Big Food's Trip Down Tobacco Road: What Tobacco's Past Can Indicate about Food's Future

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BIG FOOD’S TRIP DOWN TOBACCO ROAD:
WHAT TOBACCO’S PAST CAN INDICATE ABOUT
FOOD’S FUTURE

JOSHUA LOGAN PENNEL†

INTRODUCTION

Tobacco’s position has been usurped. Cigarette products are no longer responsible for the greatest share of preventable illnesses. ¹ Rather, obesity, resulting from a combination of the “food industry”² and the American appetite, now holds the crown as the most expensive, preventable health care cost.³ While public animosity towards the food industry may lag behind animosity towards the tobacco industry, public attitude has shifted, demanding tighter control over the food industry.⁴ This shift toward holding fast-food, junk-food, and manufacturers of unhealthy food products partially responsible for the growing obesity epidemic is necessary before legislation and judicial action against the food industry can occur.⁵ Indeed, a similar shift in public opinion helped to tighten regulations on the tobacco industry and eventually hold it liable for the harms associated with tobacco use.⁶

Understanding the history of the tobacco industry allows for a comparison of where the food industry currently stands, and

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² The “food industry” collectively refers to the junk-food and fast-food industries.
³ See Munger, supra note 1.
⁵ See id.
⁶ See id.
where it may be headed in the future. The two industries are comparable on five main issues. First, parallels between the two industries' advertising standards show the potential for developing governmental regulations that, like those in the tobacco industry, restrict and control the manner in which the food industry may advertise.\(^7\) Second, the food industry’s ethical violations are similar to ethically questionable actions perpetrated by the tobacco industry. Third, the health and economic costs of tobacco served as a catalyst for change in tobacco policy; like tobacco, the rising health and economic costs related to obesity, which are predicted to continue to rise in the coming decades, may compel similar food industry policy reform.\(^8\) Fourth, observing the tobacco industry’s past, e.g., ethical violations, advertising policies, legislation, and litigation, may give insight into the future of public opinion toward the food industry. Fifth, in response to shifting public opinion, the food industry may face similar policy, litigation, and legislative action, as did Big Tobacco.\(^9\) Indeed, some government officials are calling for the implementation of strategies that will combat the growing obesity epidemic, borrowing from previous strategies used to combat tobacco.\(^10\) For example, Governor David Paterson of New York, drawing from previous tax strategies to decrease tobacco use, recently proposed an eighteen percent tax on sugared drinks to help fight obesity.\(^11\)

By focusing on the history of tobacco regulations, one may gain insight into the future of potential food industry regulations. Whether the legislature will take similar steps to restrict the marketing and advertising of food, as it did with tobacco, remains to be seen. However, by identifying the “sign posts”\(^12\) along the

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\(^7\) See Munger, *supra* note 1, at 466.

\(^8\) *Id.* at 459.


\(^11\) *Id.*

\(^12\) See generally GENE BORIO, *TOBACCO TIMELINE* ch. 7 (2007), http://www.tobacco.org/resources/history/Tobacco_History20-2.html (discussing how seminal legislation, judicial opinions, and even scientific
path of tobacco regulation and litigation, and by avoiding the pitfalls that the anti-tobacco movement experienced, the anti-obesity movement may make quicker progress towards regulating the food industry.

A BRIEF HISTORY OF TOBACCO

In the 1950s, tobacco’s popularity reached its height. Over fifty percent of men in the United States smoked cigarettes on a regular basis, and advertisements still promoted the “healthful and harmless nature” of smoking cigarettes. Although scientific evidence of the link between smoking and lung cancer can be traced to the early 1900s, tobacco use was still thriving. Despite tobacco’s widespread use, there remained relatively few lawsuits against the nation’s tobacco companies, and the industry successfully defended against those sporadic attacks. Public opinion and the legislature still firmly supported tobacco companies’ right to market and capitalize on the popularity of its product. However, in the 1960s a momentous shift began to occur.

In 1964, the Surgeon General released his first report on the health effects of smoking. In response to the Surgeon General’s report that linked health problems and smoking, Congress enacted the Federal Cigarette Labeling and Advertising Act and the studies can show how tobacco changed from a commonly accepted commodity to a highly regulated drug. Using both the major failures and successes of the anti-tobacco movement as benchmarks will help to draw parallels between the tobacco industry and the food industry).

13 BORIO, supra note 12.
15 See id. at 646-47.
16 See id. at 644-45 (The first federal legislation against the tobacco industry did not occur until 1965.).
17 BORIO, supra note 12.
Public Health Cigarette Smoking Act.\textsuperscript{19} These two acts required cigarettes to be labeled as harmful, and restricted the marketing of cigarettes.\textsuperscript{20}

By the 1970s, cigarette use by the general population had decreased.\textsuperscript{21} Thirty-seven percent of the population smoked and lawsuits became more frequent.\textsuperscript{22} Public opinion began to shift as well.\textsuperscript{23} Anti-smoking groups became more prevalent; and, in 1970, the “Great American Smokeout” was created in Massachusetts to try to get smokers to give up cigarettes.\textsuperscript{24} In addition, President Richard Nixon signed legislation to further restrict advertising by banning all cigarette advertisements from appearing on broadcast media.\textsuperscript{25}

The 1980s and 1990s brought about new legislation, new data, and, for the first time, the potential for successful lawsuits against tobacco manufacturers.\textsuperscript{26} In 1983, the first act outlawing smoking within the workplace passed in San Francisco.\textsuperscript{27} The health effects of smoking, both in terms of the number of deaths linked to tobacco use and the financial cost of treating tobacco related illnesses, continued to rise.\textsuperscript{28} Within the courts, two decades of unsuccessful lawsuits brought against tobacco manufacturers based on breaches of warranty, product liability, and negligence caused anti-tobacco litigants to change their legal strategy.\textsuperscript{29} Legislation in Florida allowed the state to attempt to

