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The Illinois Commonsense Consumption Act: End of the Road for Fast Food Litigation in Illinois?

Norah Leary Jones
Loyola University Chicago, School of Law

Note

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*Norah Leary Jones**

I. INTRODUCTION

Times have changed since the fast food industry first dotted the American landscape.[1] In 1960, five years after McDonald's opened its doors, there were only 250 McDonald's restaurants.[2] Today, there are 28,000 worldwide.[3] Similarly, Burger King has grown from one restaurant in 1954 to over 11,000 restaurants today.[4] Today's fast food industry spans the globe and has a marketing budget in the billions of dollars.[5]

This industry change has coincided with another important development: changing American eating habits.[6] In the 1950s, families

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* J.D. expected May 2006. To my husband and family, and especially to my late father, Louis R. Jones, who taught me that with integrity, kindness, and respect attorneys can truly make the world a better place by offering assistance in times of need.

1. *E.g.*, MCDONALD'S CORP., THE MCDONALD'S HISTORY 1954–1955, *at* http://www.mcdonalds.com/corp/about/mcd_history_pg1.html (2004) [hereinafter MCDONALD'S HISTORY]. For example, the first McDonald's restaurant opened in Des Plaines, Illinois in 1955. *Id.* Since that time, "fast food has infiltrated every nook and cranny of American society." ERIC SCHLOSSER, FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL 3 (Harper Collins 2001).

2. *See* SCHLOSSER, *supra* note 1, at 24. Between 1960 and 1973 the number of McDonald's restaurants jumped from approximately 250 to 3,000. *Id.*

3. *E.g.*, MCDONALD'S CORP., MCDONALD'S FAQ, *at* http://www.mcdonalds.com/corp.about/mcd_faq.html (2004) (explaining that McDonald's currently has 28,000 restaurants in almost 120 countries).

4. BURGER KING CORP., COMPANY INFO, *at* http://www.bk.com/CompanyInfo/index.aspx (2004). Today, it has more than 11,000 restaurants in more than sixty countries. *Id.*

5. SUPER SIZE ME (Samuel Goldwyn Films 2003) (noting that McDonald's worldwide marketing budget totals almost $1.4 billion). In contrast, the advertising budget for the fruit and vegetable campaign is $2 million. *Id.; see also* Samuel J. Romero, Comment, *Obesity Liability: A Super-Sized Problem or a Small Fry in the Inevitable Development of Product Liability?*, 7 CHAP. L. REV. 239, 270–71 (2004) (discussing McDonald's advertising budget).

6. SCHLOSSER, *supra* note 1, at 4. "A generation ago, three-quarters of the money used to buy

may have eaten fast food only rarely and for special occasions, whereas families today are more likely to eat fast food on a regular basis.[7] Further, those fast food meals are no longer confined to restaurant visits or on-the-go road trips.[8] Instead, grammar and elementary schools serve fast food for lunch, and fast food restaurants occupy thousands of office parks, high rises, airports, and hospitals.[9] As a result, generations of Americans grow to love Ronald McDonald as children, continue to love him as adults, and establish eating habits that include regular fast food meals from very young ages.[10]

Regardless of whether Americans prefer the Big Mac over the Whopper, they likely agree that eating this food they love so much is not very healthy.[11] The dispute over whether eating fast food can be harmful, however, has spawned a new litigation trend: the fast food obesity claim.[12]

Combined with other factors like lack of exercise, regular fast food

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food in the United States was spent to prepare meals at home. Today about half of the money used to buy food is spent at restaurants—mainly at fast food restaurants." *Id.*

> In 1970, Americans spent about $6 billion on fast food; in 2001, they spent more than $110 billion. Americans now spend more money on fast food than on higher education, personal computers, computer software, or new cars. They spend more on fast food than on movies, books, magazines, newspapers, videos, and recorded music—combined.

Id. at 3.

7. Food Labeling: General Requirements for Health Claims for Food, 58 Fed. Reg. 2478, 2516 (Jan. 6, 1993) (to be codified at 21 C.F.R. pts. 20, 101). The federal Food and Drug Administration indicates that today "almost half of the American food dollar is spent on food consumed away from home, and that perhaps as much as 30 percent of the American diet is composed of foods prepared in food service operations . . . ." *Id.*

8. *See infra* note 9 and accompanying text (discussing the large number of schools and office parks serving fast food meals).

9. *See* Caroline Fabend Bartlett, Comment, *You Are What You Serve: Are School Districts Liable for Serving Unhealthy Foods and Beverages to Students?*, 34 SETON HALL L. REV. 1053, 1061–62 (2004) (noting that regulations permit the sale of food of minimal nutritional value, which includes McDonald's, Pizza Hut, and Taco Bell as well as their generic substitutes in school cafeterias); *see also* SCHLOSSER, *supra* note 1, at 3 (describing the myriad of locations at which Americans can find fast food restaurants).

10. *E.g.*, MCDONALD'S CORP., THE MCDONALD'S HISTORY 1956–1963, at http://www.mcdonalds.com/corp/about/mcd_history_pg1/mcd_history_pg2.html. The early indoctrination of fast food into the lifestyles and psyches of American children is demonstrated by the fact that worldwide, Ronald McDonald is second only to Santa Claus in terms of recognition. SCHLOSSER, *supra* note 1, at 4.

11. *E.g.*, SUPER SIZE ME, *supra* note 5. In 2003, New York City director Morgan Spurlock went on a thirty-day McDonald's-only diet. *Id.* Before starting, he stated that he wanted to see why people were filing lawsuits based on the effects of foods that "most of us know isn't really good for us anyway." *Id.*

12. *See infra* Part II.C (discussing the development of and subsequent increase in recent fast food litigation suits).

consumption can result in grave health consequences.[13] Approximately sixty-five percent of Americans are clinically overweight,[14] thirty percent of whom are clinically obese.[15] Americans are currently the heaviest people of all the world's industrialized nations.[16] When evaluating the serious American obesity problem, some consider the fast food industry to be at least partially responsible and believe litigation offers a viable method of enforcing that responsibility.[17]

To most people, the concept that an obese McDonald's customer could sue McDonald's for obesity-related illnesses initially seems ludicrous.[18] Advocates of fast food litigation, including the attorney

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13. *See infra* Part II.A (considering both the health and economic consequences of American obesity); *see also infra* notes 46–47 and accompanying text (recognizing that in addition to fast food consumption, a person's lack of exercise and other dietary choices contribute to obesity).

14. NATIONAL CENTER FOR HEALTH STATISTICS, CDC, PREVALENCE OF OVERWEIGHT AND OBESITY AMONG ADULTS: UNITED STATES, 1999–2002, *available at* http://www.cdc.gov/nchs/products/pubs/pubd/hestats/obese/obse99.htm (last visited Apr. 30, 2005) [hereinafter OVERWEIGHT AND OBESITY AMONG ADULTS].

15. OVERWEIGHT AND OBESITY AMONG ADULTS, *supra* note 14 (indicating that 30% of Americans are obese). The World Health Organization reports that at least 300 million adults are clinically obese worldwide. WORLD HEALTH ORGANIZATION, HEALTH TOPICS: OBESITY, GLOBAL STRATEGY ON DIET, PHYSICAL ACTIVITY, AND HEALTH: OBESITY AND OVERWEIGHT, *available at* http://www.who.int/dietphysicalactivity/publications/facts/obesity/en/ (2003). In contrast to the United States, less than 5 percent of the population in Japan and China is clinically obese. *Id.*

16. SCHLOSSER, *supra* note 1, at 240–43 (discussing the increased obesity trend in America over the last several decades and the implications of that trend). "More than half of all American adults and about one-quarter of all American children are now obese or overweight." *Id.* at 240.

17. *E.g.*, Jeremy H. Rogers, Note, *Living on the Fat of the Land: How to Have Your Burger and Sue it Too,* 81 WASH. U. L.Q. 859, 859–60 (2003).

> [I]t seems appropriate that most Americans attribute their weight problem to a lack of personal responsibility. But in light of the many causes of obesity, is it appropriate that overweight and obese people blindly adhere to the rule of personal responsibility and blame themselves? . . . Should the corporations that create and sell the nation's food be partially responsible for America's weight epidemic? The answer: Yes.

Id. The most well-known advocate of fast food litigation, law professor and Washington-based legal activist John F. Banzhaf III, likewise insists that because the fast food industry plays a substantial role in the growing numbers of obese Americans it must take responsibility for that obesity. Ameet Sachdev, *Obesity Case Ruling Whets Appetite of Food Activist: Judge Almost Acts as Coach for New Try Against Industry*, CHI. TRIB., Feb. 2, 2003, *available at* 2003 WL 11548654; *see also* John F. Banzhaf III, *Who Should Pay for Obesity?*, S.F. DAILY J., Feb. 4, 2002, *available at* http://banzhaf.net/docs/whopay.html (providing further detail on Professor Banzhaf's theories on fast food litigation).

18. *E.g.*, Trial Lawyers, Inc., *Burgers: The Next Cash Cow?*, *at* http://www.triallawyersinc.com/html/print09.html (last visited Apr. 30, 2005) (comparing fast food litigation to other so-called 'frivolous' suits). "Many people scoffed when 270-pound Caesar Barber filed a lawsuit against McDonald's and three other fast-food companies in July 2002 accusing them of selling high-fat meals that made him obese." *Id.*; *see also* Caleb E. Mason, *Doctrinal Considerations For Fast-Food Obesity Suits,* 40 TORT TRIAL & INS. PRAC. L. J. 75, 75–76 n.1 (2004) (providing a "sampling" of the public reaction to fast food litigation largely criticizing the litigation as a

who pioneered the groundbreaking tobacco lawsuits, disagree with this reaction.[19] They believe that given the right combination of legal theories and evidence, fast food companies will ultimately bear legal responsibility for their customers' obesity-related illnesses.[20] In contrast, the fast food industry and business advocacy groups dismiss fast food litigation as "frivolous," insisting that responsibility for American obesity lies only in individual diet choices.[21]

In Illinois, the fast food industry seems to have won a major victory in this conflict.[22] On July 30, 2004, Illinois Governor Rod Blagojevich signed the Illinois Commonsense Consumption Act ("ICCA") into law.[23] The ICCA, co-sponsored by Illinois State Representative John Fritchey and State Senator John Cullerton, purports to prohibit claims against fast food companies based on a consumer's obesity or obesity-related illnesses.[24] The legislators praised the bill as an important step

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failure by Americans to take responsibility for their own actions).

19. *E.g.*, Jonathan S. Goldman, Comment, *Take That Tobacco Settlement And Super-Size It!: The Deep-Frying of the Fast Food Industry?*, 13 TEMP. POL. & CIV. RTS. L. REV. 113, 121–22 (2003) (citation omitted). According to Professor Banzhaf, one of the leading proponents of fast food litigation and an early advocate for the tobacco mass tort actions:

> [E]very time we brought one of these suits [against the tobacco industry], people said they were ridiculous, frivolous, they wouldn't go anywhere. When I first proposed that smokers would sue, two of the leading legal experts in the country sat across on a television program from me and said we'd never get one of those cases to a jury. When we got it to a jury, they said, "Well, you'd never get a verdict." We got a verdict. They said, "It'll never stand on appeal." When it stood on appeal, they said we'd never get punitive damages. We got it. When we proposed non-smoker lawsuits under different theories, they laughed again. We've won $310 million so far and still going on that one. . . . So the fact that some people think these [fast food] suits aren't going anywhere [is] déjà vu all over again.

Id.

20. *Id.*

21. *See* Press Release, Illinois Restaurant Association, Illinois Restaurants Score Major Victory! (Apr. 1, 2004) (on file with author), *available at* http://ira.affiniscape.com/displaycommon.cfm?an=1&subarticlenbr=62 [hereinafter IRA Press Release] (some time after issuing the press release with this original title, the Illinois Restaurant Association changed the title on its website to "Legislation Preventing Obesity Lawsuits Passes Illinois House With Unanimous Vote").

22. In fact, the Illinois Restaurant Association issued a press release titled "Illinois Restaurants Score Major Victory!" indicating their strong belief that the new Illinois legislation benefits their goals and that such lawsuits are frivolous and are not the appropriate way to deal with the problem of obesity in Illinois. *Id.*

23. 3 ILL. LEGISLATIVE REFERENCE BUREAU, LEGISLATIVE SYNOPSIS AND DIGEST OF THE 2004 SESSION OF THE NINETY-THIRD GENERAL ASSEMBLY 1837 (2004) [hereinafter LEGISLATIVE SYNOPSIS AND DIGEST]; *see also* Press Release, Office of the Governor, Gov. Blagojevich signs Illinois Commonsense Consumption Act (July 30, 2004) [hereinafter Gov. Blagojevich Press Release], *available at* http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=3245 (announcing the new law).

24. Gov. Blagojevich Press Release, *supra* note 23.

in directing attention away from fast food restaurants and towards individual responsibility.[25] Gov. Blagojevich agreed and, while acknowledging the growing problem of obesity in Illinois, emphasized his belief that an individual must bear proper responsibility for preventing her own obesity by making healthy eating decisions.[26] Signaling its approval, Illinois' major restaurant lobby immediately issued a press release praising the actions of the Governor and the legislators.[27] The lobby pointed to the ICCA as evidence that the Illinois legislature believes that the frivolous fast food lawsuits serve only to harm Illinois' best interests.[28]

A more thorough analysis of both the Illinois legislation and the broader issues underlying recent obesity-related litigation, however, reveals that the ICCA may not provide the full protection the fast food industry seeks.[29] Rather, it leaves potential litigants with the ability to assert claims based upon violations of consumer protection statutes and breach of contract.[30] This Comment examines that possibility.[31] First, Part II of this Comment examines the problem of American obesity, the various legal theories applicable to obesity claims, the emergence of litigation against fast food companies, and the legislative response to those lawsuits.[32] Part III then examines in more detail the history and provisions of the ICCA.[33] Part IV analyzes the likely impact of the Act

25. *E.g.*, Press Release, Office of State Representative John Fritchey, Proposed Law Would Ban Obesity Lawsuits (Oct. 29, 2003) (on file with author). The sponsor of the bill, Illinois State Representative John Fritchey, claimed that the bill will "make sure not to dilute the importance of true consumer safety issues by denying the existence of personal responsibility." *Id.*

26. *E.g.*, Gov. Blagojevich Press Release, *supra* note 23. According to Gov. Blagojevich, "[o]besity is a serious problem in Illinois. But, blaming a restaurant for weight gain is not the answer. By signing this law, we are promoting personal responsibility and common sense eating habits." *Id.*

27. The Illinois Restaurant Association "applaud[ed] the actions of the Governor, as well as the Illinois legislature who supported this important bill, to protect restaurants against frivolous lawsuits." IRA Press Release, *supra* note 21.

28. The Illinois Restaurant Association asserts that "frivolous lawsuits will not solve the complex and serious issue of obesity in our state and that placing blame solely on the restaurant industry will only hurt small business owners all across Illinois." *Id.*

29. *See infra* Parts II and IV (reviewing the issues underlying fast food litigation in America and examining the provisions of the Illinois Commonsense Consumption Act).

30. *See infra* Part IV (discussing the continued ability of Illinois plaintiffs to state claims against fast food companies based on violations of consumer protection statutes and breaches of contract).

31. *Id.*

32. *See infra* Part II (exploring the relationship between obesity and fast food, the legal theories applicable to fast food litigation, previous fast food litigation, and the legislative response to those suits).

33. *See infra* Part III (discussing the Illinois Commonsense Consumption Act).

on fast food litigation in Illinois.[34] Finally, Part V provides blueprints for future action in fast food litigation.[35]

II. BACKGROUND

This Part provides an introduction to the key issues involved in fast food litigation.[36] First, it describes the growing problem of obesity in the United States and the purported contribution of fast food to that growing problem.[37] This Part then discusses the causes of action potentially most applicable to fast food litigation.[38] Next, it reviews the litigation already filed against fast food restaurants for obesity-related illnesses.[39] Finally, it reviews similar Commonsense Consumption Acts enacted by other states and the history of similar tort reform in Illinois.[40]

A. Fast Food and Obesity

According to the Centers for Disease Control, nearly sixty-five percent of American adults are overweight and approximately thirty percent are obese.[41] In Illinois, a 2002 study revealed that nearly sixty percent of Illinois adults are overweight or obese, representing a one hundred percent increase since 1992.[42] This section examines the

34. *See infra* Part IV (analyzing the provisions of the Illinois Commonsense Consumption Act and their potential impact).

35. *See infra* Part V (proposing the reactions of both fast food litigation advocates and the fast food industry in response to the Illinois Commonsense Consumption Act).

36. *See infra* Part II.A–D (discussing the relationship between fast food and obesity, the traditional causes of action available to Illinois consumers prior to the passage of the Illinois Commonsense Consumption Act, and the fast food suits already filed elsewhere in the country).

37. *See infra* Part II.A (highlighting fast food's purported role in the rise of American obesity).

38. *See infra* Part II.B (reviewing the causes of action traditionally used to advance litigation against the fast food industry in obesity suits).

39. *See infra* Part II.C (summarizing the legal issues raised by plaintiffs in previous fast food suits and the treatment of those issues by the respective courts).

40. *See infra* Part II.D (examining the National Restaurant Association's Model Commonsense Consumption Act and the different variations enacted by several states).

