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Date: Spring 2005

Should Attorneys General Involve Themselves
In Fast Food Litigation?

I. Introduction

In a nation of the Whopper and the Big Gulp, the Big Mac and the Super Size, it is no surprise that the waistline of America is expanding. Obesity has been declared a national epidemic with associated health and economic costs reaching staggeringly high levels. So how can America trim the fat? For many, the solution is as American as the problem itself: sue the fast food companies.

On the heels of the successful campaign against the tobacco companies, some lawyers are now setting their sights on the fast food industry. The fast food companies, these lawyers say, use manipulative strategies to market unhealthy products that, when consumed regularly, lead to serious health problems. Thus far, however, fast food litigation has had little success in the courtroom, has experienced opposition from legislators and the public alike, and has been shunned by the attorneys general.

This paper examines the potential role of the attorneys general in fast food litigation. First, this paper summarizes the obesity epidemic and explains why obesity is an important issue for all Americans, including the attorneys general. This paper then examines recent litigation against the fast food industry, as well as the role of the attorneys general in the tobacco lawsuit and settlement. Next, through the model of the tobacco litigation and recent fast food litigation, this paper provides reasons why the

attorneys general would, and would not, involve themselves in future fast food litigation. Finally, this paper concludes with a call to the attorneys general to enter future fast food litigation for the benefit of the consuming public.

II. The Problem Of Obesity In The United States

Before examining recent litigation against the fast food industry and the potential role of the attorneys general in future such litigation, it is helpful to first understand the depth and impact of the issue of obesity on the American landscape.

A. The Obesity Epidemic

Obesity has risen at an epidemic rate in the United States over the past twenty years.¹ Results from the 1999-2002 National Health and Nutrition Examination Survey indicate that an estimated sixty-five percent of adults in the United States are either overweight or obese.² This finding represents a prevalence that is sixteen percent higher than the age-adjusted overweight estimates obtained from the same survey conducted from 1988 to 1994.³ Moreover, thirteen percent of children aged six to eleven years and fourteen percent of adolescents aged twelve to nineteen years were overweight in 1999.⁴ This prevalence has nearly tripled for adolescents in the past two decades.⁵ The

¹ Centers For Disease Control and Prevention, Nat'l Center For Chronic Disease Prevention and Health Promotion, *Overweight and Obesity: Overview*, at <http://www.cdc.gov/nccdphp/dnpa/obesity/> (last visited April 7, 2005).

² Centers For Disease Control and Prevention, Nat'l Center For Health Statistics, *Prevalence of Overweight and Obesity Among Adults: United States, 1999-2002*, at <http://www.cdc.gov/nchs/products/pubs/pubd/hestats/obese/obse99.htm> (last visited April 7, 2005).

³ *Id.*

⁴ U.S. Dep't of Health and Human Services, *Overweight and Obesity: At A Glance*, at http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact_glance.htm (last visited April 7, 2005) [hereinafter USHHS: *At A Glance*].

⁵ *Id.*

staggering increases in obesity cut across all ages, racial and ethnic groups, and both genders.⁶

In addition to these alarming statistics is the fact that overweight and obesity may soon cause as many preventable deaths as smoking. In 2000, poor diet including obesity and physical inactivity caused four hundred thousand deaths in the United States, which constitutes more than sixteen percent of all deaths in the United States and is the number two killer.⁷ These figures compare with four hundred thirty-five thousand deaths for tobacco, or eighteen percent, as the number one killer.⁸ Overweight and obesity are associated with many health problems, including heart disease, certain types of cancer, type 2 diabetes, stroke, arthritis, breathing problems, and psychological disorders, such as depression.⁹

B. The High Economic Cost of Obesity

Overweight and obesity, along with their associated health problems, have had substantial economic consequences on the health care system in the United States. These economic impacts can be divided into direct medical costs and indirect medical costs. Direct medical costs include preventive, diagnostic, and treatment services related to obesity, while indirect medical costs relate to morbidity and mortality costs.¹⁰ Morbidity costs are defined as the value of income lost from decreased productivity, restricted

⁶ *Id.*

⁷ MSNBC News, Associated Press, *Obesity Nearly As Deadly As Tobacco In The United States*, at <http://www.msnbc.msn.com/id/4486906/> (last visited April 7, 2005).