\textsuperscript{20} Federal Cigarette Labeling and Advertising Act § 4; Public Health Cigarette Smoking Act §§ 4, 6; Boulton, supra note 14, at 645-46.
\textsuperscript{21} BORIO, supra note 12.
\textsuperscript{22} See id.; see Boulton, supra note 14, at 643-44.
\textsuperscript{23} BORIO, supra note 12.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} See id.
\textsuperscript{27} Id.
\textsuperscript{29} See Boulton, supra note 14, at 644 n.4.
recoup its Medicare costs by applying a market share principle and allowing for joint and several liability.\textsuperscript{30} Eventually, the tobacco industry capitulated and settled with multiple states, paying billions of dollars to cover the costs of tobacco related illnesses.\textsuperscript{31}

**FOOD AND TOBACCO: PARALLEL PATHS**

Today, anti-obesity campaigns against the food industry are experiencing many of the same roadblocks that anti-tobacco advocates faced in the 1960s. In order for litigation and legislation against the food industry to be successful, the public’s attitude towards obesity must shift.\textsuperscript{32} The following belief is still prevalent in society: “anyone with an IQ higher than room temperature . . . understand[s] that excessive consumption of food served in fast-food restaurants will lead to weight gain . . . .”\textsuperscript{33}

Like tobacco, the anti-obesity movement faces strong opposition from those who believe that being overweight is a matter of personal choice.\textsuperscript{34} This viewpoint tends to “blame individuals for getting fat.”\textsuperscript{35} Similarly, in the 1970s, lung cancer was thought to be a direct result of people’s inability – their lack of willpower – to stop smoking, just as an obese individual’s weight is thought to be a result of his or her personal choice to eat unhealthily.\textsuperscript{36} However, a growing attitude has emerged that begins to look past personal responsibility and instead focuses the


\textsuperscript{32}See Andrews, *supra* note 4, at 181.


\textsuperscript{34}Id. at 226.


personal responsibility aspect of obesity, and focus on the cultural,
corporate, socioeconomic, and environmental causes of obesity. As societal perceptions change and the known causes of obesity expand to become more comprehensive, the public’s desire to see governmental action against the food industry may grow.

It is “the social and political processes [that] usually pull the government and its statutory framework[,] rather than government pushing society.” Just as with tobacco in the 1970s and 1980s, a shift in public attitude towards the food industry may make action by judges and politicians politically safe. Further, a fundamental shift in the attitude of the public has been credited with making the tobacco industry more amenable to lawsuit settlements. The Master Settlement Agreement (“MSA”), which cost Big Tobacco billions of dollars and set strict marketing and advertising standards, was made at a time when the shift in attitude was making it harder for the tobacco industry to fend off attacks, i.e., multiple class action lawsuits. In many ways Big Tobacco’s acceptance of the MSA was “prescient rather than foolish.” The MSA sought to discourage further litigation and afforded tobacco companies the protection that they desperately needed to avoid bankruptcy and the loss of market share. In return, tobacco companies agreed to pay states and operate under new regulatory constraints.

Like tobacco in the 1950s, the food industry seems to have overwhelming support from the public, the legislature, and the

37 Courtney, supra note 33, at 69.
39 Id. at 31.
41 See id. at 634-35.
42 Posner, supra note 31, at 1144.
43 Patel, supra note 40, at 615, 626.
44 Id. at 626.
judiciary. A vast majority of the United States population does not currently support litigation against fast-food. In at least fourteen states the legislature has passed “Cheeseburger Bills” that protect the fast-food industry from obesity-related lawsuits. It would appear that the fast-food industry is relatively safe from lawsuit and regulation. But, as with the tobacco industry in the 1980s, public opinion may shift as further research on the effects of obesity and its costs saturate the public sphere.

INDUSTRY STANDARDS IN ADVERTISING

Advertising directed at children may have been one of the lynchpins for the shift in public opinion regarding tobacco; such advertising practices highlighted the unethical tactics of the tobacco industry. In the 1990s, while the youth smoking rates increased, R. J. Reynolds, the producer of Camel Cigarettes, continued to use Joe Camel to advertise its cigarettes. Many people believed that these youth-targeted tobacco advertisements bore responsibility for the “approximately thirty-five percent of youth [who] were smokers . . . .” Many advocates for smoking regulations pointed to R.J. Reynolds’s market share of youth smokers as proof of the affect advertisements have on smokers under eighteen years of age. Before Joe Camel became the mascot of Camel cigarettes, R.J. Reynolds had less than one percent of the youth market smoking its brand of cigarettes. Five years into its marketing campaign this percentage skyrocketed to thirteen percent. In total, the three companies that spent the most

45 See Munger, supra note 1, at 460-61, 477; see Symposium, The Mass Media’s Influence on Health Law and Policy, 5 HOUS. J. HEALTH L. & POL’Y 175, 183 (2005).
46 Munger, supra note 1, at 462-63.
47 Symposium, supra note 45, at 183 n.37.
48 Id. at 632-33.
49 See id. at 619.
50 Id. at 632-33.
51 Id. at 633.
52 Id.
money on advertising controlled eighty-five percent of the total youth market.\textsuperscript{53} In reaction, a significant portion of the MSA was designed to ensure that the tobacco industry would not “take any action, the primary purpose of which [was] to initiate, maintain[,] or increase youth smoking.”\textsuperscript{54} This included the use of any cartoons on packaging or in advertisements.\textsuperscript{55}

Not only was the tobacco industry derided for taking advantage of “susceptible” youth, the tobacco industry’s practice of directing advertising at children was seen as an intolerable interference with parental authority.\textsuperscript{56} At a minimum, parents have a duty to express “personal concern over the health, education[,] and general welfare of . . . [their] child.”\textsuperscript{57} Many felt that the tobacco industry violated parents’ rights to perform this duty by targeting its advertisements at children.\textsuperscript{58} The interests of parents “ought to include the power to protect children from seductive cartoon characters peddling an addictive product that is illegal for children to buy.”\textsuperscript{59} The fact that ninety percent of all smokers begin smoking before the age of twenty lends considerable weight to the claim that the tobacco industry’s advertisements directly challenge parents’ rights.\textsuperscript{60}

