
USA Today

Legal experts predict new rounds in food fight

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A controversial obesity lawsuit against McDonald's may have been thrown out of court. But it inspired the movie *Super Size Me*, which opens Friday and promises to raise the volume in the debate over fast food and obesity.

In September, a federal judge in New York rejected a claim by two obese teenage girls that eating McDonald's made them fat. Morgan Spurlock, the movie's director decided to test that conclusion. His film documents a 30-day immersion into McDonald's-only cuisine in which he gained 24 1/2 pounds and his liver accumulated fat so quickly that it turned, in the words of his doctor, into "pâté." He has since regained his health.

Spurlock wants his movie to launch a national conversation over fast food and nutrition, not prompt more litigation. But it may be too late. Now that obesity is recognized by the federal government as a looming public health crisis — on its way to surpassing smoking as the nation's No. 1 killer — the battle lines are drawn.

A number of fronts

Although no fast food lawsuits have been filed since the McDonald's case was dismissed, legal experts say they expect suits to be filed this year. The most promising legal avenue is to invoke state consumer protection laws to accuse companies of misleading consumers about calories or nutritional value, or to accuse companies of marketing fast food to children.

"There are obviously a number of fronts," says Richard Daynard, a law professor at Northeastern University in Boston.

Joseph Price, a Minneapolis defense lawyer, warns food companies not to ignore the threat. He has represented the manufacturers of silicone breast implants and sponsored a conference this

year in Washington to assist defense lawyers and food manufacturers in avoiding and defending so-called "fat litigation."

"There are things a company can do to protect itself," he says. "You ought to be looking at labeling to see if there are potentially misleading references."

Many of the agitators in the coming legal food fight are lawyers who successfully sued tobacco companies. They say they expect "fat litigation" to follow the same course as tobacco litigation. They say predictions that fat suits will fail because people are responsible for the food they eat are premature. Lawyers lost tobacco cases for decades before they began winning in the 1990s.

"Personal responsibility was the mantra of tobacco litigation. It's the smokers' fault," Daynard says. "It was a successful argument for a long time. Sure people should take care of themselves. One, they need accurate information to do it, and two, Madison Avenue knows how to manipulate people so they are less able to protect their own interests."

Defense lawyers point to key differences. For starters, it may be hard to convince juries Big Macs are as addictive as nicotine. "Is it the food industry's fault that Americans will happily choose a larger size?" asks Alice Johnson, a defense lawyer in Pittsburgh, who spoke at the Washington conference. "It is an open issue about what constitutes good nutrition. Can you eat carbs or not? Is it better to have meat or not? There is absolutely no unanimity."

There have been eight "fat" lawsuits. Five of them were at least partially successful. McDonald's paid \$12 million to settle a suit that charged it had failed to disclose that its french fries were cooked in beef fat. The makers of Big Daddy's Ice Cream and Pirate's Booty, a puffed snack food, paid a combined \$8 million for not disclosing the proper calorie count in those products. Kraft changed its recipe for Oreo cookies to remove trans-fatty acids. A suit against the New York school board served as a catalyst for the board's decision to ban the sale of soft drinks from schools.

Ironically, the rejected McDonald's obesity suit leaves the door open for future litigation. In dismissing the suit, U.S. District Court Judge Robert Sweet outlined how the complaint could be amended to include allegations that McDonald's preparation of its food made it more dangerous than consumers could expect. The amended suit did not meet that test, and Sweet dismissed it a second time.

"People who don't like these suits have called it (the decision) a road map for future success," says John Banzhaf, a law professor at George Washington University in Washington, who pioneered the tobacco litigation.

The McDonald's suit prompted lawmakers to act. Nineteen states have passed legislation that would ban obesity lawsuits. Similar legislation in Congress, the so-called "cheeseburger bill," passed the House of Representatives in March and is before the Senate.

More modest goals

Lawyers on both sides say the goals of the "fat litigation" are less sweeping and easier to obtain than those of tobacco litigation. Cigarettes can't be turned into healthy products. But food companies can reduce portions, alter recipes, disclose nutritional data and change marketing promotions.

McDonald's has announced it intends to end super-size servings and plans to add nutritional information to its paper tray liners at restaurants. The fast food giant also is promoting a new "GoActive! Happy Meal" with a pedometer and bottled water. Other restaurants are making similar changes.

A McDonald's spokesman could not be reached for an interview. But a statement on McDonald's Web site disputes the message of Spurlock's film: "The movie is all about one individual's decision to act irresponsibly by consuming more than 5,000 calories a day — twice the recommended level for adult males — and by purposely limiting his physical activity."

Spurlock decided to make his film after watching news coverage of the McDonald's lawsuit.

"It was crazy," he says. "Sue a food company for selling us the food that we eat. But the more I started reading about the marketing, manufacturing, and nutritional content of food, I thought, there's a basis for an argument here."