⁸ *Id.*

⁹ USHHS: *At A Glance*, at http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact_glance.htm (last visited April 7, 2005).

¹⁰ Centers For Disease Control and Prevention, Nat'l Center For Chronic Disease Prevention and Health Promotion, *Overweight and Obesity: Economic Consequences*, at http://www.cdc.gov/nccdphp/dnpa/obesity/economic_consequences.htm (last visited April 7, 2005) [hereinafter CDC: *Economic Consequences*].

activity, and absenteeism.¹¹ Mortality costs are defined as the value of future income lost by premature death.¹²

In 2000, the economic cost of obesity in the United States was approximately one hundred and seventeen billion dollars.¹³ This approximation can be split between federal and state costs. On the federal level, medical expenses for obesity accounted for nine percent of the total medical expenditures in 1998, and may have reached as high as seventy-eight billion dollars.¹⁴ State-level estimates range from eighty-seven million dollars (Wyoming) to eight billion dollars (California).¹⁵ It is evident from the rapidly increasing number of obese individuals, in conjunction with its enormous economic costs, that obesity is a serious health and financial issue for America.

III. The Tobacco Lawsuit and Recent Fast Food Litigation

Once the magnitude and economic consequences of the obesity epidemic are understood, it is helpful to next examine both the tobacco litigation and recent fast food litigation to frame a potential solution to this problem.

A. The Tobacco Litigation

As way of a backdrop, the tobacco litigation is illustrative of the powerful impact that attorneys general can have against unpopular corporations in the realm of consumer protection. In 1994, Michael Moore, the Attorney General of Mississippi (hereinafter “General Moore”), sued the major tobacco companies under a theory of unjust

¹¹ *Id.*

¹² *Id.*

¹³ USHHS: *At A Glance*, at http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact_glance.htm (last visited April 7, 2005).

¹⁴ CDC: *Economic Consequences*, at http://www.cdc.gov/nccdphp/dnpa/obesity/economic_consequences.htm (last visited April 7, 2005).

¹⁵ *Id.*

enrichment.¹⁶ The theory itself was quite simple: a conspiracy existed between the tobacco companies to keep the addictive nature of nicotine from the public; nicotine caused an increase in the use of cigarettes; the increase in the use of cigarettes caused health problems for the residents of Mississippi; and Mississippi had to pay the cost of these health problems through its Medicaid program. Therefore, Mississippi, General Moore argued, was entitled to restitution from the benefit it conferred onto the tobacco companies in paying for the health problems caused by their products.¹⁷ This theory varied somewhat in the forty-two other states that subsequently filed suit against the tobacco companies, but all generally followed a similar pattern.¹⁸ In addition, the attorneys general alleged several other causes of action, including fraud, conspiracy, breach of warranty, public nuisance, and product liability.¹⁹

Up until this time, lawsuits against the tobacco industry met with little success; however, General Moore's approach was more effective than past efforts for several reasons. First, General Moore was acting on behalf of the state, and not a selected class of individuals. And as the state was seen as an innocent party in the matter, the tobacco industry's previously utilized contributory negligence and assumption of risk defenses (smokers assumed the risks of smoking) were significantly weakened.²⁰ Second, the states were able to consolidate their resources and put forth a collective effort. A united front was a better match against the powerful tobacco industry.²¹ The attorneys general

¹⁶ Jonathan S. Goldman, *Take That Tobacco Settlement and Super-Size It: The Deep-Frying of the Fast Food Industry?*, 13 Temp. Pol. & Civ. Rts. L. Rev. 113, 124 (2003) [hereinafter Goldman].

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 125.