41. OVERWEIGHT AND OBESITY AMONG ADULTS, *supra* note 14. The CDC defines "overweight" as "increased body weight in relation to height, when compared to some standard of acceptable or desirable weight." CDC, NATIONAL CENTER FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION: DEFINING OVERWEIGHT AND OBESITY, *available at* http://www.cdc.gov/nccdphp/dnpa/obesity/defining.htm (last updated Apr. 29, 2005) [hereinafter DEFINING OVERWEIGHT AND OBESITY]. Likewise, "obesity" is an "excessively high amount of body fat or adipose tissue in relation to lean body mass." *Id.* The mathematical Body Mass Index (BMI) formula expresses the weight-to-height ratio used in identifying overweight and obese adults. *Id.* In general, "[i]ndividuals with a BMI of 25 to 29.9 are considered overweight, while individuals with a BMI of 30 or more are considered obese." *Id.*

42. CDC, NATIONAL CENTER FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION, OVERWEIGHT AND OBESITY: STATE PROGRAMS, *available at* http://www.cdc.gov/

reasons why obesity has become a tool for litigation and a legislative issue.[43] In particular, this section discusses the alleged role of fast food in creating the obesity problem.[44] This section then examines the increasing obesity rates in the United States and the various costs associated with that increase.[45]

1. What Does Fast Food Have to do with Obesity?

The Centers for Disease Control and Prevention reports that obesity results from an energy imbalance of too many calories and not enough activity.[46] Health experts state that increased calorie consumption results in part from growing portion sizes at fast food restaurants and the high fat, sugar, and caloric content of fast foods.[47] Even a brief comparison of the suggested daily nutritional intake to the nutritional content of fast food confirms that, at a minimum, fast food is not healthy.[48]

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nccdphp/dnpa/obesity/state_programs/illinois.htm (last updated Apr. 29, 2005) [hereinafter STATE PROGRAMS]; THE HENRY J. KAISER FAMILY FOUND., ILLINOIS: OBESITY PREVALENCE AMONG U.S. ADULTS, 2001 *available at* http://www.statehealthfacts.org (last visited Feb. 19, 2005). "Illinois ranks 17th highest among the 50 U.S. states and the District of Columbia for obesity. More than 3.6 million adults in Illinois are categorized as obese." *News from the Office of Woman's Health*, HEALTHY WOMAN (Ill. Dep't of Pub. Health), Spring 2003, at 3, *available at* http://www.idph.state.il.us/about/womenshealth/031680_Newsletter.pdf.

43. *See infra* Part II.A.1–2 (discussing the physical and economic harms of obesity and the role that fast food plays in causing such obesity).

44. *See infra* Part II.A.1 (discussing the low nutritional content of fast food products and the movement to link that content to rising obesity rates).

45. *See infra* Part II.A.2 (discussing the dramatic increase in American obesity and the variety of health consequences caused by that increase).

46. CDC, NATIONAL CENTER FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION, OVERWEIGHT AND OBESITY: FACTORS CONTRIBUTING TO OBESITY, *available at* http://www.cdc.gov/nccdphp/dnpa/obesity/contributing_factors.htm (last updated Apr. 29, 2005). "Overweight and obesity are a result of energy imbalance over a long period of time. The cause of energy imbalance for each individual may be due to a combination of several factors. Individual behaviors, environmental factors, and genetics all contribute to the complexity of the obesity epidemic." *Id.*

47. *Id.*

> In America, a changing environment has broadened food options and eating habits. Grocery stores stock their shelves with a greater selection of products. Pre-packaged foods, fast food restaurants, and soft drinks are also more accessible. While such foods are fast and convenient they also tend to be high in fat, sugar, and calories. Choosing many foods from these areas may contribute to an excessive calorie intake. Some foods are marketed as healthy, low fat, or fat-free, but may contain more calories than the fat containing food they are designed to replace.

Id.

48. *See infra* notes 49–58 and accompanying text (comparing the United States Departments of Agriculture and Health and Human Services nutritional guidelines to the nutritional content of fast food).

The United States Departments of Agriculture and Health and Human Services develop and issue "Dietary Guidelines for Americans" ("Guidelines") every five years.[49] The Guidelines provide user-friendly food information designed to promote health and decrease disease.[50] In general, the Guidelines recommend daily diets that include only sparse amounts of fats, oils, and sweets.[51] Specifically, the Guidelines caution against the consumption of saturated fat and cholesterol because they increase blood cholesterol levels and the risk for coronary heart disease.[52] They recommend monitoring sugar and caloric intake to avoid resultant weight gain.[53] Finally, the Guidelines recommend avoiding foods high in sodium in order to reduce the likelihood of developing high blood pressure.[54] Under the guidelines, a daily diet should consist of less than 65 grams of total fat, less than 20 grams of saturated fat, less than 300 milligrams of cholesterol, less than 2,400 milligrams of sodium, and less than 300 grams of carbohydrates.[55] To meet these daily nutritional levels, the USDA suggests eating a variety of fresh fruits, vegetables, and grains daily and eating food low in saturated fat, cholesterol, and sodium.[56]

In sharp contrast to the Guidelines' recommendations, many fast food products contain high levels of total fat, saturated fat, cholesterol, sugar,

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49. U.S. DEP'T OF AGRIC., NUTRITION AND YOUR HEALTH: DIETARY GUIDELINES FOR AMERICANS (5th ed. 2000), *available at* http://www.usda.gov/cnpp/DietGd.pdf [hereinafter GUIDELINES]; *see also* CENTER FOR NUTRITION POLICY AND PROMOTION, BACKGROUND INFORMATION ON THE DIETARY GUIDELINES FOR AMERICANS, *available at* http://www.usda.gov/cnpp/Pubs/DG2000/Backgr.PDF (explaining that every five years the departments issue new dietary guidelines based on a the recommendations of an advisory committee comprised of prominent nutritional experts) (last visited Apr. 30, 2005). In January 2005, the United States Department of Agriculture and the United States Department of Health and Human Services released updated nutritional guidelines. Information on the newly-released guidelines may be found at http://www.health.gov/dietaryguidelines/.

50. *See generally* GUIDELINES, *supra* note 49 (setting goals of physical fitness, a healthy nutritional base, and sensible decision-making and providing consumers with the information necessary to begin working toward those goals).

51. *Id.* at 15.

52. *Id.* at 28.

53. *Id.* at 32–33.

54. *Id.* at 34.

55. CTR. FOR FOOD SAFETY AND APPLIED NUTRITION, U.S. DEP'T OF HEALTH AND HUMAN SERV., FOOD AND DRUG ADMIN., HOW TO UNDERSTAND AND USE THE NUTRITION FACTS LABEL, *available at* http://www.cfsan.fda.gov/~dms/foodlab.html (last updated Nov. 2004).

56. GUIDELINES, *supra* note 49, at 2. For example, the Food Pyramid provides a visual suggestion of daily food choices based on health needs. *Id.* at 15. It recommends a base of six to eleven servings of breads and cereals, two to four servings of fruit, three to five servings of vegetables, two to three servings of dairy, two to three servings of meat, and fats, oils, and sweeteners only sparingly. *Id.*

and sodium.[57] A fast food customer can nearly meet or exceed the Guidelines' daily recommended limits in only one meal.[58] However, many of these customers return consistently to dine on highly-caloric and highly-fatty meals.[59] In fact, some suggest that the fast food industry targets advertising and marketing efforts to this group of repeat diners in order to further increase their frequency of visits.[60]

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57. *E.g.*, MCDONALD'S CORP., MCDONALD'S NUTRITION FACTS FOR POPULAR MENU ITEMS, *available at* http://www.mcdonalds.com/app_controller.nutrition.categories.nutrition.index.html (effective Mar. 19, 2004) [hereinafter MCDONALD'S NUTRITION FACTS]. For example, a McDonald's Double Quarter Pounder with Cheese contains 20 grams of saturated fat, one hundred percent of the daily recommendation, and 770 calories. *Id.* The six-piece Chicken McNuggets contains 3 grams of saturated fat, 16% of the daily recommendation; 35 milligrams of cholesterol, 12% of the daily recommendation; 670 milligrams of sodium, 28% of the daily recommendation; and 250 calories. *Id.* Even the Grilled Chicken California Cobb Salad has 11 grams of fat, 17% of the daily recommendation; 5 grams of saturated fat, 24% of the daily recommendation; 145 milligrams of cholesterol, 48% of the daily recommendation; 1060 milligrams of sodium, 44% of the daily recommendation; and 270 calories. *Id.* Demonstrating that poor nutritional content is not limited to McDonald's, Burger King's original Whopper contains 700 calories, 13 grams of saturated fat, 85 milligrams of cholesterol, and 1020 milligrams of sodium. BURGER KING CORP., HAVE IT YOUR WAY, *available at* http://www.bk.com/Food/Nutrition/NutritionWizard/index.aspx (last visited Apr. 30, 2005). The Original Whopper Jr. with cheese contains 9 grams of saturated fat, 55 milligrams of cholesterol, and 770 milligrams of sodium. *Id.* The Spicy TenderCrisp Chicken Sandwich has 720 calories, 6 grams of saturated fat, 55 milligrams of cholesterol, and 2030 milligrams of sodium. *Id.* Wendy's Big Bacon Classic contains 580 calories, 12 grams of saturated fat, 95 milligrams of cholesterol, and 1390 milligrams of sodium. WENDY'S INT'L, INC., COMPLETE NUTRITION GUIDE, *available at* http://www.wendys.com/food/index.jsp?country=US&lang=EN (last updated Apr. 1, 2005). The Jr. Bacon Cheeseburger contains 380 calories, 7 grams of saturated fat, 55 milligrams of cholesterol, and 810 milligrams of sodium. *Id.* Finally, the Chicken BLT salad contains 330 calories, 9 grams of saturated fat, 105 milligrams of cholesterol, and 840 milligrams of sodium. *Id.*

58. *E.g.*, MCDONALD'S NUTRITION FACTS, *supra* note 57. For example, if a McDonald's customer had a Quarter Pounder with Cheese, a large order of French fries, and a large Coke, that customer would have consumed eighty-three percent of the daily saturated fat recommendation, sixty-three percent of the daily sodium recommendation, and sixty-six percent of the daily carbohydrates recommendation. *Id.*

59. *E.g.*, SUPER SIZE ME, *supra* note 5 (noting that seventy-two percent of McDonald's customers eat at its restaurants at least once a week). Twenty-two percent of McDonald's customers eat at its restaurants more than five times a week. *Id.* An unusual illustration of the repeat McDonald's diner is Don Gorske, a Wisconsin man who has lived on a diet of almost nothing except Big Macs for the last thirty years with no apparent health consequences. *Id.;* Pelman v. McDonald's Corp, 237 F. Supp. 2d 512, 527–28 n.13 (S.D.N.Y. 2003) [hereinafter *Pelman I*] (discussing the details of Mr. Gorske's interesting diet).

60. *See, e.g.*, Pelman v. McDonald's Corp., 2003 WL 22052778, at *1–2 (S.D.N.Y. 2003) [hereinafter *Pelman II*] (describing McDonald's advertising campaign aimed at the category of consumers termed "super heavy users" who ate at their restaurants at least ten times per month and accounted for seventy-five percent of their sales, and claiming that the restaurants offered good basic nutritional food); *see also* Mason, *supra* note 18, at 91 (arguing that because the fast food industry relies heavily on "heavy users," the industry should reasonably foresee these consumers' high levels of consumption and the aggregate effects of such consumption, and because they should reasonably foresee such patterns and effects, fast food is an unreasonably

The low nutritional value of fast food, combined with the prevalence of fast food restaurants in American society, have led a growing number of people to identify the fast food industry as a potential cause of American obesity.[61]

2. *What Is the Problem With Obesity?*

Regardless of its sources, the physical and economic consequences of increasing American obesity are tremendous.[62] Obesity is a leading cause of diabetes, coronary disease, cancer, stroke, and death.[63] Further, obese persons are more likely to suffer from gallstones, sleep apnea, pregnancy complications, poor reproductive health, and bladder control problems.[64] Obese persons also more frequently suffer from psychological disorders such as low self-esteem, depression, eating disorders, and distorted body image.[65] As a result of the many ailments to which it contributes, the United States Surgeon General calls obesity a "crisis" and identifies it as a leading cause of death and illness in the

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dangerous product); Rogers, *supra* note 17, at 876 (comparing the fast food industry to the tobacco industry in terms of ignoring the negative health consequences of their product and suggesting that the fast food industry, just as the tobacco industry once did, entices people to eat more fast food more frequently).

61. *See, e.g.*, SCHLOSSER, *supra* note 1; SUPER SIZE ME, *supra* note 5; *see also* Laura Bradford, *Fat Foods: Back in Court*, TIME, Aug. 3, 2003, *available at* http://www.time.com/time/insidebiz/article/0,9171,1101030811-472858,00.html (quoting fast food litigation advocate Professor Banzhaf expressing his view that "[a] fast-food company like McDonald's may not be responsible for the entire obesity epidemic . . . but let's say they're five percent responsible. Five percent of $117 billion is still an enormous amount of money").

62. *See generally* United States Surgeon General Richard H. Carmona, The Obesity Crisis in America, Address Before the United States House of Representatives Subcommittee on Education Reform (July 16, 2003) [hereinafter Obesity Crisis] (remarks *available at* http://www.surgeongeneral.gov/news/testimony/obesity07162003.htm) (calling the growing rates of American obesity a "crisis" and stating that it is the fastest-growing cause of death in the country).

63. Rob Stein, *Obesity Passing Smoking as Top Avoidable Cause of Death*, WASH. POST, Mar. 10, 2004; Associated Press, *Obesity Nearly as Deadly as Tobacco in United States* (Mar. 9, 2004), *available at* http://msnbc.msn.com/id/4486906/.

64. AM. OBESITY ASSOC., AOA FACT SHEETS: HEALTH EFFECTS OF OBESITY, *available at* http://www.obesity.org/subs/fastfacts/Health_Effects.shtml (last updated Mar. 21, 2005). The American Obesity Association indicates that obese persons are at risk for an astonishing number of ailments: arthritis, giving birth to children with birth defects, several types of cancers, cardiovascular disease, carpal tunnel syndrome, chronic venous insufficiency (an inadequate blood flow through the veins), daytime sleepiness, deep vein thrombosis, Type 2 diabetes, renal disease, gallbladder diseases, gout, heat disorders, hypertension, impaired immune response, impaired respiratory function, infections, infertility, liver disease, low back pain, obstetric and gynecologic complications, pancreatitis, sleep apnea, stroke, complications with surgery, and urinary incontinence. *Id.*

65. CDC, NATIONAL CENTER FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION, OVERWEIGHT AND OBESITY: HEALTH CONSEQUENCES, *available at* www.cdc.gov/nccdphp/dnpa/obesity/consequences.htm (last updated Apr. 11, 2005).

country, contributing to the deaths of more than 300,000 Americans annually.[66]

Further, the consequences of obesity spread beyond physical and psychological well-being to reach into the nation's checkbooks.[67] Experts estimate that obesity-related medical services cost Americans almost $100 billion annually.[68] Individually, overweight and obese persons spend $700 more per person annually than non-overweight persons on visits to the doctor and related expenses such as medication and tests.[69] In Illinois alone, these expenditures total more than $3.4 billion.[70] When indirect expenditures like decreased productivity due to missed days of work are added to these direct medical costs, the annual cost of obesity rises to $117 billion nationally.[71]

A growing number of sources have recently begun attributing these growing costs to the fast food industry.[72] Past and present United States Surgeons General have suggested that fast food's low cost further increases its danger to public health[73] and Supreme Court Justice

66. Obesity Crisis, *supra* note 62. In fact, a recent study suggests that obesity will soon overtake tobacco as the leading cause of American death and may lead to as many as 500,000 deaths in 2005. Stein, *supra* note 63.

67. *See infra* notes 68–71 and accompanying text (discussing the economic impacts of American obesity).

68. "As American waistlines have expanded, so have the economic costs of obesity, now totaling about $93 billion in extra medical expenses per year." United States Surgeon General Richard H. Carmona, Reshaping America's Health Care for the Future, Remarks before the Joint Economic Committee of the United States Congress (Oct. 1, 2003) [hereinafter Reshaping America's Health Care] (remarks as prepared *available at* http://www.surgeongeneral.gov/news/testimony/reshapinghealthcare10012003.htm). The direct medical costs include items like the cost of diagnosis, treatment, and preventive services. CDC, NATIONAL CENTER FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION, OVERWEIGHT AND OBESITY: ECONOMIC CONSEQUENCES, *available at* http://www.cdc.gov/nccdphp/dnpa/obesity/economic_consequences.htm (last updated Apr. 11, 2005) [hereinafter ECONOMIC CONSEQUENCES].

69. Reshaping America's Health Care, *supra* note 68

70. ECONOMIC CONSEQUENCES, *supra* note 68.

71. Obesity Crisis, *supra* note 62. One employer group estimated that obesity and obesity-related illness costs businesses $12 billion annually. Reuters, *Employers Say Obesity a Major Cost* (Oct. 17, 2003), *available at* http://www.msnbc.msn.com/id/3076959/.

72. *E.g.*, SCHLOSSER, *supra* note 1. In 2001, Eric Schlosser's Fast Food Nation purported to expose the "Dark Side of the All-American Meal" by revealing the unknown contents and effects of fast food. *Id.* In addition, New York City film director Morgan Spurlock recently attempted to demonstrate a clear link between eating fast food and obesity by filming a documentary of his thirty-day McDonald's-only diet. SUPER SIZE ME, *supra* note 5.

73. *E.g.*, Obesity Crisis, *supra* note 62. "While extra value meals may save us some change at the counter, they're costing us billions of dollars in health care and lost productivity. Physical inactivity and super-sized meals are leading to a nation of oversized people." *Id.* Former United States Surgeon General David Satcher also suggests that fast food is partially responsible for the growing obesity crisis in America and, if left unchecked, will result in obesity surpassing tobacco as the leading cause of American death. SUPER SIZE ME, *supra* note 5 (providing a filmed

Kennedy has suggested that fast food may hold partial responsibility for rising obesity rates.[74] Further, a Boston physician released a study purporting to demonstrate a direct relationship between fast food and obesity.[75] As a result, some observers now identify fast food as a significant contributor to the American obesity problem and insist that the industry take legal and financial responsibility for the problem.[76]

B. Legal Theories Used Against the Fast Food Industry

Many who believe the fast food industry is liable for American obesity maintain that litigation is not the preferred approach.[77] Instead, they claim to prefer legislation that stringently regulates the fast food industry's marketing and advertising practices.[78] However, they find it unlikely that Congress will adopt tougher laws.[79] Consequently, they have opted to follow in the footsteps of prior mass tort movements by using the court system rather than the legislative process to create their desired social policy.[80] Some observers indicate that fast food litigation

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interview with former United States Surgeon General Satcher).

74. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 587 (2001) (Kennedy, J., concurring) ("The growth of obesity over the last few decades has had many causes, a significant factor has been the increased availability of large quantities of high-calorie, high-fat foods.").

75. *See generally* David S. Ludwig et al., *High Glycemic Index Foods, Overeating, and Obesity*, 103 PEDIATRICS, No. 3 (Mar. 1999) (noting that both excessive fat consumption and consumption of foods with a high glycemic index are major causes of obesity and pointing out that much fast food falls into these categories).

76. *Id.*; Julia Sommerfield, *Fat Suits: Who's to Blame For Flab?*, MSNBC, *at* http://www.msnbc.msn.com/id/3076962/ (last visited Apr. 20, 2005).

77. *E.g.*, Goldman, *supra* note 19, at 128.

78. *Id.* at 127.

79. *E.g.*, Lee J. Munger, Comment, *Is Ronald McDonald the Next Joe Camel? Regulating Fast Food Advertisements Targeting Children in Light of the American Overweight and Obesity Epidemic*, 3 CONN. PUB. INT. L.J. 456, 463 (Spring 2004) (quoting Professor John Banzhaf as saying that "[o]ne of the most effective ways to get social change is to sue people . . . . If I go to Congress and say, 'Do something about obesity,' I wouldn't have the slightest chance in hell.") (citations omitted), *available at* http://www.law.uconn.edu/journals/cpilj/Munger.doc (last visited Apr. 20, 2005).

80. *E.g.*, Franklin E. Crawford, *Fit For Its Ordinary Purpose? Tobacco, Fast Food, and the Implied Warranty of Merchantability*, 63 OHIO ST. L.J. 1165, 1217–18 (2002) (footnote call numbers omitted).

> Mass tort litigation often results from frustration arising out of a failure to obtain legislative action controlling such unpopular institutions as the tobacco industry. These cases often . . . seek to hold manufacturers liable for creating such social ills as gun violence and the potential dangers of alcohol. . . . Admittedly, it seems a little far-fetched to believe that courts will put Ronald McDonald and the Hamburgler in the same category as Joe Camel and the Marlboro Man, but one's attitude changes dramatically upon even a cursory examination of the current attacks on the fast food industry.

Id. *See also* Goldman, *supra* note 19, at 113 (arguing that the tactics used against tobacco companies could be successful in obesity cases); *cf.* Munger, *supra* note 79, at 456 (highlighting

has therefore extended the principles developed in tobacco mass tort actions to the fast food industry.[81]

Generally speaking, fast food litigation is grounded in product liability and alleges that, as the manufacturer and seller of a harmful product, a fast food restaurant is responsible for the damages caused by that product, the food.[82] Fast food litigation advocates, however, recognize the need to try a variety of claims in order to identify those with the most potential for success.[83] As a result, recent fast food litigation has raised a variety of legal theories.[84] This section briefly explores those theories and demonstrates, where possible, the reaction of Illinois courts.[85] Finally, this section discusses the general feasibility of using those theories to assert claims against the fast food industry.[86]

1. Misrepresentation

The most widely-used theory in fast food litigation thus far has been the allegation that the fast food industry misrepresents the quality and effects of its food.[87] In Illinois, such allegations are cognizable either under a common law theory of fraud[88] or as a violation of the state's consumer protection statute.[89] This section begins with a discussion of Illinois common law fraudulent misrepresentation by reviewing its elements and relevant applications.[90] Next, this section discusses the Illinois Consumer Fraud and Deceptive Business Practices Act and its

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the ultimate acceptance of once-novel litigation theories in tobacco litigation).

81. Crawford, *supra* note 80, at 1169 ("The history of tobacco litigation is the future of the fast food industry.").

82. *See infra* Part II.C (examining the claims raised in previously-filed fast food litigation suits). *See generally* Romero, *supra* note 5, at 257–65 (discussing the common law causes of action which could potentially be used to state a claim against fast food companies).

83. *See* Crawford, *supra* note 80, at 1169–70 (discussing Professor John Banzhaf's belief that fast food litigation advocates have to try a variety of claims because they "know from tobacco litigation that initial suits have real difficulties because the public has real problems with accepting new ideas and new concepts") (citation omitted).

84. *See infra* Part II.C (discussing the fast food suits that have already been filed).

85. *See infra* Parts II.B.1–5 (reviewing the elements of causes of action based on claims of fraudulent misrepresentation, consumer fraud, breach of contract, violation of federal nutritional labeling requirements, strict liability, and negligence).

86. *See infra* Parts II.B.1–5 (assessing the feasibility of utilizing various causes of action in fast food litigation against the fast food industry).

87. *See infra* Parts II.C (revealing that misrepresentation was alleged in the *Barber, Pelman,* and *Cohen* cases).

88. *See infra* notes 92–101 and accompanying text (discussing the Illinois common law claim of misrepresentation).

89. *See infra* notes 118–34 and accompanying text (reviewing the elements of misrepresentation under the Illinois consumer protection statute).

90. *See infra* Part II.B.1.a. (examining the elements of common law fraud in Illinois).

expansion of the common law fraud concept.[91]

a. Common Law Fraudulent Misrepresentation

The concept of fraud under Illinois common law encompasses the purposeful misrepresentation or concealment of a material fact with the intent to deceive.[92] To recover on a claim of fraudulent misrepresentation, a plaintiff must plead with specificity that the defendant (1) made a false statement or concealment of material fact,[93] (2) knew the statement to be false, and (3) was intended by the defendant to induce the plaintiff to act.[94] Additionally, the recipient of the false statement must reasonably rely on the statement before taking action, must suffer damages, and must demonstrate that the misrepresentation proximately caused the damages.[95] In considering a fraudulent misrepresentation claim, Illinois courts recognize that puffing—statements purely assigning value to a product—is not considered material and is thus considered an acceptable form of advertising and marketing.[96] However, if a seller goes beyond the simple assignment of value and makes statements attributing specific characteristics to a product, those statements are not considered puffing and can be the basis for a fraudulent misrepresentation claim.[97]

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91. *See infra* Part II.B.1.b (highlighting the differences between common law fraud in Illinois and consumer fraud under the Consumer Fraud and Deceptive Business Practices Act); *see also* the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILL. COMP. STAT. 505/1-12 (2002).

92. *E.g.*, State Sec. Ins. Co. v. Frank B. Hall & Co., 630 N.E.2d 940, 943 (Ill. App. Ct. 1st Dist. 1994) ("Fraud in its general sense includes 'any act, omission, or concealment calculated to deceive, including silence, if accompanied by deceptive conduct or suppression of material facts constituting an act of concealment.'") (quoting Farm Credit Bank of St. Louis v. Isrighauser, 569 N.E.2d 235, 237 (Ill. App. Ct. 4th Dist. 1991)). *See also* Neurosurgery and Spine Surgery, S.C. v. Goldman, 790 N.E.2d 925, 931–32 (Ill. App. Ct. 2d Dist. 2003) (providing a background of fraudulent misrepresentation as a cause of action arising from business or financial transactions and recognizing the tort's origin as a response to deceitful behaviors). Illinois plaintiffs can also recover for negligent misrepresentations, which requires pleading virtually the same elements as a fraudulent misrepresentation claim. *See* Bd. of Educ. v. A, C and S, Inc., 546 N.E.2d 580, 591 (Ill. 1989) (noting that negligent misrepresentation contains essentially the same elements as fraudulent misrepresentation; the difference is in the defendant's mental state).

93. *E.g.*, Miller v. William Chevrolet/GEO, Inc., 762 N.E.2d 1 (Ill. App. Ct. 1st Dist. 2001) (holding that "a misrepresentation is 'material' if the plaintiff would have acted differently had he been aware of it, or if it concerned the type of information upon which he would be expected to rely when making his decision to act.").

94. *Neurosurgery*, 790 N.E.2d at 933; Connick v. Suzuki Motor Co., 675 N.E.2d 584, 591 (Ill. 1996); *Bd. of Educ.*, 546 N.E.2d at 591; Soules v. Gen. Motors Corp., 402 N.E.2d 599, 601 (Ill. 1980).

95. *Neurosurgery*, 790 N.E.2d at 933; *Connick*, 675 N.E.2d at 591; *Board of Educ.*, 546 N.E.2d at 591; *Soules*, 402 N.E.2d at 601.

96. *Miller*, 762 N.E.2d at 7.

97. *Id.* at 7 ("Statements of existing facts or comments that ascribe specific virtues to a

In addition, fraudulent misrepresentation claims can result from the concealment of material facts.[98] The elements of a fraudulent concealment claim require a plaintiff to demonstrate: (1) the intentionally concealed fact was material, (2) the plaintiff could not reasonably have discovered the truth, (3) the plaintiff reasonably relied on the concealment, and (4) the plaintiff was thereby injured.[99] A plaintiff must also demonstrate that the defendant had a duty to disclose the concealed information.[100] In considering situations where a defendant made a partial disclosure of information, Illinois courts have held that partially-true statements omitting other material information qualify as actionable fraudulent concealments.[101]

In *Soules v. General Motors Corp.,* for example, the Supreme Court of Illinois ruled that a fraudulent misrepresentation may occur even when the alleged victim could have discovered the truth of the defendant's statement.[102] In *Soules,* the plaintiff based his decision to invest in one of the defendant's franchise operations on the defendant's knowingly-misstated financial representations.[103] The trial court dismissed the plaintiff's claim, finding that the plaintiff, as an investor, was in a position to determine the truthfulness of the defendant's statement and thus could not demonstrate reasonable reliance.[104] However, the appellate court reversed and the Supreme Court of Illinois affirmed that reversal.[105] The Supreme Court of Illinois held that such a

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product are not generally considered puffing and may be the subject of a fraud claim.") (citation omitted).

98. *State Sec. Ins. Co.,* 630 N.E.2d at 943.

99. *E.g.,* Lane v. Anderson, 802 N.E.2d 1278, 1284 (Ill. App. Ct. 3d Dist. 2004). To prove fraudulent concealment, the plaintiff must show:

> "(1) the concealment was of a material fact; (2) the concealment was intended to induce a false belief; (3) the innocent party could not have discovered the truth through a reasonable inquiry or inspection and relied upon the silence as a representation that the fact did not exist; (4) the concealed information was such that the injured party would have acted differently if he had been aware of it; and (5) the reliance by the person from whom the fact was concealed led to his injury."

Id.

100. *E.g., Connick,* 675 N.E.2d at 593. In Illinois, a duty to disclose under the fraudulent concealment concept arises in fiduciary or confidential relationships or in relationships where, because of agency, friendship, or experience, the defendant is in a position of superiority or influence over the plaintiff. *Id.*; W.W. Vincent & Co. v. First Colony Life Ins. Co., 814 N.E.2d 960, 969 (Ill. App. Ct. 1st Dist. 2004).

101. *W.W. Vincent,* 814 N.E.2d at 969 ("A statement which is technically true may nevertheless be fraudulent where it omits qualifying material since a 'half-truth' is sometimes more misleading than an outright lie.").

102. Soules v. Gen. Motors Corp., 402 N.E.2d 599, 601 (Ill. 1980).

103. *Id.*

104. *Id.*

105. *Id.* at 601–02.

situation alone does not preclude a finding of fraudulent misrepresentation.[106] Rather, in situations where a plaintiff is in a position to potentially determine the truth of a defendant's statements, a plaintiff's reasonable reliance must be judged in light of all the surrounding circumstances.[107]

Further, even technically true statements may constitute fraudulent concealment in Illinois if the statements are misleading.[108] For example, in *Perlman v. Time, Inc.*, the defendant magazine publisher offered the plaintiff a transferred subscription to another magazine up to the "full value" of the plaintiff's existing subscription.[109] The publisher did not state, however, that the "full value" would be calculated in a way that decreased the length of the transferred subscription offered.[110] The publisher argued that the promise of a "full value" transferred subscription was true even though the manner in which it was calculated was unexpected.[111] The Illinois Appellate Court, however, disagreed and reasoned that even technically true statements can constitute fraudulent concealments because in some circumstances they may be even more misleading than outright falsehoods.[112]

Based on these principles, observers recognize the potential to bring common law fraud claims against fast food companies.[113] The fraudulent concealment theory seems particularly attractive to fast food litigation advocates.[114] Under that theory, a plaintiff would allege that a fast food restaurant knowingly failed to disclose a material ingredient, element, or characteristic of its products.[115] However, those same

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106. *Id.* at 601.

107. *Id.*

> The question is whether, under all the circumstances, plaintiff had a right to rely on the false representations. This question is to be answered while viewing the representation in light of all the facts of which plaintiff had actual knowledge as well as those of which he "might have availed himself by the exercise of ordinary prudence."

Id. (citations omitted).

108. Perlman v. Time, Inc., 380 N.E.2d 1040, 1044 (Ill. App. Ct. 1st Dist. 1978).

109. *Id.* at 1042.

110. *Id.* at 1043. The plaintiff had originally subscribed to Life at a discounted rate. *Id.* at 1042. Therefore, his per issue cost was less than the higher magazine rack rate. *Id.* When the publisher offered to transfer his outstanding balance to another magazine subscription, it intended to charge the plaintiff the higher rack rate for the new magazine rather than a discounted rate similar to the one the plaintiff had previously enjoyed. *Id.* at 1042.

111. *Id.* at 1044–46.

112. *Id.* at 1044.

113. *See* Romero, *supra* note 5, at 258 (urging potential fast food litigation plaintiffs not to wholly abandon the theory of misrepresentation).

114. *Id.*

115. *Id.*

observers also recognize the potential difficulty of sufficiently demonstrating reasonable reliance upon the fast food restaurant's misstatement or omission.[116] Because obesity develops gradually over time, they believe that the challenge will come in showing prolonged reasonable reliance on a fast food restaurant's claims of the food's healthy attributes or compliance with a healthy diet.[117]

b. The Illinois Consumer Fraud and Deceptive Business Practices Act ("CFDBPA")

In addition to the common law concept of fraudulent misrepresentation and concealment, the Illinois Legislature created a statutory basis for suit based on unfair and deceptive business practices.[118] The CFDBPA serves two important purposes for Illinois consumers.[119] First, unlike the Federal Trade Commission Act ("FTCA"),[120] the CFDBPA creates a private right of action which allows individuals and not just the government to file suit directly.[121] Next, unlike common law fraudulent misrepresentation, the CFDBPA mandates a liberal construction that allows courts to consider the legislature's broader goal of consumer protection in evaluating claims rather than restricting courts to a narrow interpretation of the statute's provisions.[122] The CFDBPA also establishes a broad definition of

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116. *Id.*

117. *Id.* (recognizing that personal reliance in obesity suits will be difficult to show "given the relatively slow onset of obesity and the difficulty of pinpointing the specific [claims] that caused plaintiffs to eat particular products").

118. Consumer Fraud and Deceptive Business Practices Act, 815 ILL. COMP. STAT. 505/1 (2002) ("An Act to protect consumers and borrowers and businessmen against fraud, unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce and to give the Attorney General certain powers and duties for the enforcement thereof.").

119. ILLINOISPROBONO.ORG, CONSUMER FRAUD (explaining that that the CFDBPA "provide[s] significant private remedies to combat a wide range of consumer abuses. . . . [and is] important because the FTC Act, though sharply limiting the doctrine of caveat emptor, provides only FTC enforcement and not private enforcement"), *at* http://www.illinoisprobono.org/index.cfm?fuseaction=home.dsp_content&contentID=280 (last updated Dec. 11, 2003).

120. Federal Trade Commission Act 15 U.S.C. §§ 41–58 (2000). The Federal Trade Commission Act provides the FTC with the authority to enjoin unfair or deceptive practices that effect commerce, but it does not create a private right of action. *Id.*

121. 815 ILL. COMP. STAT. 505/10a(a) (2002) ("Any person who suffers actual damage as a result of a violation of this Act committed by another person may bring an action against such person. The court, in its discretion may award actual economic damages or any other relief which the court deems proper . . . .").

122. 815 ILL. COMP. STAT. 505/11a (2002) ("This Act shall be liberally construed to effect the purposes thereof."); *see also* Smith v. Prime Cable, 658 N.E.2d 1325, 1335 (Ill. App. Ct. 1st Dist. 1995) ("[The CFDBPA] creates a cause of action different from the traditional common law tort of fraud and affords greater consumer protection than does the common law action since the

"deceptive practice."[123] The CFDBPA continues to give effect to federal consumer protection laws, however, by requiring courts to consider FTCA regulations when interpreting CFDBPA requirements.[124]

The liberal interpretation of the CFDBPA creates several important distinctions between common law causes of action and CFDBPA claims.[125] First, in contrast to the common law, CFDBPA complainants need not demonstrate either reliance or that the allegedly false statement formed the basis of the bargain.[126] Instead, CFDBPA complainants need only establish: (1) a materially deceptive act or practice by the defendant;[127] (2) the defendant's intent that plaintiff rely on the deception; (3) that the deception occurred during the course of trade or business;[128] (4) damage to the plaintiff;[129] and (5) proximate causation.[130] Like the common law theory of fraud, the CFDBPA identifies the

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Act prohibits any "deception" or "false promise.") (citations omitted); Oliveira v. Amoco Oil Co., 726 N.E.2d 51, 57 (Ill. App. Ct. 4th Dist. 2000) ("The Act has been construed liberally to give effect to the legislative goals behind its enactment . . . [and to] give broader protection than common law fraud . . . .") (citations omitted).

