

SUITS AGAINST “BIG FAT” TREAD ON BASIC TORT LIABILITY PRINCIPLES

by

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Way back in 1997, shortly after three tobacco companies had agreed to settle lawsuits with the various states’ Attorneys General, one Mark F. Bernstein wrote a parody of the “tort” settlement in the August 28 issue of the *Wall St. Journal*. Bernstein’s parody, entitled “A Big Fat Target,” excoriated “junk food” sellers for raising our cholesterol, makers of kids’ movies for encouraging spectator lifestyles, and “Wisconsin Cheese Lords” for clogging our arteries. Mr. Bernstein recognized that his critique of these producers was “a bit preposterous,” given our free will to consume more or less of each of these industries’ products. But as he concluded, “It is too hot to exercise. Dieting demands willpower, and why bother if you’re just a victim? Come on, America. Get off that couch and sue.”

To paraphrase Art Buchwald, parody is becoming more and more difficult to write — reality itself has become parody enough. Three teenagers in New York City filed a lawsuit against McDonald’s Corp., alleging that that corporation’s food “caused” them to gain as much as 200 pounds in weight and to develop heart disease and diabetes. One teenager, who stands 5 foot 9 inches tall, tips the scales at 270 pounds; another, more diminutive at 5 foot 3 inches, weighs 200 pounds.

The parents of these unhappy kids sent their progeny to restaurants “nearly every day of the week,” all the while doubtless providing them with wholesome, nutritious food on those rare occasions when the little tykes decided to dine at home. Their lawyer, Samuel Hirsch, soberly contends that “toy promotions” and “Happy Meals” are a “lethal combination,” literally forcing these impressionable young people to over-consume at McDonalds.

Youth protection doesn’t stop Mr. Hirsch from also representing one Caesar Barber, 56, who is suing the potpourri of McDonald’s, Burger King Corp., KFC Corp. and Wendy’s International for “making him overweight.” Mr. Barber, who stands 5-10 and weighs in at 272 pounds, has had two heart attacks but has remained “forced” to consume fast food three or four times every week. Presumably more resistant to small toys than are the teenagers, Mr. Barber has nonetheless allegedly been

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hypnotized by restaurants' advertising. For instance, he believed that advertising that (accurately) asserted that burgers were 100 percent beef "meant it was good for you. I thought the food was OK. The fast food industry has wrecked my life. I was conned. I was fooled. I was tricked." *Obesity Suit: Litigation Lite Weighs Heavily on Food Chains*, S.D. UNION-TRIB., Aug. 8, 2002, at B12.

Tort suits against Big Fat (and, presumably soon, against Big Cheese and Big Butter) are but the latest round in the trial bar's "blame the inanimate object" game. These suits follow in the footsteps of plaintiffs' lawyers' litigation campaigns against "Big Tobacco," gun makers, and the lead paint industry, all of which produce products which can be used by actual people in ways that can be harmful.

Some may think that these suits are truly a parody. But this is serious business. This is the business of transforming tort law from a tool of private ordering (rectifying individual wrongs inflicted by one person on an unwilling victim) to a technique of public policy on the same level as taxation or regulation. Professor John Bahnzaf of George Washington University's School of Law, one of the gurus of this transformation, has admitted as much on many occasions. He would prefer to tax to death products he does not like, but those pesky elected legislators just refuse to enact the taxes he and other gurus *know* the people need to protect them from temptation. So they use litigation, before unelected and non-responsible judges, to obtain what we can't get using the proper constitutional techniques. So what if the basic principles of tort law go down the drain with the bathwater?

True, the gun and lead paint suits have been spectacularly unsuccessful, as generally have been tobacco suits (other than the state attorneys' general's settlement with the tobacco companies). The lawsuits against Big Fat will fail just as spectacularly, in the end. But they will cost their defendants tens of millions in lawyers' and court fees and will result in payoffs to Mr. Hirsch and to the rest of the plaintiffs' bar. That's what these suits are about. These suits simply are not about tort law.

