Medicaid Third-Party Liability and Claims for Restitution: Defining the Proper Role for the Tort System in Regulating the Food Industry

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

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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 industry[5] 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.wirestaurant.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]

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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

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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-

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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/calltoaction/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: [[weight (in pounds) / height (in inches) x 2] x 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/childobesity03022004.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 rates[26] 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

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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

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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.

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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]

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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

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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

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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]

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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

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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-expending activities that Americans engage in has remained relatively constant.[105] Under this premise, the gap leaves overconsumption 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

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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

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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]

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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,

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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 signifycant 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]

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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.

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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

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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.a1. 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)).

safety, and welfare of its citizens.[209] A state's quasi-sovereign interests include its citizen's health, safety, welfare, as well as, a healthful environment for those citizens.[210] In contrast, a state's proprietary interests are those that the state asserts on its own behalf as any other legal entity.[211]

Lawsuits brought on behalf of states' sovereign and quasi-sovereign interests are sometimes referred to as parens patriae actions.[212] However, the Latin label is not always used.[213] Parens patriae literally means "parent of the country."[214] Regardless of the label used, under parens patriae a state may recover costs or damages incurred because of acts that threaten the health, safety, and welfare of the state's citizens.[215] Parens patriae actions are infrequently litigated because it is rare that a breach of duty is on such a scale to warrant civil state involvement.[216]

Courts uniformly recognize a state's authority to protect its interests under the doctrine of parens patriae.[217] The principles of the parens partriae doctrine have been approved by the United States Supreme Court and endorsed by the states.[218] The doctrine generally follows the same principles in both federal and state courts.[219] State court cases brought under the theory of the doctrine of parens patriae regularly rely on federal precedents.[220]

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209. *Id.*
210. *Id.*
211. *Id.* (citing *Snapp*, 458 U.S. at 601-02).
212. Ieyoub & Eisenberg, *supra* note 72, at 1863 (citing *Snapp*, 458 U.S. at 600-01).
213. *Id.* The doctrinal labels used to support states' actions on behalf of their citizenry vary, and sometimes no doctrinal labels are used. *Id.* (citing Wyandotte Transp. Co. v. United States, 389 U.S. 191, 193 (1967) (allowing the United States to sue to "protect its interests" in a cause of action for costs of cleanup)). Sometimes the state's action is framed as one brought by the trustee of property for the benefit of the public. *Id.* (citing State v. City of Bowling Green, 313 N.E.2d 409, 411 (Ohio 1974) (allowing a cause of action for damages to the environment)). Sometimes cases to protect the public are labeled actions brought under the state's power as parens patriae. *Id.* (citing *Snapp*, 458 U.S. at 607-08 (allowing Puerto Rico to proceed as parens patriae in a suit to protect the economic interests of a class of workers)).
214. Ieyoub & Eisenberg, *supra* note 72, at 1863 (citing *Snapp*, 458 U.S. at 600).
215. *Id.*
216. *Id.* at 1864.
217. *Id.*
218. *Id.* at 1871.
219. Ieyoub & Eisenberg, *supra* note 72, at 1864.
220. *Id.* (citing *e.g.*, State *ex rel.* Ieyoub v. Bordens, Inc., 684 So. 2d 1024, 1026 (La. Ct. App. 1996) (citing *Snapp*, 458 U.S. at 592)).

The United States Supreme Court reviewed the history of the parens patriae doctrine in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*.[221] In that case, the Court recognized a state's "quasi-sovereign" interests.[222] However, what is a quasi-sovereign interest is less clear than what is a sovereign interest.[223] Quasi-sovereign interests represent the state's concern for the well-being of its citizens.[224] "A quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the [s]tate and the defendant. The vagueness of this concept can only be filled in by turning to individual cases."[225] After considering several parens patriae cases, the United States Supreme Court summarized the doctrine as follows:

> In order to maintain [a parens patriae] action, the [s]tate must articulate an interest apart from the interests of particular private parties, i.e., the [s]tate must be more than a nominal party. The [s]tate must express a quasi-sovereign interest. Although the articulation of such interests is a matter for case-by-case development—neither an exhaustive formal definition nor a definitive list of qualifying interests can be presented in the abstract—certain characteristics of such interests are so far evident. These characteristics fall into two general categories. First, a [s]tate has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a [s]tate has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.[226]

Therefore, the only requirement is the inclusion of public health interests for many possible attorney general causes of action; the interests qualifying as quasi-sovereign interests "extend well beyond the prevention of such traditional public nuisances."[227]

Of the many state causes of action filed against the tobacco industry, only one case expressly considers a state's authority to vindicate its sovereign interest under the parens patriae doctrine in order to maintain a cause of action for harm to the health, safety,

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221. *Id.* (citing *Snapp*, 458 U.S. at 600-06).
222. *Id.* at 1866 (citing *Snapp*, 458 U.S. at 601-02).
223. *Id.* at 1866-68.
224. Ieyoub & Eisenberg, *supra* note 72, at 1866 (citing *Snapp*, 458 U.S. at 602).
225. *Id.* (quoting *Snapp*, 458 U.S. at 602).
226. *Id.* at 1867-68 (quoting *Snapp*, 458 U.S. at 607).
227. *Id.* at 1868 (quoting *Snapp*, 458 U.S. at 605).

and welfare of its people.[228] In *Texas v. American Tobacco Co.*,[229] the district court sustained the state's authority to bring such a cause of action.[230] The district court directly considered whether the State of Texas could maintain a common-law parens patriae action without statutory authority.[231] Relying on *Snapp*, the judge concluded that the State of Texas could maintain such an action.[232] The district court expressly noted that the United States Supreme Court had sustained actions by states to protect quasi-sovereign interests and that these "interests can relate to either the physical or economic well-being of the citizenry."[233] The district court then found that the State of Texas had a sufficient quasi-sovereign interest to maintain its cause of action, stating:

> First, it is without question that the [s]tate is not a nominal party to this suit. The [s]tate expends millions of dollars each year in order to provide medical care to its citizens under Medicaid. Furthermore, participating in the Medicaid program and having it operate in an efficient and cost-effective manner improves the health and welfare of the people of Texas. If the allegations of the complaint are found to be true, the economy of the [s]tate and the welfare of its people have suffered at the hands of the Defendants. It is clear to the Court that the [s]tate can maintain this action pursuant to its quasi-sovereign interests found at common law.[234]

In cases against the food industry for recovery of Medicaid expenditures related to obesity, the *American Tobacco Co.* ruling has implications for actions brought by state attorneys general. As *American Tobacco Co.* demonstrates, a food company's alleged wrongdoing can give rise to a viable cause of action absent any statutory authorization.[235] The states' quasi-sovereign interests,

