



CASE FILE

BURGER, FRIES AND LAWYERS: *THE BEEF BEHIND OBESITY LAWSUITS*

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Foreword

Litigators, eager to replicate the swath of remunerative tobacco lawsuits, have focused on the rapidly increasing girth of American consumers as a problem to be addressed in the nation's courts. Purveyors of fast foods like burgers, tacos, soft drinks and the like, typically companies whose pockets compare favorably to those of Big Tobacco, are the targets of trial lawyers eager to find a lucrative villain to sue.

Some in the public health arena have climbed aboard this bandwagon, blaming the obesity epidemic on McDonald's and Burger King for daring to "Super Size" their offerings. Because the increase in obesity and the proliferation of fast food venues coincided temporally, the assumption is widespread that such foods and companies played a major role in the supersizing of Americans. But as Todd Buchholz points out in his cogent essay, mere coincidence does not prove a causal relationship.

The relatively recent upswing in the percentage of overweight and obese Americans has a number of complex roots. Many facets of Americans' lives have changed since the 1970s, only one of which is the increased availability of fast foods. As Mr. Buchholz points out, only in the last few decades is it likely that an increase in Body Mass Index (BMI) signalled an unhealthy increase in body fat. Throughout much of human history a greater BMI probably contributed to increased health, and likely to greater longevity.

But of course, things have changed. The typical worker spends much less of his or her working life in motion, and when the working day is over, much less time in active pursuits – for amusement, for family activities, or for home and self maintenance.



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Food, all type of food, is much more readily available to the average American than ever before, and cheaper too. Not only are fast foods cheaper and more accessible, so are foods in other types of restaurants and in supermarkets. And Americans have been taking advantage of these benefits, perhaps to our own detriment. We've been snacking more, and consuming larger portions wherever we eat.

Far from fast food venues being villains in this scenario, Todd Buchholz makes a reasonable case for their actually providing nutritional benefits more cheaply than do other food purveyors. Using the price of a gram of protein as an index, Mr. Buchholz points out that many items available from places like Subway or Burger King provide protein even more cheaply than do supermarkets.

Relying on a wide variety of evidence, Buchholz vitiates the contention that fast food is the primary (or even an important) factor in the recent oversizing of Americans. If we give credence to the idea that any one type of food venue is the culprit in the obesity epidemic, we will ignore the true complexity of the factors behind it, many of which Todd Buchholz has illuminated in this essay. Anyone interested in gaining insight into this increasingly important health issue would do well to start by reading this essay – it contains much food for thought, none of which is fattening!

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ABSTRACT

Americans have gained weight over the course of the last century. This increase stems from a variety of factors, primarily more consumption of calories and less vigorous activity. From a historical perspective, a rising caloric intake was a positive event for the first half of the twentieth century. Though the fast food industry has proliferated since the 1960s, there is little conclusive evidence that it is a primary cause of obesity. Further, this study finds that fast food has worked as a force to lower the cost of protein for consumers at all income levels. Lawsuits against fast food companies miss the mark from a nutritional, economic and legal perspective; they ignore the fundamental issue of personal choice and responsibility.



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A Scene:

The overweight baseball fan jumps to his feet in the bleachers of Wrigley Field, screaming for the Chicago Cubs to hold onto their 3-2 lead in the bottom of the ninth inning. He squeezes a Cubs pennant in his left hand while shoving a mustard-smeared hot dog into his mouth with the right. The Dodgers have a runner on first who is sneaking a big lead off the base. The Cubs' pitcher has thrown three balls and two strikes to the batter, a notorious power hitter. The obese fan holds his breath, while the pitcher winds up and fires a blazing fastball. "Crack!" The ball flies over the fan's head into the bleachers for a game-winning home run. The fan slumps to his bleacher seat and has a heart attack.

Who should the fan sue? (a) The Cubs for breaking his heart? (b) The hot dog company for making a fatty food? (c) The hot dog vendor for selling him a fatty food? (d) All of the above

A few years ago these questions might have seemed preposterous. But now scenes better suited for the absurd stories of Kafka snake their way into serious courtroom encounters. While no federal court has yet heard a case on behalf of sulking baseball fans, just a few months ago, the U.S. District Court for the Southern District of New York responded to a complaint filed against McDonald's by a class of obese customers, alleging among other things that the company acted negligently in selling foods that were high in cholesterol, fat, salt and sugar.¹ In the past ten years we have seen an outburst of class action lawsuits that alleged harm to buyers. With classes numbering in the thousands, these suits may bring great riches to tort lawyers, even if they provide little relief to the plaintiffs. The sheer size of the claims and the number of claimants often intimidate defending firms, which fear that their reputations will be tarnished in the media and their stock prices will be punished – not because of the merits but from the ensuing publicity. In his opinion in the McDonald's case, Judge Robert W. Sweet suggested that the McDonald's suit could "spawn thousands of similar 'McLawsuits' against restaurants." Sure enough, a few days ago, hungry lawyers

gathered in Boston to plot their strategy for future obesity litigation, convening panels with titles such as “Food Marketing and Supersized Americans.”² Recent books with titles such as *Fat Land* and *Fast Food Nation* promote the view that fast food firms are harming our health and turning us into a people who are forced to shop in the “big and tall” section of the clothing stores.³ The *Wall Street Journal* recently reported that “big and tall” has become a \$6 billion business in menswear, “representing more than a 10 percent share of the total men’s market.”⁴