As predicted, the courts seem to agree that the law in fact does matter. On January 21, 2003, Judge Sweet of the Southern District of New York dismissed the three teenagers' suit on technical grounds, stating that on its face the complaint did not allege that there were hidden secret ingredients or dietary side-effects that caught the carnivorous plaintiffs by surprise. Undaunted, attorney Hirsch has re-filed the complaint with appropriate allusions to the hidden effects of wolfing down fatty burgers.

None of the criticisms of the suits against Big Fat set out below, therefore, would impress the proponents of Big Fat lawsuits because these criticisms establish that the suits are without legal foundation. On the assumption that there are nonetheless many who do care about the Rule of Law, please consider the following.

First, there is absolutely no proof that the food sold by the defendants in these suits is "defective and unreasonably dangerous" (the legal standard for liability). True, if an individual consumed nothing other than the defendants' food, that individual would be consuming an unbalanced, and relatively unhealthy diet. But none of the defendants advise or recommend that anyone consume their food exclusively. Indeed, even the preposterous post-pubescent plaintiffs in Mr. Hirsch's "class action" themselves presumably consumed about fifteen meals per week at home. One wonders what they ate there. Despite what the plaintiffs' bar would have us believe, there is no such thing as bad food (unless, of course, the food is adulterated or poisoned). There are merely poor eating habits. There is over-eating and there is under-exercising.

Second, *even if the defendants' food was legally "defective"* (which it is not — as argued above), there is absolutely no proof that it is the *legal cause* of any of the plaintiffs' maladies. Until recently,

we were wont to actually, amazingly, assume that people had free will to eat more or less, and to exercise more or less. We assumed a citizen's own choices were the legal cause of both his caloric intake and of his sweaty out-take. But let us relax that assumption in this post-modern century. Even if there is no free will, there are so many more culprits than Big Fat. Why isn't Mom the "cause" of Junior's obesity? (she could have declined to give Junior the considerable funds needed to go to the fast food joint; she could have fed Junior lean, salad foods at home; she could have signed Junior up for the soccer team; etc.) Mom, unlike Wendy's, actually has what the law calls a "special relationship" with Junior — she has affirmative duties toward the child. What, you respond? Mom is judgment-proof? Well then, perhaps the public schools "cause" Junior's obesity. Over 79% of high schoolers get no physical education during any given week. While we are at it, why not sue zoning boards, and homebuilders, for "causing" Junior's obesity? They segregate quarter-acre single-family residences, "making" walking or biking to shops and community centers well nigh impossible. They "make" us take our cars. They "make" us into mobile couch potatoes. What about car manufacturers, come to think of it? They "make" us buy these motorized couches, what with their ubiquitous TV ads and their zero-percent financing. What about oil companies, who price gasoline so low that we are "forced" to take the car instead of walking a mile to the bus stop? As we can readily see, if we relax principles of tort liability and focus exclusively on causation, we have lots of candidates once free will is dismissed. If we're a fat nation, there are loads of factors influencing our fatness.

Third, *when plaintiffs do try to make legal arguments against Big Fat, they rely on scandalous "junk science."* For instance, the Center for Science in the Public Interest (CSPI) released a report last July stating, "popular American brands of snack chips and French fries contain disturbingly high levels of acrylamide," a substance that the U.S. Environmental Protection Agency has labeled a "probable carcinogen." McDonald's fries and Pringles Chips were big offenders. The soon-to-be ubiquitous lawsuits against these and other food suppliers will most certainly avail themselves of the CSPI report.

Alas, what CSPI failed to indicate is that it is far from clear that acrylamide is a cancer-causing substance. The rats used in the EPA experiments had to receive such high doses of acrylamide before getting cancer that a human would have to digest *486 large servings of McDonald's fries every day of his life*, before being equally exposed. Even if one could possibly consume that many fries, there is *no* evidence that these rat studies are replicable in humans. That is why the EPA itself, hardly a defender of corporate America, says the evidence is "inadequate" that acrylamide is a human carcinogen. This didn't stop those who hate fast foods from asking the World Health Organization to "urgently" convene a meeting to discuss acrylamide. During its three-day "urgent" meeting (during which in other parts of the world, more than 16,000 children died from food and water contamination, under the WHO's own estimates), WHO called for "further study" of this "major concern." Yes, we need much more study before the acrylamide issue becomes a "major concern."