228. *Id.* at 1870 (citing Texas v. American Tobacco Co., 14 F. Supp. 2d 956 (E.D. Tex. 1997)).
229. 14 F. Supp. 2d 956 (E.D. Tex. 1997).
230. Ieyoub & Eisenberg, *supra* note 72, at 1870 (citing *American Tobacco Co.*, 14 F. Supp. 2d at 962).
231. *Id.*
232. *Id.*
233. *Id.* (citing *American Tobacco Co.*, 14 F. Supp. 2d at 962).
234. *Id.* at 1870-71 (citing *Am. Tobacco Co.*, 14 F. Supp. 2d at 962-63 (citation omitted) (footnote omitted)).
235. Ieyoub & Eisenberg, *supra* note 72, at 1871.

standing-alone, give the states authority to prosecute an action against the food industry.[236]

In the tobacco litigation, the states' authority to sue under the doctrine of parens patriae was important for several reasons.[237] The doctrine of parens patriae (1) established the authority of attorneys general and the states to sue; (2) limited the scope of potential industry defenses and statutory preemptory claims; and (3) provided an additional basis for monetary and injunctive relief.[238] Whether these benefits will assist attorneys general in cases against the food industry will depend on the harms they seek to remedy, the other legal theories available to them, and the defenses that may be available to potential food industry defendants.[239]

Because most of the leading cases were decided during the early 1900s, the modern limits of the parens patriae doctrine are unknown.[240] In assessing the scope of a modern use of the parens patriae doctrine by attorneys general, three kinds of limitations have been articulated: prudential limits, practical limits, and legal limits.[241]

1. Prudential Limits

In determining whether to exercise the states' parens patriae power against the food industry, state attorneys general should consider at least two prudential factors.[242] First, actions brought under the parens patriae doctrine should be limited to circumstances that demonstrate substantial and serious harm to a state's citizens.[243] Wrongdoing against individuals or small groups usually will not require use of the doctrine.[244] The tobacco litigation exemplifies the massive harm that warrants action under the parens patriae doctrine.[245]

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236. *Id.*
237. *Id.* at 1875.
238. *Id.* at 1875-79.
239. *Id.* at 1875.
240. Ieyoub & Eisenberg, *supra* note 72, at 1879.
241. *Id.* at 1880.
242. *Id.*
243. *Id.* at 1880.
244. *Id.*
245. Ieyoub & Eisenberg, *supra* note 72, at 1880.

Second, other available remedies and causes of action available to attorneys general must be inadequate in some respect.[246] The tobacco litigation again serves as an example.[247] The lawsuits against the tobacco companies were not battles that individual citizens could or should be expected to fight against the tobacco industry's massive marketing, scientific, public relations, and legal resources.[248] The harms caused to states were independent of those harms caused to individual smokers and were interests that only the states could vindicate.[249]

2. Practical Limits

Perhaps the single most important practical limit in using the doctrine of parens patriae against the food industry will be the willingness of state attorneys general to act in concert.[250] Perhaps the most important lesson to be learned from the tobacco litigation is that states can be most effective when they act in unison.[251] State attorneys general did not always present a united front against the tobacco industry.[252] Actions by state attorneys general were not taken seriously when only a few states brought suits against the tobacco industry.[253] The first settlement in March 1996 was the

246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. Ieyoub & Eisenberg, *supra* note 72, at 1881.
251. *Id.*
252. *Id.* (citing David S. Samford, Note, *Cutting Deals in Smoke-Filled Rooms: A Case Study in Public Choice Theory*, 87 KY. L.J. 845, 868, 869 (1998-1999)).
253. *Id.* The tobacco industry's aggressive tactics against state attorneys general discouraged Colorado from filing suit. *Id.* at 1881 n.116 (citing Joan Beck, *Deadly Defense*, DALLAS MORNING NEWS, Feb. 26, 1996, at 11A). Wisconsin's attorney general stated that he would wait to see how the other states did before filing suit. Ieyoub & Eisenberg, *supra* note 72, at 1881 n.116 (citing Paul Norton, *Doyle: Wait, See on Tobacco Suit*, CAPITAL TIMES (Madison), Feb. 26, 1996, at 1A). New Hampshire's attorney general said that New Hampshire could just sit it out and sign on when and if the states win. *Id.* (citing Norma Love, *Democrats: New Hampshire Should Sue Tobacco Companies*, AP POL. SERVICE, Apr. 2, 1996, *available at* 1996 WL 5375466). Ohio's attorney general stated that "[m]any of the legal theories being used in the lawsuits are untested and unproven." *Id.* (quoting Bob Van Voris, *AG's Claims Mere Smoke?*, NAT'L L.J., Apr. 28, 1997, at A1). The Alabama attorney general's task force concluded that the legal arguments being made by other state attorneys general were "at best weak and at worst bizarre." *Id.*

turning point at which unified state action began to pressure the tobacco industry into settlement negotiations.[254] Before this first settlement, only six states had sued the tobacco industry.[255] By 1997, a set of separate state actions had evolved into a nation wide action against the tobacco industry and national settlements followed.[256]

3. Legal Limits

Legal limits of the parens patriae doctrine are a question of state law.[257] State legislatures can define the scope of their respective state's parens patriae doctrine to be as broad or as narrow as the state legislature sees fit, subject to federal and state constitutional limitations.[258] Further, several types of state laws can be viewed as statutory embodiments of parens patriae principles, such as an unfair and deceptive trade practices statute.[259] Similarly, some states may have the power through their state constitution to limit assertions of the power of the parens patriae doctrine or judicial recognition of that power.[260] Assuming that states bringing suit against the food industry to recover Medicaid costs choose to adhere to currently existing case law governing the parens patriae doctrine, the following sets forth a summary of the established legal limitations.