While it may be easy for critics to accuse fast food restaurants of serving fattening foods, this study analyzes the issues on several levels. First, this paper examines why fast food companies suddenly find themselves under legal attack. Second, this paper finds that fast food restaurants are not a chief explanation for rising obesity levels in the U.S. Third, this paper suggests that the spread of fast food restaurants has actually helped to push down the cost of protein, a key building block to good physical health. Fast food restaurants provide a very economical source of protein and calories (even though they may also be providing cheap sources of fat as well.) Fourth, this paper explains how changing and contradictory nutritional recommendations make the courtroom a particularly poor place to determine what and where people should eat.

The study does not conclude that you should stuff yourself with french fries or that you should get your children hooked on a daily “Happy Meal.” But it does argue for more facts, more careful consideration – and less litigation.

WHY HAVE FAST FOOD FIRMS BEEN UNDER ATTACK?

Fast food restaurants (“FF”)⁵ have exploded in popularity since World War II. More cars, more suburbs and more roads have made roadside eating more convenient. During the 1950s, drive-through and drive-in burger, ice cream and pizza joints catered to a mobile population. McDonald’s, which specialized in roadside restaurants, eclipsed



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White Castle hamburger stands in the 1960s because the latter had focused more on urban, walk-up customers.⁶ The McDonald's road signs in the early 1960s boasted of serving a million hamburgers; now McDonald's claims to have sold over 99 billion burgers. The "zeros" in 100 billion will not fit on the firm's tote-board signs when the 100 billionth burger is sold.

And yet despite the popularity of such FF firms as McDonald's, Wendy's, Burger King, Pizza Hut, Taco Bell, Subway, etc – at which American consumers voluntarily spend over \$100 billion annually – it has become quite fashionable to denounce these restaurants for a variety of reasons. "They make people fat." "They hypnotize the kids." "They bribe the kids with toys." "They destroy our taste for more sophisticated foods." These condemnations often come from high-brow sources who claim that customers of FF are too ignorant or too blinded to understand what they are putting in their own mouths. But the onslaught of criticism is not even limited to the food. Animal rights activists condemn FF for animal cruelty. Environmentalists allege that FF produces too much "McLitter." Orthodox organic food fans accuse FF firms of using genetically modified ingredients, which they call " Frankenfoods." In Europe, anti-globalization protestors allege that FF homogenizes culture and spreads capitalism far and wide. French kids are eating fries instead of foie gras. *Sacre bleu!*

With the fury directed at FF firms, it is no surprise that tort lawyers have jumped into the fray. Tort lawyers around the country settled the \$246 billion tobacco case in 1998. Those who have not retired on their stake from that settlement are wondering whether fast food could be the "next tobacco," along with HMOs and lead paint. After all, the Surgeon General estimates that obesity creates about \$117 billion in annual healthcare costs.⁷ There are differences, of course. No one, so far, has shown that cheeseburgers are chemically addictive. Furthermore, most FF restaurants freely distribute their nutritional content and offer a variety of meals, some high in fat,

some not. Nor is it clear that the average FF meal is significantly less nutritious than the average restaurant meal, or even the average home meal. The iconic 1943 Norman Rockwell Thanksgiving painting (“Freedom from Want”) highlights a plump turkey, which is high in protein. But surely the proud hostess has also prepared gravy, stuffing and a rich pie for dessert, which though undoubtedly tasty, would not win a round of applause from nutritionists.

The key similarity, though, between the tobacco lawsuits and claims against the FF industry is this: both industries have deep pockets and millions of customers who could join as potential plaintiffs. Therefore, lawyers have enormous incentives to squeeze food complaints into the nation’s courtrooms. They will not disappoint in their eagerness to pursue this.

HOW HAVE DIETS AND FOOD SOURCES CHANGED?

If you believe the old saying, “you are what you eat,” human beings are not what they used to be. Before jumping into today’s fashionable condemnation of calories, let us spend a moment on a historical perspective and at least admit that for mankind’s first couple hundred thousand years of existence, the basic human problem was how to get enough calories and micronutrients. Forget the caveman era, just one hundred years ago, most people were not receiving adequate nutrition. Malnutrition was rampant, stunting growth, hindering central nervous systems, and making people more susceptible to diseases. Often poor people begged on the streets because they did not have the sheer physical energy to work at a job, even if work was available to them. By modern standards even affluent people a century ago were too small, too thin and too feeble.⁸ A century ago, an American with some spare time and spare change was more likely to sign up for a weight-gaining class than a weight-loss program.



