Legal Backgrounder

WLF Washington Legal Foundation
Advocate for freedom and justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
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Vol. 20 No. 21 May 6, 2005

MY "BIG FAT" UPDATE:
COURTS DISSERVE RULE OF LAW IN FOOD LAWSUITS DECISIONS

by

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At the 2004 Detroit Auto Show, an auto manufacturer introduced a new pickup-truck as a concept vehicle. The truck sports a side-mounted spare, a small "dog door" to allow Rover to ascend into the rear of the cab, and an innovative cargo box.

Suppose that it is eventually produced, and that an owner allows his rambunctious Labrador Retriever puppy to enter the rear cab through the newfangled "dog door." Suppose said retriever, uncrated and unleashed, proceeds to jump onto his master's lap while the vehicle is being driven. Suppose a dreadful accident ensues. Should the auto company be liable to the owner (or to anyone hit by him) for damages suffered, given that the special "dog door" "encouraged" him to take his Lab puppy with him?

To ask this question is to answer it, at least if one believes in freedom and the Rule of Law. The availability of the "dog door" is not a license to let Labs loose, nor is it bonded corporate coverage for idiotic individual decisions on canine accompaniment. Our hypothetical trial judge must dismiss our hypothetical case against the auto maker. To rule otherwise would mean that "dog doors," along with countless other innovations and choices currently and prospectively available to us, will henceforth fail the lawyer smell test. Perhaps some legal eagle in the company's head office is already worried about this, alas — and maybe the wonderful little door won't survive the move from concept to production for just that reason.

Recent developments in the "Big Fat" controversy give that lawyer reason to reach for his bottle of Tums. This author last visited this issue in a WLF LEGAL BACKGROUNDER, *Suits Against 'Big Fat' Tread on Tort Liability Principles*, Mar. 14, 2003, available at http://www.wlf.org/upload/03-14-03krauss.pdf, discussing two New York City teenagers who had failed in their lawsuit against McDonald's Corp. The suit alleged that that corporation's food "caused" them to gain over 100 pounds and to develop numerous diseases. One teenager, Ashley Pelman, stood 5 foot 9 inches tall and tipped the scales at 270 pounds; the other, Jazlen Bradley, stood 5 foot 3 and weighed 200. The parents of these kids apparently allowed their progeny to

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frequent McDonald's "nearly every day of the week," all the while doubtless providing them with wholesome, nutritious food and frequent exercise on those occasions when they weren't at McDonald's. The plaintiffs' lawyer, Samuel Hirsch, contended that "toy promotions" and "Happy Meals" were a "lethal combination," literally compelling these impressionable young people to over-consume at McDonalds. As a result, the suit claimed, the boys developed "obesity, diabetes, coronary heart disease, high blood pressure, elevated cholesterol intake, related cancers, and/or other detrimental and adverse health effects . . . " The diversity suit was filed in federal court, where District Judge Robert W. Sweet summarily dismissed the case on the sensible grounds that plaintiffs had failed to allege in detail the ways in which the *defendant's food* (as opposed to other factors, such as heredity and lack of exercise) had in fact caused the alleged maladies.

The summary judgment is crucial here: if defendants can avoid the seemingly interminable and hugely costly American legal process known as "discovery," they will have little incentive to agree to "nuisance settlements." Such incentive was reborn, alas, when the U.S. Court of Appeals for the Second Circuit granted Mr. Hirsch's appeal of Judge Sweet's ruling. *Pelman v McDonald's*, 396 F.3d 508 (2nd Cir. 2005). A three-judge panel held that questions such as: "What else did the plaintiffs eat?"; "How much did they exercise?"; and "Is there a family history of the diseases which are alleged to have been caused by McDonald's products?," needn't have been addressed by plaintiffs in their complaint, because they are precisely what "discovery" was designed for. Million-dollar attorney billing meters, start running.