123. 815 ILL. COMP. STAT. 505/2 (2002).

> [D]eceptive acts or practices, include . . . the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in section 2 of the "Uniform Deceptive Trade Practices Act" . . . are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby.

Id. The Illinois Deceptive Trade Practices Act further defines deceptive practices as (1) the advertisement of goods or services with the intent not to sell them as advertised and (2) any other conduct which similarly creates a likelihood of confusion or misunderstanding. 815 ILL. COMP. STAT. 510/2 (2002).

124. 815 ILL. COMP. STAT. 505/2 (2002) ("In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act."); *see also* Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2000).

125. See *Smith*, 658 N.E.2d at 1335, for the observation that the CFDBPA eliminates the need to plead most of the common law tort elements in attempting to recover under the statute.

126. *Oliveira*, 726 N.E.2d at 57 ("Although the defendant's intent that its deception be relied on is an element of the offense, the Supreme Court of Illinois has stated no actual reliance is required to state a cause of action under the Act.") (citations omitted); *see also supra* note 95 and accompanying text (explaining that reliance on the fraudulent statement is an essential element of common law fraud in Illinois).

127. *E.g.*, People *ex rel.* Hartigan v. Knecht Serv., Inc., 575 N.E.2d 1378, 1387 (Ill. App. Ct. 2d Dist. 1991). Like the definition of materiality under the common law tort of fraud, CFDBPA principles identify a material fact as one "upon which the plaintiff could be expected to rely in determining whether to engage in the conduct in question." *Id.*

128. *Oliveira*, 726 N.E.2d at 57; *Smith*, 658 N.E.2d at 1335.

129. 815 ILL. COMP. STAT. 505/10a(a) (2002) ("Any person who suffers actual damage as a result of a violation of this Act . . . may bring an action . . . .").

130. *Oliveira*, 726 N.E.2d at 57.

suppression or omission of material facts as deceptive practices.[131] Unlike the common law theory of fraud, in a CFDBPA claim the seller need not intend to deceive the buyer.[132] Rather, courts apply the CFDBPA as liberally dispensing with the intent requirement to find deception if an advertisement is reasonably likely to deceive consumers and if the defendant intended the plaintiff to rely on the advertisement.[133] In fact, CFDBPA principles find deception even in advertisements where a closer reading of the fine print or a more narrow interpretation of the statements would have eliminated a common law misrepresentation claim.[134]

For example, when a seller does not intend to sell the product as advertised, Illinois courts have found this misleading and confusing practice to be a violation of the CFDBPA.[135] In *Williams v. Bruno Appliance & Furniture Mart*, the plaintiff alleged that the defendant furniture store violated the CFDBPA.[136] Specifically, the plaintiff alleged that the defendant advertised a three-piece furniture set for a total sale price of $298.[137] The actual price, however, was $298 per item.[138] That clarification appeared only in very small print at the bottom of the advertisement.[139] The Illinois Appellate Court held that despite the small-print disclaimer the advertisement could reasonably have been expected to mislead the plaintiff.[140] Further, the court held

131. 815 ILL. COMP. STAT. 505/2 (2002).

132. *Smith*, 658 N.E.2d at 1335 ("For example, in an action under the [CFDBPA], the intention of the seller or the mental state of the person making the misrepresentation is not material to the existence of a cause of action under the Act since an action for innocent misrepresentation also is permissible under the Act.").

133. Connick v. Suzuki Motor Co., 675 N.E.2d 584, 594 (Ill. 1996); Garcia v. Overland Bond & Inv. Co., 668 N.E.2d 199, 203 (Ill. App. Ct. 1st Dist. 1996).

134. Williams v. Bruno Appliance, 379 N.E.2d 52, 54 (Ill. App. Ct. 1st Dist. 1978) (citations omitted).

> It is well established that the test to be used in interpreting advertising is the net impression that it is likely to make on the general populace.... It is immaterial that a given phrase considered technically may be construed so as not to constitute a misrepresentation or that a deception is accomplished by innuendo rather than by affirmative misstatement.... Where an advertisement is subject to two interpretations, one of which is false, the Commission is not bound to assume that the truthful interpretation is the only one which will be left impressed on the mind of every reader.... In sum, the Commission's mandate from the courts is to protect the "ignorant, the unthinking, and the credulous."

Id. (quoting *In re* Rodale Press, Inc., 71 F.T.C. 1184, 1237–38 (1967)).

135. *Williams*, 379 N.E.2d at 53.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 54. The small print did not say that each piece was $298.

140. *Id.*

that even when a technically true advertisement reasonably results in two interpretations, a CFDBPA claim exists.[141]

Likewise, in *Garcia v. Overland Bond & Investment Co.*, the Illinois Appellate Court found a violation of the CFDBPA where the defendant car dealership deceptively advertised the terms under which cars were for sale.[142] In that case, the dealership ran advertisements in newspapers and on television picturing available cars.[143] In each of the advertisements, the words "No Money Down" or "No Down Payment" and "Easy Credit" or "Low Bank Rate" were displayed in large bold print.[144] However, the advertisements also included a disclaimer in very small print stating that the above advertisements applied only to customers with "o.k. credit."[145] The plaintiffs subsequently purchased cars from the dealership but only after providing a down payment and accepting retail installment agreements with very high interest rates.[146] The car dealership moved to dismiss the complaint, arguing that the plaintiffs did not demonstrate reasonable reliance on the advertisements.[147] The court denied the dismissal motion, however, holding that because this violation arose under the CFDBPA, the plaintiffs did not need to rely on a particular advertisement.[148] Instead, under the CFDBPA, the plaintiffs only needed to show that the dealership published some advertisements with the intent to induce reliance.[149] Therefore, because the advertisement reasonably led to confusing and conflicting interpretations, despite the inclusion of the small-print disclaimer, the court held that the plaintiffs stated a valid CFDBPA complaint.[150]

Based on the CFDBPA's more flexible pleading requirements and the statute's liberal interpretation, fast food litigation advocates consider similar consumer protection statutes another viable theory upon which to test claims against the fast food industry.[151] They believe that

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141. *Williams*, 379 N.E.2d at 54 (citations omitted); *see also supra* note 134 for a discussion of the court's holding.

142. Garcia v. Overland Bond & Inv. Co., 668 N.E.2d 199 (Ill. App. Ct. 1st Dist. 1996).

143. *Id.* at 201–02.

144. *Id.*

145. *Id.* at 202.

146. *Id.* at 202–03. For example, while the plaintiffs were charged interest rates of 29.64% and 33.11%, the bank rates at the time ranged between 9.5% and 13.5%. *Id.* at 202, 205.

147. *Id.* at 205.

148. *Id.*

149. *Id.*

150. *Id.*

151. Bradford, *supra* note 61 ("[F]ood companies may be vulnerable to lawsuits that allege they have engaged in misleading advertising—whether by misstating calorie information or

consumer protection claims provide distinct advantages over claims of common law fraud.[152] For example, plaintiffs in fast food litigation action do not need to show reliance on any particular advertisement or marketing campaign in order to recover under the CFDBPA.[153] They simply must show that the fast food company deceptively advertised to satisfy the statute, possibly eliminating the difficulty of detailing each and every advertisement seen by the plaintiffs.[154] As a result, fast food litigation advocates identify consumer protection statutes as a strong tool in a lawsuit against a fast food restaurant.[155]

2. Breach of Contract

Fast food litigation advocates also propose breach of contract as a possible theory upon which to find the fast food industry liable for American obesity.[156] The Illinois Uniform Commercial Code ("UCC") codifies contract law for the sale of goods in Illinois.[157] Three contract theories potentially apply to obesity claims against fast food companies: (1) express warranty; (2) implied warranty of merchantability; and (3) implied warranty of fitness for a particular purpose.[158] Under these theories consumers could sue a fast food company claiming that the company falsely stated the characteristics of its food or that its food could be eaten every day without harmful health effects.[159]

To recover under breach of express warranty, a buyer must demonstrate that the seller made a false statement about the product or a benefit of the product that became the basis of the bargain.[160] The

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failing to disclose health risks when describing a food as nutritious.").

152. Kenneth J. Parsigian et al., *Obesity Litigation—The Next "Tobacco"?*, FINDLAW, (2004), *available at* http://articles.corporate.findlaw.com/articles/file/00338/009676 (last visited Apr. 15, 2005).

153. *See id.* (noting that consumer protection statutes in general do not require consumers to prove they relied on the statement)

154. *Id.* The article does not say that plaintiffs will not have to detail the ads. *Id.*

155. Laura Parker, *Legal Experts Predict New Rounds in Food Fights*, USA TODAY, May 7, 2004, at A03 (quoting an observer of the fast food litigation trend as noting that "[t]he most promising legal avenue is to invoke state consumer protection laws to accuse companies of misleading consumers about calories or nutritional value").

156. *E.g.*, Romero, *supra* note 5 at 259–60.

157. 810 ILL. COMP. STAT. 5/1-101 *et seq.* (2002). In fact the Illinois version of the UCC specifically provides that unless expressly displaced by UCC provisions, the common law continues to apply. 810 ILL. COMP. STAT. 5/1-103 (2002).

158. *See generally* Romero, *supra* note 5, at 258 (discussing the application of breach of warranty theories to fast food litigation).

159. *See infra* Part II.B.2 (discussing the different breach of contract causes of action).

160. 810 ILL. COMP. STAT. 5/2-313 (2002); *see also* Weng v. Allison, 678 N.E.2d 1254, 1256 (Ill. App. Ct. 3d Dist. 1997) (providing the test for when an express warranty is enforceable); Wheeler v. Sunbelt Tool Co., 537 N.E.2d 1332, 1341 (Ill. App. Ct. 4th Dist. 1989) (stating what a

"basis of the bargain" encompasses any information forming the essence of the parties' agreement.[161] Information contained in advertisements, brochures, and other documents may constitute express warranties[162] and information contained in "small print" generally does not prevail over terms of an express warranty.[163] If a seller makes an affirmation of fact, that fact automatically forms part of the basis of the bargain.[164] However, similar to common law fraud analysis, courts distinguish express warranties from "puffing" or permissible sales pitches.[165]

Illinois courts have found breaches of express warranty even in situations where, under a common law fraud analysis, it may not have been reasonable for the buyer to rely on the statement.[166] For example, in *Weng v. Allison*, the Illinois Appellate Court found an express warranty in the seller's statement that a ten-year-old car with 96,000 miles was "in good condition," and had "no problems."[167] The buyer purchased the car based on that statement but later discovered that the car in fact needed substantial repair and was not safe to drive.[168] The lower court found that because it was unreasonable to rely on the seller's statement, that statement could not have formed part of the basis of the bargain and thus the buyer could not bring a claim for breach of express warranty.[169] However, the appellate court reversed, holding that regardless of the reasonableness of a buyer's reliance, all express statements made during a purchase negotiation become part of the basis of the bargain and may give rise to a claim for the breach of an express warranty.[170]

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plaintiff must prove in an express warranty action). In general, an express warranty is "created by the overt words or actions of the seller." BLACK'S LAW DICTIONARY 1619 (8th ed. 2004).

161. *Weng*, 678 N.E.2d at 1256; Alan Wood Steel Co. v. Capital Equip. Enter., 349 N.E.2d 627, 632 (Ill. App. Ct. 1st Dist. 1976).

162. *Wheeler*, 537 N.E.2d at 1341; Crest Container Corp. v. R.H. Bishop Co., 445 N.E.2d 19, 24 (Ill. App. Ct. 5th Dist. 1982).

163. *Alan Wood Steel*, 349 N.E.2d at 635.

164. *Weng*, 678 N.E.2d at 1256; *see also* 810 ILL. COMP. STAT. ANN. 5/2-313 cmt. 3 (West 1993) (stating that "[i]n actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods").

165. Redmac, Inc. v. Computerland of Peoria, 489 N.E.2d 380, 382 (Ill. App. Ct. 3d Dist. 1986). "Sales talk which relates only to the value of the goods or the seller's personal opinion or commendation of the goods is considered puffing and is not binding on the seller." *Id.*; *see also supra* note 96 and accompanying text (discussing the definition of "puffing" in Illinois).

166. *Weng*, 678 N.E.2d at 1256.

167. *Id.* at 1255.

168. *Id.*

169. *Id.*

170. *Id.* at 1256.

Illinois buyers can also recover for the breach of an implied warranty.[171] This cause of action rests upon either the product's merchantability—also called its implied fitness for its ordinary purpose—or its implied fitness for a particular purpose.[172] Unlike express warranties, implied warranties automatically attach to every sale unless specifically and properly excluded by the parties.[173]

To recover for the breach of the implied warranty of merchantability, the plaintiff must show that the seller is a merchant with respect to goods of the kind sold and that the goods were not fit for the ordinary purpose for which such goods are used.[174] To claim breach of the implied warranty of fitness for a particular purpose, the plaintiff must establish slightly different elements.[175] First, the plaintiff must show that the seller was aware of the purpose for which the plaintiff purchased the goods.[176] Next, the plaintiff must demonstrate both that she relied upon the seller's representation that the product was appropriate for that particular purpose and that the seller knew of the buyer's reliance.[177] Finally, the buyer must demonstrate that the product was in fact not fit for that particular purpose.[178] Because of the state's public policy interest in protecting the health of its citizens, food sellers and manufacturers in Illinois are held to an implied warranty that the food is wholesome and fit for consumption.[179] The language of the Illinois UCC seems to reject any early case law denying a restaurant's

171. 810 ILL. COMP. STAT. 5/2-314(2)(c) (2002); 810 ILL. COMP. STAT. 5/2-315 (2002). Generally, an implied warranty "aris[es] by operation of law because of the circumstances of a sale, rather than by the seller's express promise." BLACK'S LAW DICTIONARY 1582 (7th ed. 1999).

172. 810 ILL. COMP. STAT. 5/2-314(2)(c) (2002); 810 ILL. COMP. STAT. 5/2-315 (2002).

173. Constr. Aggregates Corp. v. Hewitt-Robins, Inc., 404 F.2d 505, 509–10 (7th Cir. 1969) (applying Illinois law).

174. 810 ILL. COMP. STAT. 5/2-314 (2002); Fed. Ins. Co. v. Vill. of Westmont, 649 N.E.2d 986, 990 (Ill. App. Ct. 2d Dist. 1995).

175. 810 ILL. COMP. STAT. 5/2-315 (2002). As the notes to the statute indicate, "[a] 'particular purpose' differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question." 810 ILL. COMP. STAT. ANN. 5/2-315 cmt. 2 (West 1993).

176. Banco Del Estado v. Navistar Int'l Transp. Corp., 954 F. Supp. 1275, 1286 (N.D. Ill. 1997) (applying Illinois law); Siemen v. Alden, 341 N.E.2d 713, 716 (Ill. App. Ct. 2d Dist. 1975).

177. *Banco Del Estado*, 954 F. Supp. at 1286; *Siemen*, 341 N.E.2d at 716.

178. *Banco Del Estado*, 954 F. Supp. at 1286; *Siemen*, 341 N.E.2d at 716.

179. Tiffin v. Great Atl. & Pac. Tea Co., 156 N.E.2d 249, 254–55 (Ill. App. Ct. 3d Dist. 1959); Williams v. Paducah Coca-Cola Bottling Co., 98 N.E.2d 164, 167 (Ill. App. Ct. 4th Dist. 1951); Patargias v. Coca-Cola Bottling Co., 74 N.E.2d 162, 169 (Ill. App. Ct. 1st Dist. 1947); Greenwood v. John R. Thompson Co., 213 Ill. App. 371, 376 (Ill. App. Ct. 1st Dist. 1919).

implied warranty of fitness for consumption.[180]

For example, in *Greenwood v. Thompson,* the Illinois Appellate Court found a restaurant owner liable for the death of a patron caused by the restaurant's food.[181] The patron in *Greenwood* died after eating sausage served by the restaurant.[182] The restaurant demurred, arguing that because a restaurant owner can be liable for negligently preparing food, the owner should not also be liable for the breach of an implied warranty.[183] The court disagreed and, recognizing a customer's limited ability to avoid receiving harmful food from a restaurant, allowed liability under both theories.[184] It also found that a restaurant owner is in a better position than the customer to guard against food-related illnesses.[185] As a result, the court held that restaurants are held to an implied warranty of the fitness of their food and are liable for damages as a consequence of a breach of that warranty.[186]

Observers of the development of fast food litigation predict that breach of contract claims like these offer possible avenues to pursue litigation against fast food restaurants.[187] They look particularly to tobacco suits for guidance on how to incorporate breach of contract theories into fast food claims.[188] The tobacco suits demonstrated that significant effort must be directed at defining "ordinary purpose" and "merchantability" to successfully state a claim for breach of an implied warranty.[189] However, those observers also recognize difficulties in pursuing these causes of action.[190] For example, fast food restaurants rarely expressly state that eating their products will not cause obesity or

180. "Serving food or drink for value is a sale, whether to be consumed on the premises or elsewhere. Cases to the contrary are rejected. The principal warranty is that stated in subsections (1) and (2)(c) of this section [creating an implied warranty for the fitness for the ordinary purpose]." 810 ILL. COMP. STAT. ANN. 5/2-314 cmt. 5 (West 1993).

181. *Greenwood,* 213 Ill. App. at 382.

182. *Id.* at 373–74.

183. *Id.* at 374.

184. *Id.* at 379. "The patron of the restaurant keeper who consumes his food on the premises is quite as helpless to protect himself against deleterious food as is the customer who takes the food he buys away from the premises and consumes it elsewhere." *Id.*

185. *Id.* at 376.

186. *Id.* at 376.

187. *See* Crawford, *supra* note 80, at 1165 (discussing the implied warranty of merchantability as a potential theory of liability in obesity litigation); Romero, *supra* note 5, at 259–61 (discussing express and implied warranties as theories of liability in obesity litigation).