Today, the food industry spends over $11 billion annually on advertising directed at children and an additional $22 billion on

\textsuperscript{53} Id.
\textsuperscript{54} Patel, supra note 40, at 628.
\textsuperscript{55} Id.
\textsuperscript{57} Conley v. Walden, 533 P.2d 955, 959 (Mont. 1975).
\textsuperscript{58} See Garner and Whitney, supra note 56, at 511.
\textsuperscript{59} Id. at 512.
\textsuperscript{60} See id. at 533 (quoting Alan Blum & Matt Myers, Tobacco Marketing and Promotion in TOBACCO USE: AN AMERICAN CRISIS: FINAL CONFERENCE REPORT AND RECOMMENDATIONS FROM AMERICA’S HEALTH COMMUNITY 63, 66-67 (Thomas P. Houston ed., 1993), available at http://legacy.library.ucsf.edu/tid/gdp02a00/pdf).
“consumer promotions.” With a combined total of over $30 billion, the food industry spends more on marketing than any other industry. Product placement, synergistic marketing between movies and food, websites, toys, books, video games, theme parks, and music all contribute to the onslaught of marketing ploys designed to increase a food company’s youth share of the market. Eight in ten adults agree that “business marketing and advertising exploit children by convincing them to buy things that are bad for them or that they don’t need.”

Reminiscent of Joe Camel, another fictional marketing character that made inroads with youth consumers, Ronald McDonald is as identifiable to elementary school children as Mickey Mouse, and second only to Santa Claus as the most recognized fictional character. McDonald’s corporation accurately touts its character as “the smile known around the world.” Similarly, at the height of the R.J. Reynolds’ Joe Camel advertising campaign, school children could recognize “Old Joe” as readily as Mickey Mouse. Since children are more influenced by tobacco advertising than adults, Joe Camel and other iconic marketing characters instilled product recognition and brand loyalty for a generation of consumers. Indeed, while adult smokers based their purchasing decision on, among other factors, price, smokers under the age of eighteen tended to display brand loyalty by purchasing the three most heavily advertised cigarette

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62 Courtney, supra note 33, at 70.
63 See id. at 70-71.
64 Hayne et al., supra note 61, at 394 (quoting Tom McGee & Kevin Heubusch, Getting Inside Kids’ Heads, 19 AM. DEMOGRAPHICS 52 (1997)).
65 Munger, supra note 1, at 467; see also Sarah Avery, Is Big Fat the Next Big Tobacco?, NEWS & OBSERVER, Aug. 18, 2002, at A25.
68 See Courtney, supra note 33, at 82.
brands. However, after decades of successfully avoiding liability, cigarette manufacturer, such as R.J. Reynolds, eventually realized that anti-smoking advocates were destined to succeed; consequently, R.J. Reynolds discontinued the use of Joe Camel and “self-regulated” its advertising by only targeting smokers of legal age. Although, the cigarette industry may have decided to regulate itself in an attempt to avoid formal governmentally imposed regulation of its advertising, the public’s shifting perceptions ultimately resulted in government intervention.

In recent years, large companies have voluntarily agreed to restrict food advertisements directed at youth for products that meet a certain nutritional standard. In 2006, Disney became one of the first large corporations to voluntarily reduce or eliminate the advertising and marketing of food based on “how much sugar, calories and fat could be in snacks and foods . . . .” Parents’ rights groups and anti-obesity advocates hailed the move as a direct reaction to the “increasingly vocal debate over what parents want their children to eat and what the food companies are trying to sell to them.” Disney began to disallow its popular characters to appear on packaging in which the “total fat exceeds 30 percent of calories for main and side dishes and 35 percent for snacks, saturated fat exceeds 10 percent of calories for main dishes and snacks, and added sugar exceeds 10 percent of calories for main dishes and 25 percent for snacks.” Disney further vowed to

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69 See id. at 82-83.
73 Id.
74 Id.
75 Id.
“reject as sponsors any kinds of food not meeting specific health guidelines” from its programming on the Disney Channel.76

Following Disney’s example, a dozen other companies began to restrict or eliminate the advertising of unhealthy food directed at children under twelve during “children’s programming.”77 General Mills, PepsiCo, McDonald’s, and Hershey are a few of the large corporations that have voluntarily agreed to eliminate certain types of advertising during select programs.78 In total, the “companies involved [in this self-imposed ban.] represent two-thirds of the total children’s advertising market . . . .”79 While the corporations have touted the move as corporate responsibility, critics have cited the numerous loopholes that exist within these self-imposed regulations, and highlight the threats of lawsuits and regulatory intervention as the driving force behind these “self-regulat[ions].”80 What may appear to be “good for business,” changes in the company’s behavior may in fact be a corporation’s attempt to stave off harsher regulations and satiate the growing desire of the general public for real and fundamental change.81

Critics question whether the voluntary restrictions will have the desired effect.82 They have complained that the lack of uniform standards amongst the companies and also the companies’ definition of “children’s programming,” will give the corporations too much flexibility.83 For example, companies limit their advertisements during “SpongeBob SquarePants,” which is viewed by an average audience of 876,000 children from the age of six to

78 Id.
79 Id.
80 Id.
81 See id.
82 See id.
83 Id.
eleven years old, but allows advertisements to be shown during an episode of American Idol, which attracts 2.1 million children from that same age group.84 This allows companies to maintain that they are no longer directly advertising to youth under the age of twelve, while still having their products routinely shown to that age group. Further, while a company like General Mills may stop advertising its popular cereal “Trix” during select programming because it contains thirteen grams of sugar per serving, it will continue to promote “Coco Puffs” because the product’s sugar content meets the company defined standard of only having twelve grams of sugar per serving.85 By establishing arbitrary standards and weak self-regulations, the food industry can mount a defense against criticisms while, in actuality, making few changes to its advertising practices. While these “slight-of-hand” approaches may not significantly impact the unhealthy eating habits of children, they demonstrate the pressure that large corporations face under mounting public pressure.