That McDonald's penchant will be to "make these suits go away" now that they have lost on summary judgment is highlighted by the fact that it recently settled a dubious case involving "trans fats." Understanding the trans fat suit requires recalling that McDonald's had been sued by vegetarians (and those concerned about "saturated fats") for failing to inform the public that their French Fries contained beef tallow. Following that suit, McDonald's switched from beef tallow to hydrogenated vegetable oil (low in saturated fats) as the cooking medium for fries. Hydrogenated oils are trans fats — vegetable oils altered to be firm at room temperature. Indeed, almost every processed food we eat contains trans fats. Special interest groups have been created to denounce trans fats as carcinogenic when ingested in large quantities. Those activists' "science" has failed to persuade elected legislators to ban or limit trans fats, and so recourse has been left to "regulation by litigation." Bowing to pressure, in September 2002, McDonald's announced that it would lower trans fat in its cooking oils and said the switch would be completed within five months.

In February 2003, however, McDonald's announced a further delay — intensive work had not yet come up with a formula using non-hydrogenated vegetable oil which actually tasted good, except in McDonald's chicken products, where the transformation away from trans fats did promptly occur. Unimpressed by McDonald's progress, *BanTransfats.com* (an "advocacy group") sued McDonald's in California state court in 2003, on the grounds that the company did not effectively disclose to the public that its switch away from trans fats was being delayed. McDonald's recently made that suit go away. An agreement announced on Feb. 10, 2005 provides that McDonald's will give $7 million to the American Heart Association to "educate the public" about trans fats. McDonald's also promised to spend $1.5 million "publicizing" that it did not successfully follow through on its 2002 pledge.

ISBN 1056 3059

A report released in 2002 by the National Academy of Science's Institute of Medicine did indeed conclude that no amount of "trans fat" is safe to eat. This report, if true, means that there are no safe vegetable shortenings or fried foods of any kind, since all are cooked in trans fats. Similarly, no amount of margarine is safe. Attorney Hirsch used the NAS report to inculpate McDonald's in his original "Big Fat" suit on behalf of Messrs. Pelman and Bradley. But Harvard University researcher Walter Willet, 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 in fact reported either no or a weak statistical association between trans-fat consumption and incidence of heart disease. In fact, as Willett conceded, "the exclusive focus on adverse effects of fat may have contributed to the obesity epidemic" by having people overly increase carbohydrate consumption. *See* Gary Taubes, *What If It's All Been A Big Fat Lie?*, N.Y. TIMES MAG., July 7, 2002. As 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. "For a large percentage of the population, perhaps 30 to 40 percent, low-fat diets are counterproductive," says Eleftheria Maratos-Flier, director of obesity research at Harvard's prestigious Joslin Diabetes Center. "They have the paradoxical effect of making people gain weight." Indeed, as Taubes pointed out, the low-fat dogma itself is only about 25 years old. Until the late 1970's, the accepted wisdom was that fat and protein protected against overeating by making you feel "full," and that carbohydrates made you fat. For instance, in *Physiologie du Goût*, an 1825 book considered among the most famous books ever written about food, French gastronome (and lawyer) Anthelme Brillat-Savarin wrote that he could easily identify the causes of obesity after 30 years of listening to one "stout party" after another proclaiming the joys of bread, rice and (from a "particularly stout party") potatoes. Brillat-Savarin described the roots of obesity as a natural predisposition combined with the "floury and feculent substances which man makes the prime ingredients of his daily nourishment." He added that the effects of this fecula — i.e., "potatoes, grain or any kind of flour" — were seen sooner when sugar was added to the diet.[1]

Don't worry, though, all this science is being taken care of by the tort system: Atkins is now being sued, too. Last month witnessed a refusal, by a Florida trial judge, to dismiss a lawsuit against Atkins Nutritionals. *Gorran v Atkins Nutritionals*, filed Jan. 5, 2005, available at http://www.pcrm.org/news/downloads/health04052_complaint.pdf. The lawsuit, backed and perhaps instigated by the Physicians' Committee for Responsible Medicine (PCRM), claimed that following the Atkins diet "caused" Gorran, a wealthy manufacturer of solar panels for swimming pools, to see his own cholesterol shoot from 146 to a "dangerous" 230. According to Gorran, an artery scan, performed just before he commenced the Atkins diet, showed his arteries to be whistle-clean, but after two-and-a-half years on the Atkins diet, he developed severe angina, with further scans revealing a blocked coronary artery requiring angioplasty and the installation of a stent.