188. Crawford, *supra* note 80, at 1179–88; Romero, *supra* note 5, at 259–61.

189. *See, e.g.*, Crawford, *supra* note 80, at 1198–1202 (discussing the variety of ways tobacco litigants attempted to define "merchantability" before eventually stating valid claims).

190. *See* Romero, *supra* note 5, at 259–61 (stating it is highly unlikely that consumers will succeed in obesity litigation under breach of warranty theories).

will provide beneficial health effects.[191] Further, a possible preemption problem might exist when claiming a restaurant's menu fails to accurately state nutrition qualities because, as discussed below, the federal Nutrition Labeling and Education Act may wholly govern that field.[192]

3. The Nutrition Labeling and Education Act

A federal food labeling statute has also contributed to recent fast food litigation.[193] In 1990, the federal Nutrition Labeling and Education Act ("NLEA") amended the federal Food, Drug, and Cosmetic Act to require food manufacturers to label food and drink products with nutritional content information.[194] However, the NLEA provides a restaurant exemption[195] and further provides that no state can issue regulations that in any way conflict with NLEA regulations.[196] Finally, the NLEA, unlike the CFDBPA, does not provide for a private right of action.[197]

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191. *Id.*

192. *Id.* at 260; *see also infra* notes 195–202 and accompanying text (discussing the potential preemption effect of the Nutritional Labeling and Education Act).

193. *See infra* Part II.C (discussing the role of the Nutritional Labeling Education Act in fast food litigation and its treatment in two of the previously-filed fast food litigation suits).

194. Nutritional Labeling Education Act, Pub. L. No. 101-535, 104 Stat. 2353 (1990) (codified as amended in scattered sections of 21 U.S.C.) [hereinafter NLEA].

> The purpose of those amendments, known collectively as the NLEA, was: (1) To make available nutrition information that can assist consumers in selecting foods that can lead to healthier diets, (2) to eliminate consumer confusion by establishing definitions for nutrient content claims that are consistent with the terms defined by the Secretary [of Health and Human Services], and (3) to encourage product innovation through the development and marketing of nutritionally improved foods.

Pub. Citizen v. Shalala, 932 F. Supp. 13, 14 (D.D.C. 1996) (quoting *Final Rule*, 58 Fed. Reg. 2066, 2302 (Jan. 6, 1993)).

195. 21 U.S.C. § 343(q)(5)(A)(i) (2000) (stating that labeling requirements "shall not apply to food which is served in restaurants or other establishments in which food is served for immediate human consumption or which is sold for sale or use in such establishments").

196. 21 U.S.C. § 343-1(a)(4) (2000).

> (a) Except as provided in subsection (b) of this section, no State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce . . . .
>
> (4) any requirement for nutrition labeling of food that is not identical to the requirement of section 343(q) of this title, except a requirement for nutrition labeling of food which is exempt under subclause (i) or (ii) of section 343(q)(5)(A) of this title . . . .

Id.

197. NLEA, Pub. L. No. 101-535, 104 Stat. 2353 (1990) (codified as amended in scattered sections of 21 U.S.C.); Cohen v. McDonald's Corp., 808 N.E.2d 1, 8 (Ill. App. Ct. 1st Dist. 2004). *See supra* note 121 and accompanying text (explaining the distinction between a private and public right of action).

These provisions seem to suggest that the NLEA preempts all state action aimed at regulating nutritional content labeling and advertising of foods served in restaurants.[198] However, other possibly conflicting provisions of the NLEA suggest that federal preemption may not be absolute.[199] For example, although the NLEA generally preempts any conflicting state regulations, it also expressly allows states to establish independent regulations for foods otherwise exempt under section of the NLEA.[200] Section 343(q)(5)(A) of the NLEA exempts restaurants from the NLEA's standard provisions.[201] Consequently, some argue that NLEA expressly allows state regulation of the labeling of foods served in restaurants.[202] In addition, however, federal regulations also provide that once food products give any nutritional claims or information, the food becomes subject to the NLEA.[203] Thus, it is unclear how courts will interpret the relationship of the statutory provision and regulation.[204]

4. Strict Liability

Observers also recognize potential in holding fast food restaurants

198. The Supremacy Clause of the United States Constitution declares, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. This preemption can occur when the federal statute expressly preempts state law. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000) (stating that Congressional preemption is a fundamental part of the Constitution). It can also occur when Congress intended to occupy an entire field of regulation. *See* Fla. Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963) (discussing the circumstances in which state law is preempted because of federal presence in the field).

199. *See infra* notes 200–03 and accompanying text (discussing the possible conflict between a NLEA provision and a state regulation).

200. 21 U.S.C. § 343-1(a)(4) ("[N]o State ... may directly or indirectly establish ... any requirement for nutrition labeling of food that is not identical to the requirement of [this statute] except a requirement for nutrition labeling of food which is exempt under subclause (i) or (ii) of section 343(q)(5)(A) of this title.").

201. 21 U.S.C. § 343(q)(5)(A)(i).

202. Food Labeling; General Requirements for Health Claims for Food, 58 Fed. Reg. 2478, 2517 (Jan. 6, 1993) (to be codified at 21 C.F.R. pts. 20, 101) ("State's [sic] remain free, however, to ensure under their own consumer protection laws that menus do not provide false or misleading information.").

203. 21 C.F.R. § 101.9(j)(2)(i) (2003) (Food served in restaurants is exempt from the labeling requirements as long as it "bears no nutrition claims or other nutrition information in any context on the label or in labeling or advertising. Claims or other nutrition information subject the food to the provisions of [NLEA regulations]").

204. See *infra* Part II.C.2–4 (discussing *Pelman v. McDonald's* and *Cohen v. McDonald's*, respectively). These two cases involved discussions of the NLEA statutory provision and regulation individually, but did not consider the impact of the regulation on the statutory provision.

strictly liable for the damages caused by their fast food.[205] As early as 1897, Illinois courts recognized that food manufacturers could be held strictly liable for dangerous food products.[206] In defining this concept, Illinois courts follow the Restatement (Second) of Torts model of strict liability.[207] The Restatement provides that consumers have no protection from the consequences of their freely-made, though foolish decisions.[208] However, liability attaches to products containing unknown dangers[209] that existed at the time of the defendant's control.[210]

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205. Strict liability imposes legal responsibility upon sellers of defective products. Crowe v. Pub. Bldg. Comm'n of Chi., 383 N.E.2d 951, 952 (Ill. 1978). It reflects a public policy judgment that sellers and manufacturers are in the better position to guard against the harm from defective products and therefore must bear the liability of ensure the safety of their products. *Id.*; *see also* Romero, *supra* note 5, at 261–63 (discussing the standards for strict product liability). Strict liability "does not depend on actual negligence or intent to harm, but . . . is based on the breach of an absolute duty to make something safe." BLACK'S LAW DICTIONARY 926 (7th ed. 1999).

206. *E.g.*, Wiedeman v. Keller, 49 N.E. 210, 211 (Ill. 1897).

> Where, however, articles of food are purchased from a retail dealer for immediate consumption, the consequences resulting from the purchase of an unsound article may be so serious, and may prove so disastrous to the health and life of the consumer, that public safety demands that there should be an implied warranty on the part of the vendor that the article sold is sound, and fit for the use for which it was purchased.

Id.

207. Korando v. Uniroyal Goodrich Tire Co., 637 N.E.2d 1020, 1024 (Ill. 1994). The Restatement (Second) of Torts § 402A states the following:

> Special Liability of Seller of Product for Physical Harm to User or Consumer, provides: (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has excercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

208. RESTATEMENT (SECOND) OF TORTS § 402A.

209. *Id.* cmt. i.

> The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by "unreasonably dangerous" in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably 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. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like

The presence of such dangers creates a duty on the part of the manufacturer to warn consumers about the hidden risks.[211] In order to dissuade unnecessary lawsuits, strict liability only attaches when the product is unreasonably dangerous or if its dangerousness could not be reasonably expected.[212] Likewise, a plaintiff cannot recover under strict liability for injuries caused by obvious or commonly-known dangers of products.[213]

In applying the theory of strict liability to food sellers, Illinois courts have found liability when a seller failed to warn consumers about contents of food products that consumers did not reasonably expect.[214] For example, when a consumer who bit into a candy bar and broke his tooth on a hard pecan shell attempted to recover against the manufacturer, the Supreme Court of Illinois found that a valid strict liability claim was stated.[215] The court held that the test for holding food sellers strictly liable for the consequences of the ingredients of their food should focus on the consumer's reasonable expectations.[216]

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marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.

Id.

210. *Korando*, 637 N.E.2d at 1024.

211. Renfro v. Allied Indus. Equip. Corp., 507 N.E.2d 1213, 1228 (Ill. App. Ct. 5th Dist. 1987).

212. *See Korando*, 637 N.E.2d at 1024 (holding that in strict products liability cases in Illinois, the "plaintiff must plead and prove that the injury or damage resulted from a condition of the product manufactured by the defendant, that the condition was an unreasonably dangerous one, and that the condition existed at the time the product left the manufacturer's control.") (citations omitted).

213. *See Renfro*, 507 N.E.2d at 1226 (finding that strict liability attaches only when "the product is dangerous to an extent beyond that which would be contemplated by the ordinary person with the ordinary knowledge common to the community as to its characteristics") (citations omitted).

214. Jackson v. Nestle-Beich, Inc., 589 N.E.2d 547, 548–49 (Ill. 1992).

215. *Id.* at 552.

216. *Id.* at 550.

With an awareness of that test, consumers and their attorneys need ask themselves only one question before deciding to bring an action of this type: Would a reasonable consumer expect that a given product might contain the substance or matter causing a particular injury? If the answer is in the affirmative, we would expect that consumers and their attorneys would think twice about suing the manufacturer. Similarly, with an awareness of that test, manufacturers can act accordingly with respect to their means of production. Additionally, if the answer to the foregoing question is in the negative, we would expect that manufacturers and their attorneys would think twice about declining to offer a settlement of this type of action. The test thus provides a reasonable and concrete standard to govern actions of this sort.

Id.

Therefore, if a food product contains an injury-causing ingredient that a reasonable consumer would not expect, the food seller has a duty to warn consumers about the ingredient.[217]

Based on these concepts, fast food litigation advocates believe that fast food companies should be held strictly liable for not warning consumers about the hidden nutritional content of fast food.[218] In fact, one of the fast food suits already filed alleged that fast food contains hidden dangers beyond those reasonably expected by consumers.[219] However, commentators also identify the potential difficulty in sufficiently establishing that the poor health consequences of eating fast food are not obvious.[220]

5. Negligence

Finally, fast food companies may be liable under negligence theories for obesity-related illnesses.[221] Negligence is the failure to exercise the duty of care that a reasonable person would exercise under like circumstances.[222] To recover for negligence, Illinois courts require the plaintiff to demonstrate the existence of a duty, breach of that duty, proximate causation, and damages.[223] Because Illinois follows the doctrine of comparative negligence, in Illinois a plaintiff can still recover even if she was also negligent.[224] Further, Illinois courts

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217. *Id.*

218. *See, e.g.*, Romero, *supra* note 5, at 261–63 (discussing the theory of strict liability as it applies to the fast food industry).

219. *See infra* notes 265–71 and accompanying text (discussing the claim in the *Pelman* case that fast food is inherently dangerous because it contains hidden unhealthy nutritional components).

220. *See, e.g.*, Romero, *supra* note 5, at 261–63 (stating that obesity lawsuits based on strict liability are not likely to succeed).

221. *Id.* at 263–64; *see also* Goldman, *supra* note 19, at 133 (analyzing the merits of obesity litigation); Part II.C.2 (revealing that the plaintiffs in *Pelman* raised negligence causes of action against McDonald's in that fast food litigation suit).

222. BLACK'S LAW DICTIONARY 1056 (7th ed. 1999); *see also* Ill. Cent. R.R. Co. v. Behrens, 101 Ill. App. 33, 36 (Ill. App. Ct. 4th Dist. 1901) (stating that "[c]ommon law negligence, upon which an action for damages may be based . . . is a failure of one to exercise what would be, under all the circumstances of the particular case, ordinary care in observing or performing a non-contractual duty, implied by the common law").

223. *E.g.*, Lucker v. Arlington Park Race Track Corp., 492 N.E.2d 536, 538 (Ill. App. Ct. 1st Dist. 1986) (citation omitted) ("A plaintiff in a negligence action is entitled to recover only by proving each element of the action, *i.e.*, the existence of a duty, a breach of that duty, an injury proximately resulting from the breach and damages."). In addition, Illinois law creates a duty to warn when the defendant should reasonably know that harm will likely occur without that warning. Gray v. Nat'l Restorations Sys., Inc., 2004 WL 834724, at *10 (Ill. App. Ct. 1st Dist. 2004); McColgan v. Envtl. Control Sys., Inc., 571 N.E.2d 815, 818 (Ill. App. Ct. 1st Dist. 1991); *see also supra* notes 212–16 (discussing the duty to warn in the strict liability context).

224. *E.g.*, *Lucker*, 492 N.E.2d at 539 ("The adoption of comparative negligence did nothing to

recognize that a duty to warn exists when the defendant has knowledge superior to the plaintiff and knows that harm will likely occur to the plaintiff absent a warning.[225] Thus, a defendant can be liable in negligence for failing to warn about these hidden dangers.[226]

Illinois courts have previously applied negligence theories to food sellers.[227] For example, in *Sheffer v. Willoughby,* the plaintiff-customer alleged that the defendant-restaurant negligently prepared her meal.[228] As a result, the customer allegedly became extremely ill and suffered tremendous damages.[229] The court stated a restaurant owner would be liable if he failed to exercise ordinary care in furnishing food to his patrons or if his business was conducted in a careless or negligent manner.[230] The court also agreed that injury resulting from the breach of that duty gives rise to damages.[231] However, because the customer failed to demonstrate the restaurant's specific acts of alleged negligence in preparing the food, the judge dismissed the complaint.[232]

Legal observers have evaluated the possibility of holding fast food companies liable in negligence for selling unhealthy products to the public.[233] In fact, two recent fast food litigation lawsuits adopted this theory.[234] Under this approach, a claim would allege that the restaurant

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the sufficiency of proof required to establish the defendant's negligence. It only allowed a negligent plaintiff to recover where he could not do so before and diminished the plaintiff's recovery by the percentage of fault attributable to him."). Comparative negligence is "[a] plaintiff's own negligence that proportionally reduces the damages recoverable from a defendant." BLACK'S LAW DICTIONARY 1056.

225. *Gray,* 2004 WL 834724, at *10.

226. *Id.*

227. *E.g.*, Welter v. Bowman Dairy Co., 47 N.E.2d 739, 762 (Ill. App. Ct. 1st Dist. 1943) (discussing liability for a dairy that allegedly negligently delivered bad milk); Sheffer v. Willoughby, 45 N.E. 253 (Ill. 1896) (analyzing liability for a restaurant that served bad oyster stew). Today, however, because Illinois law holds food manufacturers to an implied warranty of quality, these cases would likely be considered under strict liability theory. *See supra* notes 214–18 and accompanying text (discussing Illinois strict liability theory as applied to food sellers and manufacturers).

228. *Sheffer,* 45 N.E. at 254. The customer alleged that the restaurant "carelessly, negligently, and unskillfully, and through carelessness . . . [delivered] to the plaintiff, to be by her eaten, an oyster stew that was not good or wholesome, but deleterious, dangerous, and poisonous." *Id.*

229. *Id.*

230. *Id.* at 255.

231. *Id.*

232. *Id.*

233. *E.g.*, Romero, *supra* note 5, at 263–64 (discussing negligence as a potential theory of liability in obesity litigation); *Goldman,* supra note 19, at 133 (analyzing the merits of obesity litigation); *see also infra* Part II.C.2 (discussing that the plaintiffs in *Pelman v. McDonald's Corp.* raised negligence causes of action against McDonald's).

234. Plaintiff's Complaint at 9–15, Barber v. McDonald's Corp. (N.Y. Sup. Ct. 2002) (No. 23145/2002), *available at* http://news.findlaw.com/hdocs/docs/mcdonalds/barbermcds72302cmp

breached its duty to its customers by selling unhealthy and dangerous foods.[235] Commentators suggest that the damages element would be relatively easy to demonstrate because obese plaintiffs suffer from obvious health problems and illnesses.[236] However, they also indicate that the duty, breach, and causation elements present significant obstacles for plaintiffs because it is unlikely that fast food consumption alone caused the obesity-related damages.[237]

In summary, Illinois law provides a number of causes of action potentially applicable to product liability claims in general and to fast food litigation in particular.[238] Many of these theories have formed the basis of recent fast food litigation.[239]

C. The Litigation Approach

Under the legal theories discussed above, plaintiffs have filed a number of suits against fast food companies in recent years.[240] Generally, the plaintiffs have sought legal recognition of and financial recovery for fast food's contribution to obesity and obesity-related illnesses.[241] This section examines those cases.[242] This section begins with an analysis of the earliest fast food litigation complaints filed.[243] Then, this section discusses *Pelman v. McDonald's,* the most widely-

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.pdf (last visited Feb. 8, 2005) [hereinafter *Barber Complaint*]; Pelman v. McDonald's Corp., 237 F. Supp. 2d 512 (2003); *see also infra* Part II.C (discussing the *Barber* and *Pelman* cases).

235. *Barber Complaint*, *supra* note 234, at 9–15

236. Goldman, *supra* note 19, at 133 ("By definition of the class, there is also little doubt the plaintiffs are damaged . . . .").

237. *Id.* at 133–34.

> It is . . . difficult to establish that the fast-food industry has a duty to its customers when there is an extensive legal history suggesting that plaintiffs are personally responsible for the harm caused by products they purchase with knowledge of their dangerous qualities. . . .
>
> [However,] [t]he most difficult barrier to ascribing liability to the fast-food industry is causation.