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Just as life expectancy in the United States rose almost steadily from about 47 years in 1900 to 80 years today, so too has the “Body Mass Index” or BMI, a ratio of height to weight. (The BMI is calculated by dividing weight in kilograms by height in meters squared. A person five feet five, weighing 150 pounds, would have a BMI of 25. A taller person, say, six feet tall could weigh 184 and have a BMI of 25, too.) In the late nineteenth century most people died too soon and were, simply put, too skinny. The two are related, of course. For most of human history only the wealthy were plump; paintings of patrons by Peter Paul Rubens illustrated that relationship. In ancient times figurines of Venus (carved thousands of years ago) display chunky thighs, fulsome bellies and BMIs far above today’s obesity levels. Likewise, skinny people looked suspicious to the ancients. Remember, that the back-stabbing Cassius had a “lean and hungry look.” *The rise in the BMI from the nineteenth century to about 1960 should be counted as one of the great social and medical victories of modern times.* In a sense, it created a more equal social status, as well as a more equal physical stature.

WHAT WENT WRONG? SHOULD WE BLAME FF FOR BIGGER BMIS?

So what went wrong more recently? It is *not* the case that the average BMI has suddenly accelerated. In fact, BMI has been rising fairly steadily for the last hundred and twenty years. Nonetheless, since the 1960s the higher BMI scores have surpassed the optimal zone of about 20-25.⁹ No doubt, a more sedentary lifestyle adds to this concern. (In contrast, the healthy rise in BMIs during the early 1900s might be attributed to gaining more muscle, which weighs more than fat.). The post-1960s rise in BMI scores is similar to a tree that grows 12 inches per year, but in its 10th year starts casting an unwanted shadow on your patio. In the case of people, more mass from fat has diminishing returns, cutting down their life spans and raising the risk for diabetes, heart disease, gallbladder disease, and even cancer. Over half of American adults are overweight, and nearly one-quarter actually qualify as obese, according to the National Institutes of Health.

Should we chiefly blame FF firms for BMI s over 25? According to the caricature described by lawyers suing FF companies, poor, ill-educated people are duped by duplicitous FF franchises into biting into greasy hamburgers and french fries. The data tell us that this theory is wrong. If the “blame fast food” hypothesis were right, we would see a faster pace of BMI growth among poorly educated people, who might not be able to read or understand nutritional labels. *In fact, college educated, not poorly educated people accounted for the most rapid growth in BMI scores between the 1970s and the 1990s* – though poorly educated people still have a higher overall incidence of obesity. The percentage of obese college-educated women nearly *tripled* between the early 1970s and the early 1990s. In comparison, the proportion of obese women without high school degrees rose by 58 percent. Among men, the results were similar. Obesity among those without high school degrees climbed by about 53 percent. But obesity among college graduates jumped by 163 percent.¹⁰ *If the “blame FF” hypothesis made sense, these data would be flipped upside down.*

Increase in Obesity By Population Group			
	Percent Obese		Percentage Change
	1971-75	1988-94	
<u>Women Aged 20+</u>			
<High School	24	38	58%
College or More	7	20	186%
<u>Men Aged 20+</u>			
<High School	15	23	53%
College or More	8	21	163%

Data derived from the National Health and Nutrition Examination Survey, US Dept. of Health and Human Services.

Of course, we cannot deny that people are eating more and getting bigger. But that does not prove that FF franchises are the culprit. On average Americans are eating about 200 calories more each day than they did in the 1970s. An additional



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200 calories can be guzzled in a glass of milk, a soda, or gobbled in a bowl of cereal, for example. FF critics eagerly pounce and allege that the additional calories come from super-sized meals of pizza, burgers, or burritos. It is true that between the 1970s-1990s, daily fast food intake grew from an average of 60 calories to 200 calories. But simply quoting that data misleads. Though Americans have been consuming somewhat more fast food at mealtime, they have reduced their home consumption at mealtime. Americans have cut back their home meals by about 228 calories for men and 177 for women, offsetting the rise in fast food calories.¹¹ *In total, mealtime calories have not budged much, and mealtimes are when consumers generally visit FF restaurants.* So where are the 200 additional calories coming from? The U.S. Department of Agriculture has compiled the “Continuing Survey of Food Intakes by Individuals,” which collects information on where a food was purchased, how it was prepared, and where it was eaten, in addition to demographic information, such as race, income, age and sex. The Survey shows us that Americans are not eating bigger breakfasts, lunches or dinners. But they are noshing and nibbling like never before. Between the 1970s and the 1990s, men and women essentially doubled the calories consumed between meals (by between 160 and 240 calories). In 1987-88 Americans typically snacked less than once a day; by 1994 they were snacking 1.6 times per day. But surely, the FF critics would argue, those FF cookies and pre-wrapped FF apple pies must account for calories. Again the data fails to make their case. *Women ate only about six more snack calories at fast food restaurants, while men ate eight more snack calories over the past two decades.* That is roughly equal to one cracker or a few raisins. Where do Americans eat their between-meal calories? Mostly at home. Kitchen cabinets can be deadly to diets. And in a fairly recent development, supermarket shoppers are pulling goodies off of store shelves and ripping into them at the stores before they can even drive home. Consumers eat two to three times more goodies inside stores than at fast food restaurants.¹²

Why are people eating more and growing larger? For one thing, food is cheaper. From a historical point of view that is a very good thing. A smaller portion of today's family budget goes to food than at anytime during the twentieth century. In 1929, families spent 23.5 percent of their incomes on food. In 1961, they spent 17 percent. By 2001, American families spent just 10 percent of their incomes on food.¹³ The lower relative cost of food made it easier, of course, for people to consume more.