²⁰ John J. Zefutie, Jr., *From Butts To Big Macs – Can The Big Tobacco Litigation and Nation-Wide Settlement With States' Attorneys General Serve As A Model For Attacking the Fast Food Industry?*, 34 Seton Hall L. Rev. 1383, 1393 (2004) [hereinafter Zefutie].

²¹ *Id.*

bringing the claim of unjust enrichment, along with the pooling of resources and efforts, seemed to shift the power away from the tobacco companies.

As a result, and after many years of negotiations, a Master Settlement Agreement was reached between the tobacco companies and forty-six states, the District of Columbia, and five United States Territories.²² The tobacco industry agreed to pay an astounding total amount of three hundred and sixty-eight billion dollars. The industry was required to pay ten billion dollars in the first year, of which seven billion dollars would go to the states and three billion dollars to the federal Department of Health and Human Services to fund a smoking cessation campaign, enforce a ban of sales to minors, and set up a compensation fund for smokers who win court cases. The industry would thereafter pay approximately eight billion dollars rising to fifteen billion dollars annually in perpetuity. Finally, the industry settled attorneys' fees at approximately eight billion dollars.

B. The Recent Fast Food Litigation

Within years of the Master Settlement Agreement, fast food litigation entered the courtroom. In August of 2002, two children, along with their parents as guardians, brought suit against McDonalds alleging that the practices of McDonalds in making and selling their products was deceptive and that this deception caused the minors -- who had regularly consumed McDonalds' products -- to injure their health by becoming obese.²³

²² A copy of the Master Settlement Agreement can be found at National Association of Attorneys General, *Tobacco Public Page*, at <http://www.naag.org/issues/tobacco/index.php?sdpid=399> (last visited April 8, 2005).

²³ *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 516 (2003).

The court dismissed the original complaint pursuant to the defendant's Rule 12(b)(6) motion, but granted leave to amend the complaint.²⁴

In the amended complaint, the plaintiffs alleged three causes of action all based on the New York Consumer Protection Act.²⁵ Count I alleged that McDonalds misled the plaintiffs, through advertising campaigns and other publicity, that its food products were nutritious, of a beneficial nutritional nature or effect, and/or were easily part of a healthy lifestyle if consumed on a daily basis. Count II alleged that McDonalds failed adequately to disclose the fact that certain of its foods were substantially less healthy, as a result of processing and ingredient additives, than represented by McDonalds in its advertising campaigns and other publicity. Count III alleged that McDonalds engaged in unfair and deceptive acts and practices by representing to the New York Attorney General and to New York consumers that it provides nutritional brochures and information at all of its stores when in fact such information was not adequately available to the plaintiffs at a significant number of McDonalds outlets.

The court held that the plaintiffs failed to meet the reliance component of the New York Consumer Protection Act. In short, the court found that the plaintiffs' vague allegations of reliance on a "long-term deceptive campaign" were insufficient to fulfill the reliance requirement for otherwise unspecified advertisements.²⁶ Moreover, the plaintiffs failed to show that the defendant's entire advertising campaign was fraudulent.²⁷

²⁴ *Id.* at 543.

²⁵ *Pelman v. McDonald's Corp.*, 2003 U.S. Dist. LEXIS 15202, *5-6 (2003).

²⁶ *Id.* at *22.

²⁷ *Id.*

The court also held that the plaintiffs failed to meet the causation requirement of the New York Consumer Protection Act. The plaintiffs specified how many times they ate at McDonalds, but they did not address other relevant factors that may or may not have led to their health problems. The court provided several examples in this regard: what else the plaintiffs ate, how much they exercised, and whether there was a family history of the alleged health conditions.²⁸ Thus, the court found that an adequate causal connection between the plaintiff's consumption of McDonalds' food and their alleged injuries could not be drawn.

Lastly, the court held that the advertisements that the plaintiffs cited were not objectively deceptive. The test utilized by the court to determine whether a practice or advertisement was deceptive or misleading was whether a reasonable consumer would have been misled by the defendant's conduct.²⁹ The court ultimately found that a reasonable consumer would not have been misled. Accordingly, the court granted the defendants motion to dismiss, but did not grant leave to amend the complaint.³⁰ The first fast food lawsuit did not even survive a preliminary motion to dismiss.