Romero, *supra* note 5, at 265.

238. *See supra* Parts II.B.1–5 (discussing the causes of action available to Illinois plaintiffs in product liability actions).

239. *See infra* Part II.C (reviewing the causes of action raised in previously-filed fast food litigation complaints).

240. *Id.*

241. *See infra* Part II.C. (highlighting the way in which the plaintiffs in each of the cases discussed attempted to link fast food consumption or advertising with damages caused by the food's nutritional content).

242. *See infra* Part II.C. (examining the *Liberty* case, the *Barber* complaint, the *Pelman* complaints, and the *Cohen* case).

243. *See infra* Part II.C.1 (reviewing the claims raised in the *Liberty* case and the *Barber* complaint).

publicized fast food litigation suit to date.[244] Finally, this section examines fast food litigation in Illinois.[245]

1. The Early Cases—*Liberty* and *Barber*

In 1978, James Liberty, a former District of Columbia police officer, sued the D.C. Police and Fireman's Retirement Board for additional retirement benefits, claiming his coronary heart disease resulted from on-the-job conditions.[246] As a local patrol officer, Mr. Liberty worked long, irregular hours in sometimes stressful situations.[247] He alleged these conditions caused him to smoke cigarettes and consume large quantities of fast food, which ultimately resulted in his coronary disease.[248] After an administrative hearing, the Retirement Board found that the conditions of Mr. Liberty's job did not cause or aggravate his coronary disease by requiring him to smoke cigarettes and eat fast food.[249] As part of its findings, the Board determined that Mr. Liberty's evidence did not demonstrate a strong causal connection between his job and his obesity-related injuries.[250] The D.C. Court of Appeals dismissed Mr. Liberty's case, but Mr. Liberty nonetheless gained prominence by filing one of the first cases suggesting a link between fast food consumption and obesity.[251]

Several years later, fifty-six-year-old Caesar Barber, a 270 pound, five-foot-ten maintenance worker from the Bronx, filed a class action suit in the Supreme Court of New York alleging McDonald's, Burger King, Wendy's, and KFC were partially responsible for his obesity and obesity-related illnesses.[252] Mr. Barber's class action complaint detailed the increasing prevalence of obesity in the United States, and the health, economic, and social effects of that obesity and then set forth five causes of action against the fast food companies: (1) negligence in selling dangerously unhealthy foods, (2) failure to label or adequately warn customers about the low nutritional content of fast food, (3) negligence in marketing fast food to children, (4) failure to adequately label the nutritional content of fast food, and (5) violations of New York

244. *See infra* Parts II.C.2–3 (analyzing the causes of action raised in the two *Pelman* complaints).

245. *See infra* Part II.C.4 (discussing the *Cohen* case).

246. Liberty v. D.C. Police & Fireman's Ret. & Relief Bd., 452 A.2d 1187 (D.C. Cir. 1982).

247. *Id.* at 1189.

248. *Id.*

249. *Id.* at 1188.

250. *Id.* at 1190.

251. *Id.*

252. *Barber Complaint*, *supra* note 234.

consumer protection statutes.[253] Mr. Barber's complaint made headlines around the country and sparked a frenzy of debate.[254] However, believing that an adult like Mr. Barber was not the type of sympathetic plaintiff needed to prevail against the fast food industry, Mr. Barber and his attorneys neglected to pursue the case.[255]

2. *Pelman I*

A month after Mr. Barber's case ended, however, the parents of two minor teenagers filed the most famous fast food case to date.[256] In *Pelman v. McDonald's*, the parents sued McDonald's in the Southern District Court of New York, claiming the company's deceptive marketing practices caused their children to over-consume fast food, to become obese, and to suffer from a wide range of ailments.[257] The plaintiffs raised five causes of action against McDonalds: two counts alleging deceptive marketing in violation of consumer protection laws, two counts alleging that McDonald's negligently sold and marketed food with low nutritional value, and one count alleging that McDonald's failed to warn its customers of the dangers of eating too much McDonald's food.[258] McDonald's moved to dismiss all counts of the complaint for failure to state a claim upon which relief could be granted.[259]

District Court Judge Robert Sweet first considered the two consumer protection claims.[260] He held that to state a valid claim under the statute, a plaintiff must show that the act upon which the claim was based was consumer-oriented, the act was misleading in a material respect, and

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253. *Id.*; *see also* New York Consumer Protection Act, GEN. BUS. §§ 349, 350 (2004).

254. *E.g.*, *Crossfire* (CNN cable broadcast, Sept. 2, 2002) (transcript *available at* http://transcripts.cnn.com/TRANSCRIPTS/0209/02/cf.00.html); Sommerfield, *supra* note 76.

255. *See* Alyse Meislik, Note, *Weighing in on the Scales of Justice: The Obesity Epidemic and Litigation Against the Food Industry*, 46 ARIZ. L. REV. 781, 793 (2004) (citing an interview with Mr. Barber's attorney in which the attorney indicated that he "discontinued" Mr. Barber's case because Mr. Barber did not represent a sufficiently-sympathetic plaintiff); *see also* Marguerite Higgins, *Food Fight: Obesity Epidemic is Providing Food for Lawyers, Advocates*, WASH. TIMES, Oct. 19, 2003 at A1, *available at* 2003 WLNR 767978 (detailing the dismissal of Barber's lawsuit).

256. *Pelman I*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003).

257. *Id.* at 516. The teenage plaintiffs "have become overweight and have developed diabetes, coronary heart disease, high blood pressure, elevated cholesterol intake, and/or other detrimental and adverse health effects as a result of the defendants' conduct and business practices." *Id.* at 519.

258. *Id.* at 520.

259. *Id.* at 516. The Federal Rules of Civil Procedure provide that a complaint will be dismissed if, despite making factually accurate allegations, it fails to allege any legally proscribed behavior. FED. R. CIV. PRO. 12(b)(6).

260. *Pelman I*, 237 F. Supp. 2d at 524.

that the plaintiff was injured as a result of the deceptive act.[261] Because the plaintiffs in *Pelman* failed to plead any specific examples of McDonald's deceptive advertising, the judge dismissed both consumer protection claims for failure to state valid causes of action.[262] He recognized that, in general, McDonald's advertisements encouraging daily visits to the restaurant as part of a well-balanced diet most likely represented nonactionable puffery.[263]

The judge next considered the plaintiffs' negligence claims.[264] In the negligence claims, the plaintiffs alleged that McDonald's negligently served food with dangerously low nutritional content and failed to warn customers about the food's hidden dangers that negatively impacted the plaintiffs' health.[265] In response, McDonald's argued that it could not be liable for the results of consuming food which the public recognizes as not highly-nutritious.[266] Judge Sweet relied upon Restatement (Second) of Torts product liability principles in considering these arguments.[267] He ruled that a valid claim under those principles would have to allege that the nutritional content of the food was either unreasonably dangerous or far beyond the consumer's reasonable expectations.[268] Here, the plaintiffs' complaint did not go so far as to allege such things but instead merely alleged low nutritional content of McDonald's

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261. *Id.* at 525. The plaintiffs claimed violations of the New York consumer protection statutes. *Id.* at 524. To state a claim under this act, the plaintiffs had to show (1) that the act, practice, or advertisement was consumer-oriented, (2) that it was misleading in a material respect, and (3) that the plaintiff was thereby injured. New York Consumer Protection Act, GEN. BUS. §§ 349 and 350 (2004). These required elements are similar to the CFDBPA elements of (1) a materially deceptive act or practice by the defendant, (2) the defendant's intent that plaintiff rely on the deception, (3) the deception occurred during the course of trade or business, (4) damage to the buyer, and (5) proximate causation. *See supra* notes 118–35 and accompanying text (discussing the elements of a consumer protection statute violation in Illinois).

262. *Pelman I*, 237 F. Supp. 2d at 527, 530.

263. *Id.* at 527–28.

264. *Id.* at 530.

265. *Id.* at 530–42.

266. *Id.* at 530–31.

267. *Id.* at 531–32.; *see also* Restatement (Second) of Torts § 402A.

268. *Pelman I*, 237 F. Supp. 2d at 531–33.

> 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. . . .It is only when that free choice [to eat McDonald's food] becomes but a chimera—for instance, by the masking of information necessary to make the choice, such as the knowledge that eating McDonald's with a certain frequency would irrefrageably cause harm—that manufacturers should be held accountable.

Id. at 532–33.

food.[269] Further, the complaint did not allege why the plaintiffs reasonably could not obtain accurate nutrition information elsewhere or allege that the nutrition information remained solely in McDonald's possession.[270] In addition, proximate causation presented a problem for the plaintiffs.[271] First, the court noted that they failed to demonstrate that they visited McDonald's on a consistent enough basis to sufficiently show that the fast food was the proximate cause of their obesity.[272] Second, the plaintiffs failed to address and rule out other causes of obesity, like lack of exercise, genetic predisposition, or other socioeconomic factors.[273] As a result of these deficiencies in the plaintiffs' complaint, Judge Sweet dismissed the negligence claims.[274]

Although the judge dismissed the plaintiffs' complaint, he granted leave to amend and suggested ways to redraft the pleadings.[275] With regard to the consumer protection causes of action, Judge Sweet indicated that a claim might exist if the plaintiffs could demonstrate that McDonald's advertisements stated false information.[276] He also suggested that an advertisement's emphasis on certain beneficial characteristics of a product and contemporaneous failure to present other more dangerous characteristics might trigger consumer protection violations.[277] With regard to the negligence claims, the judge indicated

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269. *Id.*

270. *Id.* at 529.

271. *Id.* at 537–39.

272. *Id.* at 538.

> In order to survive a motion to dismiss, the Complaint at a minimum must establish that the plaintiffs ate at McDonalds [sic] on a sufficient number of occasions such that a question of fact is raised as to whether McDonalds' [sic] products played a significant role in the plaintiffs' health problems.... Naturally, the more often a plaintiff had eaten at McDonalds [sic], the stronger the likelihood that it was the McDonalds' [sic] food (as opposed to other foods) that affected the plaintiffs' health.

Id. at 538–39.

273. *Id.* at 539.

> [I]n order to allege that McDonalds' products were a significant factor in the plaintiffs' obesity and health problems, the Complaint must address these other variables and, if possible, eliminate them or show that a McDiet is a substantial factor despite these other variables.

Id.

274. *Id.* at 537, 540, 543.

275. *See infra* notes 276–80 and accompanying text (discussing Judge Sweet's suggestions for the amended complaint).

276. *See Pelman I*, 237 F. Supp. 2d at 528 (discussing the effectiveness of actions in the 1980s by several states against McDonald's in which the states successfully stated claims of deceptive practices based on advertisements that falsely stated ingredient information and that certain McDonald's food products contained low sodium levels).

277. *See id.* at 529 (identifying an earlier claim that McDonald's advertised the relatively low cholesterol content of a hamburger while failing to mention the "much more relevant" saturated

that if heavy food processing reduced the nutritional values of McDonald's products to a level well below a consumer's reasonable expectations, McDonald's may have a duty, under the Restatement (Second) of Torts, to warn customers about those hidden characteristics.[278] For example, if the health effects of a processed McDonald's cheeseburger differ so wildly from those of a home-cooked cheeseburger because of the additives and preservatives used in fast food processing, McDonald's may have a duty to inform its customers of the differences between the two.[279] Finally, the judge suggested that if McDonald's intended for customers to eat McDonald's food everyday, and that McDonald's knew daily consumption of fast food creates dangerous health consequences, the company may face liability for serving food unreasonably dangerous for their intended purpose.[280]

3. *Pelman II*

One month after their initial complaint was dismissed, the *Pelman* plaintiffs filed an amended complaint.[281] The amended complaint initially stated four causes of action—three claims that McDonald's violated local consumer protection statutes and one claim that McDonald's failed to warn customers of the hidden dangers of eating its food.[282] However, the plaintiffs ultimately dropped the failure to warn claim and only pursued the consumer protection allegations.[283] In these amended consumer protection claims, the plaintiffs once again argued that McDonald's falsely advertised its food as nutritious, failed to

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fat content).

278. *Id.* at 534–36. The judge indicated that McDonald's may have a duty to warn its customers if "the processing of McDonalds' [sic] food has created an entirely different—and more dangerous—food than one would expect from a hamburger, chicken finger or french fry cooked at home or at any other restaurant than McDonalds [sic]." *Id.* at 534; *see also* Restatement (Second) of Torts § 402A.

279. *Pelman I*, 237 F. Supp. 2d at 535. The judge used as an example for his hypothetical duty to warn the long list of ingredients used in McDonald's Chicken McNuggets, as opposed to the normally used ingredients of a home-cooked chicken finger. *Id.* Further, the judge distinguished the hidden dangers of McDonald's food and food served in

> pizza parlors, neighborhood diners, bakeries, grocery stores, and literally anyone else in the food business (including mothers cooking at home) . . . [that] serve plain-jane hamburgers, fries and shakes—meals that are high in cholesterol, fat, salt and sugar, but about which there are no additional processes that could be alleged to make the products even more dangerous.

Id. at 536 (citation omitted).

280. *Id.* at 537.

281. Plaintiff's Amended Verified Complaint at 1, *Pelman II*, 2003 WL 23474873 (S.D.N.Y. 2003).

282. *Id.* at 1–2.

283. *Pelman II*, 2003 WL 22052778 at *2.

disclose hidden nutritional content of its foods, and deceptively represented the nutritional content of its food.[284]

The plaintiffs' new complaint went further than the initial one by identifying specific advertisements and promotions allegedly in violation of New York consumer protection statutes.[285] As a result, Judge Sweet could more fully consider the deceptive practices claims.[286] Like the CFDBPA, New York law requires plaintiffs to allege that the act complained of was consumer-oriented and misleading and that the plaintiff was consequently injured.[287] New York consumer protection law differs from Illinois law in an important respect, however: New York, unlike Illinois, requires reliance as part of a false advertising claim.[288]

In drafting the amended complaint, the plaintiffs pointed to a series of allegedly deceptive advertisements from the late 1980s.[289] Because the advertisements aired in the late 1980s, however, the claims were time-barred for all but the teenage plaintiffs.[290] Further, the judge found that the plaintiffs failed to allege sufficient reliance on almost all of the advertisements.[291] Ultimately, he found that only one claim relating to one advertisement survived both the statute of limitations challenge and the failure to plead reliance challenge.[292] That advertisement stated that McDonald's French fries were cooked in 100 percent vegetable oil and contained no cholesterol.[293] The plaintiffs pled sufficient reliance upon

284. Plaintiff's Amended Verified Complaint at 2, *Pelman II*, 2003 WL 23474873.

285. *Id.* at 10–18. See *supra* notes 118–34 and accompanying text for a discussion of the elements of a consumer protection claim in Illinois under the CFDBPA. See *supra* note 261 and accompanying text for a discussion of the elements of a consumer protection claim in New York under the New York Consumer Protection Act, GEN. BUS. §§ 349, 350.

286. *Pelman II*, 2003 WL 22052778 at *4; *see also supra* note 261 and accompanying text (listing consumer reliance as an element of a consumer protection claim in New York under the New York Consumer Protection Act, GEN. BUS. §§ 349, 350).

287. *Pelman II*, 2003 WL 22052778 at *4.

288. *Compare Pelman II*, 2003 WL 22052778 at *7 ("To state a claim under [New York Consumer Protection Statute] Section 350 for false advertising, however, it is necessary to allege reliance on the allegedly false advertisement.") *with* Oliveira v. Amoco Oil Co., 726 N.E.2d 51, 57 (Ill. App. Ct. 2000) ("[N]o actual reliance is required to state a cause of action under the [CFDBPA in Illinois].").

289. Plaintiff's Amended Verified Complaint at 11–18, *Pelman II*, 2003 WL 23474873.

290. *Pelman II*, 2003 WL 22052778 at *5–6. The judge rejected the majority of the plaintiff's arguments to toll the statute of limitations, except as regards to the infant plaintiffs. *Id.* Because the teenaged plaintiffs were either not born or very young at the time of the 1987 advertisements, New York law provided that the statute of limitations for a cause of action is tolled until the plaintiff reaches majority. *Id.* at *6.

291. *Id.* at *8.

292. *Id.* at *9.

293. *Id.*

this advertisement by claiming that they would not have purchased and consumed McDonald's french fries as frequently as they did if they had not seen that advertisement.[294] However, the judge ultimately dismissed this claim for failing to demonstrate causation.[295] Although the amended complaint alleged that the plaintiffs ate McDonald's food twice a day, five days a week, it still failed to eliminate the possibility that any other factors potentially caused the obesity or obesity-related illnesses.[296] Consequently, the amended complaint created only a tenuous causal connection, insufficient to find proximate causation.[297]

The judge also found that the plaintiffs failed to demonstrate the objectively deceptive nature of the McDonald's French fry advertisement.[298] In contrast to the advertisement's message, the evidence showed that McDonald's actually cooked its French fries in beef tallow, not one hundred percent vegetable oil.[299] However, McDonald's disclosed this information on its website, and Judge Sweet held that that this disclosure eliminated the possibility that the advertisement was objectively deceptive.[300] Further, the plaintiffs did not specifically allege that the use of beef fat adds cholesterol to McDonald's French fries.[301] As a result, the plaintiffs failed to demonstrate that the advertisement deceptively stated that French fries contained no cholesterol.[302] Based on these failings of the pleadings, Judge Sweet dismissed the amended complaint and denied leave to amend further.[303]

4. Litigation Comes to Illinois—*Cohen v. McDonald's*

On February 4, 2002, Marc S. Cohen filed a two-count complaint against McDonald's in the Circuit Court of Illinois alleging that the fast food giant was liable for violations of the CFDBPA and for common

294. *Id.*

295. *Id.* at *11.