First, as stated above, a state's action against the food industry under the parens patriae doctrine requires that the state not be acting in a proprietary capacity.[261] Only when the state itself is harmed by tortious or contractual misconduct can it directly vindicate its interests as fully as any other litigant.[262] Second, states cannot be acting simply as enforcement agencies for small collections of private individuals against the food industry.[263] A state interest beyond that of private parties must exist to give rise to a

254. *Id.* at 1881 (citing Lynn Mather, *Theorizing About Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 LAW & SOC. INQUIRY 897, 923 (1998)).
255. Ieyoub & Eisenberg, *supra* note 72, at 1881-82.
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.* at 1882 (citing, *e.g.*, Louisiana Unfair Trade Practices and Consumer Protection Law, LA. REV. STAT. ANN. §§ 51:1401-1418 (Supp. 2000)).
260. *Id.*
261. Ieyoub & Eisenberg, supra note 72, at 1882.
262. *Id.*
263. *Id.*

sustainable action against the food industry under the parens patriae doctrine.[264]

c. Recoupment of Medicaid Costs Incurred Treating Obesity Related Health Problems is a Quasi-Sovereign State Interest

As indicated above, the United States Supreme Court has not set out the exact nature of a quasi-sovereign state interest.[265] However, the states' interest in the health, safety, and welfare (physical and economic) of their citizens has supported such actions in the past, specifically against the tobacco industry.[266] Although such actions are available to attorneys general against the food industry today, causes of action under the parens patriae doctrine are not means by which states can avoid other important prerequisites to legal relief.[267] In particular, the requirement remains that members of the food industry breach some legal duty that harms a state's parens patriae interest.[268]

While the parens patriae doctrine helps articulate a state's legal interest against the food industry, it does not define the defendant's legal duties.[269] State litigation that relies on the parens patriae doctrine must be within the limits of the doctrine and demonstrate a breach of legal duties by the potential defendants.[270]

As mentioned above, Congress has mandated that states participating in the Medicaid program must include in their administration plan a procedure for recovering funds from third parties that

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264. *Id.*

265. *See supra* notes 222-27 and accompanying text.

266. Ieyoub & Eisenberg, *supra* note 72, at 1866, 1883.

267. *Id.* at 1883.

268. *Id.*

> '[J]udicial relief sometimes may be granted to a quasi-sovereign state under circumstances which would not justify relief if the suit were between private parties. . . .' But, in general, the cases involve misbehavior by defendants that likely would give rise to liability under some nuisance or other tort theory. . . . And it 'must appear that the state has suffered a wrong furnishing ground for judicial redress or is asserting a right susceptible of judicial enforcement.' *Id.* at 1864 n.18 (citing Florida v. Mellon, 273 U.S. 12, 16-17 (1927)).

269. Ieyoub & Eisenberg, *supra* note 72, at 1883. The tobacco litigation complaints generally contained several allegations of breach of legal duties. *Id.* at 1883 n.124 (citing *e.g.*, *American Tobacco Co.*, 14 F. Supp. 2d at 965-74 (alleging product liability, RICO, antitrust, consumer, nuisance, and fraud claims)).

270. *Id.*

are liable for the injuries of Medicaid recipients.[271] This principle of restitution is not subject to the discretion of the states.[272] The statutory scheme enacted by the participating state must include recovery procedures.[273]

However, a state's statutory recovery provision does not create a federal right of recovery; rather, the right of recovery is dependent on the substantive state law in which recovery is sought.[274] If state law does not recognize a particular cause of action, the Medicaid statute does not require the creation of such a cause of action.[275] In contrast, where liability is available under state law, the state must pursue the action against the third party.[276]

Thus, the first step for a state's attorney general will be to consult that state's Medicaid statutory scheme to determine the possible causes of action available to them in their recoupment actions against the food industry.[277] Similar to the litigation against the tobacco industry, state attorneys general should focus on the theory of unjust enrichment[278]—the remedy for which is restitution.[279]

As the discussion above demonstrates, the food industry is primarily focused on successfully generating large profits by selling its products to consumers without assuming any responsibility for the harmful consequences. Thus, state attorneys general should argue that the states are indirectly conferring a benefit upon the food industry by paying the health care costs related to obesity through

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271. Sherrill, *supra* note 44, at 501 (citing 42 U.S.C. § 1396a(a)(25) (1996)). The state plan must take all "reasonable measures to ascertain the legal liability of third parties." *Id.* at 501 n.35.

> [W]here such a legal liability is found to exist after medical assistance has been made available on behalf of the recipient, 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 the legal liability. . . . *Id.* (citing 42 U.S.C. § 1396a(a)(25)(B) (1996)).

272. *Id.* at 501.

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

274. Sherrill, *supra* note 44, at 502 (citing *Philip Morris*, 942 F. Supp. at 694).

275. *Id.*

276. *Id.*

277. *See id.* at 507.

278. *Id.*

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

state funds, which are soon will directly include state Medicaid funds.[280]

3. Anticipating Food Industry Defense Tactics

In an effort to increase the ability of each state to recover Medicaid expenses from tobacco companies, some states passed third-party Medicaid liability acts in the battle against the tobacco industry.[281] The legislation enacted in Massachusetts was relatively limited and only provoked minor attacks during removal proceedings brought by the tobacco companies.[282] While the state was expressly given a separate and independent cause of action against cigarette manufacturers, no special provisions eliminated the tobacco industry's traditional defenses.[283] Though the tobacco industry may have argued against the statute on the grounds of equal protection because of the act's singular specification of cigarette manufacturers, this issue was not addressed by the Massachusetts federal district court in its decision to remand the case to state court.[284]

In contrast, Florida's statute was the most aggressive in increasing the potential liability of the tobacco industry and, as a result, it quickly encountered direct constitutional attacks.[285] Florida's statute eliminated affirmative defenses of the tobacco industry, including assumption of risk and comparative negligence.[286] Further, the statute eliminated the defense of statute of repose,[287] applied joint

280. *Id.* (citing Michael C. Moore & Charles J. Mikhail, *The Fight Against Tobacco: A New Attack on Smoking Using an Old-Time Remedy*, 111 DHHS Pub. Health Rep. 192, May 1996)).

281. *See generally id.* at 502-05.

282. *Id.* at 502 (citing *Philip Morris*, 942 F. Supp. at 691-92).

283. Sherrill, *supra* note 44, at 504 (citing MASS. GEN. LAWS ANN. ch. 118E, § 22 (West 1996) and 1994 Mass. Acts ch. 60, § 276).

284. *Id.* at 504-05 (citing *Philip Morris*, 942 F. Supp. at 690).

285. *Id.* at 502 (citing Agency for Health Care Admin. v. Associated Indus., 678 So. 2d 1239 (Fla. 1996)).

286. *Id.* at 502-03 (citing FLA. STAT. ANN. § 409.910(1) (West 1996)). "Principles of common law and equity as to . . . comparative negligence, assumption of the risk, and all other affirmative defenses normally available to a liable third party, are to be abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources . . . ." *Id.* at 502 n.45 (citing FLA. STAT. ANN. § 409.910(1)).