IV. The Attorneys General and Future Fast Food Lawsuits

By using both the tobacco litigation and the recent fast food litigation as models, it is evident that the participation of the attorneys general in future fast food lawsuits would be beneficial to those bringing the claims. However, significant differences between the tobacco litigation and future fast food lawsuits, as well as the overall strength of the case, may make the attorneys general unwilling to join.

²⁸ *Id.* at *32-4.

²⁹ *Id.* at *34.

³⁰ *Id.* at *42.

At the onset, it is important to note that the power of an attorney general to bring suit varies from state to state, and so an attorney general must look to state law to determine his or her ability to proceed against the fast food industry. Generally speaking, however, the attorney general may "exercise all such authority as the public interest requires" and "has wide discretion in making the determination as to the public interest."³¹ Even though this broad grant of authority is controversial among state officials and is a source of debate among scholars,³² it would most certainly permit the attorneys general to proceed with fast food litigation.

A. Including Attorneys General In Future Litigation

The attorneys general could put forth a similar theory against the fast food industry as was utilized successfully against the tobacco industry. In short, the attorneys general could allege that the fast food industry's business practices led to health problems for the residents of the state, which, in turn, had direct and indirect negative socio-economic effects for the state. Direct effects would include the health care costs for preventive, diagnostic, and treatment services related to obesity. Indirect effects would include the value of income lost from decreased productivity, restricted activity, and absenteeism, as well as the value of future income lost by premature death. As previously mentioned, the economic cost of these effects in the United States in 2000 was approximately one hundred and seventeen billion dollars.³³

Despite the attractiveness of potentially recouping hundreds of millions of dollars for the state, the theory that was utilized successfully in the tobacco litigation and the

³¹ *Florida ex rel Shevin v. Exxon Corp.*, 526 F.2d 266, 268-9 (5th Cir. 1976).

³² See *Feeney v. Commonwealth*, 373 Mass. 359 (1977) (finding that the attorney general possesses ultimate authority over litigation); *People ex rel Deukmejian v. Brown*, 29 Cal. 3d 150 (1981) (finding governor possesses ultimate authority over litigation).

³³ See Section II, Subsection B *infra*.

approach articulated here have substantial differences. These differences will be discussed in greater detail in the following section of this paper.

Other theories that the attorneys general could put forth against the fast food industry include claims for deceptive trade practices in manipulating food content as well as aggressive marketing techniques targeting children. Some allege that fast food restaurants deliberately lower the frying temperature at which they cook french fries so that the fries absorb more fat and consumers crave them more -- this technique may be compared to those used by the tobacco companies in manipulating the amount of nicotine in cigarettes to increase public consumption.³⁴ If the attorneys general could compel documents through discovery of the manipulation of the fat content of french fries, a claim of negligent marketing, deceptive trade practices, fraud, or conspiracy to misrepresent material facts could possibly be made. However, this seems like an unrealistic avenue for the attorneys general. Perhaps a more successful approach would be to focus on the fast food industry's practice of marketing their products to children -- this technique was highly successful in galvanizing public opinion against the tobacco industry. As has been refilled by the same attorneys who brought the first fast food lawsuit, a claim could be made that McDonalds engaged in deceptive advertising because it failed to adequately disclose additives and processing methods that make its food less healthful.³⁵

The involvement of the attorneys general would be beneficial to future fast food lawsuits for the same reasons that their involvement was beneficial to the tobacco litigation. As previously stated, the role of the attorneys general in the tobacco litigation

³⁴ Goldman, 13 Temp. Pol. & Civ. Rts. L. Rev. at 142.

