

MEDICAID THIRD-PARTY LIABILITY AND CLAIMS FOR
RESTITUTION: DEFINING THE PROPER ROLE FOR THE
TORT SYSTEM IN REGULATING THE FOOD INDUSTRY

*Coby Warren Logan**

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* Coby Warren Logan is a May 2006 Juris Doctor candidate at the University of Arkansas School of Law, Fayetteville, Arkansas. This Comment received the University of Arkansas *Journal of Food Law & Policy's* 2005 Annual Arent Fox / Dale Bumpers Excellence in Writing Award. The author would like to thank Arkansas Bar Foundation Professor of Law Robert B Leflar for his guidance, patience, and support in the preparation of this Comment. The author would also like to thank 2004-05 Note and Comment Editor Jason Milne, J.D. 2005, for his encouragement, guidance, and review of numerous drafts of this Comment.

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I. INTRODUCTION

In March 2004 and again in October 2005, tort reform advocates and the food industry tasted a temporary victory when the United States House of Representatives passed the Personal Responsibility in Food Consumption Act, popularly titled the "Cheeseburger Bill."¹ The purpose of the measure was to prevent lawsuits against food manufacturers, marketers, distributors, advertisers, sellers, and trade associations for alleged injuries or

1. See H.R. Res. 339, 108th Cong. (2003); H.R. Res. 554, 109th Cong. (2005); see also Project Vote Smart, *Food Industry Lawsuits—Passage Member Vote List*, at http://www.vote-smart.org/issue_keyvote_member.php?vote_id=3375 (last visited Oct. 9, 2005).

health conditions stemming from weight gain or obesity.² However, in both legislative sessions, the victory by tort reform advocates was short-lived as the United States Senate allowed the Cheeseburger Bill's companion measure, the Commonsense Consumption Act, to die in committee.³ This defeat came as no surprise. The Senate had previously blocked other House-passed measures intended to cap legal damages and limit tort lawsuits against American industries.⁴

Nevertheless, with current public opinion favoring the notion that individuals should not be able to sue the food industry⁵ for their

2. H.R. Res. 339, 108th Cong. (2003); H.R. Res. 554, 109th Cong. (2005).

3. S. Res. 1428, 108th Cong. (2003); S. Res. 908, 109th Cong. (2005).

4. Liza Porteus et al., *House Passes "Cheeseburger Bill,"* FOXNews.com, Mar. 11, 2004, at http://www.foxnews.com/printer_friendly_story/0,3566,113836,00.html (last visited Oct. 9, 2005); see also Carl Hulse, *Vote in House Offers a Shield In Obesity Suits*, The New York Times on the Web, Mar. 11, 2004, at <http://www.wirerestaurant.org/news/obesity/67.htm> (last visited Oct. 10, 2005) (providing examples of Republican-led House measures to give legal immunity to certain industries, such as gun manufacturers and dealers, producers of a gasoline additive blamed for water pollution, the tobacco industry, and producers of vaccines, that were ultimately defeated in the Senate).

5. This Comment does not attempt to identify any particular member or group of members of the food industry that might constitute proper defendants in lawsuits seeking damages for obesity. However, it is acknowledged that such a determination is necessary for the suggested obesity lawsuits to be a viable option of enforcing regulations imposed upon the food industry. Various authors and attorneys have begun the process of identifying the proper members of the food industry from which to seek damages for obesity. The plaintiff's attorney in the class action of *Barber v. McDonald's Corp.* named the following defendants: McDonald's Corp., Burger King Corp., KFC Corp. d/b/a Kentucky Fried Chicken, and Wendy's International, Inc. No. 23145/2002 (N.Y. Sup. Ct. Bronx County filed July 26, 2002), available at <http://news.findlaw.com/cnn/docs/mcdonalds/barbermcds72302cmp.pdf> [hereinafter *Barber Complaint*]. The plaintiff's attorney in *Pelman v. McDonald's Corp.* named only McDonald's Corp. as the defendant. 237 F. Supp. 2d 512 (S.D.N.Y. 2003). One book uses the term "food industry" to refer to companies that produce, process, manufacture, sell, and serve foods, beverages, and dietary supplements. MARION NESTLE, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH* 11 (2002). In a larger sense, the term encompasses all enterprises involved in the production and consumption of food and beverages: producers and processors of food crops and animals (agribusiness); companies that make and sell fertilizer, pesticides, seeds, and feed; those that provide machinery, labor, real estate, and financial services to farmers; and others that transport, store, distribute, export, process, and market foods after they leave the farm. *Id.* In yet another sense, the food industry could be defined as the food service sector—food carts, vending machines, restaurants, bars, fast-food outlets, schools, hospitals, prisons, and workplaces—and associated suppliers of equipment and serving materials. *Id.* Another approach might be to define "Big Food" as the

obese condition,⁶ the battle over tort reform against the food industry is far from over. In particular, state legislatures are introducing measures that mirror the federal Cheeseburger Bill in an attempt to reach the same results.⁷ With strong support from the powerful food industry, such efforts have not been without success.⁸

more high-profile members of the food industry such as: AFC Enter., Inc. (operates Church's Chicken and Popeyes); Altamira Corp. (operates Arby's); Burger King Corp.; Checkers Drive-In Restaurants, Inc. (operates Rally's Burgers); Chick-fil-A, Inc.; Dairy Queen Corp.; Domino's Pizza, L.L.C.; Jack in the Box, Inc.; The Krystal Co.; McDonald's Corp.; Papa John's Int'l, Inc.; Schlotzsky's, Inc.; Sonic Corp.; Whataburger Corp.; Wendy's Int'l, Inc.; Yum! Brands, Inc. (operates Kentucky Fried Chicken, Pizza Hut, Taco Bell, Long John Silvers, and A&W); Krispy Kreme, Inc.; Coca-Cola Co.; and Pepsi Co. See Jeremy H. Rogers, Note, *Living on the Fat of the Land: How To Have Your Burger and Sue It Too*, 81 WASH. U. L.Q. 859, 861 n.17 (2003). One alternative might be to sue the members of major food industry professional organizations such as the National Restaurant Association that serve as representatives of the industry as a whole. See generally *infra* note 8. This Comment contends that the main criteria for selecting the proper defendants should be to target companies that prioritize the generation of profits first and foremost without regard for the consequences of over-consumption of their products and do not take an active role in preventing obesity among America's population.

6. H.R. Rep. No. 108-432, at 13 (2004), 2004 WL 409208 (2004) (citing Gallup Poll, *Analysis, Public Balks at Obesity Lawsuits*, (July 21, 2003) (basing its results on telephone interviews using a randomly selected national sample of 1,006 adults (eighteen years and older), conducted July 7-9, 2003)).

7. National Conference of State Legislatures, *2003-2004 State Legislation on Civil Immunity for Food Vendors*, at <http://www.ncsl.org/programs/health/Fvmemo.htm> (as of October 1, 2004) (last visited Oct. 10, 2005). See Appendix A.

8. Representative Richard Anthony Keller (R. Fla.), the primary sponsor of H.R. 339 is well supported by the food industry. See Hulse, *supra* note 4 (listing the National Restaurant Association and the National Federation of Independent Businesses as backers of the bill). See also Michele Simon, *Junk Food/Obesity Lawsuits Alarm U.S. Food Giants* (Apr. 1, 2004), at <http://www.organicconsumers.org/foodsafety/obesity042004.cfm> (last visited Oct. 9, 2005); James R. Carroll, *Senator Opposes Obesity Lawsuits*, *Courier-Journal.com* (July 15, 2003) at <http://www.courier-journal.com/localnews/2003/07/15ky/wir-front-fat0715-7101.html> (last visited Jan. 17, 2005) (stating that Rep. Keller's district includes the headquarters of the company that owns the Red Lobster, Olive Garden, Bahama Breeze, and Smokey Bones restaurant chains). Similarly, Senator McConnell (R. Ky.), the primary sponsor of S. 1428, has received more than \$200,000 in campaign contributions from companies operating restaurants and bars, food processing companies, food stores, and food and beverage firms, according to Federal Election Commission records analyzed by the Center for Responsive Politics, a Washington-based group that monitors political contributions and spending. See *id.* Among the contributions were \$5,000 from the National Restaurant Association, \$2,000 from

As of February 16, 2005, bills have been introduced in thirty-five states and enacted in thirteen of those states.⁹

However, not all states are convinced that legislative action is needed. Wisconsin Governor James E. Doyle, vetoed the state's version of the bill in March 2004, and food vendor lawsuit immunity legislation failed to pass in several states including California and New Hampshire.¹⁰ Still other states, such as Arkansas, have not yet decided how to address the issues involved but have begun to address the issue by taking the initial step of enacting measures to study the problem of obesity.¹¹

The Cheeseburger Bill legislation, at both the federal and state levels, comes on the heels of two recent tort lawsuits filed in the State of New York.¹² In both cases, overweight individuals turned to the courts to seek compensation for injuries caused by their obese condition.¹³ In addition to seeking compensation, some of the plaintiffs hoped that successful tort claims against the food industry would force the industry to take more responsibility for reducing the prevalence of obesity in America.¹⁴

This comment contends that tort liability can complement legislative and administrative government regulation of the food industry, providing sellers and manufacturers of food with an incentive to prevent consumers from over-consumption and becoming obese. Specifically, this comment supports the proposition that after government regulations are promulgated by Congress, claims should be allowed by state attorneys general to recoup Medicaid costs incurred in treating health conditions and illnesses caused by obesity.¹⁵ The legislature is the proper branch of our government to determine the legislation and regulations needed to regulate the

McDonald's Corp., and \$3,000 from Yum Brands, Inc., the parent company of KFC, Taco Bell, Pizza Hut, A&W, and Long John Silver's. *Id.*

9. *Id.*

10. *Id.*

11. Alyse Meislik, Note, *Weighing In On the Scales of Justice: The Obesity Epidemic and Litigation Against the Food Industry*, 46 ARIZ. L. REV. 781, 796 (2004) (referring to an article detailing state study finding forty percent of Arkansas school children are obese).