287. *Id.* at 503 (citing FLA. STAT. ANN. § 409.910(12)(h)).

and several liability to any recovery,[288] allowed the market share theory of liability,[289] permitted treble damages in cases of criminal violations,[290] permitted the use of statistics to prove causation and damages,[291] and eliminated the need to identify individual recipients in large claims.[292]

a. Discovery Tactics

Successful litigation against the food industry may ultimately depend on the limits placed on discovery.[293] If precedent holds, the food industry will attempt to force the states to identify each Medicaid recipient for whom the state claims restitution.[294] The intent of the food industry will be to controvert the issue of causation, thereby introducing the issue of whether the states can prove particular food products or food companies caused the obesity related health problems for which the Medicaid recipient was treated.[295] As discussed previously, causation is perhaps the first and foremost important issue which must be resolved before state attorneys general begin filing suits against the food industry for recoupment of Medicaid costs incurred as a result of treating health related problems caused by obesity.[296]

The tobacco litigation suggests that courts may be willing to limit such discovery.[297] Another step in the right direction occurred

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288. *Id.* at 502-03 (citing FLA. STAT. ANN. § 409.910(1)).
289. Sherrill, *supra* note 44, at 503 (citing FLA. STAT. ANN. § 409.910(9)(b)).
290. *Id.* (citing FLA. STAT. ANN. § 409.910(19)).
291. *Id.* (citing FLA. STAT. ANN. § 409.910(9)).
292. *Id.* (citing FLA. STAT. ANN. § 409.910(12)(h)).
293. *Id.* at 509.
294. Sherrill, *supra* note 44, at 509 (citing *Discovery Battle Still Rages in Mississippi's Medicaid Reimbursement Case*, 10 MEALEY'S LITIG. REP.: TOBACCO NO. 11 (Oct. 3, 1996)).
295. *Id.* In Florida, the district court refused to allow the tobacco industry's discovery request, finding that investigation and/or deposition of named Medicaid patients was not necessary under the Florida Third Party Liability Act. *Id.* at 509 n.99 (citing *State Can Submit Patient ID Numbers in Medicaid Reimbursement Suit, Court Says*, 4 Health Care Policy Rep. (BNA) No. 43, at D-28 (Oct. 28, 1996) [hereinafter Health Care Pol'y Rep.]).
296. *See supra* Section III.C.1.
297. Sherrill, *supra* note 44, at 509 (citing Henry Weinstein & Jack Nelson, *Untested Theory Becoming Tobacco Firms' Top Threat*, L.A. TIMES, Aug. 4, 1996, at A1 (reporting that Minnesota and Mississippi courts issued orders allowing the tobacco industry to take depositions from only twenty Medicaid recipients)).

when the Florida Supreme Court struck down the provision of the state's statute that allowed the state to proceed against the tobacco industry without identifying individual Medicaid recipients who were harmed.[298] The court based its decision on the grounds that the provision was a violation of constitutional due process because it created a statutory presumption that Medicaid payments were properly made without providing defendants an opportunity to rebut the presumption.[299] However, a subsequent court ruling held that the identification numbers of Medicaid patients satisfied the state's discovery burden.[300] Though the subsequent ruling did not eliminate the state's burden of proving causation, it did limit the tobacco industry's ability to depose and discover medical information.[301]

b. Procedural Tactics

Indications from the tobacco industry litigation suggest further that the food industry might not be successful in its attempt to remove the cases from state to federal courts.[302] In *Massachusetts v. Philip Morris Inc.*, the tobacco companies made two unsuccessful arguments in their removal efforts which will undoubtedly be attempted again in litigation against the food industry.[303]

First, the tobacco companies argued that the federal requirement of a recovery provision in a state's Medicaid statutory scheme against liable parties brought the cases under federal question jurisdiction.[304] Second, the tobacco companies argued that because the federal government would receive a share of any successful state Medicaid recoupment, the federal government was an "unnamed plaintiff with a real interest in the suit."[305] However, the court rejected both arguments, finding that the states were acting under

298. *Id.* at 503 (citing *Associated Indus.*, 678 So. 2d at 1255-56).
299. *Id.*
300. *Id.* at 504.
301. *Id.* (citing Health Care Pol'y Rep., *supra* note 295).
302. Sherrill, *supra* note 44, at 510. Federal courts in Connecticut, Louisiana, Maryland, Massachusetts, and Mississippi remanded suits back to state courts. *Id.* at 510 n.103.
303. *Id.* (citing *Philip Morris*, 942 F. Supp. at 692).
304. *Id.* (citing *Philip Morris*, 942 F. Supp. at 692).
305. *Id.*

state law and were not roceeding as agents of, or on behalf of, the federal government.[306]

In addition, tobacco companies filed preemptive suits seeking an injunction against the filing of a restitution suit by the state.[307] In the District Court of Connecticut, Philip Morris claimed the Medicaid suits were (1) unduly burdensome on interstate commerce, (2) violative of due process and equal protection guarantees, and (3) inconsistent with the Supremacy Clause of the United States Constitution due to preemption.[308]

However, federal courts uniformly rejected this tactic and refused to enjoin the Medicaid suits.[309] The District Court of Connecticut applied the Younger Abstention Doctrine[310] when it dismissed a preemptive suit filed against Connecticut's attorney general, finding that an important state interest was at issue.[311]

c. Plaintiff Party Limitations

In the tobacco litigation, the defendant parties were generally the same in each case.[312] However, in attempting various approaches

306. Sherrill, *supra* note 44, at 510 (citing *Philip Morris*, 942 F. Supp. at 696). *See also Connecticut Medicaid Case Remanded Back to State Court*, 10 MEALEY'S LITIG. REP.: TOBACCO NO. 13 (Nov. 1, 1996)).

307. Sherrill, *supra* note 44, at 510 (citing *e.g.*, Philip Morris, Inc. v. Blumenthal, No. 396CV01121 (D. Conn. filed June 28, 1996); Philip Morris, Inc. v. Harshbarger, No. 95-12574-GAO (D. Mass. filed Nov. 28, 1995); Philip Morris, Inc. v. Morales, No. 95-14807 (Tex. Dist. Ct., Travis County filed Nov. 28, 1995)). Maryland, New Jersey, Utah, and Hawaii were also targeted for preemptive strikes. *Id.* at 510 n.107 (citing Andrew Blum, *Tobacco Industry Tries Pre-emptive Lawsuits*, NAT'L L.J., Sept. 23, 1996, at A6).

308. *Id.* (citing Complaint, at para. 23, Philip Morris, Inc. v. Blumenthal, No. 396CV01121).

309. *Id.* (citing Andrew Blum, *Tobacco Industry Tries Pre-emptive Lawsuits*, NAT'L L.J., Sept. 23, 1996, at A6).

310. Younger v. Harris, 401 U.S. 37 (1971).

311. Sherrill, *supra* note 44, at 510-11 (citing Steven Fromm, *Tobacco Takes a Hit*, CONN. L. TRIB., Jan. 6, 1997, at 1 (noting the judge determined that Connecticut's Fair Trade Act was at issue and the defendants had a fair opportunity for review of constitutional matters in the state court; the judge determined that Younger Abstention Doctrine was applicable due to the preemptive nature of the filing)).