³⁵ Time.com, *Fat Foods: Back In Court*, at <http://www.time.com/time/insidebiz/article/0,9171,1101030811-472858,00.html> (last visited May 9, 2005).

was effective for two reasons. First, in defending against assumption of risk. Under a theory of assumption of risk, “conduct implies consent” whenever the plaintiff “had specific knowledge of the risk posed by the defendant’s negligence, appreciates its nature, and proceeded voluntarily to encounter it nevertheless.”³⁶ In both the tobacco and fast food litigation, the plaintiffs voluntarily used the products. When the attorneys general joined the tobacco litigation, however, the state was seen as an innocent party, which significantly weakened the assumption of risk defense put forth by the industry. In the case of future fast food lawsuits, since the state did not choose to eat fast food but only seeks reimbursement for medical costs associated with the treatment of residents suffering from health problems as a result of eating fast food, the assumption of risk defense is similarly weakened.

Second, the involvement of the attorneys general in the tobacco litigation was effective in collecting resources and efforts. The participation of the attorneys general demonstrated that, when compared to the states, the tobacco industry was no longer an insurmountable opponent. The states possessed resources that could match those of the tobacco companies. The pooling of resources and efforts against the powerful fast food industry would be similarly advantageous for the plaintiffs. If nothing else, the addition of the attorneys general would change the bargaining power between the parties, demonstrating to the industry that they must deal with all the resources the state has to offer.³⁷

In addition, as was seen in the recent fast food litigation, causation was a hurdle that the plaintiffs could not overcome. The participation of the attorneys general may be

³⁶ Dan B. Dobbs, *The Law of Torts* § 211 (2000).

³⁷ Interview with Richard Daynard, Associate Dean for Academic Affairs and Professor of Law, Northeastern University School of Law (April 28, 2005) [hereinafter Daynard interview].

effective in lessening this defect. As has been explained, "lawsuits brought by states rather than individuals may also allow for looser causation rulings, particularly regarding the use of statistical evidence."³⁸ States have the ability to demonstrate to the court, through statistical evidence, the economic costs incurred as a result of obesity as well as the link between the fast food and the adverse health effects in individuals. As such, the attorneys general may be more effective in demonstrating to the court that the fast food caused the alleged health injuries.

Finally, and perhaps most importantly, the addition of the attorneys general would add legitimacy to future fast food lawsuits.³⁹ As will be discussed in greater detail in the following section, public sentiment surrounding fast food litigation has not been supportive. However, as Professor Richard Daynard explains, having the state's highest law enforcement officer join the effort would "lend legitimacy to the lawsuits" and "demonstrate to the public that indeed there is an obesity epidemic, and that it is a law enforcement problem that must be addressed."⁴⁰

B. Excluding Attorneys General From Future Litigation

Despite the aforementioned advantages of having the attorneys general participate in future fast food lawsuits, there are significant dissimilarities between the tobacco litigation and the recent fast food litigation that may make the attorneys general believe they cannot prevail on the merits. Thus, rather than back a lame horse, the attorneys general may simply decide not to get involved.

³⁸ Zefutie, 34 Seton Hall L. Rev. at 1412.

³⁹ Daynard interview.

⁴⁰ *Id.*

Perhaps the key reason that the tobacco companies decided to settle was the fact that the attorneys general could establish fraud.⁴¹ The attorneys general could prove that nicotine was addictive, that the tobacco companies knew that nicotine was addictive, and that the tobacco companies attempted to cover-up the fact of addiction from the public. In the case against the fast food industry, however, there is no scientific evidence that fast food is addictive, that the fast food industry knows that fast food is addictive, or that the fast food industry has attempted to cover-up any information in this regard. And as the court in the tobacco litigation noted, establishing addiction for these sorts of class actions is essential for claims for negligence, product liability or intentional exposure to hazardous materials.⁴²

Another difficulty with fast food litigation is causation -- the link between eating fast foods and obesity and the health risks entailed. Although, as previously noted, the addition of the attorneys general may soften the casual requirement, there is still doubt as to whether this element can be satisfied. A casual relation is not always the product of a single event followed by the consequence, but can often be based on the combination of several events.⁴³ Hence, there can be several independent causes for a single event. For example, there are many factors associated with obesity that result in health problems: fast food, a diet of unhealthy foods other than fast food, heredity, and/or a lack of adequate exercise. It may be difficult to show how much of an individual's obesity can be attributed to eating fast food and how much may be from other sources. Moreover, unlike tobacco users who tend to show loyalty to one particular brand, those who eat fast food tend to eat unhealthy products from a variety of different sources. While it may be

⁴¹ Zefutie, 34 Seton Hall L. Rev. at 1394-5.