ETHICAL VIOLATIONS AND THE CALL FOR CHANGE

The addictive and harmful nature of cigarettes, and the manner in which the tobacco industry concealed this fact, added to the perceived ethical violations of Big Tobacco.86 Tobacco companies also conducted research and assigned its “legal counsel” to supervise the studies.87 This practice allowed “bad findings [to] be held back as lawyer-client confidences, whereas good findings could be described as the product of scientific inquiry.”88 This allowed damaging reports to be withheld from the public and allowed the “scientific research that was most favorable

84 Id.
85 Id.
87 See id. at 500.
88 Id. at 500-01.
to [the industry’s] position” to be publicized.89 The discovery of these tactics affected the tobacco industry in two ways: first, it opened the industry to successful lawsuits, and second, it severely damaged public opinion; no longer was it enough to say that smokers knew the health hazards of smoking.90 Smokers lacked a significant amount of information, largely because the tobacco industry desperately tried to keep consumers from knowing.91

While it is true that “solid, scientific evidence that fast-food is an addiction driving the nation to obesity has not been produced,”92 as it eventually was in the case of tobacco, “ethical violations” have already served as the basis for successful lawsuits against the food industry and have affected public perception. For example, McDonald’s failed to report the use of beef fat in the cooking of its fries, which cost it $12 million in a lawsuit settlement.93 Regulatory agencies have also fined companies like Kraft and Pirate’s Booty for using deflated fat grams on their nutritional labels.94 While these ethical violations may simply be isolated incidences involving mistakes, or the actions of less scrupulous companies, they may also be the beginning of a mass uncovering of industry-wide practices. Prior to 2002, the food industry liberally applied the label “organic” to the food packages it produced.95 However, in 2002, the U.S. Department of Agriculture began regulating the packaging of food in reaction to

90 See generally Ciroti et al., supra note 86, at 478-80.
91 See Green, supra note 89, at 414-16.
92 Munger, supra note 1, at 477-78 (citing Donald W. Garner & Richard J. Whitney, Protecting Children From Joe Camel and His Friends: A New First Amendment and Federal Preemption Analysis of Tobacco Billboard Regulation, 46 EMORY L.J. 479, 510 (1997)).
93 Kate Zernike, Lawyers Shift Focus from Big Tobacco to Big Food, N.Y. TIMES, Apr. 9, 2004, at A15.
94 Id.
the misleading practices of certain companies.\textsuperscript{96} Today, the food industry is allowed to apply the word “healthy” without regulation, and the flexibility in current food labeling regulations on serving sizes allows companies to adjust serving portions in order to fall within defined categories, e.g. “low fat.”\textsuperscript{97} These labels are then placed on food packaging, completing a deception completely within the current standards.\textsuperscript{98}

\textbf{THE HEALTH AND ECONOMIC COSTS OF AN INDUSTRY}

\textit{Tobacco}

The magnitude of the health problems associated with tobacco became so large that the public and elected officials found it difficult to ignore the health costs of smoking. In 1964, the Surgeon General’s Advisory Committee on Smoking and Health released its first official report, which concluded that cigarettes were dangerous and that there was an increased risk of cancer from smoking.\textsuperscript{99} The 1960s also brought about the labeling of cigarettes with the now familiar Surgeon General’s warning, the removal of cigarette advertisements from broadcast media, and the annual tracking of the health effects of tobacco use.\textsuperscript{100} The Advisory Committee and public health agencies uncovered additional health risks, i.e., heart disease, stroke, and chronic bronchitis with the release of subsequent reports.\textsuperscript{101} By the time that prenatal dangers

\textsuperscript{96} See id. at 287.
\textsuperscript{98} Id.
\textsuperscript{100} Id.
\textsuperscript{101} Id.
and second-hand smoke became publically recognized risks, the
number of deaths attributed annually to smoking and tobacco exceeded 400,000 per year.\footnote{Id.}

In addition to the direct health effects of tobacco, the indirect economic burden ballooned as well.\footnote{CDC Foundation, Focus on Tobacco, http://www.cdcfoundation.org/programs/FocusOnTobacco.aspx (last visited Apr. 27, 2009).} Eventually, “states that wanted to [hold] tobacco companies . . . liable for state health care and Medicaid costs”\footnote{Benjamin J. Wolf, Comment, “Can You Hear Me Now?”: Cellular Phones and Mass Tort Litigation After Newman v. Motorola, Inc., 14 ALB. L.J. SCI. & TECH. 267, 305 (2003).} succeeded in holding the tobacco industry liable for its products. Each year, individuals, states, and insurance companies spend $75 billion dollars on medical expenditures for tobacco-related illnesses and businesses lose an estimated $92 billion due to fallen productivity, all because of smoking related illnesses.\footnote{CDC Foundation, supra note 103.} These staggering numbers eventually helped to shift public opinion enough so that legislatures took action to regulate the industry.\footnote{See e.g., Richards, supra note 67.}

\textbf{OBESITY}

Like tobacco throughout the late 1900s, obesity has been steadily increasing over the past decades and is poised to become the leading cause of preventable death in the United States.\footnote{See Alyse Meislik, Comment, Weighing in on the Scales of Justice: The Obesity Epidemic and Litigation Against the Food Industry, 46 ARIZ. L. REV. 781, 784 (2004).} According to the U.S. Department of Health, sixty-one percent of adults in America are overweight.\footnote{Munger, supra 1, at 459.} One-third of all adults in this country are at or above the Center for Disease Control and Prevention’s threshold for obesity, by having a Body Mass Index

\footnote{\textit{Id.}}\footnote{CDC Foundation, Focus on Tobacco, http://www.cdcfoundation.org/programs/FocusOnTobacco.aspx (last visited Apr. 27, 2009).} \footnote{Benjamin J. Wolf, Comment, “Can You Hear Me Now?”: Cellular Phones and Mass Tort Litigation After Newman v. Motorola, Inc., 14 ALB. L.J. SCI. & TECH. 267, 305 (2003).} \footnote{CDC Foundation, supra note 103.} \footnote{See e.g., Richards, supra note 67.} \footnote{See Alyse Meislik, Comment, Weighing in on the Scales of Justice: The Obesity Epidemic and Litigation Against the Food Industry, 46 ARIZ. L. REV. 781, 784 (2004).} \footnote{Munger, supra 1, at 459.}
The occurrence of obesity has been steadily rising; Colorado is currently the only state where less than twenty percent of its population qualifies as obese.