296. *Id.*

297. *Id.* However, it is important to recognize that on appeal, the New York Appellate Court found that because Section 349 of the New York Consumer Protection Statute, unlike Section 350, does not require a showing of reasonable reliance, Judge Sweet should have allowed this claim to continue. *Pelman v. McDonald's Corp.*, 346 F.3d 508, 511 (2nd Cir. 2005), at 2005 WL 147142 *2. As a result, that claim has now been remanded to the trial level. *Id.*

298. *Pelman II*, 2003 WL 22052778 at *12.

299. *Id.*

300. *Id.* at *13.

301. *Id.*

302. *Id.*

303. *Id.* at *14; *see also supra* note 297 (discussing the fact that the general consumer protection claim has been remanded back to the trial court for further proceedings).

law fraud.[304] Mr. Cohen's claims stemmed from McDonald's alleged misrepresentation of the nutritional content of foods intended for young children.[305] Specifically, Mr. Cohen's complaint alleged that the McDonald's Nutrition Fact sheet regarding Happy Meals violated a NLEA provision requiring foods intended for children under the age of four to have separate nutritional labeling directed at the needs of that age group.[306] While Mr. Cohen admitted NLEA generally exempts restaurants from its requirements, he alleged that because McDonald's voluntarily provided some nutritional information for its foods it then had to comply fully with all NLEA requirements, including the provision mandating separate nutritional information for food intended for children under the age of four.[307] Mr. Cohen claimed McDonald's was liable under Illinois consumer protection law because of this failure to comply with NLEA requirements.[308]

The judge granted McDonald's motion to dismiss for failure to state a claim, finding that NLEA preempted Mr. Cohen's fraud causes of action.[309] In addition, because the NLEA creates no private right of action, the judge held that only the FDA may pursue alleged violations of its regulations.[310]

These cases against fast food companies for obesity and obesity-related illnesses generated significant media attention.[311] Observers pondered whether the fast food suits could eventually become newer versions of tobacco cases and result in enormous settlement agreements.[312]

D. The Legislative Response to Fast Food Litigation

In response to the emerging fast food tort action, a movement grounded in the widely held belief that such suits are frivolous soon

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304. Cohen v. McDonald's Corp., 808 N.E.2d 1, 3–4 (Ill. App. Ct. 1st Dist. 2004).

305. *Id.* at 4.

306. *Id.* at 7; *see also supra* notes 193–204 and accompanying text (listing and explaining NLEA's provisions).

307. *Cohen*, 808 N.E.2d at 7. Mr. Cohen was relying on federal regulations which states that restaurants are exempt from NLEA labeling requirements "[p]rovided, that the food bears no information in any context on the label or in labeling or advertising. Claims or other nutrition information subject the food to the provisions of this section." 21 C.F.R. § 101.9(j)(2)(i) (2003).

308. *Cohen*, 808 N.E.2d at 4.

309. *Id.* at 10.

310. *Id.*

311. *E.g.*, Karen Robinson-Jacobs, *Lawyers Put their Weight Behind Obesity Cases*, L.A. TIMES, Jul. 2, 2003, at A1 *available at* 2003 WL 2417821; Bradford, *supra* note 61; Caleb E. Mason, *Doctrinal Considerations for Fast-Food Obesity Suits*, 40 AMERICAN BAR ASSOCIATION: TORT TRIAL & INSURANCE PRACTICE LAW JOURNAL 75, n.1 (Fall 2004).

312. Parsigian, *supra* note 152; Trial Lawyers, Inc., *supra* note 18,

developed to preclude the filing of similar actions in the future.[313] This growing tort reform movement aims to legislatively preempt the future filing of suits against the fast food industry for obesity-related illnesses.[314] This section first explores the fast food litigation tort reform nationally, looking specifically at the National Restaurant Association's Model Bill as an example.[315] This section then reviews previous tort reform efforts in Illinois in order to better understand the context of the Illinois Commonsense Consumption Act.[316]

1. Fast Food Tort Reform

As of October 2004, fourteen states have attempted to statutorily prohibit suits like *Pelman, Cohen, Barber,* and *Liberty*.[317] Four other states and the United States Congress are currently considering similar legislation.[318] Advocates of this legislation—typically known as "Commonsense Consumption" Acts—call it an important tort reform measure in the fight against frivolous lawsuits.[319] While the thirteen states' individual bills differ in precise language and scope, they

313. *See infra* notes 317–21 and accompanying text (discussing the nationwide movement to enact "Commonsense Consumption Acts").

314. *See infra* Part II.D.1 (discussing the goals of the fast food industry in adopting Commonsense Consumption Acts)

315. *See infra* Part II.D.1 (discussing the fast food tort reform movement across the country).

316. *See infra* Part II.D.2 (discussing Illinois' previous tort reform measures).

317. Arizona: ARIZ. REV. STAT. ANN. §§ 12-681, 683, 688 (West 2004); Colorado: COLO. REV. STAT. §§ 13-21-1101–05 (2004); Florida: FLA. STAT. ANN. § 768.37 (West 2005); Georgia: GA. CODE ANN. §§ 26-2-430–35 (West 2004); Idaho: IDAHO CODE §§ 39-8701–06 (Michie 2004); Illinois: 2004 Ill. Laws 93-0848; Louisiana: LA. REV. STAT. ANN. § 2799.6 (West 2005); Michigan: MICH. COMP. LAWS ANN. § 600.2974 (West 2004); Missouri: MO. ANN. STAT. § 537.595 (West 2005); Pennsylvania: 2004 Pa. Laws 2912; South Dakota: 2004 S.D. Laws 1282, *available at* http://legis.state.sd.us/index.cfm (last visited Feb. 8, 2005); Tennessee: TENN. CODE ANN. § 29-34-205 (2004); Utah: UTAH CODE ANN. §§ 78-27d-101–06 (2004); Washington: WASH. REV. CODE ANN. § 7.72.070 (West 2005); *see also supra* Part II.C.1–4 (discussing the previously-filed fast food litigation suits).

318. The Common Sense Consumption Act OF 2003, S. 1428, 108TH CONG. (2003); Ohio: H.B. 350, 125th Gen. Assem., Reg. Sess., *available at* http://www.legislature.state.oh.us/ (last visited Feb. 8, 2005); Rhode Island: S.B. 2934, Jan. Sess., *available at* http://www.rilin.state.ri.us/ (last visited Feb. 8, 2005); New Jersey: A. 3514, 211th Leg., *available at* http://www.njleg.state.nj.us/Default.asp (last visited Feb. 8, 2005).

319. Colorado Gov. Bill Owens called the passage of the Colorado Commonsense Consumption Act a "preemptive measure that defends a key industry from frivolous lawsuits." Press Release, Office of the Governor, Owens Signs "Commonsense Consumption" Act (May 18, 2004), *available at* http://www.state.co.us/owenspress/05-18-04a.htm; The Detroit News Editorial Board called the Michigan law "a victory for personal responsibility and common sense . . . [because] the dangers of chowing too many Big Macs should be obvious to anyone with a sound mind and a bathroom scale." Editorial, *Obesity Lawsuit Bill Protects State Restaurants*, THE DETROIT NEWS, Oct. 11, 2004, *available at* http://www.detnews.com/2004/editorial/0410/11/a08-299430.htm.

generally follow the language, format, and goals of the National Restaurant Association's Model Bill ("Model Bill").[320]

320. NAT'L RESTAURANT ASS'N., OBESITY ISSUE KIT: MODEL BILL-TEXT, *available at* http://www.restaurant.org/government/state/nutrition/resources.cfm (2004) [hereinafter MODEL BILL]. The Model Bill provides:

SEC. 1. SHORT TITLE

This Act may be cited as the 'Commonsense Consumption Act.'

SEC. 2. LITIGATION MANAGEMENT FOR PURVEYORS OF FOOD THAT COMPLY WITH APPLICABLE STATE AND FEDERAL LAWS

(a) PREVENTION OF FRIVOLOUS LAWSUITS.—Except as exempted in subsection (b) below, a manufacturer, packer, distributor, carrier, holder, seller, marketer or advertiser of a food (as defined at Section 201(f) of the Federal Food Drug and Cosmetic Act (21 U.S.C. 321(f)), or an association of one or more such entities, shall not be subject to civil liability arising under any law of the State of _____ (including all statutes, regulations, rules, common law, public policies, court or administrative decisions or decrees, or other State action having the effect of law) for any claim (as defined below) arising out of weight gain, obesity, a health condition associated with weight gain or obesity, or other generally known condition allegedly caused by or allegedly likely to result from long-term consumption of food.

(b) EXEMPTION.—Subsection (a) above shall not preclude civil liability where the claim of weight gain, obesity, health condition associated with weight gain or obesity, or other generally known condition allegedly caused by or allegedly likely to result from long-term consumption of food is based on (i) a material violation of an adulteration or misbranding requirement prescribed by statute or regulation of the State of _____ or the United States of America and the claimed injury was proximately caused by such violation; or (ii) any other material violation of federal or state law applicable to the manufacturing, marketing, distribution, advertising, labeling, or sale of food, provided that such violation is knowing and willful (as defined below), and the claimed injury was proximately caused by such violation.

(c) DEFINITIONS.—For purposes of this Act, the following definitions apply. A "claim" means any claim by or on behalf of a natural person, as well as any derivative or other claim arising therefrom asserted by or on behalf of any other person. The term "other person" as used in the immediately preceding sentence means any individual, corporation, company, association, firm, partnership, society, joint-stock company, or any other entity, including any governmental entity or private attorney general. A "generally known condition allegedly caused by or allegedly likely to result from long-term consumption" means a condition generally known to result or to likely result from the cumulative effect of consumption, and not from a single instance of consumption. A "knowing and willful" violation of federal or state law means that (i) the conduct constituting the violation was committed with the intent to deceive or injure consumers or with actual knowledge that such conduct was injurious to consumers; and (ii) the conduct constituting the violation was not required by regulations, orders, rules or other pronouncement of, or any statute administered by, a Federal, state, or local government agency.

(d) PLEADING REQUIREMENTS.—In any action exempted under subsection (b)(i) above, the complaint initiating such action shall state with particularity the following: the statute, regulation or other law of the State of ____ or of the United States that was allegedly violated; the facts that are alleged to constitute a material violation of such statute or regulation; and the facts alleged to

In summary, the Model Bill exempts fast food companies from common law liability for obesity and obesity-related illnesses while still allowing narrow liability for willful violations of consumer protection laws.[321] Section Two forms the substance of the Model Bill by providing the scope of the exemption, defining the affected parties and entities, and identifying the narrow exceptions.[322] The Model Bill precludes suits "by or on behalf of a natural person" against a "manufacturer, packer, distributor, carrier, holder, seller, marketer or advertiser of a food" for any claim resulting from "weight gain, obesity, a health condition associated with weight gain or obesity, or other generally known condition allegedly caused by or allegedly likely to result from long-term consumption of food."[323] By creating this group

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demonstrate that such violation proximately caused actual injury to the plaintiff. In any action exempted under subsection (b)(ii) above, in addition to the foregoing pleading requirements, the complaint initiating such action shall state with particularity facts sufficient to support a reasonable inference that the violation was with intent to deceive or injure consumers or with the actual knowledge that such violation was injurious to consumers. For purposes of applying this Act, the foregoing pleading requirements are hereby deemed part of the substantive law of the State of ____ and not merely in the nature of procedural provisions. [ADD FOR STATES, LIKE CALIFORNIA, WITHOUT ACTUAL INJURY REQUIREMENT: The requirements of actual injury, knowledge and willfulness (as defined above), and proximate causation set forth in this subsection (d) shall apply as set forth herein notwithstanding any other law of the State of _____ which may be inconsistent with or contrary to such requirements.]

(e) STAY PENDING MOTION TO DISMISS.—In any action exempted under subsection (b) above, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party. During the pendency of any stay of discovery pursuant to this paragraph, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such party and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the State of ____ [Rules of Civil Procedure].

SEC. 3. APPLICABILITY TO PENDING AND FUTURE CLAIMS

The provisions of this Act shall apply to all covered claims pending on the date of the Effective Date and all claims filed thereafter, regardless of when the claim arose.

SEC. 4. EFFECTIVE DATE

321. NAT'L REST. ASS'N., OBESITY ISSUE KIT: GUIDING PRINCIPLES, MODEL BILL—SUMMARY, *available at* http://www.restaurant.org/government/state/nutrition/resources.cfm (2004) [hereinafter GUIDING PRINCIPLES].

322. "Section 2 is the heart of the Act. Its first three subsections, ((a), (b), and (c)) address the scope of liability, while subsections (d) and (e) include the procedural provisions that serve effectively to enforce the substantive ones." *Id.* at 2.

323. MODEL BILL, *supra* note 320 at § 2(a), (c).

of precluded suits, the National Restaurant Association aims to protect all fast food businesses from any obesity-related claim.[324] Further, it looks to prevent litigation from obese persons who, despite common knowledge that fast food is low in nutritional value, continue to eat at restaurants such as Wendy's, McDonald's, or Burger King until becoming obese.[325]

After broadly excusing fast food companies from obesity-related lawsuits, the Model Bill then creates two exceptions to that general exemption:[326] (1) when a fast food company violates local or federal food adulteration or branding laws, or (2) when a fast food company violates state or federal consumer protection laws.[327] However, the exceptions actually narrow consumers' recovery ability by further requiring that the alleged violation be "knowing and willful."[328] Therefore, the Model Bill places an additional hurdle in front of consumers, who now must not only demonstrate a violation of consumer protection laws, but also an intention to violate and harm consumers.[329] Finally, the Model Bill requires plaintiffs to plead with

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324. NAT'L REST. ASS'N., OBESITY ISSUE KIT: GUIDING PRINCIPLES, COMPARISON: MODEL BILL VERSUS LOUISIANA LAW, *available at* http://www.restaurant.org/government/state/nutrition/resources.cfm (2004) [hereinafter MODEL BILL COMPARISON] (explaining the importance of the definition because it "expressly protects all those in the chain of commerce").

325. GUIDING PRINCIPLES, *supra* note 321.

> Weight gain and obesity are specific instances of conditions likely to be caused by repeated consumption, but others, such as atherosclerosis (the narrowing of arteries due to the buildup of fatty deposits), are intended to be covered as well. The animating principle of this provision is that injuries which only arise from long-term consumption of an otherwise safe and lawful food are fully within the power of an informed consumer to prevent through the exercise of moderation and personal responsibility.

Id.

326. *Id.*

> The underlying principle of these two exceptions is to balance two goals. The first is to preserve liability in those areas where traditionally the food industry has been liable—namely, adulteration and misbranding of food—and in cases involving reprehensible conduct (*i.e.*, willful consumer injury or intentional deception).

Id.

327. MODEL BILL, *supra* note 320 at § 2(b).

328. *Id.*

329. GUIDING PRINCIPLES, *supra* note 321.

> First, the conduct constituting the violation must be done with the intent to deceive or injure consumers, or with actual knowledge that such conduct was injurious to consumers. Note that, due to the inherent difficulty in "knowing" that the consumer is being deceived, actual knowledge of deception is insufficient to invoke the exception; *intent* to deceive is required. Second, the conduct at issue must not be required by any other federal, state, or local law (broadly defined to include any statute, regulation, rule, or other government pronouncement). This requirement prevents the imposition of liability upon a food supplier for merely complying with legal requirements, even if a plaintiff could prove that his or her injury resulted from such compliance.

particularity the specific facts and elements underlying that violation.[330] The National Restaurant Association believes that this Model Bill, as actualized in the enacted legislation in thirteen states, creates a formidable barrier to obesity law suits against fast food companies.[331]

2. History of Illinois' Tort Reform Efforts

Before analyzing Illinois' new fast food litigation reform, it is important to recognize that this is not the state legislature's first attempt to bar frivolous lawsuits.[332] There has been dramatic growth in recent years in tort reform measures, both in Illinois and across the country.[333] Because the focus of this article concerns a recent piece of Illinois tort reform legislation, however, it is most instructive to review previous Illinois measures.[334]

The Illinois Legislature has enacted tort reform acts relating to

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Id.

330. MODEL BILL, *supra* note 320, at § 2(d).

331. NAT'L REST. ASS'N., OBESITY ISSUE KIT: PERSONAL RESPONSIBILITY/FRIVOLOUS LAWSUIT TALKING POINTS ("It is unfortunate, but necessary, to have legislation enacted that will help deter unscrupulous attorneys from filing abusive, frivolous lawsuits that only enrich the trial bar at the expense of the hardworking restaurant operators and their employers."), *available at* http://www.restaurant.org/government/state/nutrition/resources/nra_20040208_talkingpoints_lawsuits.pdf (2004).

332. *See generally* Victor E. Schwartz et al., *Illinois Tort Law: A Rich History of Cooperation and Respect Between the Courts and the Legislature*, 28 LOY. U. CHI. L.J. 745 (1997) (providing a review of the development of tort reform in Illinois from the early 1800s to the present time and identifying the role played by the legislature in modifying common law).

333. AM. TORT REFORM ASS'N., TORT REFORM RECORD, *available at* http://www.atra.org/files.cgi/7802_Record6-04.pdf (Jul. 13, 2004). The American Tort Reform Association reports that since 1985, thirty-nine states have modified the tort liability concept of joint and several liability; twenty-three state have modified the collateral source rule; thirty-one states have modified or limited punitive damages awards; eighteen states have modified the rule for awarding noneconomic damages; fourteen states have enacted prejudgment interest reforms; fifteen states have enacted product liability legislation; eight states have reformed class action rules. *Id.* In addition, tort reform debate found a willing forum during the 2004 Presidential campaign, with both candidates calling for and proposing a variety of reforms. *See* Press Release, Bush-Cheney '04, Inc., Bush-Cheney '04 Launches New Television Advertisement, "Tort Reform" (Oct. 5, 2004) (on file with author) (detailing script for tort reform commercial); Press Release, Kerry-Edwards 2004, Inc., Bush's Wrong Direction on Health Care (Sept. 7, 2004), *available at* http://www.johnkerry.com/pressroom/releases/pr_2004_0907c.html. *See generally "Common Sense" Legislation: The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765 (May 1996) (discussing the development of tort reform efforts at a federal and state level).