Since the mid-1980s we have seen an interesting change in restaurant pricing, which has made restaurants more attractive to consumers. Compared to supermarket prices, restaurant prices have actually fallen since 1986. Whereas a restaurant meal was 1.82 times the cost of a store-bought meal in 1986, by 2001 a restaurant meal cost just 1.73 times as much.¹⁴ Higher incomes and lower relative restaurant prices have induced people to eat more and to eat more away from home.

Despite the attraction of restaurant eating and the proliferation of sit-down chain restaurants such as the Olive Garden, TGI Friday's, P.F. Chang's, etc, Americans still consume about two-thirds of their calories at home. Critics of FF spend little time comparing FF meals to meals eaten at home, at schools or at sit-down restaurants.

The nature of the American workplace may also be contributing to higher caloric intake. Whether people dine while sitting down at a table or while standing at a FF counter, at the workplace they are literally sitting down on the job more than they did during prior eras. More sedentary desk jobs probably contribute to wider bottoms. Consider two middle-income jobs, one in 1953 and one in 2003. In 1953, a dockworker lifts 50 boxes off of a mini-crane and places it on a handtruck, which he pulls to a warehouse. In 2003, a person earning a similar income would be sitting in front of a computer, inputting data and matching orders with deliveries. What's the key difference? *Until recently, employers paid employees to exert energy and burn calories. In*



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contrast, employers pay workers to stay in their seats. For many, the most vigorous exercise comes from tearing off a sheet of paper from a printer or walking to the refrigerator. Furthermore, I would suggest that the decline in factory work – with its fixed lunch and coffee break schedule – enables people to eat more often. Less factory work means less foremen supervision. According to Bureau of Labor Statistics data, manufacturing employment fell from about 24.4 percent of civilian employment in 1970 to merely 13 percent in 2000. A woman who spends her career sitting at a desk may “end up with as much as 3.3 units of BMI more than someone with a highly active job.”¹⁵ A person telecommuting from home may be sitting even closer to the refrigerator or cupboard. In 1970 the term “telecommuting” did not even exist. By 2000, however, with advances in computers and remote access technology, approximately 12 percent of the workforce worked from home at least part of the week. This figure does not include over 25 million home-based businesses.¹⁶ Casual observation implies that many telecommuters take breaks from their home-work at coffee shops and other sellers of baked goods.

Finally, some analysts argue that over the past three decades the national anti-smoking campaign has driven up cigarette prices and led smokers to switch from nicotine to calories.¹⁷

FAST FOOD EATING VS. ALTERNATIVES

Very few defenders of FF would tell moms and dads to throw out the home-cooked meal and instead eat 21 meals a week at a FF restaurant. But it is a mistake to stereotype FF as simply a cheeseburger and a large fries. FF restaurants have vastly expanded their menus for a variety of reasons, including health concerns and demographic shifts. The increasing role of Hispanic-Americans in determining national food tastes has inspired many FF franchises to offer tacos, burritos and salsa salads. Wendy’s, traditionally known for its square-shaped hamburgers, offers a low-fat chili

dish that the Minnesota Attorney General's office recommended as a "healthier choice" in its fast food guide.¹⁸ McDonald's has continuously revamped its menu in recent years. On March 10, 2003, the company unveiled a new line of Premium Salads that feature Paul Newman's Own All-Natural dressings. In its publicity blitz, McDonald's facetiously asked, "What's Next? Wine Tasting?" Meanwhile, Burger King features a Broiled Chicken Teriyaki in addition to its traditional fare. Judge Sweet notes that the Subway sandwich chain, which boasts of healthy choices, hired a spokesman who apparently lost 230 pounds of weight while eating the "Subway Diet."¹⁹ In fact, FF meals today derive fewer calories from fat than they did in the 1970s. Consumers can customize their FF meals, too. Simply by asking for "no mayo," they may cut down fat calories by an enormous proportion. It is worth pointing out that FF firms introduced these alternative meals in response to changing consumer tastes, not in reply to dubious lawsuits. During the 1990s, McDonald's and Taco Bell invested millions of dollars trying to develop low-fat, commercially viable selections such as the McLean Deluxe hamburger and Taco Bell's Border Lights. Burger King adopted its "Have It Your Way" slogan several decades ago.

While plaintiffs' lawyers vigorously denounce the nutritional content of FF, they tend to ignore the nutritional content of alternatives. Home cooking, of course, has a nice ring to it, and it is hard to criticize the idea of a traditional meal cooked by mom or dad. But if we put nostalgia aside for a moment, we can see that the typical American meal of 25 years ago might win taste contests but few prizes from today's nutritionists. Meat loaf, fried chicken, butter-whipped potatoes and a tall glass of full-fat milk may have kept us warm on a cold winter evening. But such a diet would surely fail a modern test for healthy living. And let's not even discuss a crusty apple pie or bread pudding for dessert. Yesterday's "comfort" food gives today's dieticians indigestion. *No surprise then that today's FF derives a smaller percentage of calories from fat than a typical home meal from 1977-78.* In fact, even in the 1970s, FF meals had almost the



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same fat/calorie ratio as home cooking at that time. By this measure of fat/calories, FF in the 1970s looked healthier than restaurant cooking.²⁰ Therefore, the caricature of FF as a devilish place for nutrition makes little historical sense.