⁴² *Barnes v. American Tobacco Co.*, 161 F.3d 127, 143-4 (3rd Cir. 1998).

⁴³ See generally Restatement (Second) of Torts § 432 (1965).

possible to prove that smoking caused a particular person's lung cancer, and even to identify the company that manufactured the tobacco, it may be difficult to determine how much of a role obesity played in a heart attack and nearly impossible to specify which of the many fast food companies may be responsible.⁴⁴

In addition, a factor that may lead the attorneys general away from future fast food lawsuits is the public sentiment surrounding the issue. A majority of Americans feel that blaming the fast food industry for becoming obese is an outrageous notion. In actuality, they see such claims as frivolous and that the issue is one of personal responsibility -- one chooses whether to eat fast food; therefore, one should suffer or reap the benefits of such decisions.⁴⁵ As the attorneys general are public officials elected in forty-three states,⁴⁶ they must be cognizant of this public sentiment and, unfortunately, make certain decisions based upon public accountability. However, an attorney general should also consider the notion that people cannot have personal responsibility if they are uniformed. As stated by Judge Sweet in the recent obesity litigation, "as long as a consumer exercises free choice with appropriate knowledge, liability for negligence will not attach to a manufacturer...When that free choice becomes but a chimera" manufacturers should be held accountable for consumer's decisions.⁴⁷

C. Barring Attorneys General From Future Litigation

Despite the attitude that an attorney general may have toward fast food litigation, attorneys general may be barred from bringing such suits because of "frivolous lawsuit

⁴⁴ John F. Banzhaf III, *Using Legal Action to Help Fight Obesity*, at <http://banzhaf.net/obesitylinks.html> (last visited April 29, 2005) [hereinafter Banzhaf].

⁴⁵ Shelly Branch, *Obese America: Is Food the Next Tobacco*, Wall St. J., June 13, 2002, at B1 (detailing a 2002 survey of 1,000 consumers finding fifty-seven percent blamed individuals rather than food producers and others for obesity).

⁴⁶ Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 Colum. L. Rev. 1998, 2002 (2001).

⁴⁷ *Pelman*, 237 F. Supp. 2d at 533.

legislation” being enacted at the state and federal level. On March 10, 2004, the United States House of Representatives passed the Personal Responsibility in Food Consumption Act, which, if signed into law, would block frivolous lawsuits against food manufacturers, sellers, and distributors.⁴⁸ The bill has been nicknamed the "cheeseburger bill" because of its emphasis on protecting fast food companies from obesity-related lawsuits.⁴⁹

Many state legislatures have also weighed in on the obesity issue. There is legislation around the country that limits the civil liability of any manufacturer, distributor, seller, or retailer of food in cases in which liability is based on an individual's weight gain, obesity, or obesity-related health condition that results from that individual's long-term consumption of a food or beverage.⁵⁰ Sixteen state legislatures have passed such frivolous lawsuit statutes (see Appendix A for a full accounting) and eighteen state legislatures have such frivolous lawsuit statutes pending (see Appendix B for a full accounting). These laws may bar the attorneys general from bringing fast food lawsuits.

V. Conclusion

The question of whether an attorney general should or should not join future fast food litigation is of course dependant upon the individual attorney general. Many attorneys general will simply look to the merits of the lawsuit in making this determination, asking whether he or she can win the case and what damages may be available. However, as Professor James Tierney believes, attorneys general should not only be concerned with whether the case is “a good case,” but should also consider the

⁴⁸ CBS News, *House Passes ‘Cheeseburger Bill,’* at <http://www.cbsnews.com/stories/2004/03/10/health/main605157.shtml> (last visited April 7, 2005).