12. *See Pelman*, 237 F. Supp. 2d 512; Barber Complaint, *supra* note 5.

13. *See generally Pelman*, 237 F. Supp. 2d 512; Barber Complaint, *supra* note 5.

14. *See generally Pelman*, 237 F. Supp. 2d 512; Barber Complaint, *supra* note 5.

15. *See Rogers*, *supra* note 5, at 883 (proposing that states should be allowed to sue fast food companies to recoup Medicaid costs incurred as a result of caring for overweight and obese citizens).

food industry, thus a thorough discussion of all possible measures to regulate the food industry is beyond the scope of this paper.

Unlike the Master Settlement Agreement (MSA)¹⁶ reached by the states with the tobacco industry which has been described as “largely toothless” in regulating the tobacco industry,¹⁷ the tort system, by means of liability exposure, can discourage manufacturers and sellers of food products from focusing solely on the generation of profits and attempting to circumvent regulatory measures authorized by Congress to govern the food industry. Tort liability can provide the incentive needed for manufacturers and sellers of food to take responsibility for the harm that over-consumption of their products imposes on the scarce financial resources of the states’ Medicaid budgets.

II. OBESITY IS A NATIONAL PUBLIC POLICY CONCERN

The fiscal ramifications of obesity have thrust the issue onto the public policy agenda, triggering a debate between those who view obesity solely as a matter of personal responsibility and those who do not.¹⁸ In 2001, the United States Surgeon General issued a “Call to Action to Prevent and Decrease Overweight and Obesity,”¹⁹ thereby bringing national attention to the issue of obesity. In this report, the Surgeon General compared the health effects of obesity directly with those caused by smoking cigarettes.²⁰ According to Roland Strum,

16. See *infra* Section IV.A.

17. Alan E. Scott, *The Continuing Tobacco War: State and Local Tobacco Control In Washington*, 23 SEATTLE U. L. REV. 1097, 1104 (2000); Robert L. Kline, *Tobacco Advertising After the Settlement: Where We Are and What Remains To Be Done*, 9 KAN. J.L. & PUB. POL’Y 621, 634 (Summer 2000).

18. See generally Lou Marano, *Is Obesity a U.S. Public Policy Issue*, United Press International, May 14, 2003, available at <http://www.upi.com/view.cfm?StoryID=20030513-101626-5081r> (interviewing Shannon Brownlee, Senior Fellow at the New America Foundation). For additional information, visit the website of George Washington School of Law Professor John F. Banzhaf III at <http://banzhaf.net> (last visited Oct. 9, 2005).

19. United States Dep’t of Health & Human Services (DHHS), *The Surgeon General’s Call to Action to Prevent and Decrease Overweight and Obesity (2001)*, available at <http://www.surgeongeneral.gov/topics/obesity>.

20. *Id.* Though the original Centers for Disease Control (CDC) report estimated the number of deaths linked to overweight and obesity to be about 400,000 per year, in a letter and correction published in the *Journal of the American Medical Association*, CDC has since reduced its estimate to about 365,000 per year. See Betsy McKay, *CDC Cuts Estimate of Deaths From Obesity*, WALL ST. J., Jan. 19, 2005, at

the health economist who conducted the study giving rise to the Surgeon General's report, "[o]besity appears to have a stronger association with the occurrence of chronic medical conditions, reduced health-related quality of life, and increased health care and medication spending than smoking or problem drinking."²¹

A. *The Statistics of Obesity*

Being overweight or obese is an epidemic among Americans.²² The National Institutes of Health (NIH) determines whether persons are overweight or obese by calculating their body mass index (BMI).²³ The Centers for Disease Control (CDC) estimates that 64%, or approximately two out of three American adults, are either overweight or obese.²⁴ NIH estimates the number to be ninety-seven million Americans.²⁵ In 1991, only four of forty-five states partici-

D7, 2005 WL-WSJ 59838170. Nonetheless, this correction does not change the fact that obesity is the second leading cause of preventable death. *Id.*

21. Jonathan S. Goldman, Comment, *Take That Tobacco Settlement and Super-Size It!: The Deep-Frying of the Fast Food Industry?*, 13 TEMP. POL. & CIV. RTS. L. REV. 113, 129 (2003) available at http://www.surgeongeneral.gov/news/pressreleases/pr_obesity.htm (citing Press Release, DHHS, Overweight and Obesity Threaten U.S. Health Gains (Dec. 13, 2001)).

22. See Rogers, *supra* note 5, at 862 (citing David Satcher, DHHS, *Foreword to Call To Action To Prevent and Decrease Overweight and Obesity*, available at <http://www.surgeongeneral.gov/topics/obesity/calloaction/foreward.htm>); Ali H. Mokdad et al., *The Spread of the Obesity Epidemic in the United States, 1991-1998*, 282 J. AM. MED. ASS'N 1519 (1999); *Overweight, Obesity Threaten U.S. Health Gains*, FDA CONSUMER, Mar.-Apr. 2002, at 8; see also Goldman, *supra* note 21, at 129.

23. Rogers, *supra* note 5, at 863 (citing NIH, *Clinical Guidelines on the Identification, Evaluation, and Treatment of Overweight and Obesity in Adults: The Evidence Report*, NIH Publication No. 98-4083 at xiv, available at http://www.nhlbi.nih.gov/guidelines/obesity/ob_gdlns.pdf) [hereinafter *Clinical Guidelines*]). BMI is calculated as: $[(\text{weight (in pounds)} / \text{height (in inches)} \times 2) \times 703]$. *Id.* BMI is categorized as follows: Underweight (BMI < 18.5); Normal Weight (BMI = 18.5 – 24.9); Overweight (BMI = 25.0 – 29.9); Obesity I (BMI = 30.0 – 34.9); Obesity II (BMI = 35.0 – 39.9); Obesity III [Morbid Obesity] (BMI = 40). *Id.*

24. Richard H. Carmona, United States Surgeon General, Statement on His Testimony Before the Subcommittee on Competition, Infrastructure, and Foreign Commerce, Committee on Commerce, Science, and Transportation of the United States Senate, available at http://www.surgeongeneral.gov/news/testimony/child_obesity03022004.htm. See also CDC, REPORT ON OVERWEIGHT AND OBESITY—DEFINING OVERWEIGHT AND OBESITY, available at <http://www.cdc.gov/nccdphp/dnpa/obesity/defining.htm>.

25. Rogers, *supra* note 5, at 862 (citing *Clinical Guidelines*, *supra* note 23, at vii).

pating in a survey conducted by CDC had obesity prevalence rates²⁶ of 15-19% and no state had a prevalence rate greater than 20% of its population.²⁷ In 2001, twenty states had obesity prevalence rates of 15%-19%; twenty-nine states had prevalence rates of 20-24%; and one state reported a prevalence rate of more than 25%.²⁸ As a result, obesity has been recognized as a disease by NIH, the National Academy of Sciences' Institute of Medicine, the Federal Trade Commission, the Maternal and Child Health Bureau, the World Health Organization, the American Heart Association, the American Academy of Family Physicians, and the American Society of Bariatric Physicians.²⁹

Most recently, in July 2004, the Secretary of DHHS, announced that Medicare was removing language in its Coverage Policy Manual indicating that "obesity is not an illness."³⁰ This language had previously meant that no payments could be made for obesity treatment because, by statute, Medicare only pays for the treatment of illnesses and accidents.³¹ The DHHS policy change indicates that Medicare will now pay for treatments of obesity which are reasonable and effective.³² Effectiveness of treatments will be decided by the established Medicare process.³³

The Medicare Coverage Advisory Committee (MCAC) held a hearing on November 4, 2004, to review Medicare's Coverage Policy Manual which approves gastric bypass surgery when used for treating diseases caused by obesity.³⁴ MCAC was persuaded that surgeons should follow the 1991 NIH Consensus Conference protocol, which provides surgery to persons with a BMI greater than

26. CDC, REPORT ON OVERWEIGHT AND OBESITY—1991-2001 PREVALENCE OF OBESITY AMONG U.S. ADULTS BY STATE, available at http://www.cdc.gov/nccdphp/dnpa/obesity/trend/prev_reg.htm.