Now it is true that home cooking has changed since the 1970s and that it has made even more progress than FF at reducing fat calories. Very few families these days feast on pork rinds and pecan pie, a development that flatters our current nutritional tables. How do FF meals compare to schools? Despite the legions of concerned dieticians and PTA leaders, school meals do not look considerably better on the test of fat. While schools provide slightly fewer fat calories, they deliver more saturated fat than FF, the more dangerous subset of fats. The comparison to sit-down restaurants is similar, with no clear advantage to either FF or sit-down restaurants. Of course, FF firms have made it easier for patrons to learn about nutritional content than fancier kinds of food outlets. Few patrons of the fabled 21 Club in New York would know that its \$26 hamburger is made with rendered duck fat. Should super-chef Daniel Boulud worry about lawsuits for daring to sell a \$50 hamburger at db Bistro Moderne that is crafted from ground sirloin and braised short ribs, stuffed with foie gras, and topped with shaved black truffles?

In sum, the facts show that obese plaintiffs might just as well walk up to a FF counter rather than tuck a napkin under their chins and dine at a chic restaurant or at a school.

FF critics also like to criticize portion sizes. True, FF restaurants have been offering super-sized sandwiches, drinks, and french fries. But have these critics been to a movie theater lately, where popcorn containers look like bushel baskets? Or to fancy restaurants featuring all-you-can-eat Sunday buffets? A study in the *Journal of the American Medical Association* cited the "most surprising result [as] the large portion-size

increases for food consumed at home—a shift that indicates marked changes in eating behavior in general.”²¹ People eat bigger portions of hamburgers, fries, and Mexican food on their own kitchen tables than when they are sitting on a FF stool. The study found that “the average home-cooked hamburger now weighs in at about eight ounces, versus perhaps 5.5 ounces in full-service restaurants and a little over seven ounces at fast-food outlets.” When the USDA surveyed portion sizes and compared them to official U.S. government portions, it did find that FF hamburgers exceeded official estimates by 112 percent. But it also found that Americans were eating pasta portions that surpass official measures by 333 percent and muffins that rise to 480 percent of the official sizes.²² If we are turning into a jumbo people, we are a jumbo people everywhere we eat, not just where the tort lawyers target defendants.

FAST FOOD AND PROTEIN PER DOLLAR

As discussed earlier in this paper, obtaining enough protein and calories to fuel the human body has been a constant struggle throughout history. A time traveler from almost any other era would be befuddled by our current obsession with losing weight, which has spurred America’s \$50 billion diet industry, \$12 billion in annual health club revenues, and the 100,000 radical gastric bypass surgeries last year.²³ Nowadays in the United States food comes pretty cheap, and FF has played a role in giving people access to inexpensive foods.

There are many measures of nutritional value. In an earlier time, we might simply measure calories per dollar. Because, however, critics accuse FF of selling “empty” calories (that is, calories comprised of fats and sugars), I have developed a more specific benchmark, namely “cost per gram of protein.” Protein is the building block for muscles, and animal protein foods, including meat, poultry, fish, dairy products and eggs, contain the [nine] essential amino acids that cannot be synthesized in the body. Using the ratio of dollar/protein gram seems reasonable and, because it does not include fats and



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sugars, creates a tougher test for FF than, for example, dollar/calorie.

This section compares the cost of protein obtained at FF restaurants to protein obtained at supermarkets. It finds that FF restaurants provide reasonable value to the consumer, considering the cost of raw materials and the cost of time in preparing meals. In a survey of fast food chains and supermarkets in five southern California communities (where the FF chains and the supermarkets were located within the same towns), I compared the cost of purchasing a “marquee” hamburger, a grilled chicken sandwich, a fish sandwich, a sliced turkey sandwich, and a green salad. The results suggest that in some cases consumers can actually purchase a high protein meal at a fast food chain for less than the cost of buying the separate groceries at a supermarket and preparing the sandwich themselves. The comparisons understate the cost of supermarket purchases for two principal reasons:

- First, supermarket prices generally reflect a cost savings for purchasing a larger quantity. You can order one fish fillet from Burger King; it is nearly impossible to buy a single frozen fish fillet in your supermarket.
- Second, supermarket prices do not reflect the time and cost to the shopper of preparing the meal at home. Nor have I included the extra ingredients such as pickles, relish, onion, mustard, etc. There is little doubt that for a worker earning the average hourly rate (which is \$15, according to the Bureau of Labor Statistics) preparing a cooked sandwich would cost far more in materials and time than simply purchasing it from a FF restaurant. Even for a minimum wage worker earning \$5.15 per hour an FF sandwich is probably much cheaper than spending 30 minutes preparing and grilling a hamburger, fish fillet, or chicken breast.

