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Lawyers Shift Focus From Big Tobacco to Big Food

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Lawyers who have made their careers defending the makers of breast implants, guns and tobacco are working from a new playbook. Make portions smaller, they advise food clients. Do not fudge the fat grams. Skip "problem ingredients." And if a case goes to trial, choose jurors who go to the gym; avoid those who take diet drugs or support universal health care.

People may have laughed 16 months ago when obese teenagers unsuccessfully sued McDonald's, saying its food made them fat. But a well-honed army of familiar lawyers who waged war against the tobacco companies for decades and won megamillion-dollar settlements is preparing a new wave of food fights, and no one is laughing.

Both sides seem undaunted by the "cheeseburger bills" wending their way through Congress. Personal responsibility, that legislation proposes, trumps corporate liability when it comes to being overweight. The House passed a bill in March that would prevent people from suing restaurants for making them fat, and the food industry has been supporting similar legislation, nicknamed the Baby McBills, in 19 states. But even proponents of similar legislation in the Senate say it is not likely to pass this year.

And beyond those grounds, lawyers on both sides see broad potential for litigation, including challenges to the ways children are wooed toward sugar and fatty foods, deceptive labeling and misleading advertisements. While lawsuits in tobacco cases were filed before smoking was seen as a public health crisis, awareness about obesity is already high. The federal government calls obesity an epidemic and released statistics last month showing that it was close to overtaking smoking as the nation's No. 1 cause of death.

"The conditions are ripe," Alice Johnston, a lawyer in Pittsburgh, told about 100 lawyers and representatives of some of the largest food companies, including Coca-Cola, Frito-Lay, KFC-Yum Brands and Krispy Kreme, at a recent Washington conference on how to prevent and defend against new obesity lawsuits.

"I'm old enough to remember when they first started talking about suing the cigarette companies and everyone thought it was a joke," said Joseph M. Price, a lawyer in Minneapolis who has defended the makers of breast implants and the Dalkon Shield birth-control device. "Despite the fact that companies are saying this is all bogus and personal responsibility is what counts, I think the lesson we've learned, and that I would preach from my experience, is that you have to take the plaintiffs' bar at their word. They've said they're going to make this the next tobacco. If you go blithely along and ignore it, sooner or later it'll turn around and bite you in the backside."

Lawyers cite 10 prominent cases against the food industry so far, five of which had some success. McDonald's paid \$12 million to settle a complaint that it failed to disclose beef fat in its French fries; Kraft agreed to stop using trans fats in Oreos; the makers of Pirate's Booty, a puffy cheese snack, paid \$4 million to settle a claim over understating fat grams.

But both sides say they expect more. Defense and plaintiffs' lawyers have begun holding conferences to map strategy. The first for defense lawyers, in January, was so oversubscribed it had to be moved to a larger conference hotel. They say the next suits will not be traditional tort or personal-injury suits, largely because those cases are hard to prove. The defense can argue that the person suing should have eaten better foods, or exercised more, and that no one kind of cookie, hamburger or soda made someone obese.

Instead, lawyers expect new cases to take on companies under consumer protection laws, accusing them of, say, advertising a product as low-fat without also mentioning that it is high in sugar and calories, or promising that a revamped product is "lower" in fat even though it is still not low-fat.

Defense lawyers say companies are vulnerable to suits about misstating fat, calorie and carbohydrate content. They are advising clients to make sure to disclose all ingredients to avoid so-called Frankenfood cases, a specter raised by the judge in the McDonald's case, who said that most people would not expect Chicken McNuggets to have so many additives.

The greatest likelihood, however, is that the cases will involve children. "You're never going to get anybody holding for an adult who goes in and eats too many Quarter Pounders," said John Coale, a plaintiffs' lawyer in tobacco and asbestos cases preparing for suits against food companies. "The issue is about what goes on with the kids, the advertising, what's in schools. That's an issue that has some oomph to it."

Potential targets include contracts involving "pouring rights," where soft drink companies require schools to serve only their products, and advertising directed at children.

"If I could choose what kind of case to begin with, it would have been that, under state consumer protection acts against somebody who was continuing to market heavily to kids," said Richard M. Daynard, who directed the Tobacco Products Liability Project at Northeastern University School of Law and is now director of the Public Health Advocacy Institute there. Mr. Daynard says the institute will file suits against the food industry within the year.

Mr. Daynard and others, saying they believed that the McDonald's case was not the ideal opening volley, tried to persuade the lawyer who filed the case not to. Still, they say, the reaction among companies and defense lawyers to the suit encouraged their interest in filing more.

"The industry reacted as if the sky was falling, which leads me to believe that there's a lot there in terms of culpability," Mr. Coale said. "You don't react like that if you aren't worried."

The worry, defense lawyers say, was that the judge in the McDonald's case was so willing to entertain the claims. In throwing the suit out the first time, he suggested ways the plaintiffs could successfully refile their complaint. His ruling dismissing it the second time was unusually lengthy and again suggested ways obesity cases might be argued.

"Nobody should think this is over," said Anne E. Cohen, a lawyer with Debevoise & Plimpton in New York. "He set a pretty low standard for what they had to do to get past a motion to dismiss."

The tobacco cases got traction only when lawyers began bringing cases on grounds of deceptive marketing rather than personal injury.

Peter A. Cross, a defense lawyer in New York, said that 56 percent of Americans now tell pollsters that they would not side with the plaintiff in obesity cases.

"That was the same number with tobacco before the disclosure of documents saying they knew more about the dangers of smoking than they were admitting, that they had manipulated their recipe to make it more enjoyable and more addictive," Mr. Cross said. "While you can debate whether the claims are valid, the publication of those documents changed the terms of the debate. The food industry has the same issues. It's something every company has to be concerned about. Communications they thought were internal can be used in ways no one expected."

Lawyers worry in particular about what is in marketing plans, where marketers are prone to speaking about goals like "owning" the preschool or teenage market, or strategizing about how to display sugary food so children can easily persuade their parents to buy it.

"There's always something in there that somebody, if they thought about it, would have a different way of saying," said Mr. Price, the defense lawyer in Minneapolis.

John F. Banzhaf III, a professor at George Washington University Law School and the lawyer most identified with the anti-obesity crusades, says plaintiffs do not have to do much to win. Damage to reputation, or the risk of it, may be enough to prompt healthy changes from the food industry, Mr. Banzhaf said.

Already, McDonald's has announced it will stop "supersizing," and companies and restaurants are producing healthier foods, although they say their efforts are to meet consumer demand and not because they are concerned about suits.

Whatever they say publicly, however, their lawyers are telling them they should be concerned.

"I think it's a mistake, and I've told clients this, to underestimate the creativity and the imagination and very frankly the aggressiveness of the plaintiffs' bar," said Joseph McMenamin, a defense lawyer and doctor in Richmond, Va. "They have a hell of a track record, frankly. They kept slogging away on tobacco and eventually they prevailed, and the sums of money companies had to pay exceed the gross national product of some third-world countries.

"Is that going to happen in food? I don't think so. But I would not have thought so in tobacco either. If you had told me 10 years ago I would be busily studying digestive enzymes and hormonal influences on human body weight, I would have dismissed it as silly."