27. *Id.*

28. *Id.*

29. Rogers, *supra* note 5, at 863 n.30.

30. AOA, *Treatment: Medicare and Obesity: Frequently Asked Questions*, at <http://www.obesity.org/treatment/medicarefaq.shtml> (last visited Oct. 10, 2005). DHHS did not definitively say obesity is a disease, rather, it removed the language which said "obesity is not a disease," and added language that Medicare would pay for treatments that were effective. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. AOA, *supra* note 30.

forty, and persons with a BMI greater than thirty-five with comorbid conditions.³⁵

It is now the task of the Centers for Medicare and Medicaid Services (CMS) to make national coverage determinations (NCDs) which will provide what will be covered under the national rules for Medicare.³⁶ The American Society of Bariatric Surgery (ASBS) is preparing to ask CMS for a new NCD based on the strong support for surgery expressed at the November 4, 2004 hearings.³⁷ The American Obesity Association (AOA) is considering filing a petition with CMS to cover physician counseling and services incident to physician services consistent with the existing Medicare program.³⁸ In addition, AOA is planning a return to Congress to seek the inclusion of drugs to treat obesity in the Medicare pharmaceutical benefit NCD.³⁹ The American Dietetic Association (ADA) is contemplating what to do regarding the Medical Nutrition Therapy benefit NCD.⁴⁰

Historically, what Medicare decides to cover is also selected for coverage by the federal-state Medicaid program and by private, commercial insurance providers.⁴¹ By removing the language from the Coverage Policy Manual, Medicare officials have "opened the door almost as far as they can go. Everything now is a technicality."⁴² A decision to cover obesity treatments under Medicaid could create the possibility for state attorneys general to recoup costs for treating obesity-related illnesses from the food industry.⁴³

When Congress first enacted Medicaid by passing the State Plans for Medical Assistance Act, the statute provided that participating states must include in their administration plan a procedure for recovering funds from third parties liable for the injuries of Medicaid recipients.⁴⁴ This statutory recovery is not subject to the

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. AOA, *supra* note 30.

40. *Id.*

41. *Id.*

42. Marguerite Higgins, *Obesity Policy Will Benefit Trial Lawyers*, WASH. TIMES, July 17, 2004, available at <http://washingtontimes.com/functions/print.php?StoryID=20040716-114333-6943r> (quoting Professor Banzhaf).

43. *Id.*

44. Cliff Sherrill, Comment, *Tobacco Litigation: Medicaid Third Party Liability and Claims for Restitution*, 19 U. ARK. LITTLE ROCK L. REV. 497, 501 (1997) (citing 42

discretion of the states, and the administration plan adopted by the participating state must include proper recovery procedures.⁴⁵

B. *The Costs of Obesity*

According to a study of national costs attributed to obesity, direct medical expenses accounted for 9.1% of the total United States medical expenditures in 1998, an amount estimated to be as high as \$78 billion.⁴⁶ Further, the National Governors Association (NGA) estimates that the nation spends \$56 billion on indirect costs related to obesity.⁴⁷ The burden of paying these expenses fell squarely on American taxpayers, as approximately half of these costs were paid by Medicaid and Medicare.⁴⁸ Obesity is now estimated to cost our society approximately \$117 billion in direct and indirect costs, second only to the costs associated with tobacco use.⁴⁹

A 2004 study focused on state-level estimates of total Medicare and Medicaid medical expenditures attributable to obesity.⁵⁰ State-level estimates ranged from \$87 million in Wyoming to \$7.7 billion

U.S.C. § 1396a(a)(25) (1996)). The state's administration plan must take all "reasonable measures to ascertain the legal liability of third parties." *Id.* at 501 n.35.

[I]n any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual and where the amount of reimbursement the State can reasonably expect to recover exceeds the cost of such recovery, the State . . . will seek reimbursement for such assistance to the extent of such legal liability *Id.* (citing 42 U.S.C. § 1396a (a)(25)(B) (1996)).

45. *Id.* (citing 42 U.S.C. § 1396a(a)(25) (1996); Health Care Financing Administration State Fiscal Administration Rule, 42 C.F.R. § 433.138 (1996)).

46. CDC, REPORT ON OVERWEIGHT AND OBESITY—ECONOMIC CONSEQUENCES, available at http://www.cdc.gov/nccdphp/dnpa/obesity/economic_consequences.htm [hereinafter ECONOMIC CONSEQUENCES] (citing a 2003 study by Finkelstein, Fiebelkorn, and Wang).

47. Rogers, *supra* note 5, at 867 (citing NGA, *NGA Highlights States Efforts to Combat Obesity*, available at http://www.nga.org/nga/newsroom/1,1169,C_PRESS_RELEASE;D_3995,00.html).

48. ECONOMIC CONSEQUENCES, *supra* note 46.

49. Carmona, *supra* note 24. "Direct costs" include preventive, diagnostic, and treatment services related to obesity. ECONOMIC CONSEQUENCES, *supra* note 46. "Indirect costs" relate to morbidity and mortality costs. *Id.* "Morbidity costs" are defined as the value of income lost from decreased productivity, restricted activity, absenteeism, and bed days, whereas "mortality costs" are the value of future income lost by premature death. *Id.*

50. ECONOMIC CONSEQUENCES, *supra* note 46.

in California.⁵¹ Medicare expenditure estimates attributable to obesity range from \$15 million in Wyoming to \$1.7 billion in California, and Medicaid expenditure estimates attributable to obesity range from \$23 million in Wyoming to \$3.5 billion in New York.⁵²

Research studies have shown that obesity increases the risk of developing numerous health complications including type 2 diabetes, hypertension, coronary heart disease, ischemic stroke, colon cancer, post-menopausal breast cancer, endometrial cancer, gall bladder disease, osteoarthritis, and obstructive sleep apnea.⁵³ Further, adults who are overweight are considered to be at a greater risk for disability and premature death.⁵⁴

It is estimated that more than nine million children—one in every seven children—are at increased risk of weight-related chronic diseases.⁵⁵ Pediatricians are diagnosing a greater number of children with type 2 diabetes, formerly known as adult-onset diabetes, and research indicates that one-third of all children born in 2000 will develop type 2 diabetes during their lifetime.⁵⁶ These statistics are alarming because complications are likely to appear much earlier in life for those who develop type 2 diabetes in childhood or adolescence, and people with type 2 diabetes are at an increased risk of developing heart disease, stroke, kidney disease, and blindness.⁵⁷

Thus, health problems associated with obesity clearly have a significant economic impact on the economy of the United States. It is equally clear that these costs are only going to increase. The issue of who is going to pay for these costs is what is at stake in the current debate in federal and state legislatures and in our nation's courtrooms.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. ECONOMIC CONSEQUENCES, *supra* note 46.

56. *Id.*

57. *Id.*

*C. Obesity is a Public Policy Issue Requiring Government
and Judicial Intervention*

Prevention of obesity has been an explicit goal of our national public health policy since 1980.⁵⁸ Although public policy regarding obesity has historically been assigned to DHHS, the implementation of obesity objectives has been distributed among several different agencies within DHHS, with no single agency taking lead responsibility.⁵⁹

CDC was to encourage the adoption of a model school criteria, the Food and Drug Administration (FDA) was to develop a mass-media campaign to educate the public about food labels, and NIH was to sponsor workshops and research obesity.⁶⁰ Further, in response to increasing obesity in America, the United States Public Health Service (PHS) developed successive ten-year plans to reduce behavioral risks for obesity through specific and measurable health objectives.⁶¹ However, while the various agencies continue to encourage and publicize, their efforts to achieve national obesity objectives have been curbed due to lack of sufficient funds.⁶²

Nevertheless, obesity among American citizens may have little to do with failed government efforts.⁶³ Rather, it may be due to the capitalistic economics of our nation's food system.⁶⁴ In a competitive marketplace, food companies must meet shareholder demands for profits by encouraging more people to consume their products.⁶⁵

58. Marion Nestle & Michael F. Jacobson, *Halting the Obesity Epidemic: A Public Health Policy Approach*, 115 PUB. HEALTH REPORTS 12, 15 (Jan./Feb. 2000) (citing DHHS, *Promoting Health/Preventing Disease: Objectives for the Nation*, Washington: Government Printing Office (1980)).

59. *Id.* (citing DHHS, *Promoting Health/Preventing Disease: Public Health Service Implementation Plans for Attaining the Objectives for the Nation*, PUB. HEALTH REPORT SUPP. (Sept./Oct. 1983)).

60. *Id.*

61. *Id.* at 15-16 (citing DHHS, *Healthy People 2000: National Health Promotion and Disease Prevention Objectives*, Washington: Government Printing Office (1990); United States Department of Health and Human Services, *Healthy People 2010: Understanding and Improving Health*, Washington: Government Printing Office (2000)).

62. NESTLE, *supra* note 5, at 22.

63. *Id.* at 21.