312. *Id.* at 511. Defendant manufacturers included The American Tobacco Co., Liggett Group, Inc., R.J. Reynolds Tobacco Co., and United States Tobacco Co. *Id.* at 511 n.112. Other cases included as defendants the tobacco trade associations: The Council for Tobacco Research-U.S.A., Inc. and The Tobacco Institute, Inc. *Id.*

to litigating against the tobacco industry, different plaintiff party configurations were tested.[313]

One partially unsuccessful configuration was when the State of Minnesota joined with the Blue Cross / Blue Shield of Minnesota as named plaintiffs.[314] In *Minnesota v. Philip Morris, Inc.*,[315] the Minnesota Supreme Court found Blue Cross / Blue Shield lacked standing to pursue a claim of negligent undertaking of a voluntary duty against the tobacco industry; however, that the organization had standing to pursue claims arising under Minnesota's state consumer protection and antitrust statutes.[316] The court concluded that the Minnesota legislature had the authority to expand the potential proper parties for statutory causes of action, but that tort claims required more direct damages.[317]

State attorneys general should also be aware of a second issue that arose amidst plaintiff parties against the tobacco industry was whether it is the responsibility of the attorney general's office or the governor's office to bring such actions against the food industry within their respective states.[318] For example, the Governor of Mississippi filed suit to prevent that state's attorney general from pursuing the Medicaid recoupment suit against the tobacco industry.[319] It was asserted that the Mississippi Attorney General lacked authority to act in opposition to the Governor's expressed policy as the state's chief executive officer.[320]

d. Rebutting the Slippery Slope Objections

Litigation against the food industry is not frivolous if the evidence presented establishes the causal connection between obesity and food consumption.[321] If a cause of action has any legal merit, it

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The tobacco industry public relations firm Hill & Knowlton, Inc. was also named as a defendant in other cases. *Id.*

313. Sherrill, *supra* note 44, at 511.

314. *Id.*

315. 551 N.W.2d 490 (Minn. 1996).

316. Sherrill, *supra* note 44, at 511 (citing *Philip Morris*, 551 N.W.2d at 495).

317. *Id.*

318. *Id.*

319. *Id.* (citing Complaint, *Fordice v. Moore*, No. 96-M-114 (Miss. filed Feb. 17, 1996)).

320. *Id.*

321. *See* Rogers, *supra* note 5, at 880 (citing John Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 HOFSTRA L. REV. 433, 464 (1986)).

is not frivolous.[322] Nonetheless, the court in *Pelman v. McDonald's Corp.* has noted the judiciary's concern over the slippery slope effect of allowing such cases against the food industry to proceed.[323]

A "slippery slope" argument invokes the fear that once a right is infringed upon, it will keep being infringed upon until there is nothing left of it.[324] A classic example of this type of argument is the National Rifle Association's position that any prohibition of weapon ownership will lead to the banning of all guns, including hunting rifles.[325] An example of a slippery slope argument in the First Amendment arena is that permitting the government to ban any type of speech (e.g., false advertising) will lead to the erosion of the protection of other types of speech, including the prohibition of core political speech, such as opposition to government policies.[326]

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322. *Id.*

323. *Id.* (citing *Pelman*, 237 F. Supp. 2d at 518 ("Even if limited to that ilk of fare dubbed 'fast food,' the potential for lawsuits is great . . . .").

324. Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 361-62 (1985) (stating "the phenomenon referred to [by the term "slippery slope"] is that a particular act, seeming innocuous when taken in isolation, may yet lead to a future host of similar but increasingly pernicious events.").

325. *See* James Weinstein, *A Constitutional Roadmap to the Regulation of Campus Hate Speech*, 38 WAYNE L. REV. 163, 183 (1991) (citing Jervis Anderson, *A Reporter at Large: An Extraordinary People*, THE NEW YORKER, Nov. 12, 1984, at 159-60).

326. *See id. See also* Joseph E. Olson & David B. Kopel, *All the Way Down the Slippery Slope: Gun Prohibition in England and Some Lessons for Civil Liberties in America*, 22 HAMLINE L. REV. 399 n.3 (1999) (listing other examples as: Henry Geller & Jane H. Yurow, *The Reasonable Access Provision (312(a)(7)) of the Communications Act: Once More Down the Slippery Slope*, 34 FED. COMM. L.J. 389 (1982) (arguing that the Federal Election Commission review of a television station's refusal to allow a federal candidate "reasonable access" creates a slippery slope for government control of the media's editorial decisions); John Q. La Fond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. PUGET SOUND L. REV. 655 (1992) (arguing that allowing the civil commitment of persons labeled as violent sexual predators creates a slippery slope to the widespread use of lifetime confinement of other people based on only a single crime); Jennifer L. Bradshaw, Comment, *The Slippery Slope of Modern Takings Jurisprudence in New Jersey*, 7 SETON HALL CONST. L.J. 433 (1997) (discussing a decision upholding the Pinelands Protection Act and arguing that the slippery slope endangers Fifth Amendment property rights); and as an example of a slippery slope argument against something other than a potential infringement of a civil liberty *see generally* JAMES Q. WILSON, MORAL JUDGMENT: DOES THE ABUSE EXCUSE THREATEN OUR LEGAL SYSTEM (1997) (asserting that expert testimony about battered women's syndrome creates a slippery slope away from personal responsibility)).

For their persuasive force, slippery slope arguments depend primarily on the perceived inability of future decisionmakers to recognize or uphold doctrinal lines.[327] However, arguments based upon the difficulty of drawing lines "are based on a fallacious view of the nature of language, one that presupposes that a distinction that cannot be drawn sharply should not be drawn at all."[328]

"The slippery slope argument is almost always universally derided by philosophers as a bad argument."[329] Such arguments are called "the trump card of the traditionalist" because no proposed societal reform is immune from the slippery slope objection, no matter how strong the arguments are in its favor.[330] In fact, the stronger the arguments in favor of the reform, as is the case against the food industry, the more likely the traditionalist will make the slippery slope objection because "it is then the only one he has."[331]

"The slippery slope argument is almost always an embarrassment to readers who possess even a modicum of critical skill."[332] While the slippery slope argument may be a valid concern, slippery slope claims deserve to be viewed skeptically, and the proponent of such a claim must be expected to provide the necessary empirical support.[333]

The solution is for judges who adjudicate cases against the food industry to make their holdings and rationales explicit, giving examples of situations in which the principles would not apply.[334] Further, judges should disregard the speculative risks.[335] Judges should recognize their duty to decide the cases the best they can and refuse to entertain the speculative, concern that some people in the future may oversimplify the reasoning into something broader.[336] Speculative consequences notwithstanding, Medicaid recoupment cases against the food industry must stand on their own merits.