On average, a gram of hamburger protein found in a Burger King Whopper or McDonald’s Big N’ Tasty costs about seven cents. Each sandwich provides 25 grams of protein. During a recent national campaign, both of these restaurant chains slashed

their prices, bringing the dollar/protein ratio down to just 3.8 cents. The supermarket survey shows that a gram of protein from a ground beef patty and bun costs about eight cents (leaner beef would cost somewhat more, standard ground beef somewhat less). The cost of supermarket beef does not include the cost of a tomato, lettuce, pickle, and other accompaniments, nor does it include any time or labor costs for preparing a sandwich yourself.

For fish fillets, the results were similar. A Burger King fish fillet provides protein at 7.8 cents per gram. Van de Kamp's and Gorton's frozen fish fillets cost 15 cents per gram.

The results for grilled chicken sandwiches display an advantage for supermarket buyers. A Burger King grilled chicken sandwich provides 35 grams of protein at 10.5 cents per gram. McDonald's grilled chicken costs 13.9 cents per gram. Purchasing chicken breast fillets at a supermarket averages just 4.6 cents per gram of protein. Again, the comparison does not include the extra costs or time involved in creating a grilled chicken sandwich served with lettuce, tomato, and seasoning.

Sliced turkey also shows an advantage for supermarket shoppers. While a Subway turkey sandwich costs almost 24 cents per gram of protein, sliced Sara Lee turkey averages just over 10 cents per gram of protein. Once again, the Subway sandwich also includes lettuce, tomatoes, green peppers, onion, olives, pickles and a choice of breads, as well as the convenience of someone else putting together the meal.

Salad greens are roughly similar in price at FF restaurants and supermarkets. Because greens are not notable for their protein content, I have instead calculated the cost per ounce. A Burger King side salad costs just under 20 cents per ounce, compared with over 27 cents for a Fresh Express bag of prewashed "American Salad."



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In sum, FF provides in a number of cases competitively priced foods per gram of protein. For people who lack the time, kitchen space, or ability to purchase from grocery stores and cook at home, FF can provide significant benefits. Furthermore, if consumers choose with some level of prudence from the FF menus, they can eat fairly nutritious meals.

IS NUTRITION A MOVING TARGET?

I remember my mother forcing us to eat beef liver every two months because it was iron-rich. I hated it and often snuck bite-sized pieces under the table to our appreciative sheepdog. Nowadays, few people press cholesterol-laden liver on their family. For liver-hating kids everywhere, that represents a big step forward, almost as important as the Salk vaccine.

What has been more fickle than diet recommendations over the years, which continuously spark new fads? In the 1980s and early 1990s, “carbo-loading” was hot, and steaming bowls of pasta shoved roast beef off the dinner table. Today a plate of pasta scares those on the popular, low-carb Atkins diet, who are instructed to load up their breakfast plates with fried eggs, ham and bacon while leaving toast off to the side. According to the Atkins’ approach, it is fine to bite into a greasy hamburger, but don’t dare chew on the bun. Desserts, too, have changed. During the 1960s and 1970s, parents maneuvered to keep chocolate away from children, fearing the high fat and sugar content, as well as a connection to acne. More recently we read that cocoa powder and dark chocolate may help delay the progression of cardiovascular disease.²⁴ Chocolate contains a healthful nutrient known as a flavonoid that may slow the oxidation of “bad cholesterol” (LDL). So maybe we should not worry so much about a few pimples.

Surely, you might say, there are obvious national standards such as the official U.S. Department of Agriculture’s food pyramid. Why not force FF firms to serve meals that

fit into the pyramid's architecture? The pyramid tells us to eat at least six servings of grain (breads, pasta, etc) each day, two servings of fruit, and only a little bit of fat or sweets. Sounds reasonable, no? Here is what the controversial head of the Harvard School of Public Health says about the pyramid: "some people are likely to die from following the USDA pyramid because they will be eliminating healthy fats, such as liquid vegetable oils, that actually reduce the risk of heart disease."²⁵ Who should Wendy's listen to? The U.S. government or Harvard? Is this a fair choice for a restaurant?

During the 1980s, nutrition advocates lobbied McDonald's to switch its french frying oil from partially beef-derived to vegetable-based. Then after McDonald's switched, many of the same advocates assailed McDonald's for using trans-fatty acids – a result of using the vegetable oils! Now McDonald's is introducing new vegetable oils that reduce the trans-fatty acids.

Here again, FF presents a very different case than tobacco, even though plaintiffs' counsels are eager to deploy the same lucrative, cookie-cutter approach to litigation. FF meals, though tasty to many patrons, are not chemically addictive. One seldom hears of Subway or Wendy's customers shaking with withdrawal symptoms when they give up a turkey sandwich or a frozen fish fillet. Second, no one has claimed yet that he or she became sick, cancerous, or even choked or coughed from "second-hand" eating. Swallowing food is very much an individual act.