64. *Id.*

65. *Id.*

On an annual basis, the food industry spends approximately \$33 billion on direct and indirect media advertisements.⁶⁶ In 1999, McDonald's spent \$627.2 million, Burger King \$403.6 million, Taco Bell \$206.5 million, and Coca-Cola \$174.4 million on advertising.⁶⁷ Such figures dwarf the \$300 million that the United States Department of Agriculture spends annually on nutrition education,⁶⁸ the National Cancer Institute's \$1 million annual investment to increase consumption of fruit and vegetables,⁶⁹ and the \$1.5 million dollar budget of the National Heart, Lung, and Blood Institute's National Cholesterol Education Campaign.⁷⁰

The economics of food industry spending in relation to government spending on problems related to obesity are not functioning on an equal basis. The food industry receives an enormous part of our country's economic resources;⁷¹ however, those funds are not being used to counter the negative impact that overconsumption of the food industry's products has on our society.

III. SOCIAL TORT LITIGATION AGAINST THE FOOD INDUSTRY

A. Social Tort Litigation

An emerging trend is the use of mass tort litigation to regulate corporate behavior.⁷² The social impact of law is a legal research inquiry that was first suggested in 1915 by Roscoe Pound in his

66. *Id.* at 22. See also Nestle & Jacobson, *supra* note 58, at 18 (citing A.E. Gallo, *The Food Marketing System in 1996*, AGRIL. INFO. BULL. NO. 743, Washington: United States Department of Agriculture (1998)).

67. NESTLE, *supra* note 5, at 22.

68. *Id.*

69. Nestle & Jacobson, *supra* note 58, at 18 (citing *Government and Industry Launch Fruit and Vegetable Push, But NCI Takes Back Seat*, 22.26 Nutrition Week 1,2 (1992)).

70. *Id.* (citing Lenfant C. Cleeman II, *The National Cholesterol Education Program: Progress and Prospects*, 280.20 J. AM. MED. ASS'N 99-104 (1998)).

71. The American public spends more than \$110 billion annually purchasing food industry products. ERIC SCHLOSSER, *FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL* 3 (2002). Other estimates are as high as \$800 billion. NESTLE, *supra* note 5, at 11.

72. See generally Michael L. Rustad, *Smoke Signals from Private Attorneys General in Mega Social Policy Cases*, 51 DEPAUL L. REV. 511 (2001); Francis E. McGovern, *Class Actions and Social Issue Torts in the Gulf South*, 74 TUL. L. REV. 1655 (2000); Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, The Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859 (2000).

theory of social interests in the law.⁷³ The modern trend of regulation by litigation first arose during state Medicaid recoupment lawsuits against the tobacco industry.⁷⁴

During the tobacco litigation, trial courts deviated from traditional legal principles in order to allow state governments to achieve their public policy goals through litigation.⁷⁵ The tobacco litigation reallocated the financial burden of caring for tobacco users, and increased the accountability of the tobacco industry in its marketing practices.⁷⁶ Social policy tort lawsuits serve the public interest in three ways. First, they reallocate the burden of caring for consumers harmed by industries profiting from such consumers. Second, such actions increase the accountability of such industries. Third, they help to eliminate defective products and corporate practices.⁷⁷

B. Comparing Potential Litigation Against the Food Industry With Litigation Against the Tobacco Industry

In evaluating the future viability of the obesity lawsuits in forcing the food industry to take a more active role in preventing obesity, obesity litigation should be compared with the litigation that devastated the tobacco industry and ultimately resulted in the tobacco industry's MSA.⁷⁸ Litigation against the tobacco industry may have expanded the field of products liability.⁷⁹ Similar to the cases against the tobacco manufacturers, the likelihood of success against food companies would significantly increase if hidden manufacturing or marketing strategies are discovered through

73. Rustad, *supra* note 72, at 514 (citing Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343 (1915)). Professor Rustad was Of Counsel for the Amicus Curiae Brief of the Coalition for Consumer Rights and University Scholars and Law Professors in *Illinois v. Phillip Morris, Inc.*, 759 N.E.2d 906 (Ill. 2001). *Id.* at n.a1.

74. *Id.* at 511-12.

75. Victor E. Schwartz, *The Remoteness Doctrine: A Rational Limit on Tort Law*, 8 CORNELL J.L. & PUB. POL'Y 421 (1999). States passed legislation to facilitate their victory in court. See FLA. STAT. § 409.910 (1997); 1998 Vt. Acts & Resolves 142 (codified in part at VT. STAT. ANN. tit. 33, §§ 1904, 1911 (1998); MD. CODE ANN., HEALTH-GEN. I § 15-120 (West 1998). See generally Robert A. Levy, *Tobacco Medicaid Litigation: Snuffing Out the Rule of Law*, 22 S. ILL. U. L.J. 601 (1998).

76. Schwartz, *supra* note 75, at 421.

77. Rustad, *supra* note 72, at 514.

78. See *infra* Section IV.A.

79. Meislik, *supra* note 11, at 801-02.

industry whistleblowers or the discovery process.⁸⁰ While it cannot be predicted at this time whether the states would be victorious in litigation against the food industry, it would be unwise for the food industry to underestimate the possibility of such litigation.⁸¹

1. Similarities Between Litigation Against the Food Industry and Litigation Against the Tobacco Industry

There are several similarities between litigation against the tobacco industry and litigation against the food industry. The same lawyers who successfully engineered the litigation against the tobacco companies are also the lawyers supporting litigation against the food industry.⁸² The starting point for both movements is also the same.⁸³ In 1964, United States Surgeon General Luther L. Terry began the anti-smoking movement by calling cigarette smoking a “health hazard of sufficient importance in the United States to warrant appropriate remedial action.”⁸⁴ Similarly, in 2001, Surgeon General David Satcher issued a “Call to Action” against obesity,⁸⁵ and since that declaration the fight against obesity has continued to grow throughout the United States.⁸⁶ Further, the advertising campaigns used by both industries are very similar.⁸⁷

80. *Id.* at 802.

81. *See id.* (citing Laura Bradford, *Fat Foods: Back in Court: Novel Theories Revive the Case Against McDonald's—and Spur Other Big Firms To Slim Down Their Menus*, TIME ONLINE EDITION, Aug. 3, 2003, at <http://www.time.com/time/insidebiz/article/0,9171,1101030811-472858,00.html> (last visited Oct. 9, 2005)). David Adelman, a consumer-food analyst at Morgan Stanley who covered the tobacco industry litigation contends “[i]t would be a mistake to underestimate the creativity of plaintiffs’ lawyers.” Meislik, *supra* note 11, at 802 n.214.

82. *Id.* at 802 (citing John Alan Cohan, *Obesity, Public Policy, and Tort Claims Against Fast-Food Companies*, 12 WIDENER L.J. 103, 110 (2003) (“Lawyers who pioneered suits against tobacco companies have set their sights on [the food industry].”)).

83. *Id.*

84. *Id.*

85. *See supra* Section II.

86. Meislik, *supra* note 11, at 802.

87. *Id.* at 804.

2. Differences Between Litigation Against the Food Industry and Litigation Against the Tobacco Industry

Unlike the tobacco industry, it has not been established that the food industry preyed on unknowing consumers, so the food industry may lack the “diabolical reputation associated with tobacco manufacturers.”⁸⁸ Even so, supporters of litigation against the food industry are slowly working to eliminate this difference.⁸⁹ In cases against the tobacco companies, plaintiffs discovered documents revealing that the tobacco industry “had prior knowledge of the dangers of tobacco [and there had been] a long pattern of concealment, denial, and even manipulation of the addictive component of tobacco.”⁹⁰ Further, evidence obtained in the tobacco industry litigation revealed that the tobacco industry intentionally sought to addict young consumers in order to ensure lifelong customers.⁹¹

Unlike the tobacco manufacturers, there is no evidence that food companies intentionally increased the addictive nature of their products or intentionally misled consumers about the dangers of their products.⁹² Further, those who oppose litigation against the food industry contend that food is not addictive like nicotine, and even if some foods are discovered to be addictive, the addictive effects are not as harmful as the addictive effect of nicotine.⁹³

However, without first being allowed to complete the discovery process, it is impossible to know exactly what the food companies know about their products or do to make their products more dangerous.⁹⁴ Meanwhile, researchers are investigating whether food is addictive and can trigger cravings similar to drug addictions.⁹⁵ The Physicians Committee for Responsible Medicine (PCRM) claims there is biochemical evidence that the craving of unhealthy foods

88. *Id.* (citing Franklin E. Crawford, Note, *Fit for Its Ordinary Purpose? Tobacco, Fast Food, and the Implied Warranty of Merchantability*, 63 OHIO ST. L.J. 1165, 1219 (2002)).

89. *Id.*

90. *Id.* at 804-05 (quoting Jonathan Turley, *A Crisis of Faith: Tobacco and the Madisonian Democracy*, 37 HARV. J. ON LEGIS. 433, 447 (2000)).

91. Meislik, *supra* note 11, at 805 (citing Crawford, *supra* note 88, at 1219).

92. *Id.*

93. *Id.* (citing Crawford, *supra* note 88, at 1219-20).