[1]Sugar, or more accurately the removal of it, underlies another absurd recent lawsuit filed in California against cereal producers Kraft Foods, General Mills, and Kellogg Co. The complaint, which seeks class action status, alleges that the defendants "falsely represented" that reduced-sugar versions of cereals such as Trix and Cocoa Puffs "offer a nutritional advantage," and that they engaged in "fraudulent and deceptive" acts. *See* Sarah Ellison, *Suit Challenges 'Low Sugar' Cereals*, WALL ST. J., Mar. 28, 2005, at B6. A cursory examination of the cereal boxes reveal that no such claims were made, and a review of the Food and Drug Administration-required food label provides concerned consumers with sufficient information to make a judgment on whether the food meets their nutrition expectations.

  ISBN 1056 3059

Amazingly, Gorran is seeking less than $15,000 in damages, for all this, thereby avoiding removal to federal court. It is certainly fair to ask, in the context of this suit, why did a man who was in apparently good health decide to undergo a distinctly non-routine scan of his coronary arteries just before allegedly going on the Atkins diet? And how exactly do we know Mr. Gorran was even following the Atkins diet?

Many studies associate proper following of the "Atkins diet" with a *lowering* of bad cholesterol and weight. Also, unlike hazardous substances, *book writing* and medical opinion (even opinion as strange as, say, PCRM's) has always had constitutional protection. But the Florida trial judge said the jury should get this case against the Atkins estate, and has also recently ordered the company to produce more internal business records, setting up an eventual Floridian "*Engle*"-style class action catastrophe. *See* Michael I. Krauss, *Liggett Group v. Engle: A Case Study Of Class Action Abuse*, LEGAL BACKGROUNDER, Oct. 31, 2003, available at: http://www.wlf.org/upload/10-31-03krauss.pdf.

As noted in the previous LEGAL BACKGROUNDER on "Big Fat," what all these suits exemplify is the transformation of 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 and techniques of which he does not approve, but that pesky democratic process has not enabled him to enact the taxes and regulations he and like-minded gurus *know* the people need to protect them from the temptations of their own free choice. So they use litigation to obtain what they can't get using the proper constitutional techniques.

The lawsuits against Big Fat are in reality lawsuits against individual responsibility. Millionaire businessmen may read about, and choose to follow, the dietary theories of Ralph Nader, Tommy Lasorda, or Robert Atkins. McDonald's may be accused of "marketing to children," but of course parents have legal custody of these children and can prevent them from consuming 60% of their meals as Big Macs. Children may no more spend money at McDonald's than they can at a toy store or an amusement park, without their parents' tacit or explicit consent. "It's true," concedes the Center for Science in the Public Interest, "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 Obesity*. NATION'S RESTAURANT NEWS 1 (Vol. 36 Issue 38, Sept. 23, 2002). Glib? For many of us, that's not a glib defense at all — that's a defense based on basic notions of tort law. Human self-determination is not "caused" by others. The Constitution has recognized this since slavery was abolished, and tort law recognized it too, until these summary judgments were denied.

Justice Frankfurter once warned that a timid judge (the kind who lets every plaintiff's case get to a jury, even when legal principles require dismissal of a suit) is a lawless judge. Manufacturers' fear of lawlessness is likely already restricting everything from our food choices to our vehicle's "dog doors." We must stop this, by insisting on the enforcement of the principles of tort law.

  ISBN 1056 3059