwhelming demand for fast food products makes it unlikely that a governmental or judicial action with regards to fast food will go unnoticed by a majority of Americans. As will be discussed in Part V, even the hint of judicial interference with the fast food industry has already spurred severe public outcry and legislative action.

V. THE CONSEQUENCES OF PENDING LEGISLATION

In the wake of the publicity surrounding these lawsuits, Congress has taken steps to remedy the situation by introducing legislation designed to remove the threat of litigation facing the fast food industry.[129] Interestingly, legislation has also been introduced that would direct all restaurants with twenty or more locations to provide to consumers nutritional information on each of its products.[130] This section will consider the ramifications of each of these Acts.

A. H.R. 339: Personal Responsibility in Food Consumption Act

On January 27, 2003, a bill titled the "Personal Responsibility in Food Consumption Act" was introduced in the House of Representatives that will effectively preempt any civil actions brought against food sellers for health-related claims relating to the sell of food products.[131] The stated purpose of the bill is "to allow Congress, State legislatures, and regulatory agencies to determine appropriate laws, rules, and regulations to address the problems of weight gain, obesity, and health conditions associated with weight gain or obesity."[132]

Section three of the bill, entitled "Preservation of the Separation of Powers," expressly prohibits qualified "civil liability actions" in both Federal and State courts brought on these grounds.[133] Section four defines a "qualified civil liability action" as the following:

> [T]he term 'qualified civil liability action' means a civil action brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, penalties, declaratory judgment, injunctive or declaratory relief, restitution, or other relief arising out of, related to, or resulting in injury or potential injury resulting from a per-

---

129 *See* Personal Responsibility in Food Consumption Act, H.R. 339, 108th Cong. (2003); Commonsense Consumption Act of 2003, S. 1428, 108th Cong. (2003).

130 *See* The Menu Education and Labeling Act, H.R. 3444, 108th Cong. (2003).

131 H.R. 339.

132 *Id.* § 2.

133 *Id.* § 3.

> son's consumption of a qualified product and weight gain, obesity, or any health condition that is associated with a person's weight gain or obesity, including an action brought by a person other than the person on whose weight gain, obesity, or health condition the action is based, and any derivative action brought by or on behalf of any person or any representative, spouse, parent, child, or other relative of any person.[134]

The statute then provides three reasonable exceptions that will allow plaintiffs to bring civil actions should they meet the statutory requirements.[135] The first exception allows lawsuits where a manufacturer or seller

> knowingly and willfully violates a Federal or State statute applicable to the manufacturing, marketing, distribution, advertisement, labeling, or sale of the product, and the violation was a proximate cause of injury related to a person's weight gain, obesity, or any health condition associated with a person's weight gain or obesity.[136]

The second exception provided by the statute allows a civil suit which alleges the "breach of express contract or express warranty in connection with the purchase of a qualified product."[137] The third and final exception provided by the statute focuses on actions brought under the Federal Trade Commission Act of the Federal Food, Drug, and Cosmetic Act.[138] Note, however, that at the time of this writing, the bill is currently in committee and thereby subject to further amendment.[139]

B. S. 1428: Commonsense Consumption Act of 2003

On July 17, 2003, the Senate also introduced legislation titled the "Commonsense Consumption Act of 2003" that will serve to prohibit health-related claims relating to the sell of food products.[140] This bill's stated purpose is to "prohibit civil liability actions from being brought or continued against food manufacturers, marketers . . . [and] sellers . . . for damages or injunctive

---

134 *Id.* § 4(5)(A).

135 *Id.* § 5(B)-(C).

136 *Id.* § 5(B)(i).

137 *Id.* § 5(B)(ii).

138 *Id.* § (5)(C).

139 This Bill was passed by the House of Representatives on March 10, 2004.

140 S. 1428, 108th Cong. (2003).

relief for claims of injury resulting from a person's weight gain, obesity or any health condition related to weight gain or obesity."[141] Pertinent statutory language states as follows:

> (a) IN GENERAL. A qualified civil liability action may not be brought in any Federal or State court.
>
> (b) DISMISSAL OF PENDING ACTIONS. A qualified civil liability action that is pending on the date of this Act shall be dismissed immediately by the court in which the action was brought or is currently pending.[142]

The statutory language in this bill is significantly more extensive than its counterpart in the House because the following subsection explicitly defines relevant terms such as "engaged in the business,"[143] "manufacturer,"[144] "qualified product,"[145] and "qualified civil liability action."[146] It is important to note that while the bill's purpose only addresses causes of action relating to "weight gain or obesity,"[147] it does provide a reasonable exception for claims resulting from a "knowing and willful" violation of a federal or state statute which was a "proximate cause of the claim of injury resulting from a person's weight gain, obesity, or health condition."[148] Also noteworthy is the absence of any language relating to products liability actions that do not involve claims relating to obesity. In other words, the bill does not preempt typical tort actions such as food poisoning that result from the consumption of food products.

While the Senate's "Commonsense Consumption Act of 2003" is still in committee and thus subject to further amendment, it appears that its thoroughness and level of detail would afford the court system an easier and more efficient application to pending and future cases. Unlike the House's version, this bill goes to great lengths to specify the types of actions, actors, and products that

---

141 *Id.*

142 *Id.* § 2.

143 *Id.* § 3(1) (defining "engaged in business" as "a person who manufactures, markets, distributes, advertises, or sells a qualified product in the person's regular course of trade or business").