94. *Id.*

95. *Id.* (citing Crawford, *supra* note 88, at 1219-20); Forrest Lee Andrews, Comment, *Small Bites: Obesity Lawsuits Prepare To Take On the Fast Food Industry*, 15 ALB. L.J. SCI. & TECH. 153, 164-66 (2004)).

originates more from a physical addiction to those foods than from a lack of willpower.⁹⁶ PCRM asserts that researchers have found certain foods are “seductive foods”—foods that are “similar to drugs in that they cause the release of opiate-like compounds that stimulate the brain’s pleasure center.”⁹⁷

Another difference is that food is essential and we cannot live without it; however, people can live without tobacco. Food has health benefits, but “there is no such thing as a healthy diet of smoking or smoking in moderation.”⁹⁸ In addition, unlike tobacco users who tend to be loyal to particular brands, it will be difficult to prove causation for liability purposes among food addicts because they tend to eat unhealthy products from a variety of sources.⁹⁹ Causation also becomes difficult because people who eat unhealthy foods at restaurants also may eat poorly at home.¹⁰⁰

*C. Primary Limitation of Litigation Against the Food Industry:
The Enigma of Causation*

With adverse case law and an industry that appears to be acting responsibly, state attorneys general seeking to hold the food industry liable for obesity must confront several obstacles. First, employing a class action lawsuit to force defendant food companies to choose the cheaper route of settlement over costly litigation requires the creation of a suitable class. Second, even if enough plaintiffs are found so as to allow for the creation of a class, the fatal flaws of traditional causes of action still exist.

In order to successfully mount a class action, the plaintiff class bears the burden of proving causation. While scientific evidence satisfactorily establishes that obesity results from consumption of calories in excess of that used as energy by the body, prevention of obesity requires individuals to balance the calories they consume with the calories they burn through metabolic and muscular

96. Meislik, *supra* note 11, at 805 (citing Press Release, PCRM, Nutrition Expert Provides New Ammunition for Fast-Food Lawsuits (June 3, 2003), *available at* <http://www.pcrm.org/news/health030603.html>).

97. *Id.* at 806 (citing Press Release, PCRM, Health Advocates Condemn Proposed Bill to Shield Junk Food Industry (June 16, 2003), *available at* <http://www.pcrm.org/news/health030616.html>).

98. *Id.* at 808 (citing Bradford, *supra* note 81).

99. *See id.*; *see also infra* Section III.D.

100. *See infra* Section III.D.

activity.¹⁰¹ Nevertheless, the precise relationship between the diet and activity in order to prevent obesity is still being researched.¹⁰²

In April 2003, at a scientific conference of the Federation of American Societies for Experimental Biology, findings were presented which demonstrated that over the past twenty years, teenagers have, on average, increased their caloric intake by 1%.¹⁰³ The report also showed that during that same period, the percentage of teenagers who said they engaged in some physical activity for at least thirty minutes a day dropped from 42% to 29%.¹⁰⁴ If these findings are true, then the drop in physical activity might be the major factor causing increased obesity in this country. Nevertheless, there is scientific evidence supporting the counter-argument that the level of energy-expendending activities that Americans engage in has remained relatively constant.¹⁰⁵ Under this premise, the gap leaves over-consumption of food products as the most probable cause of excessive weight gain.¹⁰⁶

Currently, in the context of traditional causes of action against the food industry, the primary bar to successful litigation is the legally required consideration of the number of other factors which could have contributed in producing the harm and the extent of the effect which such factors have in producing the harm.¹⁰⁷ A second consideration is whether a particular food company has created a force or series of forces which is in continuous and active operation up to the time of the harm.¹⁰⁸

Even if food industry practices play a role in obesity, surely other factors such as genetics, inactivity, and cultural differences do

101. NESTLE, *supra* note 5, at 8.

102. Nestle & Jacobson, *supra* note 58, at 12 (citing United States Preventative Services Task Force, *Guide to Clinical Preventative Services*, 2d ed. Alexandria (VA): International Medical Publishing (1996); S. Dalton, *Overweight and Weight Management*, Gaithersburg (MD): Aspen Publishing (1997)).

103. H.R. Rep. No. 108-432, at 10.

104. *Id.*

105. Rogers, *supra* note 5, at 881 (citing Mokdad et al., *supra* note 22, at 1521 (“[O]ur data demonstrate that a major contributor to obesity—physical inactivity—has not changed substantively at the population level between 1991 and 1998”). “[S]urveys do not report enough of a decrease in activity levels to account for the current rising rates of obesity.” See NESTLE, *supra* note 5, at 8.

106. NESTLE, *supra* note 5, at 8.

107. RESTATEMENT (SECOND) OF TORTS § 433 (1965).

108. *Id.*

as well.¹⁰⁹ Nonetheless, despite these many obstacles, the ingenuity of the American legal system to create legal theories in order to fairly distribute tort costs should not be dismissed.

D. *Eliminating Proof of Specific Causation Against Any Single Food Industry Company or Product*

Under current law, regardless of the theory under which the action is brought,¹¹⁰ plaintiffs must prove that a particular food company or product caused the obesity for which they claim damages.¹¹¹ Causation is the central, decisive factor in mass tort litigation.¹¹² To understand why the causation requirement is detrimental in litigation against the food industry, an understanding of how causation is proved is essential.

In ordinary products liability cases, a plaintiff explains the causal link that produced the plaintiff's injury.¹¹³ Similarly, in toxic tort cases, proof of causation against any specific food industry company or product is extremely difficult to show for obvious reasons. Generally, exposure to a single food company or food product is not a necessary cause of obesity.¹¹⁴ In the case of obesity, it would be almost impossible to prove that an individual's obesity is

109. Scott M. Grundy, *Multifactorial Causation of Obesity: Implications for Prevention*, 67 AM. J. CLINICAL NUTR. 563S, 566S-67S (1998).

110. Margaret A. Berger, *Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts*, 97 COLUM. L. REV. 2117, 2120 (1997) (stating that plaintiffs can rely on a variety of legal theories including strict liability, negligence, design defect, failure to warn, and nuisance).

111. *Id.* (citing Richard A. Nagareda, *In the Aftermath of the Mass Tort Class Action*, 85 GEO. L.J. 295, 317 n.100 (1996) ("In contrast to the variations in state tort law on other questions, there is no reason to believe that any jurisdiction deviates from the requirement that the plaintiff demonstrate general causation.")).

112. *Id.* (citing JUDGE JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 148 (1995) ("The only real liability issue becomes causation: was this manufacturer's product a substantial cause of this plaintiff's medical problems—however we define them?")).

113. Grundy, *supra* note 109, at 566S-67S.

114. Berger, *supra* note 110, at 2121. Of course, tort law requires only a but-for cause, not a necessary cause, in order to establish liability. *Id.* at 2121 n.15. It is easier, however, to prove a but-for cause when the defendant's product is necessarily implicated in plaintiff's harm. *Id.* Establishing a but-for relationship is also not problematic when the plaintiff suffers from harm that is uniquely or almost always caused by exposure to a defendant's product. *Id.*

attributable to a particular food product or company.¹¹⁵ Plaintiffs must therefore produce sufficient scientific evidence which establishes a probability-based inference that the food product in question was capable of causing the obesity in question (i.e., general causation). After establishing general causation, the plaintiff must then establish that the exposure to the defendant's product was the specific cause of the obesity (i.e. specific causation).¹¹⁶ In many instances of toxic tort litigation, the factfinder must determine the sufficiency of causation even though the causal mechanism is not fully understood.¹¹⁷ Nonetheless, it is the responsibility of the finder of fact to determine the sufficiency of causation.¹¹⁸

In the context of a single company or product being found liable for obesity, it is unlikely that any sufficient statistical association between that particular company or product and the plaintiff's obesity can be sufficiently demonstrated to compel a court to concede a causal connection.¹¹⁹ In the case of obesity, it would be nearly impossible for a plaintiff to produce sufficient scientific evidence from which a probability-based inference could be drawn that a particular food company or product caused the plaintiff's obesity.¹²⁰

115. *Id.* at 2122 (citing David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 859-60 (1984) for the proposition that liability should be imposed in proportion to the probability of causation attributable to the substance in issue, whether or not the probability is above or below 50%).

116. Berger, *supra* note 110, at 2122 (citing Joint E. & S. Dist. Asbestos Litig. V. United States Mineral Prod., 52 F.3d 1124, 1131 (2d Cir. 1995) ("Causation in toxic torts normally comprises two separate inquiries: whether the epidemiological or other scientific evidence establishes a causal link between [x and y], and whether plaintiff is within the class of persons to which inferences from the general causation evidence should be applied." [citations omitted])). "Plaintiffs typically prove specific causation by calling a physician to testify that a differential diagnosis (as opposed to introducing affirmative evidence of causation) of plaintiff revealed no other explanation for plaintiff's disease." *Id.* at 2122 n.18.

117. *Id.* at 2121 n.15. For a discussion of necessary and sufficient causes *see id.* (citing Sorell L. Schwartz, *An Overall Conceptual Approach to the Problem of Causation*, 3 SHEPARD'S EXPERT & SCI. EVIDENCE Q. 1 (1995)).