Three states currently have an obesity rate that exceeds thirty percent.

Nearly every facet of America is affected by obesity. Vast numbers of people have friends, family, neighbors, and/or co-workers who suffer from this growing epidemic. Children are also gaining weight at an alarming rate. This weight gain not only affects individuals, but could also threaten the future workforce and the health of the next generation. Overweight children and adolescents are more likely to become obese adults. The health problems from which these obese adults will suffer are a danger to the stability and long-term growth of the economy. Without a healthy and productive population, America will be less competitive in the global market.

However, obesity and the threat it presents is not just a problem for future generations; Americans already face economic difficulties from increased health insurance premiums, lost

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110 Id.


113 Id.


115 Id.
productivity, and higher taxes. Those individuals who maintain a healthy weight are less of a strain on the U.S. health system. The effect of obesity is costing Americans money and as the trend increases so will the cost. Health care costs associated with obesity are now more expensive than any other preventable illness, including tobacco. In economic terms, treatment related to patients who are overweight and obese exceeded $78 billion in 1998. Well over half, $47 billion, of these health care expenditures resulted from the treatment of obese patients and the plethora of health-related problems that accompany obesity. As the number of obese individuals has increased, so to have the costs associated with treating them. In 2002, the dollar amount associated with health care for overweight and obese people exceeded $117 billion. During this year, the economic cost of treating obesity surpassed the cost of treating tobacco-related illness for the first time. With one-third of all children projected to develop diabetes, health care costs will become an even bigger burden on the next generation. Solving the problem now by

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117 See generally id.
118 Munger, supra note 1, at 459.
120 Finkelstein et al., supra note 119.
121 See generally Munger, supra note 1, at 459.
122 Id.
123 Id.
reducing the number of youth that are destined to become obese adults should be a pressing concern in this country.

Despite U.S. goals to reduce childhood obesity, the rate of overweight children in the U.S. nearly tripled in each age category from the latter half of the 1970s to 2003.\textsuperscript{125} These numbers show that the U.S. government’s goal of reducing the number of overweight children to five percent by 2010 is far from being accomplished.\textsuperscript{126} Youth who are overweight not only suffer from social problems, such as low-self esteem and social stigmatization; they also commonly suffer from sleep apnea and problems with their bones and joints.\textsuperscript{127} Further exacerbating the health concerns associated with being overweight or obese, “an estimated [sixty-one] percent of obese young people have at least one additional risk factor for heart disease, such as high cholesterol or high blood pressure.”\textsuperscript{128} The startling statistics concerning obesity, particularly those pertaining to obese youth, may diminish public opinion toward the food industry in a manner similar to the public opinion downfall seen towards tobacco.

A CRISIS OF HEALTH AND THE SHIFT IN PUBLIC OPINION

The rise in both premature deaths and the financial cost of obesity may spotlight the need for legislative action directed at the food industry. As tobacco before, the rise in obesity-related deaths and the economic cost of obesity may make the public much more willing to change its opinions. By the 1990s, public opinion shifted away from the strict view that tobacco users were responsible for

\textsuperscript{125} \textit{Id.} (discussing that rates in the two to five year old group increased from 5% to 13.9%, six to eleven year old group increased from 4% to 18.8%, and twelve to nineteen year old group increased from 6.1% to 17.4%).


\textsuperscript{127} Centers for Disease Control and Prevention, Health Topics: Childhood Obesity, http://www.cdc.gov/HealthyYouth/obesity/index.htm (last visited May 1, 2009).

\textsuperscript{128} \textit{Id.}
the illnesses that they suffered.\textsuperscript{129} Instead, due to the magnitude of the health crisis and the deceitful manner in which the tobacco industry had been operating, the industry became the focal point of populist anger towards the health epidemic.\textsuperscript{130} It was not until 1995 that the White House viewed the fight against tobacco as “a political winner.”\textsuperscript{131} With the anti-smoking sentiment “squarely in the cultural mainstream,”\textsuperscript{132} President Clinton felt that it was politically safe to begin pushing for legislation. In some ways, the White House even “gain[ed] points for picking a fight with an unpopular industry.”\textsuperscript{133} Similarly, public attitude may make legislative action against the food industry politically safe. Public awareness of the overweight/obesity epidemic has grown in the past decade. In the final quarter of 1999, fewer than a dozen stories on obesity-related public policy appeared in major U.S. publications.\textsuperscript{134} The courts had only recently agreed to the MSA settlement with the tobacco industry, which was the culmination of decades of work and fundamental shifts in the public perception of the tobacco-induced public health crisis.\textsuperscript{135} Tobacco litigation resulted from numerous changes in the legislative and judicial levels of government, as well as changes in the public’s perception of tobacco use and the tobacco industry.\textsuperscript{136} In 2001, the Surgeon General issued the first official report on obesity.\textsuperscript{137} This report, highlighting the remarkable increase in obese individuals in the U.S., attempted to develop the first national action plan to combat the growing

\begin{footnotesize}
\begin{enumerate}
\item See generally Ciresi et al., supra note 86, at 522.
\item See Richards, supra note 67, at 1176-77.
\item Id. at 1177 n. 128.
\item Id.
\item Kersh & Morone, supra note 35, at 842.
\item Patel, supra note 40, at 625.
\item Id. at 621-22.
\end{enumerate}
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obesity epidemic. As a result of the Surgeon General’s report, the number of articles on obesity increased a thousand-fold, with more than 1,200 articles published by the final quarter of 2002. Continuing to the present, obesity still receives a great amount of attention as a public health topic and, as a result, the push for action has grown too.