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327. Schauer, *supra* note 324, at 379-81.
328. *Id.* at 381.
329. Eric Lode, Comment, *Slippery Slope Arguments and Legal Reasoning*, 87 CAL. L. REV. 1469, 1474 n.31 (1999) (quoting Jeffrey P. Whitman, *The Many Guises of the Slippery Slope Argument*, 20 SOC. THEORY & PRAC. 85, 85 (1994)).
330. *Id.* at 1473 (citing Glanville Williams, *"Mercy Killing" Legislation—A Rejoinder*, 43 MINN. L. REV. 1, 9 (1958)).
331. *Id.*
332. Paul F. Campos, *Advocacy and Scholarship*, 81 CAL. L. REV. 817, 834 (1993).
333. *Id.*
334. *Id.* at 1093.
335. *Id.*
336. *Id.*

V. CONCLUSION

Obesity is a public policy issue affecting the long-term health of America's population, and the food industry has a duty to engage in the battle against it. As stated by the United States Surgeon General:

> [The food industry] has a vital role in the prevention of overweight and obesity. Through the production and distribution of food and other consumer products, [the food industry] exerts a tremendous impact on the nutritional quality of the food we eat and the extent of physical activity in which we engage. [The food industry] can use that leverage to create and sustain an environment that encourages individuals to achieve and maintain a healthy or healthier body weight.[337]

This comment does not endorse all tort claims against the food industry. It argues only in favor of claims that would allow states to recover for costs imposed upon their Medicaid agencies as a result of obesity if the food industry fails to comply with federal regulation of the industry.

Tort claims against the food industry can compliment legislative efforts to regulate the industry and can thereby make a contribution to decreasing obesity in America. Imposing restrictions on the food industry by using tort litigation as a substitute for legislation is improper. However, tort liability can work in conjunction with legislative regulation, providing incentives to prevent consumers from over-consumption and becoming obese instead of looking for ways to simply increase sales and profits.

The same reasoning behind the Medicaid suits against the tobacco industry products applies equally to food products, particularly food products with negative or minimal nutritional value.[338] Individuals require treatment for health problems caused by poor diet just as individuals require treatment for health problems related to usage of tobacco products.[339] The statistical information required to establish a "definitive link to a specific debilitation"[340] is sufficient to justify forcing the food industry to help pay for the negative

337. Surgeon General's Call to Action, *supra* note 19, at 28.
338. Sherrill, *supra* note 44, at 515.
339. *Id.*
340. *Id.* at 515-16.

effects imposed on society by its products on public policy grounds.[341]

State Medicaid recoupment claims are not unwarranted or unnecessary governmental intrusions into areas of purely personal conduct. The intent of such lawsuits is not to impose governmental mandates on proper diet and healthy lifestyles. Further, the goal of such state actions is not to place the power of the legislative branch to regulate industries into the hands of state attorneys general. The judicial branch of our government is not the arm charged with promulgating commercial regulations.[342]

The proposed state Medicaid recoupment lawsuits would allow the tort system to serve as a complementary check on industry compliance with legislatively authorized regulations. Further, because the food industry is profiting from consumer purchases of its products, the industry has a duty to compensate the state Medicaid budgets that bear the burden of paying for the ill effects of obesity caused by the food industry's intent to generate profits.

341. *See supra* Section II.

342. Sherrill, *supra* note 44, at 517 (citing U.S. CONST. art. I, § 8, cl. 3).

VI. APPENDIX A

National Conference of State Legislatures

2003 – 2005 State Legislation On Civil Immunity for Food Vendors

Below is the most recent report from the National Conference of State Legislatures regarding action on bills introduced during the 2003-2004 and 2004-2005 legislative sessions as of February 16, 2005. This report is *available at* http://www.ncsl.org/programs/health/Fvmemo.htm (last visited Oct. 17, 2005).

> As concern continues to mount about the growing obesity epidemic among both children and adults in the United States, legislators have responded to different voices in the debate. In many states, legislation has been introduced to limit the liability of food manufacturers, sellers, and others in the food distribution and marketing industry for claims resulting from individuals' obesity, weight gain, or health conditions related to obesity as a result of food consumption. Discussion of these bills focuses on:
> (1) Industry concerns about who is responsible for healthy choices in food consumption and the potential for food industry-focused tort litigation,
> (2) Public health concerns about the costs and health impact of obesity-related chronic conditions such as heart disease, cancer, stroke and diabetes (the first, second, third and sixth leading causes of death in the United States), and
> (3) Questions about the advisability of limiting access to potential remedies through the courts.
> Industry representatives argue that these bills will protect against frivolous lawsuits for obesity claims. Trial lawyers contend that court rules already provide for the early dismissal of frivolous cases and the award of attorney's fees. In one state, concerns have been raised that the proposed legislation conflicts with constitutional provisions that guarantee injured people open access to the courts.
>
> **State and Federal Activity**
>
> As of February 16, 2005, bills on this topic had been introduced in thirty-five (35) states and enacted in thirteen (13) of those states. The thirteen (13) states that have enacted legislation to limit civil liability for obesity claims against food vendors and others in the food industry are Arizona, Colorado, Florida,

Georgia, Idaho, Illinois, Louisiana, Michigan, Missouri, South Dakota, Tennessee, Utah, and Washington State.
Many state-level proposals are modeled on federal legislation introduced in 2003, either the Commonsense Consumption Act (S 1428) or the Personal Responsibility in Food Consumption Act (HR 339). The chart below details bills introduced in state legislatures during the 2003-2004 and 2004-2005 legislative sessions that would provide some degree of immunity from civil lawsuits against food vendors, distributors, and marketers, and others in the food industry.

As discussed in this Comment, a widely publicized obesity lawsuit against McDonald's Corporation was dismissed by a federal district court in September 2003. On January 26, 2005, the United States Court of Appeals for the 2nd Circuit overruled the lower federal court decision and reinstated portions of the case, ruling that the plaintiffs should be given an opportunity to show that there was a link between their obesity and eating foods from McDonald's.

Below is the latest reported action on bills introduced in the state legislatures as prepared by Amy Winterfeld, Senior Policy Specialist, Health Program, National Conference of State Legislatures.