118. *Id.*

119. Berger, *supra* note 110, at 2121.

120. Grundy, *supra* note 109, at 566S-567S. As discussed above, obesity may result from the interaction of multiple factors including genetic susceptibility, environmental factors, and other company's food products. *See supra* note 115 and accompanying text.

Nevertheless, for the purpose of lawsuits brought by state attorneys general against the food industry as a whole, courts should be willing to concede the causal connection between obesity and the food products manufactured and sold by the food industry. In the case of "signature diseases," the sufficiency of the statistical association between the product and a particular harm is so compelling that courts and scientists are willing to concede a causal connection.¹²¹ Courts have been willing to ascribe causation in cases of a signature disease because the number of persons who will be compensated undeservedly is low, and because denying meritorious compensation to the injured would be unfair to so many.¹²² The consequence is that the food industry will be liable provided plaintiffs can prove a sufficient exposure to products manufactured and sold by the food industry.¹²³

Because causation would be an essential element of food industry liability, scientific proof against the food industry must meet the two prong test set forth in the United States Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹²⁴ First, the evidence must be scientifically valid, meaning it is derived from scientific practices that are methodologically sound.¹²⁵ Second, the expert's evidence must fit the facts of the case, or in other words be relevant.¹²⁶ In various toxic tort cases, plaintiffs have traditionally relied on four different types of scientific evidence to prove causation: (1) structure-activity analysis; (2) in vitro analysis; (3) in vivo analysis; and (4) epidemiological analysis.¹²⁷ However, none of these forms of scientific evidence can conclusively prove a cause and

121. Berger, *supra* note 110, at 2121. Although some would restrict the term "signature disease" to a disease that is associated uniquely with exposure to a particular agent, lawyers often use the term to refer to a disease that is "caused almost exclusively" by a particular exposure. *Id.* (citing Linda A. Bailey et al., *Reference Guide on Epidemiology*, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 121, 177 (Fed. Judicial Ctr. Ed., 1994); Kenneth S. Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform*, 73 VA. L. REV. 845, 859-60 n.38 (1987)).

122. Berger, *supra* note 110, at 2121 n.16.

123. *Id.*

124. 509 U.S. 579 (1993).

125. Berger, *supra* note 110, at 2122-23 (citing *Daubert*, 509 U.S. at 590).

126. See generally *id.* at 2123 (citing *Daubert*, 509 U.S. at 591).

127. *Id.* (citing Susan R. Poulter, *Science and Toxic Torts: Is There a Rational Solution to the Problem of Causation?*, 7 HIGH TECH. L.J. 189, 217-26 (1992)).

effect relationship between a plaintiff's health condition and a plaintiff's exposure to a defendant's product.¹²⁸

Perhaps the only realistic way to overcome the causation barrier is through a modification in the specific causation requirement for Medicaid recoupment suits against the food industry. Similar modifications have previously occurred with respect to toxic tort cases as some legal commentators have used the difficulty of jurors in properly assessing the aforementioned uncertainty as a basis for modifying the causation requirement in toxic tort cases.¹²⁹

Similar to obesity cases against the food industry, toxic tort cases run contrary to the rationale of requiring proof of specific causation and the view that specific causation is key to determining the link between the act and the resulting harm.¹³⁰ The plaintiffs in toxic tort cases cannot be determined in advance of a harm, the causes of injury are frequently not known or cannot be precisely determined by scientific methods, and the lapse of time between the act and the harm caused creates an incentive for people to avoid an act whose adverse consequences may not manifest until many years later.¹³¹ The characteristics of toxic torts, as well as cases linking obesity to a particular company or product, mesh poorly with the notion of corrective justice that actors should be liable only for irresponsible choices that are foreseeable.¹³²

"[C]ausation is often fortuitous and thus morally arbitrary. To erect sharp disparities of treatment on such a foundation violates the requirement of equal treatment implied by the conception of equal dignity and respect."¹³³ From this perspective, it has been proposed that in order to minimize the risks to society caused by uncertainty and inconclusive proof of causation, tort law should focus on creating a standard of care regarding a corporation's duty to keep itself informed about the risks of its products.¹³⁴ As a result,

128. *Id.* at 2123-29.

129. *Id.* at 2130, 2131-32.

130. Berger, *supra* note 110, at 2132.

131. *See id.* at 2132-33.

132. *Id.* at 2133.

133. *Id.* at 2134 (quoting Christopher H. Schroeder, Causation, Compensation, and Moral Responsibility, in *Philosophical Foundations of Tort Law* 347, 348 n.1 (David G. Owen ed., 1995); Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 *UCLA L. REV.* 439, 439 (1990)).

134. *Id.*

[i]f a corporation fails to exercise the appropriate level of due care, it should be held liable to those put at risk by its action, without regard to injuries that eventually ensue; it is culpable because it has acted without taking into account the interests of those who will be affected by its conduct.¹³⁵

Arguably, current law encourages corporations to engage in behavior that keeps them from investigating the risks caused by their products because the future likelihood that a causal connection can be proven between the corporation's acts and a plaintiff's harm is perceived as minimal when compared to the cost of present compliance.¹³⁶ Uncertainty about the future with respect to proof of causation, coupled with the lapse of time before definitive harm will emerge, usually creates incentives for management of a corporation to decide in favor of maximizing short-term objectives.¹³⁷ To compel corporations to obtain earlier and better information about the potential adverse health effects of their food products, such companies must be convinced that it is in their best interest not to suppress unfavorable research results or other data showing the adverse health effects brought about by their food products.¹³⁸

One way to accomplish this goal is to impose liability in negligence for failure to provide substantial information relating to the potential risks of a company's product, and to eliminate the requirement of proving specific causation.¹³⁹ Under this model, once a plaintiff proves the defendant's negligence in failing to reveal substantial information relevant to assessing the potential risks of exposure, a *prima facie* case of liability would be made out for those able to substantiate exposure and injury, provided the defendant either did no research or did not reveal negative research.¹⁴⁰ The end result would be compensation for plaintiffs exposed to a product and who suffered a health impairment that the defendant could not prove was not attributable to its products.¹⁴¹

Eliminating causation in toxic tort cases is not anti-scientific. Rather, it compels corporations to engage in more scientific research, "not to win lawsuits, but to protect society against the risks

135. Berger, *supra* note 110, at 2134.

136. *Id.* at 2134, 2139.

137. *Id.* at 2140.

138. *Id.* at 2141.

139. *Id.* at 2143.

140. Berger, *supra* note 110, at 2144.

141. *Id.* at 2146.

posed by their products."¹⁴² In this scenario, in litigation against the food industry for recoupment of Medicaid costs, scientific evidence would only need to establish the common sense fact that over-consumption of food products is linked to obesity.¹⁴³ Liability would depend upon the aforementioned model on proving that the food industry failed to develop and disclose substantial information that is needed to assess obesity risks related to consumption of their products.¹⁴⁴

Another legislative method to achieve the goal of eliminating proof of causation against the food industry is for state legislatures to enact legislation to that effect.¹⁴⁵ In its litigation against the tobacco industry, the State of Florida enacted legislation that permitted the use of statistics to prove causation and damages.¹⁴⁶ Further, though the provision was subsequently declared unconstitutional,¹⁴⁷ the Florida statute originally allowed the state to proceed in large claim cases without identifying individual Medicaid recipients.¹⁴⁸

Conditioning liability on a plaintiff's ability to prove that the product of a single food industry company caused the plaintiff's obesity is counterproductive. The insistence on causation linked to a particular company or product creates incentives on the part of food companies to avoid research information that may disclose the extent of the harmful nature of its products.

IV. THE PROPER ROLE OF THE TORT SYSTEM IN REGULATING THE FOOD INDUSTRY

A. The Tort System as a Complement to Legislative and Administrative Regulation

The judicial treatment of the prior New York cases brought by individual plaintiffs seeking to hold the food industry liable for obesity creates a burden to define a role for the tort system in

142. *Id.* at 2152.

143. *Id.*

144. *Id.*

145. *See, e.g.,* Sherrill, *supra* note 44, at 502-03 (citing FLA. STAT. ANN. § 409.910(9) (West 1996)).

146. *Id.* (citing FLA. STAT. ANN. § 409.910(9) (West 1996)).

147. *Id.* (citing Agency for Health Care Admin. v. Associated Indus., 678 So.2d 1239, 1255-56 (Fla. 1996)).

148. *Id.* (citing FLA. STAT. ANN. § 409.910(9)(a) (West 1996)).

regulating the food industry. This Comment suggests that courts have an important role to play in enforcing the regulation of the food industry—complementing the efforts of legislatures and the regulatory agencies that carry out their mandates.¹⁴⁹

Legislatures and administrative agencies have important limitations which courts do not have. First, an industry may exert significant lobbying resources toward legislators as well as the administrative agencies that govern the industry.¹⁵⁰ Second, regulatory enforcement of the food industry could be severely limited because of a lack of agency resources.¹⁵¹ The threat of tort liability would provide an incentive for the food industry to police itself. In the modern regulatory environment, the tort system plays an essential role in complementing the work of legislatures and administrative agencies.

