

## **Obesity lawsuits against fast-food companies: will it be the next “tobacco” litigation or is it dead in the water?**

By Cheryl P. Vollweiler

With the government estimating that more than half of all U.S. adults and 13% of U.S. children suffer from clinical obesity, the plaintiffs’ bar is trying to contribute to the national effort to fight obesity. Their contribution has not been a new diet or exercise regimen aimed at helping people shed those unwanted pounds, but rather a string of lawsuits against “fast-food” restaurants like McDonald’s and Kentucky Fried Chicken alleging that their products cause obesity among children, teenagers and adults alike. Led by some of the law firms at the forefront of the tobacco litigation, the plaintiffs’ bar in 2003 announced their intention to combat obesity by pursuing a broad series of lawsuits against fast-food chains, food manufacturers and even school boards that sell high-calorie soft drinks without offering healthier choices. So far, however, the courts have been unreceptive to this approach to “batting the bulge.”

Perhaps the most well-known of these cases is *Pelman et al. v. McDonald’s Corp., et al.*, in which two obese teenage girls in New York (a 19-year-old weighing 270 pounds and a 14-year-old weighing 170) and their parents alleged that the girls’ health problems were caused by frequent dining at various McDonald’s restaurants. The girls ate at McDonald’s restaurants approximately three to seven times a week for several years. By their mid-teens, they had become obese and developed serious health problems including heart disease, diabetes, high blood pressure and elevated cholesterol. The plaintiffs initially alleged that the restaurant used false advertising to mislead consumers into believing that fast-foods are healthier than they are, failed to warn of the dangers of eating their food and failed to warn that fatty foods can be addictive, thereby causing the plaintiffs to gain excessive amounts of weight. The court initially dismissed the claim but permitted the plaintiffs to amend their complaint to strengthen their argument that the processing of McDonald’s food rendered it more dangerous than their advertising led consumers to believe, and to strengthen their deceptive advertising claim. The plaintiffs amended their complaint to allege, among other things, that they were misled by advertising that claimed that McDonald’s foods were “nutritious” or “not as detrimental to one’s health when...[the] products were hazardous or detrimental to an extent beyond which was contemplated or understood.”

The United States District Court for the Southern District of New York, however, dismissed the amended complaint with prejudice in January 2004, finding that the plaintiffs failed to prove that they relied on any false advertising when they decided to eat the defendant’s food or that their obesity and other health problems had been caused by the defendant’s food. The court also ruled that there was no evidence that the food is dangerous because it is addictive. In so ruling, Judge Sweet opined that it is widely known that fast food, and McDonald’s products in particular, contain high levels of potentially harmful ingredients. Specifically, Judge Sweet opined that “[I]f a person knows or should know that eating copious orders of supersized McDonald’s products is unhealthy and may result in weight gain, it is not the place of the law to protect them from their own excesses. . . .” Judge Sweet noted that “[n]obody is forced to eat at McDonald’s (except, perhaps, parents of small children who desire McDonald’s food, toy promotions or playgrounds, and demand their parents’ accompaniment). . . . This opinion is guided by the principle that legal consequences should not attach to the consumption of hamburgers and other fast-food fare unless consumers are unaware of the dangers of eating such food.”

We caution, however, that Judge Sweet’s decision (and those of other courts who have dismissed these claims to date) alone may not be enough to stem the tide of fast-food litigation. Judge Sweet left open a potential loophole when he opined that a claim alleging that a fast-food chain may have somehow altered its food while processing it, creating an “entirely different—and more dangerous—food than one would expect” might pass judicial muster. Judge Sweet opined, for example, that Chicken McNuggets may not be pieces of chicken but instead “a

McFrankenstein creation of various elements not utilized by the home cook.” This could potentially open the door to allegations that the manner in which certain foods are processed may render the food defective. Whether this type of argument could find scientific support necessary to pass judicial scrutiny under *Daubert* and its progeny (or simply be dismissed as junk science), however, is unclear at this juncture. Indeed, a study released by the U.S. Chamber of Commerce in July 2003 challenges the notion that fast food restaurants are to blame for the increase in obesity and says that lawsuits won’t help people lose weight.

### **Potential Federal Legislation**

Fearing that obesity litigation could indeed become as big as tobacco litigation given the current mass tort and class-action climate, the federal government has stepped in with proposed legislation (nicknamed the “Cheeseburger Bill”) to shield fast-food makers and sellers from lawsuits seeking to hold them liable for the “obesity crisis.” Toward this end, on March 10, 2004, in a 276-139 vote, the House of Representatives passed HR 339, the “Personal Responsibility in Food Consumption Act” (a companion bill is pending in the Senate—the “Commonsense Consumption Act,” S 1428), which would preclude consumers who buy food or drinks that aren’t illegal and subsequently gain weight from bringing lawsuits against the companies that made the foods, the stores that sold them or the restaurants that served them. Under the Cheeseburger Bill, food and drink manufacturers, distributors and sellers gain protection from liability based on consumption of their products (provided that product was in compliance with all the applicable regulations and laws). The bill does not apply to alcoholic beverages. The bill will now go to the Senate for a vote, although it is unclear how quickly the Senate will address the issue.

State legislatures are also addressing this issue. Louisiana has passed similar state legislation. Nineteen other state legislatures (Arizona, California, Colorado, Florida, Georgia, Idaho, Illinois, Kentucky, Mississippi, Missouri, Nebraska, New Hampshire, Ohio, Pennsylvania, South Dakota, Tennessee, Utah, Washington and Wisconsin) are also considering similar bills as of March 1, 2004.

### **The Future of Obesity Lawsuits**

It is difficult to predict whether obesity claims against fast-food restaurants and other food manufacturers will become the next mass tort litigation or be dead in the water. While the House passed the Cheeseburger Bill, the Senate is not expected to address the Bill in the near future. If the Senate and/or more states act quickly to pass similar legislation, then mass tort litigation will likely be averted. If, however, the legislatures do not step in to preclude these types of lawsuits, it is foreseeable that there will be some proliferation of obesity lawsuits nationwide as the plaintiffs’ bar attempts to reframe the allegations to fit within loopholes left by existing court decisions, massage the complaints to withstand judicial scrutiny or file suits in various jurisdictions until they find a court that decides to permit the suits to go forward.

We will, of course, keep you posted.

---

This article is for general guidance only and does not contain definitive legal advice. Contact us at [productliability@wilsonelser.com](mailto:productliability@wilsonelser.com).