Arizona	**AZ HB 2220 (2004) (Enacted, signed by the governor, 4/12/04, Chapter 67)** Provides that food products may not be classified as defective and unreasonably dangerous for product liability purposes; and that there is no duty to warn purchasers that consumption of a food product may cause health problems if consumed excessively. Creates an affirmative defense for repeated consumption of a food product as a proximate cause of injury.
California	**CA AB 173 (New bill for 2005, Introduced 1/27/05, To Assembly Committee on Judiciary)** Would provide civil liability immunity for food manufacturers, packers, distributors, carriers, sellers or associations for claims arising from weight gain, obesity, or a health condition associated with weight gain or obesity from the long-term consumption of the food. **CA AB 1909 (2004) (Failed to pass judiciary committee, 5/4/04)**

	Would have exempted manufacturers, distributors, or sellers of food or nonalcoholic beverages intended for human consumption from civil liability for personal injury or wrongful death based on an individual's consumption of food or nonalcoholic beverages leading to an individual's weight gain, obesity, or a health condition related to weight gain or obesity.
Colorado	**CO HB 1150 (2004) (Enacted, signed by the governor, 5/04, Chapter 229)** Creates the Commonsense Consumption Act, limiting the civil liability of food manufacturers, distributors, sellers, or retailers for claims resulting from a person's obesity, weight gain, or health conditions related to obesity resulting from a person's long-term consumption of a food or beverage.
Connecticut	**CT HB 6156 (New bill for 2005, Introduced 1/24/05, To Joint Committee on Judiciary)** Would prohibit class action lawsuits for based on obesity claims.
Florida	**FL HB 333 (2004) (Enacted, signed by the governor, 5/21/04, Chapter No. 2004-88)** Provides food manufacturers, sellers, and distributors with immunity from civil liability for personal injury or wrongful death based upon long-term consumption of certain foods or nonalcoholic beverages under certain circumstances; and provide limitations on that immunity if required nutritional content information was not provided or if false or misleading information was provided to the public.
Georgia	**GA HB 1519 (2004) (Enacted, Act 590, 5/14/04)** Creates the Commonsense Consumption Act, prohibiting civil lawsuits against food manufacturers, marketers, distributors, advertisers, sellers, and trade associations for claims resulting from a person's obesity, weight gain, or health conditions related to weight gain or obesity.
Idaho	**ID HB 590 (2004) (Enacted , Chaptered 4/2/04, Chapter 380)** Creates the Commonsense Consumption Act,

	prohibiting civil lawsuits against food manufacturers, marketers, distributors, advertisers, sellers, and trade associations for claims resulting from a person's obesity, weight gain, or health conditions related to weight gain or obesity.
Illinois	**IL HB 3981 (2004) (Enacted, signed by governor, 7/30/04, Public Act No. 93-848)** Creates the Commonsense Consumption Act, providing that no person shall bring a qualified civil action in State court against any seller of a food product. Defines "qualified civil action" to include a lawsuit against a food seller on a claim of injury resulting from a person's weight gain, obesity, or any obesity-related health condition.
Iowa	**IA SB 2186 (2004) (Last action, 3/2/04, in Senate Committee on Judiciary)** Would limit the civil liability of manufacturers, distributors, and sellers of food or nonalcoholic relating to the consumption of food or nonalcoholic beverage products unless the plaintiff proves that at the time of sale, the product was not in compliance with applicable federal or state statutory and regulatory requirements.
Kansas	**KS SB 75 (New bill for 2005, Introduced 1/24/05)** Would provide immunity from civil liability for claims relating to weight gain or obesity.
Kentucky	**KY SB 103 (New bill for 2005, Last action 2/10/05, Passed Senate, To House)** Would create the Commonsense Consumption Act excluding food establishments from civil liability for claims arising out of weight gain or obesity, for claims pending on the effective date and all claims filed thereafter regardless of when the claim arose. **KY SB 176 (2004) (Last action, 2/19/04, to Senate Committee on Judiciary)** Would provide immunity from civil liability to food manufacturers, packers, distributors, carriers, holders, sellers, marketers, and advertisers for any claim arising out of weight gain, obesity, a health condition

	associated with weight gain or obesity, or other generally known condition caused by or likely to result from long-term consumption of food.
Louisiana	**LA HB 518 (2003) (Enacted, signed into law by the governor 1/30/04, Act 158)** Limits the liability of manufacturers, distributors, and sellers of food and non-alcoholic beverage products.
Maine	**ME SB 200 (New bill for 2005, Last action 2/8/05, Referred by House to Joint Committee on Judiciary in concurrence)** Would create a defense from liability for persons or businesses serving food, for claims of obesity of or excessive weight gain by consumers as a result of their long-term consumption of food from that person or entity, with exceptions for altered or misbranded food items.
Maryland	**MD HB 15 (New bill for 2005, Last action 2/14/05, Reported unfavorably from House Committee on Judiciary.)** Would prohibit civil lawsuits against food sellers based on a claim of injury or death resulting from a person's weight gain, obesity, or a related health condition. **MD SB 315 (New bill for 2005, Introduced 1/31/05, To Senate Committee on Judicial Proceedings)** Would prohibit civil lawsuits against food sellers based on a claim of injury or death resulting from a person's weight gain, obesity, or a related health condition.
Michigan	**MI HB 5809 (2003) (Enacted, signed into law by the governor 10/7/04, Public Act No. 367)** Provides immunity from civil liability for food manufacturers, packers, distributors, carriers, holders, sellers, marketers, or advertisers or an association that include one or more of these entities for personal injury or death arising out of weight gain, obesity, a health condition associated with weight gain or obesity, or other generally known condition allegedly caused by or allegedly likely to result from long-term consumption of food.

Minnesota	**MN HB118 (New bill for 2005, Introduced 1/10/05, To House Committee on Agriculture and Rural Development)** Would prohibit civil lawsuits against specified persons for weight gain resulting from the consumption of certain foods. **MN SB 631 (New bill for 2005, Introduced 1/31/05, To Senate Committee on Judiciary)** Would prohibit civil lawsuits against certain persons for weight gain resulting from the consumption of certain foods.
Mississippi	**MS HB 1054 (New bill for 2005, Introduced 1/17/05, To House Committee on Judiciary)** Would limit the civil liability of food manufacturers and sellers for weight gain claims. MS SB 2910 (2004) (Died in committee 3/9/04) Would have limited civil lawsuits against food manufacturers, marketers, distributors, advertisers, sellers, and trade associations for claims resulting from a person's obesity, weight gain, or health conditions related to weight gain or obesity.
Missouri	**MO HB 1115 (2004) (Enacted, signed by governor, 6/25/04)** Creates the Commonsense Consumption Act, prohibiting civil lawsuits against manufacturers, distributors, and sellers of food for any claims arising out of weight gain, obesity, or health conditions associated with weight gain or obesity. Exceptions to this prohibition are provided for certain violations of state and federal law.
Nebraska	**NE LB 1046 (2004) (Last action, placed on general file as amended, 3/11/04)** Would provide limitations on civil liability for specified claims against manufacturers, distributors, and sellers of food or nonalcoholic beverages for any claims arising out of weight gain, obesity, or health conditions associated with weight gain or obesity based on an individual's long-term consumption of food or nonalcoholic beverages.