The fear of a “tobacco-style legal quagmire” has compelled some members of the food industry to disclose more nutritional information and offer more healthy choices on their menus.¹⁵² Several companies are voluntarily setting up public health programs and modifying their marketing strategies, such as airing public-service announcements about health and eating in moderation and funding new in-school physical fitness programs.¹⁵³

Critics of allowing litigation against the food industry suggest that the threat of litigation may be alleviated as more food companies go the “healthful route” and provide consumers with more information about their products.¹⁵⁴ However, it must be remembered that food companies did not begin acting voluntarily until

149. For a discussion of the complementary role of courts in efforts to regulate tobacco products, see Peter D. Jacobson & Kenneth E. Warner, *Litigation and Public Health Policy Making: The Case of Tobacco Control*, 24 J. OF HEALTH POL., POL'Y & L., 769, 770 (1999); in regulating gun manufacturers, 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 (2000).

150. See generally NESTLE, *supra* note 5, at 95-110. See also PETER BELL & JEFFREY O'CONNELL, ACCIDENTAL JUSTICE 97 (1997) (discussing the concept of “agency capture”); Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 MO. L. REV. 1, 65 (1995).

151. See discussion *supra* Section II.C.

152. Meislik, *supra* note 11, at 799-801.

153. *Id.*

154. *Id.* at 811-12 (citing David Phelps, *The Bottom Line: Legal Threats Haunt Fast-Food Industry; Few Rushing to Court Yet, but the Specter of Lawsuits Already is Changing the Menu*, STAR TRIB. (Minn.), Oct. 12, 2003, at 3A).

2003 in their effort to avoid negative publicity and potential litigation.¹⁵⁵ This comment contends government regulation of the food industry is needed and tort liability for Medicaid recoupment should be imposed to ensure compliance with government regulation.

Prior to the 1998 MSA,¹⁵⁶ in June 1997 an unsuccessful attempt at a "global settlement" with the federal government was proposed.¹⁵⁷ Though Congress considered various versions of the global settlement, Congressional approval was given to provisions of the global settlement that would have included regulation of the tobacco products by FDA and industry immunity from private lawsuits.¹⁵⁸ However, when the terms of the global settlement became unacceptable to the participating tobacco manufacturers, the manufacturers withdrew its support and engaged in heavy lobbying which killed the settlement proposal in 1998.¹⁵⁹

After the federal proposal was defeated, state attorneys general continued to meet with tobacco industry representatives to discuss a less comprehensive settlement.¹⁶⁰ In 1998, the attorneys general and the participating tobacco manufacturers announced the MSA.¹⁶¹ The MSA was a positive step in the regulation of the tobacco industry. The participating tobacco manufacturers agreed to pay approximately \$8 billion per year to various states as reimbursement for medical expenses paid by the states.¹⁶² They also agreed to certain advertising restrictions and to pay \$250 million to create a national foundation that funds health studies and pays for anti-tobacco advertising.¹⁶³

155. *Id.* at 799.

156. The original participating manufacturers to the MSA were Philip Morris, Inc.; R.J. Reynolds Tobacco Co.; Lorillard Tobacco Co.; and Brown Williamson Tobacco Corp. Scott, *supra* note 17, at 1101 n.33. Since the agreement, other tobacco manufacturers have subsequently followed suit. *Id.*

157. *Id.* at 1101.

158. *Id.* (citing S. Res. 1415, 105th Cong., 2d Sess. (1998) (McCain Bill endorsed by Senate Commerce Committee)).

159. *Id.* (citing Jonathan D. Salant, *Tobacco Company's Lobbying Costs Drop*, Associated Press On-Line, Sept. 28, 1999 (reporting that the tobacco industry spent \$37 million in lobbying and \$40 million in advertising in 1998 to defeat the federal settlement proposal, and that lobbying costs dropped 70% in 1999 when the battleground shifted to the courts)).

160. Scott, *supra* note 17, at 1101.

161. *Id.*

162. *Id.* at 1103 (citing MSA § IX).

163. *Id.* (citing MSA §§ III, VI). The national foundation is known as the American Legacy Foundation. *Id.* at 1103 n.48.

More specifically, the MSA bans all advertising using characters but not human figures.¹⁶⁴ Tobacco ads on billboards, buses, and subway cars are banned, but outdoor ads smaller than fourteen square feet are permitted.¹⁶⁵ Tobacco advertising in sports arenas and venues is banned, but tobacco companies are each allowed to sponsor one sporting event a year for each brand they manufacture.¹⁶⁶

Further, in the MSA, participating tobacco manufacturers state that they are “committed to reducing underage tobacco use.”¹⁶⁷ However, no MSA provisions regulate self-service displays, point-of-sale advertising, or vending machines.¹⁶⁸ The participating tobacco companies agreed not to target underage tobacco users, but are not required to print additional and unequivocal health warnings on their packages.¹⁶⁹

Most pertinent to this comment is the fact that the MSA contained no “look-back” provisions which set industry targets and penalties for the failure to conform and achieve the goals of the MSA.¹⁷⁰ The MSA was not a result of legislative enactment and thus is not subject to federal agency control. As a result, the MSA has been described as “largely toothless” in regulating the tobacco industry.¹⁷¹ This comment contends that Congress should focus its efforts on promulgating appropriate legislative measures to regulate the food industry and curb the obesity epidemic. Enforcement of such regulations should be left to the tort system. Specifically, states should be allowed to bring Medicaid recoupment claims against the food industry if the industry attempts to circumvent such regulations.

164. Scott, *supra* note 17, at 1103 (citing MSA §§ III(b), III(c)(2)).

165. *Id.* at 1101 (citing MSA §§ III(d), II(ii)).

166. *Id.* (citing MSA §§ III(d), III(c)(2)).

167. *Id.* (citing MSA § I).

168. *Id.*

169. Scott, *supra* note 17, at 1101 (citing MSA § III(a)).

170. *Id.* at 1103.

171. *Id.* at 1104.

B. *Enforcing Regulations Imposed on the Food Industry: State Medicaid Recoupment Claims For the Costs of Obesity*

1. Borrowing Strategies From Litigation Against the Tobacco Industry

The two fatal flaws of the original litigation against the tobacco industry were (1) the plaintiffs' inability to match the tobacco companies' "war chests" and (2) juries' lack of sympathy for plaintiffs who willingly exposed themselves to harm.¹⁷² However, the eventual litigation against the tobacco industry embodied innovative solutions to those problems.¹⁷³ The most successful of these solutions were lawsuits filed by state attorneys general, allied with private attorneys, seeking recovery of damages for the costs incurred by their state

Medicaid programs in treating tobacco-related illnesses.¹⁷⁴ The benefits of this new strategy quickly became apparent to other attorneys general, and soon the tobacco industry faced Medicaid suits from nearly every state in the country.¹⁷⁵ The legal strategies employed during the final stages of litigation against the tobacco industry produced several unique methods of recovery that can be applicable in the potential litigation against the food industry today.

On May 23, 1994, the Attorney General of Mississippi, Michael Moore, in conjunction with private attorney Richard Scruggs, launched an attack on the tobacco industry by filing the first Medicaid recoupment lawsuit against the tobacco industry.¹⁷⁶ By

172. Bryce A. Jensen, *From Tobacco to Health Care and Beyond—A Critique of Lawsuits Targeting Unpopular Industries*, 86 CORNELL L. REV. 1334, 1343 (2001) (citing 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, 313, 316 (1998)).

173. *Id.* (citing Ingrid L. Dietsch Field, Comment, *No Ifs, Ands or Butts: Big Tobacco Is Fighting for Its Life Against a New Breed of Plaintiffs Armed With Mounting Evidence*, 27 U. BALT. L. REV. 99, 114-16 (1997); Susan E. Kearns, Note, *Decertification of Statewide Tobacco Class Actions*, 74 N.Y.U. L. REV. 1336, 1340 (1999)).

174. *Id.* at 1344 (citing Kearns, *supra* note 173, at 1340). See generally Sherrill, *supra* note 44; Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Governments' Tobacco Litigation*, 33 CONN. L. REV. 1143, 1147 (2001).

175. Jensen, *supra* note 172, at 1344 (citing Richard L. Cupp, Jr., *A Morality Play's Third Act: Revisiting Addiction, Fraud and Consumer Choice in "Third Wave" Tobacco Litigation*, 46 U. KAN. L. REV. 465, 476-77 (1998)).