LEGISLATIVE AND LITIGATIVE SOLUTIONS

According to the New York Times, the Government’s taxation of cigarettes was the “biggest health care breakthrough in the last [forty] years . . . .” For every ten percent increase in the price of cigarettes, sales are reduced by approximately three percent. This figure more than doubles to seven percent within the teenage smoking population. Assuming these figures to be accurate, then “the 1983 increase in the federal tax on cigarettes [alone] saved 40,000 lives per year.” These federal taxes, along with state imposed cigarette taxes, which have grown significantly, from Iowa’s two cent tax in the 1920s to New York’s $2.75 tax in 2008, have dramatically increased the number of lives saved.

New York State’s Governor David Paterson proposed the implementation of a tax on sugared drinks for New York State. Any drink that is non-diet, including fruit juice that is less than seventy percent juice, would be subjected to an eighteen percent tax. While Governor Paterson has stated that this would raise

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138 Id. at V.
139 Kersh & Morone, supra note 35, at 842.
140 Id. at 843.
141 Nicholas D. Kristof, Miracle Tax Diet, N.Y. TIMES, Dec. 18, 2008, at A43.
142 Id.
143 Id.
144 Id.
145 Id.
147 Paterson, supra note 10.
148 Id.
more than $400 million in extra tax revenue, he also predicts that this tax would reduce the amount of soda and other non-diet drinks consumed by five percent.\textsuperscript{149} When attempting to extol the virtues of this tax, Governor Paterson directly compared the “obesity tax” to the taxes that the government placed on cigarettes.\textsuperscript{150} He states that the taxes on cigarettes are responsible for preventing “more than 243,000 kids from smoking, sav[ing] more than 37,000 lives and produc[ing] more than $5 billion in health care savings.”\textsuperscript{151} Hoping to see a similar effect from the “obesity tax,” Governor Paterson admits that the tax will be unpopular and face initial opposition.\textsuperscript{152} However, he notes that raises in cigarette taxes are, and continue to be, unpopular in some sections of the population.\textsuperscript{153} The cigarette tax’s affect is however “undeniable . . . for the first time in generations, fewer than [twenty] percent of Americans smoke . . . .”\textsuperscript{154} Hopefully, “[j]ust as the cigarette tax has helped reduce the number of smokers and smoking-related deaths, a tax on highly caloric, non-nutritional beverages can help reduce the prevalence of obesity.”\textsuperscript{155}

The food industry has already had direct litigation brought against them.\textsuperscript{156} In \textit{Pelman v. McDonald’s Corp.}, a group of overweight teenagers sued McDonald’s, asserting that the company’s practices and marketing were deceptive and caused them to injure their health by becoming obese.\textsuperscript{157} The plaintiffs contended, in part, that McDonald’s advertising made it seem possible to consume McDonalds' products on a daily basis without any adverse health consequences.\textsuperscript{158} The case was eventually

\begin{thebibliography}{99}
\bibitem{149} Id.
\bibitem{150} Id.
\bibitem{151} Id.
\bibitem{152} \textit{See id.}
\bibitem{153} \textit{See id.}
\bibitem{154} Id.
\bibitem{155} Id.
\bibitem{156} \textit{See generally Pelman v. McDonald’s Corp.}, 237 F. Supp. 2d 512 (S.D.N.Y. 2003).
\bibitem{157} Id. at 516.
\bibitem{158} Id. at 527-28.
\end{thebibliography}
dismissed after numerous re-filings. Portions of McDonald’s successful defense have direct ties to past tobacco defenses. Quoting the Second Restatement of Torts, McDonald’s highlights a section that discusses unreasonably dangerous products. “Good butter is not unreasonably dangerous merely because . . . it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.” Interestingly, McDonald’s chose to use this portion of the passage but neglected to include the preceding sentence of the Restatement which stated, “[g]ood tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous.” The judge in Pelman points out that the “good tobacco” example was likely excluded “because the authors of the Restatement, writing in the 1960s, did not envision the successful tobacco litigation and settlements of the 1990s.” McDonald’s statement may contain a bit of irony if, in the future, courts determine, as they did with tobacco, that the harmful effects of the product in questions can contribute to judgments in favor of plaintiffs. Will Pelman qualify as the beginning point of litigation against the food industry? Tobacco too had numerous unsuccessful lawsuits brought against it from the 1950s to the mid 1990s.

The food industry is beginning to see regulations that restrict the manner in which it can advertise, package its products, and make claims. In the 1960s and 1970s, the U.S. government required tobacco companies to apply a warning to their packaging

159 See Pelman v. McDonald’s Corp., 396 F.3d 508, 510, 512 (2d Cir. 2005).
161 Id.
162 Id.
163 Id. at 531.
164 Id. at 532 n.18.
165 Id.
and remove cigarette advertisements from broadcast media.\textsuperscript{167} In 1965, the Federal Cigarette Labeling and Advertising Act ("FCLAA") established "a comprehensive Federal Program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health."\textsuperscript{168} The FCLAA also required cigarette companies to list the ingredients that are in their products.\textsuperscript{169} The food industry has many of the same requirements attached to the manner in which it may advertise and package its food. The Food and Drug Administration regulates the terminology that the food industry places on its packaging and requires that nutritional information be listed.\textsuperscript{170} Further, actions may be called for and might parallel some of the restrictions that were placed on tobacco products.

In 1978, the government proposed the regulation of advertising as directed at children.\textsuperscript{171} That year, the Federal Trade Commission ("FTC") attempted to ban all advertisements directed at children under the age of seven.\textsuperscript{172} Even though scientific studies showed that children who watched television programs "could not delineate between television programming and commercials,"\textsuperscript{173} "big business" immediately opposed the FTC’s proposed ban. Congress, spurred by heavy lobbying from the food industry, legislatively barred the FTC from being able to regulate non-misleading advertisements directed at children. This ban is still in effect today.\textsuperscript{174} While the FTC may regulate false advertising, the ban continues to restrict it from regulating any


\textsuperscript{169} Id.