Third, cigarette research has been rather consistent for decades in pointing to the physical effects of smoking. In contrast, diet advice and research has been inconsistent and often contradictory. As a result, FF firms have been reacting to the changing tastes and nutritional expectations of customers. As stated above, in the 1970s there was very little difference between the fat content of home-cooked meals or FF meals. FF chains did not start out by conspiring to sell diabolical menus. Over the past twenty



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years, homes and FF restaurants have pursued lower fat menus (though homes have admittedly moved more quickly). This would be expected since commercial restaurants would tend to follow the tastes of patrons. Today, nearly every FF restaurant offers non-fried poultry and low-fat salads. Further, within twenty seconds of inquiring, each of the FF chains mentioned in this paper produced nutritional content charts. Should we expect or demand that FF lead the march to better menus? How could they? What would they base it on? The U.S. government's nutrition pyramid? The Harvard pyramid? The Atkins diet? Weight Watchers? Oprah's personal plan? Clearly the best avenue is for FF firms to provide choices and provide information so that customers can be informed, prudent and as up-to-date as they like.

In April 2003, the *Wall Street Journal* carried the following headline: "Wendy's Sees Green in Salad Offering: More Sophistication, Ethnic Flavors Appeal to Women ...". Salads had leapt to more than 10 percent of Wendy's total sales, from 3 percent a year earlier. In October 2002, Bloomberg News announced that "Wendy's 3rd Qtr Net Rises 16 percent as Salads Boost Sales." The story explained how Wendy's new "Garden Sensations" salad strategy was drawing customers from sit-down restaurants, while also posing new challenges to McDonald's and Burger King, "as consumers seek healthier choices." The story then described how Wendy's more healthful strategy spurred on "rival Burger King [which] is trying to gain market share by introducing new items that compete directly with Wendy's, including a baked potato and chili ..." ²⁶ Is this a broken system that desperately cries for judicial action? No, it is a super-competitive market where stores jockey for position, trying to please customers and their changing tastes for a more healthful lunch.

Faced with the conundrum of changing tastes and nutritional recommendations, Judge Sweet shrewdly took up the distinction between an inherently dangerous meal and a meal that may pose some legitimate risk, if only from over-consumption. The

Restatement (Second) of Torts states that “[o]rdinary sugar is a deadly poison to some diabetics” and that “Good whiskey is not reasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fuel oil, is unreasonably dangerous.”²⁷ These risks are not good reasons to outlaw good sugar or good whiskey. Fried fish may be oily but that does not mean it is contaminated. Absent a truly compelling and sweeping health reason, we should not let lawsuits rob consumers of choices.

Judge Sweet recognized “that the dangers of over-consumption of ... high-in-fat foods, such as butter, are well-known. Thus any liability based on over-consumption is doomed if the consequences of such over-consumption are common knowledge. ... Thus, in order to state a claim, the Complaint must allege either that the attributes of McDonald’s products are so extraordinarily unhealthy that they are outside the reasonable contemplation of the consuming public or that the products are so extraordinarily unhealthy as to be dangerous in their intended use. The Complaint – which merely alleges that the foods contain high levels of cholesterol, fat, salt and sugar, and that the foods are therefore unhealthy – fails to reach this bar.”²⁸ Judge Sweet also found, as I did in my survey, that McDonald’s willingly provides information on the nutritional content of its products.

What would the plaintiffs’ counsel want McDonald’s to do – other than pay out settlement sums? Should Judge Sweet have stopped McDonald’s from flipping burgers? What about diners at the 21 Club? Should they too be protected, or are the FF lawsuits a patronizing tool to protect the poor and the allegedly illeducated from their own mouths? If the fear is over-consumption, should McDonald’s discriminate against plump people? Should a cheeseburger require a doctor’s prescription? Should FF firms be required to punch holes in a meal ticket and refuse to serve those who have already filled their card? Surely some intermeddlers could devise a national BMI card,



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certified by a government nutritionist, that determines how many fat grams Burger King may sell to you. Of course, that number would have to be revised with each new issue of the *Journal of the American Medical Association* and after every meeting of the American Society for Clinical Nutrition.

CONCLUSION

The Food and Drug Administration, with its battalion of researchers, aided by thousands of university and private-sector scientists throughout the world, are constantly exploring, testing and digging for scientific insight. A class action lawsuit would not be digging for scientific inferences. Instead, plaintiffs' lawyers would be digging into the pockets of franchise owners, employees and shareholders in order to pull out gold. Moreover, the threat of such lawsuits can do no good to the employees, shareholders or customers of FF firms. When tort lawyers strut in front of cameras waiving weighty complaints that are flimsy in facts, the media quickly follow the story. Nearly every major publication in the country carried stories about the McDonald's obesity suit. If "McLawsuits" spread, we will see at least one, if not all, of the following three results: (1) lower wages for FF employees; (2) lower stock prices for shareholders; and/or (3) higher prices for consumers. FF restaurants hire and train hundreds of thousands of workers; attract investments from millions of middle class citizens; and quench the hunger and thirst of millions of satisfied patrons.

This study finds that fast food restaurants are not a chief culprit in the fattening of America. But let us be frank here. Depending on what you pile on it, a fast food burger may not enhance your health and it may even hinder your ability to run a marathon – but it is very easy to find out how fatty that burger is. You do not need a tort lawyer by your side to pry open a brochure or to check the thousands of Web sites that will provide nutrition data. Lawsuits against fast food firms fail to recognize the fact that people choose what and how they want to eat. While it is unlikely that nutritionists will soon announce that super-sized double-cheeseburgers will make you thin, society should not allow the latest fads or the most lucrative lawsuits to govern what we eat for lunch.