176. *Id.* (citing David A. Hyman, *Tobacco Litigation's Third-Wave: Has Justice Gone Up in Smoke?*, 2 J. HEALTH CARE L. & POL'Y 34, 36-37 (1998); Adam Bryant, *Who's Afraid of Dickie Scruggs?*, NEWSWEEK, Dec. 6, 1999, at 46, 49).

using the “blameless” state agency, Medicaid, as the plaintiff, the tobacco companies were denied their previously successful assumption of the risk defense.¹⁷⁷ The complaint asserted theories that served as a template for subsequent actions filed by other states.¹⁷⁸

Most of the complaints filed against the tobacco industry alleged the traditional causes of action: conspiracy, fraud or fraudulent misrepresentation, breach of warranty, negligent undertaking of a voluntary duty, design defect, nuisance, violations of state consumer protection laws, violations of the Racketeer Influenced and Corrupt Organizations (RICO) Act,¹⁷⁹ and, most significantly, unjust enrichment.¹⁸⁰ The theory of unjust enrichment is defined as “[a] benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense.”¹⁸¹ The remedy for unjust enrichment is restitution.¹⁸²

Subsequent to the filing of the Mississippi litigation, the Florida legislature passed the Medicaid Third-Party Liability Act (MTPLA), thus allowing similar suits to be brought in Florida.¹⁸³ This unprecedented legislation denied the tobacco industry defendants their previously successful common law affirmative defenses. The legislation allowed the application of market share liability, replaced the concepts of causation and damages with “statistical analysis,” and removed the requirements that the state identify individual recipients whose illnesses were treated through the state’s Medicaid program.¹⁸⁴

Another approach, exemplified by the state of Minnesota, involved state litigation accompanied by a suit by the state’s Blue Cross/Blue Shield health insurer, working closely with the Attorney

177. *Id.* (citing Hyman, *supra* note 176, at 37 and n.19).

178. Little, *supra* note 174, at 1147. Little was counsel for Philip Morris Companies, Inc. and briefed and argued a constitutional and statutory challenge to the State of Connecticut’s contingency fee contract with counsel suing the tobacco companies in Connecticut’s recoupment action against the tobacco companies. *Id.* at n.a1.

179. 18 U.S.C. §§ 1961-1968 (1970).

180. Sherrill, *supra* note 44, at 506-07. Copies of the states’ complaints are available at <http://www.stic.neu.edu/Libraries.html>.

181. BLACK’S LAW DICTIONARY 1573 (8th ed. 2004).

182. Sherrill, *supra* note 44, at 507.

183. Little, *supra* note 174, at 1147 (citing Florida Medicaid Third-Party Act, FLA. STAT. ANN. § 409.910 (West 1995)).

184. *Id.*; see also Sherrill, *supra* note 44, at 502-04.

General's office.¹⁸⁵ This approach created an entirely new category of lawsuits that eventually resulted in many state-regulated Blue Cross/Blue Shield organizations filing actions against the tobacco industry as well.¹⁸⁶

By 1999, the tobacco industry was facing concerted recoupment litigation at every level of political organization (federal, state, county, and municipal) in the United States.¹⁸⁷ The tobacco industry was also litigating with non-governmental entities which filed similar claims.¹⁸⁸ Further, foreign governments also entered the fray by filing recoupment suits in American courts as well as courts in their own countries.¹⁸⁹

Inevitably, the sheer weight of the pending litigation resulted in a settlement with the tobacco industry.¹⁹⁰ The participating tobacco companies first settled with four states that were approaching trial under agreements valued at approximately \$40 billion.¹⁹¹ This was followed by the MSA in which forty-six states entered into a \$206 billion settlement to be paid over the following twenty-five years.¹⁹² The tobacco companies also committed to contributing \$1.5 billion to an anti-smoking education and advertising campaign and \$250

185. Little, *supra* note 174, at 1148.

186. *Id.* This approach was not entirely effective. See *infra* Section IV.B.3.c.

187. Little, *supra* note 174, at 1148-49.

188. *Id.* Phillip Morris was defending 530 lawsuits by the end of 1997: 375 individual personal injury cases, fifty class action cases including second-hand smoke cases, and 105 health care recoupment cases, mostly brought by governments and unions. *Id.* at 1148 n.28 (citing Jerry Bulow & Paul Klemperer, *The Tobacco Deal*, BROOKINGS PAPERS ON ECONOMIC ACTIVITY: MICROECONOMICS, Nov. 1998, at 323, 332). R.J. Reynolds was defending 540 cases by March 3, 1998, as compared with fifty-four cases at the end of 1994. *Id.*

189. Little, *supra* note 174, at 1148-49 (citing Hanoch Dagan & James J. White, Governments, Citizens and Injurious Industries, 75 N.Y.U. L. REV. 354, 363 (2000)).

190. Jensen, *supra* note 172, at 1344; Little, *supra* note 174, at 1143.

191. Little, *supra* note 174, at 1171. Minnesota, Mississippi, Texas, and Florida were the original four states reaching settlements with the tobacco industry. Jensen, *supra* note 172, at 1345 n.82. These four states that settled earlier received more money than they would have under the national settlement, as well as non-monetary concessions that the remaining forty-six states did not receive. *Id.* (citing Michael V. Ciresi, *An Account of the Legal Strategies That Ended an Era of Tobacco Industry Immunity*, 25 WM. MITCHELL L. REV. 439, 441-42 (1999); Richard A. Daynard & Graham E. Kelder Jr., *The Many Virtues of Tobacco Litigation*, TRIAL, Nov. 1998, at 42).

192. Little, *supra* note 174, at 1171 (citing the MSA, available at <http://www.naag.org/tobac/cigmsa.rtf>).

million for a foundation dedicated to reducing underage smoking.¹⁹³ These settlements are reported to represent the largest privately-negotiated redistribution of wealth in world history.¹⁹⁴

2. Application of Tobacco Litigation Strategies to Medicaid Recoupment Suits Against the Food Industry

a. Lessons Learned

As previously discussed, engaging private counsel on a contingency fee basis would result in a no-lose situation for state attorneys general against the food industry.¹⁹⁵ Other than arriving at an agreement between the state and private attorney, there are no apparent restrictions on the ability of attorneys general to appoint outside counsel.¹⁹⁶ If the states prevail, the states are likely to collect billions of dollars that could then be used to help fight obesity. On the other hand, if the claims fail, the states would not be required to pay legal fees because the private attorneys would have been retained on a contingency basis.

The inclusion of state governments in a lawsuit brings credibility and a “moral authority” to the cause.¹⁹⁷ As a result, an industry that initially appears blameless begins to be perceived as culpable in the public’s opinion as public authorities align themselves against it.¹⁹⁸

b. The Doctrine of *Parens Patriae*

As noted above, the Medicaid statute requires a state that participates in Medicaid to develop a procedure for recovering funds from third parties liable for the injuries of Medicaid recipients.¹⁹⁹ However, the recovery provision created by the state does not create a new federal right of recovery for the state, but rather is dependent

193. *Id.*

194. *Id.* (citing Michael E. DeBow, *The State Tobacco Litigation and Separation of Powers in State Governments: Repairing the Damage*, 31 SETON HALL L. REV. 1, 2-3 (2001)).

195. *See, e.g.*, Jensen, *supra* note 172, at 1344.

196. Sherrill, *supra* note 44, at 516.

197. Jensen, *supra* note 172, at 1370.

198. *Id.*

199. Sherrill, *supra* note 44, at 501 (citing 42 U.S.C. § 1396a(a)(25) (1996)).

upon the substantive law of the state in which recovery is sought.²⁰⁰ The Medicaid statute does not require participating states to recognize any particular theories of liability for the recovery of Medicaid funds.²⁰¹ Only where it is available under state law is it required that a state pursue recovery against a liable third party.²⁰²

The legal theories against the tobacco industry varied from state to state.²⁰³ While some state legislatures may be willing to enact measures similar to the Florida statutes against the tobacco industry (giving the state attorney general statutory authority to bring suit against the food industry) undoubtedly other state legislatures will not. For those attorneys general who cannot derive authority for a cause of action against the food industry from their state statutory schemes, another source of authority can be derived directly from individual state sovereignty.²⁰⁴

The State of Louisiana's claim for damages against the tobacco industry is particularly instructive.²⁰⁵ Though no legal theory against the tobacco industry was ever tested in court, the principles of the *parens patriae* doctrine employed by Louisiana's trial team serve as an example for potential actions by attorneys general against the food industry.²⁰⁶

A state's actionable interests may be sovereign, quasi-sovereign, or proprietary.²⁰⁷ Food industry conduct that violates criminal law, civil law, or other regulatory provisions compromises the sovereignty of a state and can be the subject of a civil action brought in the state's name.²⁰⁸ As a sovereign, the state has authority to do more than merely enforce its laws; a state exists to promote the health,

200. *Id.* at 502 (citing *Massachusetts v. Philip Morris, Inc.*, 942 F. Supp. 690, 694 (D. Mass. 1996)).

201. *Id.*

202. *Id.*

203. See discussion *supra* Section IV.B.1.

204. See generally Ieyoub & Eisenberg, *supra* note 72, at 1859. Ieyoub was the Louisiana Attorney General who led the trial team that sued the tobacco industry on behalf of the state. *Id.* at 1859 n.a.1. Eisenberg served as a consultant to the Louisiana private counsel who represented the State of Louisiana in its action against the tobacco industry. *Id.*

205. See generally *id.*

206. *Id.* at 1862.

207. Ieyoub & Eisenberg, *supra* note 72, at 1863.

208. *Id.* (citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 600-01 (1982)).