\textsuperscript{170} See generally Carver, supra note 166.

\textsuperscript{171} Munger, supra note 1, at 475.

\textsuperscript{172} Id.

\textsuperscript{173} Id.

\textsuperscript{174} Id. at 475-76.
other type of advertisement directed at children.\textsuperscript{175} It is no coincidence that the increase in advertisements directed at children began to gradually increase after the congressional ban on regulation went into effect.\textsuperscript{176}

Many of the arguments that will likely be put forth by the food industry against regulating advertising will be similar to those used by the tobacco industry. “Speech that is regulated based solely on its content is generally given the most First Amendment protection.”\textsuperscript{177} However, this has not always applied to commercial speech.\textsuperscript{178} Not until \textit{Central Hudson Gas & Electric Corporation v. Public Service Commission} (“\textit{Central Hudson}”) in 1980, did the Supreme Court determined that the state’s interest to restrict commercial speech had to pass intermediate scrutiny.\textsuperscript{179} While asserting that the economic interest denied commercial speech the strict scrutiny afforded other manners of speech, the Supreme Court did recognize that some protection of speech was necessary.\textsuperscript{180} Commercial speech “not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.”\textsuperscript{181} \textit{Central Hudson} developed a four part test that the state must satisfy in order for a regulation to be constitutional.\textsuperscript{182} First, the activity must be misleading or related to an illegal activity.\textsuperscript{183} Second, the governmental interest must be

\textsuperscript{175} \textit{Id.} at 476.
\textsuperscript{176} \textit{Id.}
\textsuperscript{177} Kerri L. Keller, \textit{Lorillard Tobacco Co. v. Reilly: The Supreme Court Sends First Amendment Guarantees up in Smoke by Applying the Commercial Speech Doctrine to Content-Based Regulations}, 36 \textit{Akron L. Rev.} 133, 138 (2002) (explaining that First Amendment restrictions do not mean that regulations cannot be imposed, but that the government must show, among other things, a compelling interest to restrict the speech).
\textsuperscript{178} \textit{Id.} at 138-39.
\textsuperscript{180} \textit{Id.}
\textsuperscript{181} \textit{Id.} at 561-62.
\textsuperscript{182} \textit{Id.} at 588.
\textsuperscript{183} \textit{Id.}
substantial.\textsuperscript{184} Third, the regulation must directly serve that interest.\textsuperscript{185} Fourth, the regulation must be narrowly tailored.\textsuperscript{186}

The tobacco industry had some success when asserting a right under the \textit{Central Hudson} test.\textsuperscript{187} When Massachusetts attempted to restrict the methods of advertising and marketing used by the tobacco industry, Lorillard Tobacco filed suit questioning the constitutionality of the regulation.\textsuperscript{188} Massachusetts attempted to preclude tobacco manufacturers from advertising within 1,000 feet of a school or playground, and placed strict regulations on the location of both products and advertisements within a store.\textsuperscript{189} When deciding this case, the Supreme Court paid little attention to the first two prongs of the \textit{Central Hudson} test.\textsuperscript{190} While the Court recognized that the regulation served the interest of the state, it was the fourth prong of the Central Hudson test that proved to be the “critical inquiry in th[e Lorillard Tobacco] case.”\textsuperscript{191} The Court held that while the state does not need to show that “there is no incursion on legitimate speech interests,” the Massachusetts regulation “unduly impinge[d] on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products.”\textsuperscript{192} Regardless of the youth smoking problem in Massachusetts and “the importance of the State's interest in preventing the use of tobacco products by minors,” the regulation was not narrowly tailored and therefore would not pass the fourth prong of the \textit{Central Hudson} test\textsuperscript{193}

Any suit brought against the food industry could have a similar result as that of Lorillard Tobacco case. While there is little question that the food industry’s speech should be provided some

\begin{flushright}
\textsuperscript{184} Id.
\textsuperscript{185} Id.
\textsuperscript{186} Id.
\textsuperscript{188} Id. at 536-37.
\textsuperscript{189} See \textit{id.} at 534-35.
\textsuperscript{190} See \textit{id.} at 555-56.
\textsuperscript{191} Id. at 561.
\textsuperscript{192} Id. at 565 (emphasis added).
\textsuperscript{193} Id. at 555-56.
\end{flushright}
protection under the First Amendment, the government also has little difficulty showing that it has a strong interest in protecting the health of young people.\textsuperscript{194} However, like in \textit{Lorillard Tobacco}, the third and fourth prong of the \textit{Central Hudson} test would potentially receive the greatest amount of attention by the Court while reviewing a similar food industry case. Whether regulating the food industry’s advertisements would directly serve a state’s interest is questionable. Although the standard is not impossible to overcome, since the Supreme Court allows a state to “justify [its] restrictions based solely on history, consensus, and simple common sense,”\textsuperscript{195} a state will also need to show a credible link between obesity and advertising.\textsuperscript{196} Finally, the fourth prong will also require a strong showing on the part of the government; although, the \textit{Central Hudson} test does not require the “least restrictive means,” it does require a “reasonable fit between the legislature’s ends and the means chosen to accomplish those ends . . . .”\textsuperscript{197}

\textbf{DIFFERENCES}

Although the similarities between tobacco and obesity show the potential for parallel action, the differences that exist between the two may prove decisive. First, unlike cigarettes, food is a necessity in some quantity, while tobacco is “harmful when consumed in any quantity.”\textsuperscript{198} Second, regardless of the changing attitudes towards obesity in the past decade, the fact remains that

\textsuperscript{194} In \textit{Lorillard Tobacco}, none of the petitioners contested the state’s interest in protecting the health of youth, leading the court to quickly accept the state’s interest as valid. 533 U.S. at 555. A state could conceivably show a similar uncontested interest in the health of its youth as it relates to obesity and food advertisements.

\textsuperscript{195} \textit{Id.}

\textsuperscript{196} Massachusetts’s inability to show this link contributed to the Court finding for Lorilland Tobacco. \textit{Id.} at 557.