⁴⁹ *Id.*

⁵⁰ National Restaurant Association, *State Frivolous-Lawsuit Legislation*, at http://www.restaurant.org/government/state/nutrition/bills_lawsuits.cfm#il (last visited April 6, 2005).

public policy implications of bringing the case on behalf of the public at large.⁵¹ If winning the lawsuit is not the primary goal of the attorneys general -- but rather changing the behavior of the fast food industry as a whole for the betterment of the consuming public -- there is no doubt that the attorneys general should take on the fast food industry.

If changes in the behavior of the fast food industry are indeed some of the goals of the attorneys general, the mere filing of their lawsuits may be a victory.⁵² For instance, in September 2002, in the wake of the first fast food lawsuit, McDonalds announced that it would start using a new cooking oil to decrease the fat in its french fries.⁵³ This change cut in half the amount of trans fatty acids and increased the amount of more healthy polyunsaturated fats in an order of french fries.⁵⁴ Although McDonalds would undoubtedly claim that the litigation had nothing to do with its decision, the timing of the change leads one to believe otherwise. There have also been many other “healthy” changes in the fast food industry since litigation was commenced, and such changes may increase if the powerful attorneys general enter the fray. In addition to these changes, the significant media attention that would certainly follow the attorneys general bringing suit against the fast food industry would raise awareness about the adverse effects of consuming fast food. This awareness could lead to better consumer choices, which, in turn, may help reduce the incidents of overweight and obesity.

In sum, even if the attorneys general ultimately loose the case against the fast food companies in court, they may still succeeded in securing a victory for the public. A

⁵¹ Lecture by James Tierney, Professor of Law, Northeastern University School of Law (April 7, 2005).

⁵² USA Today, *Fats-Food Market Hustles To Get In Shape*, at http://www.usatoday.com/money/industries/food/2003-09-08-nutrition_x.htm (Sept. 8, 2003).

⁵³ USA Today, *McDonald's Gambles, Cuts "Trans Fat" In French Fries*, at http://www.usatoday.com/money/industries/food/2002-09-02-mcdonalds-fries_x.htm (Sept. 3, 2002).

⁵⁴ *Id.*

settlement or victory in court offering monetary or injunctive relief would only add to this victory. As Professor John Banzhaf states: “There is another important difference between tobacco and food. The tobacco industry can't make a safe cigarette, but fast food companies can make food less unhealthy.”⁵⁵

⁵⁵ Banzhaf, *Using Legal Action to Help Fight Obesity*, at <http://banzhaf.net/obesitylinks.html> (last visited April 29, 2005).

APPENDIX A:

Frivolous lawsuit statutes passed by state governments that may bar attorneys general from bringing fast food litigation⁵⁶

Arizona

On April 13, 2004, HB 2220 was signed into law.

Colorado

On May 17, 2004, HB 1150, which is also referred to as the Commonsense Consumption Act, was signed into law.

Florida

On May 21, 2004, HB 333 was signed into law.

Georgia

On May 14, 2004, HB 1519, which is also referred to as the Commonsense Consumption Act, was signed into law.

Idaho

On April 2, 2004, HB 590, which is also referred to as the Commonsense Consumption Act, was signed into law.

Illinois

On July 30, 2004, HB 3981, which is also referred to as the Commonsense Consumption Act, was signed into law.

Kentucky

On March 8, 2005, SB 103 was signed into law.

Louisiana

On June 2, 2003, HB 518 was signed into law.

Michigan

On October 7, 2004, HB 5809 was signed into law.

⁵⁶ National Restaurant Association, *State Frivolous-Lawsuit Legislation*, at http://www.restaurant.org/government/state/nutrition/bills_lawsuits.cfm#il (last visited April 6, 2005).

Missouri

On June 25, 2004, HB 1115 was signed into law.

North Dakota

On March 31, 2005, HB 1241 was signed into law.