Nevada	**NV BDR748 (Bill draft request filed 10/25/04)** Would protect specified food manufacturers and sellers from "frivolous" lawsuits arising from weight gain or obesity.
New Hampshire	**NH SB 408 (2004) (Failed to pass House, 4/15/04)** Would have exempted food sellers, manufacturers, distributors, packers, advertisers, and marketers from civil liability for individuals' weight gain, obesity, or health condition related to obesity.
New Jersey	**NJ AB 3514 (New bill, Introduced 11/15/04, Last action 11/22/04, To Assembly Committee on Judiciary)** Would limit the liability of food producers, manufacturers, packers, distributors, carriers, holders, sellers, marketers and advertisers for claims for weight gain or obesity. **NJ SB 1462 (2004) (Last action, 11/8/04, From Senate Committee on Judiciary as substituted)** Would prohibit lawsuits against food manufacturers or sellers on the grounds that food consumption caused a person's weight gain or obesity.
New Mexico	**NM HB 553 (New bill for 2005, Introduced 1/27/05, To House Committee on Judiciary)** Would create the "Right to Eat Enchiladas Act" eliminating civil liability for health conditions caused by long-term food consumption.
New York	**NY AB 11336 (2004) (Last action, 5/28/04, to Assembly Committee on Codes)** Would define certain lawsuits against manufacturers, packers, distributors, carriers, holders or sellers of food as frivolous if alleging injury caused by the use of food or deceptive trade practices in connection with a person's purchase or consumption of food.
North Dakota	**ND HB 1241 (New bill for 2005, Passed House, Last action, 2/7/05, To Senate Committee on Judiciary)** Would limit the liability of food producers, manufacturers, packers, distributors, carriers, holders, sellers,

	marketers, trade associations, or advertisers for claims of injury resulting from weight gain, obesity, or any health condition related to weight gain.
Ohio	**OH HB 350 (2003) (Last action, 5/26/04, Read on concurrence. Informally passed.)** Would provide immunity from civil damages for food manufacturers, sellers, and trade associations for claims resulting from a person's obesity or weight gain or any health condition related to obesity, weight gain, or cumulative consumption. **OH SB 161 (2003-2004) (Last action, 1/7/04, to Senate Committee on Agriculture)** Would provide a qualified immunity from civil damages to a manufacturer or supplier of a food or a non- alcoholic beverage for a claim of weight gain, obesity, or a related health condition resulting from the consumption of the food or non-alcoholic beverage unless certain circumstances are proven by a claimant.
Oklahoma	**OK HB 1554 (New bill for 2005, Last action 2/8/05, To House Committee on Judiciary)** Would create the Commonsense Consumption Act to prevent "frivolous" lawsuits against manufacturers, sellers, holders, marketers or advertisers of food products that comply with applicable statutory and regulatory requirements.
Pennsylvania	**PA HB 2912 (New bill introduced 10/14/04, Last action 10/14/04, To House Committee on Judiciary)** Would provide for food purveyor civil immunity. **PA SB 1260 (New bill introduced 11/5/04, Last action 11/5/04, To Senate Committee on Judiciary)** Would provide civil immunity from liability for food purveyors under certain circumstances **PA HB 1986 (2003) (Last action, 9/16/03, to House Committee on Judiciary)** To create the Personal Responsibility in Food Consumption Act aimed at preventing lawsuits deemed frivolous against manufacturers, distributors, or sellers of food and nonalcoholic beverage products

	that comply with statutory and regulatory requirements.
South Carolina	**SC HB3118 (New bill introduced 12/8/04, Last action 1/11/05, To House Committee on Judiciary)** Would provide immunity from liability for food manufacturers, packers, distributors, carriers, holders, sellers, marketers, and advertisers for claims relating to weight gain or obesity; with exceptions for claims based on adulteration or misbranding of food labels.
South Dakota	**SD HB 1282 (2004) (Enacted, filed with SD Secretary of State 3/9/04)** Disallows recovery on civil claims for injury or death against a manufacturer, seller, trade association, livestock producer, or retailer resulting from an individual's weight gain, obesity, or a health condition resulting from the individual's long-term consumption of a qualified product.
Tennessee	**TN HB 3041 (2004) (Substituted on House floor by S 2379)** **TN SB 2379 (2004) (Enacted, chaptered as law 4/30/04, Chapter 570)** Enacts the Commonsense Consumption Act to prohibit civil lawsuits for damages against a manufacturer, packer, distributor, seller or advertiser of food claiming weight gain or obesity caused by long-term consumption of the food unless: (1) The alleged weight gain is a direct result of violation of state or federal regulations on food content and labeling; or (2) The weight gain is a direct result of intentional violation of state or federal law on manufacturing, marketing, distribution, advertising, labeling or selling the food.
Utah	**UT SB 214 (2004) (Enacted and chaptered as Chapter 194, 3/19/04)** Provides manufacturers, packers, distributors, carriers, holders, sellers, marketers, and advertisers of food with immunity from civil liability for obesity and weight gain claims, while

	allowing an exception for food that does not meet state or federal standards; and requires that any civil actions commenced plead with particularity the injury and the proximate cause.
Virginia	**VA HB 1617 (New bill, Prefiled 12/16/04, Last action 1/28/05, To Senate Committee on Courts of Justice)** Would prohibit product liability actions against food manufacturers or sellers for qualified food products, for claims of injury, potential injury or death resulting from consumption of a food product and weight gain, obesity or any health condition related to weight gain or obesity.
Washington	**WA SB 6601 (2004) (Enacted and chaptered as Chapter 139, 3/26/04)** Prohibits lawsuits against manufacturers, packers, distributors, carriers, holders, sellers, marketers, or advertisers of food products that comply with applicable statutory and regulatory requirements for claims arising out of weight gain, obesity, or health conditions associated with weight gain or obesity, caused by or allegedly likely to result from long-term consumption of food.
Wisconsin	**WI AB 595 (2003-2004) (Vetoed by the governor, 3/17/04)** **WI SB 289 (2003-2004)(Failed to pass pursuant to Senate Joint Resolution 1, 3/31/04)** Both bills would have created a civil liability exemption for food manufacturers, marketers, packers, advertisers, distributors, or sellers for claims resulting from a person's weight gain or obesity or health condition related to weight gain or obesity caused by the consumption of food.