\textsuperscript{197} \textit{Id.} at 556.

many people consume fast-food or junk-food, and because they do so infrequently or in moderation, they avoid becoming overweight or obese.\textsuperscript{199} Multiple factors, other than food, influence a person’s weight. A person’s exercise habits and genetic makeup, aside from food consumption, might contribute to his or her issue with weight.\textsuperscript{200} Third, tobacco is directly linked to health problems.\textsuperscript{201} While the links between tobacco and disease may not be strong enough to produce a “signature disease,” the causal relationship is undeniable.\textsuperscript{202} Eating fast-food or junk-food has no direct effect, unlike second-hand smoke, on other individuals. San Francisco was the first city to enact a ban on smoking within buildings.\textsuperscript{203} Asthma, allergies, and the effect of second-hand smoke all figured into the rationale for passing indoor smoking bans.\textsuperscript{204} As discussed above, tobacco and obesity both present skyrocketing health care costs, but only tobacco harms individuals who do not willingly partake in the product. Both of these factors make fast-food a more “sympathetic” defendant than tobacco. The tobacco industry was at one time relieved of any moral wrongdoing by the general population; however, it eventually was required to pay billions of dollars to state governments, in part because it falsely marketed a product and denied the addictive nature of nicotine.\textsuperscript{205} In many respects, this indelibly changed the “sympathy” that the public had towards the tobacco industry. Before “Big Food” can get to the

\textsuperscript{199} Courtney, \textit{supra} note 33, at 94.
\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{202} Some diseases, such as mesothelioma, by their very existence can show causal connection. Michael D. Green, \textit{The Paradox of Statutes of Limitations in Toxic Substances Litigation}, 76 \textit{CALIF. L. REV.} 965, 997 n.137 (1988). While the health problems associated with tobacco use may not rise to the level of a signature disease, the scientific evidence of the health links are well established. \textit{Id.} at 997.
\textsuperscript{203} BORIO, \textit{supra} note 12.
\textsuperscript{205} See generally Green, \textit{supra} note 89.
settlement stage, a number of other hurdles that differentiate it from Big Tobacco must be cleared.

Possibly the largest difference between junk food and tobacco is that “[c]igarette . . . consumption by minors, as a result of targeted advertisements, is illegal, and clearly affronts parental authority and autonomy . . . [F]ast-food does not have the same legal consequences.”206 The illegality of underage smoking pressured the tobacco industry to cease youth-targeted advertising. The existence of the age limitation gave the tobacco industry less credible arguments and less first-amendment protection.207 Much of the public outcry against tobacco stemmed from this particular issue.208 If the outcry was a result of the illegality of youth smoking, then this fundamentally sets tobacco and food in separate categories. However, if the public’s outcry was due to the perceived ethical violation of targeting children to buy products that were bad for them, then tobacco and food may not be that different. In the wake of the obesity lawsuits brought against McDonald’s, a study found that eighty-nine percent of a study group did not support fast-food litigation; however, over half (fifty-six percent) of the respondents thought that “fast-food advertisers should not target children . . .” while “[thirty-six] percent thought fast-food restaurants should warn customers about the risks of eating their food.”209

Whether the similarities between the tobacco industry and the food industry are close enough to forecast some of the regulations that potentially await Big Food is unclear. There are numerous differences between tobacco and junk food, and it will be these differences that must be overcome before it can be argued that the food industry should be regulated in much the same way as the tobacco industry.

206 Munger, supra note 1, at 478.
207 See id. at 479.
208 See id. at 477-79.
209 Id. at 463.
CONCLUSION

The harmful effects of obesity and tobacco use are undeniable.\textsuperscript{210} Combined, obesity and tobacco have caused millions of deaths and cost hundreds of billions of dollars in recent decades.\textsuperscript{211} It remains unclear whether the similarities between the tobacco industry and the food industry are close enough to forecast the regulations that potentially await Big Food. In many ways, the food industry is positioned similarly to tobacco in the 1960s. The Surgeon General has expressed concern over the dangers of unhealthy food and the skyrocketing costs of obesity.\textsuperscript{212} Furthermore, public opinion may pressure the food industry to reduce its advertising to children. If public opinion shifts further, the “frivolous” suits brought by obese people against the food industry may begin to gain legitimacy. The legislature may start to think of Big Food as a politically safe target to regulate through legislation. Eventually, states may decide that the cost of treating one-third of their population for diabetes is too expensive and may begin to look for those companies “responsible” so that they can recoup some of their Medicare costs.\textsuperscript{213}

Reviewing Big Tobacco’s past can serve the purpose of acting as a template for anti-obesity advocates who wish to place regulations on the food industry. While the story of tobacco may not predict regulations, it can show pitfalls that occurred in early tobacco litigation. By avoiding these pitfalls and adjusting the strategies that were not successful against the tobacco industry, action against the food industry may prove swifter and more

\textsuperscript{210} See e.g., U.S. Dep’t Health & Hum. Serv, supra note 28; Munger, supra note 1, at 459 (citing The Surgeon General’s Call to Action to Prevent and Decrease Overweight and Obesity, § 1).

\textsuperscript{211} See Centers for Disease Control and Prevention, Smoking & Tobacco Use, supra note 99.

\textsuperscript{212} Munger, supra note 1, at 459 (citing The Surgeon General’s Call to Action to Prevent and Decrease Overweight and Obesity, § 1).

\textsuperscript{213} State action against the tobacco industry culminated in the MSA. See Patel, supra note 40, at 626. Similar action could conceivable occur once states begin paying for the exorbitant medical costs associated with obesity.
efficient. It took half a century for the government to begin regulating tobacco after the first studies identified it as a probable cause of cancer.\textsuperscript{214} The obesity epidemic has been steadily growing for the past thirty years.\textsuperscript{215} Without action, the harmful effects of obesity on future generations are guaranteed.

\textsuperscript{214} BORIO, \textit{supra} note 12.

\textsuperscript{215} See Centers for Disease Control and Prevention, Overweight and Obesity: Obesity Trends, \textit{supra} note 110.