Ohio

On January 6, 2005, SB 80 was signed into law.

Tennessee

On May 4, 2004, SB 2379 was signed into law.

Utah

On March 19, 2004, SB 214 was signed into law.

Washington

On March 26, 2004, SB 6601 was signed into law.

Wyoming

On February 24, 2005, HB 170 was signed into law.

APPENDIX B:

Frivolous lawsuit statutes pending in state governments that, if enacted, may bar attorneys general from bringing fast food litigation⁵⁷

Alabama

On March 15, 2005, Representative Neal Morrison introduced HB 636, which has since been referred to the House Judiciary Committee.

California

On February 22, 2005, Senator Sam Aanestad introduced SB 937, which has since been referred to the Rules Committee for assignment.

On January 20, 2005, Assemblyman Guy Houston introduced AB 173. A hearing on AB 173 is scheduled before the Assembly Judiciary Committee on April 5, 2005.

Connecticut

On January 24, 2005, House Minority Leader Representative Robert Ward introduced HB 6156, which has since been referred to the Joint Committee on Judiciary.

Georgia

On January 28, 2005, Representative Bob Smith reintroduced HB 196, which would update the currently enacted Commonsense Consumption Act. HB 196 has passed both the House and Senate, and is currently awaiting consideration by the Governor.

Kansas

On January 21, 2005, the Senate Judiciary Committee introduced SB 75. The House Federal and State Affairs Committee thereafter introduced a companion bill to SB 75, entitled HB 2233. SB 75 has passed the House and is currently under review in the Senate.

Maine

On February 8, 2005, Senator Karl Turner introduced LD 645, which has since been referred to the Judiciary Committee.

⁵⁷ National Restaurant Association, *State Frivolous-Lawsuit Legislation*, at http://www.restaurant.org/government/state/nutrition/bills_lawsuits.cfm#il (last visited April 6, 2005).

Maryland

On January 12, 2005, Delegate John Arnick introduced HB 15. Senator Alexander Mooney thereafter introduced a companion bill to HB 15, entitled SB 315. The House Judiciary Committee released an unfavorable report on HB 15 on February 14, 2005.

Minnesota

On January 1, 2005, Representative Dean Urdahl introduced HB 118. Senator David Hann thereafter introduced a companion bill to HB 118, entitled SB 631. The House Committee on Civil Law and Elections did not pass HB 118 on March 7, 2005.

Nebraska

On January 17, 2004, Senator Combs introduced NE L 455, which has since been referred to the Judiciary Committee.

Nevada

On March 24, 2005, Senator Nolan introduced SB 313. The Senate Judiciary Committee took no action on April 5, 2005.

New Jersey

On November 8, 2004, the Senate Judiciary Committee approved an amended version of SB 1462. SB 1462 is currently before the Senate for consideration.

New York

On February 16, 2005, Assemblyman Vito Lopez introduced AB 5076 and Senator Owen Johnson introduced SB 2482.

Oklahoma

On February 7, 2005, Senator E. Scott Pruitt introduced SB 612, which has since been referred to the Senate Judiciary Committee.

On January 20, 2005, Representative Dale DeWitt introduced HB 1554, which has since passed the House and is currently under review in the Senate.

Pennsylvania

On February 17, 2005, Representative Douglas Reichley introduced HB 670, which has since been referred to the House Committee on State Government.

Rhode Island

On March 1, 2005, Representative Thomas Winfield introduced HB 5902, which has since been referred to the House Health, Education and Welfare Committee.

On February 22, 2005, Representative Kenneth Carter introduced HB 5630, which has since been referred to the House Judiciary Committee.

South Carolina

On January 11, 2005, Representative Herb Kirsh introduced HB 3118, which has since been referred to the House Judiciary Committee.

Texas

On January 31, 2005, Representative Corbin Van Arsdale introduced HB 107, which has since been referred to the Assembly Judiciary Committee.

Virginia

On February 16, 2004, Delegate William Janis introduced HB 1617, which has since passed the House and is currently under review in the Senate.