144 *Id.* § 3(2) (defining "manufacturer" as "a person who is lawfully engaged in the business of manufacturing the product in interstate or foreign commerce").

145 *Id.* § 3(4) (defining "qualified product" as "food as defined in section 201(f) of the Federal Food Drug and Cosmetic Act (21 U.S.C. 321(f))").

146 *Id.* § 3(5) (defining "qualified civil liability action" as a "civil action brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages or injunctive relief based on a claim of injury resulting from a person's weight gain, [or] obesity").

147 *Id.*

148 *Id.* § 3(5)(A).

are covered by the statute. Moreover, the bill is consistent with the public policy rationale that states that businesses should not be held liable, and thereby subject to crushing liability, for producing a perfectly legal product that can have, at most, only a tangential role in the development of adverse health conditions.

C. *H.R. 3444: The Menu Education and Labeling Act*

In response to the health-related concerns raised by the plaintiff's bar to the fast food industry, Congress has attempted to remedy the situation by introducing a bill that will affect the manner in which the fast food industry displays each food item on the menu. In November 2003, the U.S. House of Representatives introduced the Menu Education and Labeling Act ("MENU Act") to ensure that consumers receive accurate "information about the nutritional content of restaurant foods."[149] Citing an array of health statistics linking fatty food consumption with heart-related illnesses, Congress evidently believes that increasing the availability of nutritional information will lead to the decreased consumption of fast food, and necessarily, an improvement in the overall health status of millions of Americans.[150]

Specifically, the MENU Act requires restaurants with twenty or more outlets to list the nutritional information for each item on the menu "in a clear and conspicuous manner."[151] The nutritional information shall include "the total number of calories, grams of saturated plus trans fat, and milligrams of sodium" for each menu item.[152]

While this bill does seem to serve as an adequate compromise between the plaintiff's bar and the fast food industry, the realistic impact of such legislation is unclear. It is noteworthy that Congress does not point to any evidence that would suggest that increasing the level of nutritional information will have any negative impact on the consumption of high-fat, high-sodium foods. Bear in mind, however, that this bill is only at its infancy stage and is subject to considerable debate and amendment.[153]

VI. CONCLUSION

The conclusions that can be drawn from the analysis herein are substantial and promising. First, under the current state of the law, it appears that the

---

149 H.R. 3444, 108th Cong. (2003).

150 *See id.* § 2.

151 *Id.* § 3(a).

152 *Id.* § 3(b).

153 As of Nov. 22, 2004, the bill has remained in the House Committee of Energy and Commerce.

plaintiffs simply have no case in their claims that the fast food industry is responsible for their poor overall physical condition. There is no advertisement that can be cited which deceived a reasonable consumer into believing that the excessive consumption of fast food would not adversely impact that person's health. Moreover, it does not appear that such an advertisement is anywhere in sight. Short of an affirmative representation that a daily intake of Big Macs will cause the typical consumer to experience significant weight loss and a diminished cholesterol level, it is unlikely that the plaintiffs will ever be able to point to an advertisement that suggests to the reasonable consumer that the consistent consumption of fast food is a healthy activity.

Second, the plaintiffs have an extremely difficult hurdle to overcome in their attempt to establish causation. Too many variables, such as genetic history, current and prior levels of activity, exercise patterns, and foods consumed independently from fast food restaurants, are of a determinative nature to assess liability exclusively with the fast food industry. It is very difficult, if not impossible, to isolate the effects that fast food has on the overall health condition of a person while holding constant all other activities that contribute to that condition. Simply stated, bald assertions that the consumption of fast food caused a person's obesity are not sufficient—more evidence must be proffered that specifically indicates the nature of the harm that fast food consumption has caused if the plaintiffs are ever to realize payouts that even approach the magnitude of the successful tobacco litigation.

Finally, the legislative process may end any discussion of the fast food litigation before it ever really begins. Both the Commonsense Consumption Act and the Personal Responsibility in Food Consumption Act would effectively preempt current and future lawsuits of this nature if and when they are signed into law. While the Association of Trial Lawyers does have a stake in defeating these bills, it is unlikely that they are willing to spend the political capital necessary to do so. Indeed, an examination of that group's website does not reveal any indication that lobbying efforts are currently being pursued to defeat either of these bills.[154]

On the other hand, however, the MEAL Act would represent a victory for the consumer groups that are currently pushing for full disclosure of fast food nutritional information. It remains to be seen if any of these bills will become law.

While Professor Banzhaf's theory has served to facilitate the marketplace of ideas with regards to the direction of the American legal system, that appears to be all that it has done. The theory that the fast food industry should be held responsible for the health condition of a frequent consumer is entirely without merit. Barring a remarkable set of facts that is outside this author's

[154] The website of the Association of Trial Lawyers of America (http://www.atla.org) was examined unsuccessfully on November 21, 2004 for any indication of efforts taken to defeat the above cited pieces of legislation.

imagination, the analysis herein indicates that this theory has no legal foundation on which to build even the most attenuated of cases.

Donald R. Richardson[*]

[*] B.A., Marshall University, 2000; J.D., West Virginia University College of Law, 2004. Member of the Florida Bar, 2004. Assistant State Attorney, Nineteenth Judicial Circuit, Okeechobee, Florida. I would like to dedicate this Note to my wife, Vanessa, who was a constant source of love, inspiration, and companionship during my law school career.