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ENDNOTES

- 1 *Pelman v. McDonald's Corporation* 2003 U.S. Dist. Lexis 707.
- 2 Sarah Ellison and Brian Steinberg, "To Eat, or Not to Eat," *Wall Street Journal*, June 20, 2003, p. B1.
- 3 Greg Critser, *Fat Land: How Americans Became the Fattest People in the World* (Boston: Houghton Mifflin Co, 2003); Eric Schlosser, *Fast Food Nation* (Boston, Houghton Mifflin Co., Boston: 2001).
- 4 Better Clothes for Biggest Guys," *Wall Street Journal*, February 28, 2003, p. W14.
- 5 For the purposes of discussion, FF is used in its common usage, and according to the Bureau of the Census description is an establishment "engaged in selling limited lines of refreshments and prepared food. Included in this group are establishments which prepare items such as chicken and hamburgers for consumption either on or near the premises or for "take-home" consumption. Such establishments do not have waiter/waitress service where the patron's order is taken while the patron is seated at a table, booth, or counter." U.S. Census Bureau, Retail Trade: Definitions of Industries (5812)
- 6 Thomas Sowell, *Basic Economics* (New York: Basic Books, 2001).
- 7 U.S. Department of Health and Human Services. *The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity*. U.S. Department of Health and Human Services, Public Health Service, Office of the Surgeon General, 2001.
- 8 Robert W. Fogel, "Economic Growth, Population Theory, and Physiology: The Bearing of Long-Term Processes on the Making of Economic Policy," Nobel Lecture 1993, p. 90.
- 9 Even though the BMI index was not widely used until the 1990's, it is possible to construct historical BMI's based on known heights and weights. See Dora Costa and Richard Steckel, "Long Term Trends in Health, Welfare, and Economic Growth in the United States," in Floud and Steckel (eds), *Health and Welfare During Industrialization* (Chicago: University of Chicago Press, 1997). These numbers are not definitive for each individual, since a very muscular person, for example, may have a high BMI simply because muscle weighs more than fat. For example, Arnold Schwarzenegger and Sylvester Stallone might technically be obese if one looked only at their BMI ratings.
- 10 David M. Cutler and Edward L. Glaeser, "Why Have Americans Become More Obese?" NBER Monograph, January 2003, table 1. This paper presents an intriguing hypothesis that technology has created obesity by making ready-to-eat foods more available.
- 11 *Ibid*, table 4, which is derived from the USDA's "Continuing Survey of Food Intakes By Individuals."
- 12 *Ibid*.
- 13 Economic Research Service, USDA, "Diet and Health: Food Consumption and Nutrient Intake Tables," Table 7.
- 14 Economic Research Service, USDA, "Food, CPI, and Expenditures: Relative Prices of Food at Three Stages of the System," Table 13.
- 15 Darius Lakdawalla and Tomas Philipson, "The Growth of Obesity and Technological Change: A Theoretical and Empirical Examination" (April 1, 2002), p. 3
- 16 U.S. Environmental Protection Agency, "Telecommuting/Telework Programs: Implementing Commuter Benefits Under the Commuter Choice Leadership Initiative," (September 2001), p. 1.
- 17 Shin-Yi Chou, Michael Grossman and Henry Saffer, "An Economic Analysis of Adult Obesity: Results from the Behavioral Risk Factor Surveillance System," (July 2001), p. 31.
- 18 Attorney General, State of Minnesota website.
- 19 *Pelman*, n 15.
- 20 Economic Research Service, USDA, "Diet and Health: Food Consumption and Nutrient Intake Tables," Table 7.
- 21 Samara J. Nielsen and Barry M. Popkin, "Patterns and Trends in Food Portion Sizes, 1977-1988, *Journal of the American Medical Association*, January 2003 289:450-453.
- 22 Lisa R. Young and Marion Nestle, "The Contribution of Expanding Portion Sizes to the US Obesity Epidemic," *American Journal of Public Health* 2002 92: 246-249.
- 23 Scott Wapner, "Weight Loss Firms are Fatter than Ever," MSNBC.com, March 4, 2003.
- 24 Ying Wan, et al., "Effect of Cocoa Powder and Dark Chocolate on LDL," *American Journal of Clinical Nutrition*, November 2001;74:596-602.
- 25 "A Voice of Reason on Diet," *Discover* March 2003, p.16.
- 26 Shirley Leung, "Wendy's Sees Green in Salad Offerings: More Sophistication, Ethnic Flavors Appeal to Women, Crucial to Building Market Share," *Wall Street Journal*, April 25, 2003, p. B2; "Wendy's 3rd- Qtr Net Rises 16% as Salads Boost Sales," *Bloomberg News* October 24, 2002.
- 27 *Pelman v. McDonald's Corporation* 2003 U.S. Dist. Lexis 707,13.
- 28 *Pelman*,14.



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