Along the same lines, a report released in 2002 by the National Academy of Science's Institute of Medicine concluded that no amount of "trans fats" (vegetable oils that have been altered to be firm at room temperature) is safe to eat. This report, if true, also means that there are no safe vegetable shortenings or fried foods of any kind, since all of them are cooked in trans fats. Similarly, no amount of margarine is safe. Attorney Hirsch has used this report to inculpate McDonald's, *et al.* But there is *no* safe vegetable shortening or fried foods, since all of them are cooked in trans fats. Harvard University researcher Walter Willett, the co-author of every single study that claims to link trans fat consumption with heart disease risk, was forced to essentially acknowledge in a *New York Times Magazine* interview with science writer Gary Taubes that the hard data about heart disease simply does not support his conclusion. Every Willett study has reported either no or a weak statistical association between trans-fat consumption and incidence of heart disease. In fact, as he stated, "the exclusive focus

on adverse effects of fat may have contributed to the obesity epidemic.” See Gary Taubes, *What If It’s All Been A Big Fat Lie?*, N.Y. TIMES MAG., July 7, 2002. As Mr. Taubes pointed out at length in his article, the notion that dietary fat is intrinsically bad was a political judgment, never a scientific one. Today, high-fat diets from the “Paleo Diet” to the “Atkins diet” to “The Zone” are based on the notion that it is not fat that makes us fat, but carbohydrates. Like all diets, Paleo and Atkins work for some folks but not for all, and most who use them slim down eventually gain back most of the weight, because of basic lifestyle choices determining caloric intake and exercise.

Fourth and finally, the lawsuits against Big Animal Fat are in reality lawsuits against parental responsibility. McDonald’s may “market to children,” but of course parents have legal custody of children. Children may no more spend money at McDonald’s than they can at Toys-R-Us or a Six Flags amusement park, without their parents’ tacit or explicit consent. Suing the creator of legal advertising is impliedly conceding that parents have abdicated responsibility for their own children. “It’s true,” concedes the CSPI, “that parents pay for the food, parents agree to go into McDonald’s, parents could turn off the television so kids don’t see the advertisements, parents could scrutinize the nutritional information before they purchase the food. But that’s completely unrealistic; it’s a glib defense.” Bonnie Brewer Cavanagh, *Parents Sue McD, Claim Its Menu Marketing Fuels Juvenile Obeesity*. NATION’S RESTAURANT NEWS 1 (Vol. 36 Issue 38, Sept. 23, 2002). Alas, for many of us, that’s not a glib defense at all — that’s a defense based on basic notions of tort law. If there is no fraud, no misrepresentation, and no sale of a defective and dangerous product, there can be no liability.

Those who back the lawsuits against Big Fat hope, as noted above, to leverage them to obtain tax and police action against fast foods. These folks deplore the “epidemic” of obesity, as if it were the equivalent of the smallpox or polio epidemics, which resulted in mandatory vaccination programs. But smallpox and polio, unlike obesity, spread involuntarily. The obesity “epidemic” is not of this ilk. It is a complex result of shifts in living patterns and of cultural phenomena that lead to free choices to over-consume food and under-consume exercise. Those choices, if socially inappropriate, are perhaps appropriately criticized. Existing legislation may inadvertently contribute to the problem, and public legislation (from reforming zoning bylaws to relaxing the public school monopoly, to modifying the food stamp program to many other initiatives) may have a useful role to play in solving the problem. But reducing obesity is neither within the scope of, nor respectful of, the nature of tort law. Suing Big Fat is a big fat mistake.