334. *See infra* notes 335–49 and accompanying text (discussing previous Illinois tort reform measures); *see also* AM. TORT REFORM ASS'N., BRINGING JUSTICE TO JUDICIAL HELLHOLES 3 (2003), *available at* http://www.atra.org/reports/hellholes (identifying Madison County, Illinois courts as the top "hellhole" in the United States because "Madison County judges are infamous for their willingness to take cases from across the country, with little or no connection, and offer decisions that regulate entire industries nationwide").

personal property,[335] medical malpractice,[336] judgment recovery,[337] government employee's tort liability,[338] and products liability.[339] For example, responding to allegedly frivolous medical malpractice suits in the 1980s, the Illinois Legislature enacted significant medical malpractice reform in 1985.[340] Included among the reform provisions were a limitation on contingency fees for medical malpractice suits,[341] an allowance for periodic payments of medical malpractice awards,[342] and a requirement that a panel of medical experts review and approve medical malpractices claims prior to filing.[343] Finally, the landmark Civil Justice Reform Amendments of 1995 attempted to address all perceived weaknesses in Illinois' existing tort liability system.[344] This legislation prohibited joint and several liability, limited recovery of non-economic damages to $500,000 in all cases, created a presumption of product safety in product liability cases, and limited punitive damages awards to three times economic damages.[345]

In constitutional challenges to the 1980s reforms, the Supreme Court of Illinois upheld all but the panel review provision.[346] In challenges to the 1995 reforms, the Supreme Court of Illinois struck down all of the provisions.[347] Since that time, the Illinois legislature's efforts of tort

335. Code of Civil Procedure, 735 ILL. COMP. STAT. 5/13-214 (2002) (as amended by 1981 Ill. Laws 82-280).

336. 735 ILL. COMP. STAT. 5/2-1114, 1115, 1705 (2002) (as amended by 1985 Ill. Laws 84-7); 735 ILL. COMP. STAT. 5/13-212 (2002) (as amended by 1981 Ill. Laws 82-280).

337. 735 ILL. COMP. STAT. 5/2-1205 (2002) (as amended by 1981 Ill. Laws 82-280).

338. Local Governmental and Governmental Employees Tort-Immunity Act, 745 ILL. COMP. STAT. 10/1-101 (2002) (as amended by 1965 Ill. Laws 2983 § 1-101).

339. 735 ILL. COMP. STAT. 5/13-213 (2002) (as amended by 1981 Ill. Laws 82-280).

340. 1985 Ill. Laws 84-7.

341. 735 ILL. COMP. STAT. 5/2-1114 (2002) (as amended by 1985 Ill. Laws 84-7 § 1).

342. 735 ILL. COMP. STAT. 5/2-1705 (2002).

343. 1986 Ill. Laws 84-1431.

344. Civil Justice Reform Amendments of 1995, 1995 Ill. Laws 89-7 (found unconstitutional by Best v. Taylor Machine Works, Inc., 689 N.E.2d 1057 (Ill. 1997)); *see also* Schwartz, *supra* note 332 (explaining the legislature's belief that more reform was needed to address the fact that "[m]any people now believe that they should have the right to sue and receive a reward for any slight, inconvenience, or injury").

345. Civil Justice Reform Amendments of 1995, 1995 Ill. Laws 89-7; *see also* Kirk W. Dillard, *Illinois' Landmark Tort Reform: The Sponsor's Policy Explanation*, 27 LOY. U. CHI. L.J. 805 (1996) (explaining the motivations behind the provisions); AM. TORT REFORM ASS'N., ILLINOIS REFORMS, for a chronological list of Illinois' tort reform legislation, *available at* http://www.atra.org/states/index.php?state=IL&display=bydate (2002).

346. Berneir v. Best, 497 N.E.2d 763, 771 (Ill. 1986). The court struck down the provision because it violated the constitutional provision of separation of powers in that the judge on the panel was forced to either share judicial authority or relinquish it to the power of the others on the panel. *Id.*

347. *Id.* The court struck down the noneconomic damages cap because it was special

reform were relatively silent until the Illinois Commonsense Consumption Act.[348]

III. ILLINOIS COMMONSENSE CONSUMPTION ACT

In 2004, Illinois revived its tort reform efforts by joining the growing number of states seeking to ban lawsuits like *Pelman* through the adoption of Commonsense Consumption Acts.[349] This Part first explores the legislative history of the ICCA and then it examines the ICCA's provisions.[350]

A. Legislative History of the ICCA

On October 29, 2003, Illinois State Representative John Fritchey hosted a press conference with the National Restaurant Association's Illinois branch.[351] At this press conference, State Rep. Fritchey announced his introduction of a bill into the Illinois State Legislature that would prevent lawsuits against the fast food industry for obesity-related illnesses.[352] According to State Rep. Fritchey and the bill's co-sponsor, State Senator John Cullerton, Illinois needed to pass the ICCA to stop obesity suits and to emphasize Illinois' commitment to personal responsibility.[353]

When State Rep. Fritchey introduced his bill ("Original Bill") into the Illinois General Assembly, the proposed provisions protected a wide range of activity.[354] First, the Original Bill adopted the FDA's definition

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legislation and violative of the separation of powers doctrine and the bar on joint and several liability because it was unconstitutional special legislation. *Id.*

348. AM. TORT REFORM ASS'N., *supra* note 345.

349. *See supra* Part II.D.1 (reviewing the fast food litigation tort reform measures taken across the country).

350. *See infra* Parts III.A. and III.B. (explaining the components of the ICCA).

351. Press Release, John Fritchey, Illinois State Representative, Proposed Law Would Ban Obesity Lawsuits (Oct. 29, 2003) [hereinafter *Rep. Fritchey Press Release*], *available at* http://www.fritchey.com/pdfs/2003/obesityPressRelease.pdf.

352. *Id.* "State Representative John Fritchey today announced that he will be introducing legislation which would bar lawsuits against restaurants, food manufacturers and distributors based upon claims that the food in question led to an individual's obesity." *Id.*

353. Statement of Illinois State Senator John Cullerton in Gov. Blagojevich Press Release, *supra* note 23.

> Obesity is not caused by the people who sell food, it is caused by the people who eat food. We must put the focus on healthier lifestyles and nutritional balance instead of costly lawsuits and litigation that only serve to clog up our courts and drive up the cost of a meal.

Id.

354. H.B. 3981, 93rd Gen. Assemb., Reg. Sess. (introduced version) [hereinafter Original Bill], *available at* http://www.ilga.gov/ (last visited Feb. 17, 2005).

of "food," thereby including not only regular food items but also components of those items.[355] Next, the Original Bill extended liability immunization to food sellers, manufacturers, and trade associations.[356] This expansive definition would have immunized not only fast food restaurants but also non-profit groups like the Illinois Manufacturers' Association from obesity-related claims.[357] Finally, the Original Bill protected a broad array of business functions, including the marketing, distribution, advertising, and selling of fast food.[358] The Original Bill ultimately provided that no person could bring a suit in Illinois seeking recovery against any seller, manufacturer, or trade association dealing in fast food for obesity-related illnesses.[359] The Illinois House referred the Original Bill to the Committee on the Judiciary, where it passed unanimously.[360]

However, soon after the Original Bill was placed back on the Illinois House Calendar, State Rep. Fritchey introduced an amendment ("Amendment") to the bill that substantially limited its provisions.[361] The Amendment eliminated the litigation immunization provision for manufacturers and trade associations.[362] Further, it reduced the category of immunized activities to include only the sale of fast food, not its

355. *Id.* at § 5.

356. *Id.* The Original Bill defined "manufacturer" as "a person who is lawfully engaged in the business of manufacturing the product." *Id.* It defined "seller" as "a person lawfully engaged in the business of marketing, distributing, advertising, or selling." *Id.* Finally, it defined "trade association" as "an association or business organization (whether or not incorporated under federal or State law) that is not operated for profit, and [two] or more members of which are manufacturers, marketers, distributors, advertisers, or sellers." *Id.* It further provided that no person could bring a claim against one of these entities "for damages or injunctive relief based on a claim of injury resulting from a person's weight gain, obesity, or any health condition that is related to weight gain or obesity." *Id.* (defining "qualified civil liability action").

357. Illinois Manufacturer's Association (2004), *at* http://www.ima-net.org/ga/govaffairs.cfm ("The Illinois Manufacturers' Association (IMA) is a founding member of the Illinois Coalition for Jobs, Growth, and Prosperity, a group of employer organizations that has banded together to attack anti-business interests in Springfield.") (last visited Feb. 15, 2005).

358. Original Bill, *supra* note 354, at § 5. "'Engaged in the business' means a person who manufacturers, markets, distributes, advertises, or sells a qualified product in the person's regular course of business." *Id.*

359. *Id.* at § 10 (defining the limited liability provision of the Original Bill).

360. 3 LEGISLATIVE SYNOPSIS AND DIGEST, *supra* note 23, at 1836 (showing that the Original Bill was referred to the Illinois House Judiciary Committee on Feb. 2, 2004 and that it passed out of that committee unanimously on Feb. 25, 2004).

361. *Id.* (showing that after the Original Bill was put on the House Calendar on Feb. 25, 2004, State Rep. Fritchey introduced House Amendment 1 to H.B. 3981); House Amend. 1 to H.B. 3981, 93rd Gen. Assemb., Reg. Sess., *available at* http://www.ilga.gov/ (last visited Feb. 10, 2005) [hereinafter *Amendment*].

362. The Amendment only listed "sellers" as the protected entities under the bill. *Amendment*, *supra* note 361, at § 5.

marketing, distribution, manufacturing, or advertisement.[363] Consequently, the Amendment maintained a prohibition of suits against fast food sellers based on obesity-related illnesses, but did not retain a prohibition of suits against fast food distributors, marketers, or manufacturers.[364]

State Sen. Fritchey acknowledged this change but characterized it as insignificant.[365] In fact, when questioned about the position of Illinois' manufacturing interests, State Sen. Fritchey responded that they had no reason for opposition.[366] He reasoned that because the manufacturers never enjoyed litigation immunity previously for obesity-related suits, the Amendment simply returned them to the status quo.[367]

The Illinois House of Representatives unanimously approved the amended bill.[368] The amended bill then proceeded through the rest of the legislative process unanimously without any opposition or further debate.[369] Illinois Gov. Rod Blagojevich signed the bill on July 30, 2004, lauding its potential to increase healthy personal decisions and curb frivolous lawsuits.[370]

B. The Provisions of the ICCA

Section One of the enacted bill entitles the law the "Illinois Commonsense Consumption Act."[371] Section Five sets forth the relevant definitions.[372] As amended, the ICCA narrowly limits protection to fast food "sellers."[373] It does not protect manufacturers or

363. *Id.*

364. *Id.*

365. "House Bill 3981 tries to take on at least a portion of the issue of frivlous lawsuits by precluding lawsuits based on obesity related health claims against restaurants. . . . We have tailored this piece of legislation to be limited simply to restaurants." State of Illinois, 93rd Gen. Assemb., House of Rep., Transcription Debate at 18, 113th Legis. Day, Mar. 31, 2004 (transcript *available at* http://www.ilga.gov/).

366. *Id.*

367. *Id.* The Amendment "limited the scope of the Bill which had originally precluded lawsuits against manufacturers, distributors, and sellers of food. And we've narrowed this down to simply protect the restaurant industry in Illinois. So, the manufacturers would not longer be shielded from liability, but they aren't shielded from that liability today." *Id.*

368. LEGISLATIVE SYNOPSIS AND DIGEST, *supra* note 23, at 1837.

369. *Id.*

370. Gov. Blagojevich Press Release, *supra* note 23 ("House Bill 3981 . . . is an effort to prevent frivolous lawsuits and encourage responsible dietary habits. Obesity is a serious problem in Illinois. But, blaming a restaurant for weight gain is not the answer. By signing this law, we are promoting personal responsibility and common sense eating habits.").

371. Illinois Commonsense Consumption Act, Pub. Act. No. 93-848 § 1, 2004 Leg. Serv. 2347 (West) (to be codified at 745 ILL. COMP. STAT. 43) [hereinafter ICCA].

372. *Id.* at § 5.

373. *Id.*

trade associations.[374] It also narrowly defines the scope of protected activities by including only the sale of fast food rather than its manufacturing, advertising, distribution, and marketing.[375] The litigation precluded by the ICCA encompasses "a civil action brought by any person against a seller of a qualified product, for damages or injunctive relief based on a claim of injury resulting from a person's weight gain, obesity, or any health condition that is related to weight gain or obesity."[376]

Section Ten establishes the substance of the legislation.[377] It provides that "no person shall bring a qualified civil liability action in State court against any seller of a qualified product."[378] In essence, this means that no person may sue a fast food restaurant in Illinois for becoming obese by eating that restaurant's food.[379] Next, the ICCA sets out three exceptions to the litigation prohibition.[380] First, it excepts actions alleging violations of state or federal consumer protection statutes when the plaintiff can demonstrate the violation was willful and knowing and that the violation was the proximate cause of the plaintiff's injury.[381] The second exception allows claims for breaches of contract or express warranty.[382] The third and final exception provides that plaintiffs can also sue sellers of qualified products if those products are adulterated under the Federal Food, Drug, and Cosmetic Act.[383] Finally, Section Twenty dismisses any lawsuits based on outlawed causes of action against fast food companies pending at the time the ICCA became effective.[384]

IV. ANALYSIS OF THE ILLINOIS COMMONSENSE CONSUMPTION ACT

The ICCA became effective in January 2005, and as such, no fast food cases have yet been filed or heard under the new legislation.[385] Consequently, the best way to anticipate the ICCA's future impact is to

374. *Id.*
375. *Id.*
376. *Id.*
377. *Id.* at § 10.
378. *Id.*
379. *Id.*
380. *Id.* at § 15.
381. *Id.*
382. *Id.* at § 15(b).
383. *Id.* at § 15(c).
384. *Id.* at § 20.
385. *Id.* at § 20. Cohen v. McDonald's Corp., 808 N.E.2d 1 (Ill. App Ct., 1st Dist 2004), was dismissed in February 2004, prior to the adoption of the ICCA.

analyze it in light of previously raised causes of action.[386] This Part begins this analysis by comparing the ICCA to the National Restaurant Association's Model Bill in order to determine whether the text of the ICCA appears to further the restaurant lobby's goals.[387] Next, it applies the ICCA's provisions to the types of claims that have already been filed against the fast food industry in an attempt to determine the ICCA's treatment of those claims.[388]

A. Comparison of the ICCA to the Model Bill

A comparison of the National Restaurant Association's Model Bill to the ICCA highlights several important similarities and differences. First, like the Model Bill, the ICCA adopts the FDA's definition of food.[389] This definition significantly includes not only products commonly thought of as food, but also gum and component ingredients used in making food.[390] Second, the Model Bill and the ICCA similarly prohibit claims arising from obesity and obesity-related illnesses.[391] Although the ICCA defines "person" more broadly than the Model Bill, because the Model Bill also prohibits entities from filing derivative suits on behalf of a natural person, the two bills' definitions are essentially identical.[392] Both the Model Bill and ICCA provisions function to dismiss any pending claims that the statute would otherwise preclude.[393] Finally, both pieces of legislation provide exceptions to the litigation prohibition for knowing and willful violations of consumer protection statutes.[394]

The most obvious difference between the ICCA and the Model Bill

386. *See infra* Part IV.A–D (examining the causes of action discussed in Part II.C under the ICCA).

387. *See infra* Part IV.A (comparing the ICCA to the Model Bill).

388. *See infra* Part IV.B (applying the provisions of the ICCA to the claims brought against fast food restaurants in previous suits).

389. *Compare* ICCA, 2004 Ill. Laws 93-848 § 5 *with* MODEL BILL, *supra* note 320 § 2(a) (both defining food according to the definition in Section 201(f) for the Federal Food Drug and Cosmetic Act, 21 U.S.C. 321(f)).

390. MODEL BILL COMPARISON, *supra* note 324.

391. Although the ICCA's prohibition against suits resulting from obesity is somewhat more narrow than the Model Bill's prohibition of claims resulting from conditions "allegedly likely" to be related to fast food consumption, it embraces the general aim of preventing suits based on obesity-related claims. *Compare* ICCA, Pub. Act. No. 93-848 § 5, 2004 Legis. Serv. 2347 (West) (defining "qualified civil liability action") *with* MODEL BILL, *supra* note 320, at § 2(a) (insulating all members of the fast food supply chain from liability).

392. ICCA § 5; MODEL BILL, *supra* note 320, at § 2(c).

393. ICCA § 20; MODEL BILL, *supra* note 320, at § 3.

394. ICCA § 15(a); MODEL BILL, *supra* note 320, at § 2(b)(ii).

concerns the entities and scope of activities immunized from liability.[395] While the Model Bill seeks to exempt all participants in the chain of production,[396] the ICCA only exempts sellers.[397] In fact, the legislative history of the ICCA suggests that Illinois legislators purposely chose the more narrow liability immunization when they amended the bill to eliminate protection for all entities except sellers.[398] Therefore, manufacturers, distributors, packers, carriers, holders, marketers, and advertisers of fast food could still potentially face liability in Illinois under the ICCA.[399] An additional difference between the Model Bill and the ICCA is found in the definition of a "knowing and willful" consumer protection statute violation.[400] The Model Bill provides a definition of "knowing and willful" but the ICCA does not.[401] The significance of this difference is unclear and may suggest either that the Illinois legislature intended to reject the Model Bill's definition or that the Illinois legislature found the concept of "knowing and willful" to be self-explanatory.[402] Finally, the ICCA allows an important exception to the liability immunization where the Model Bill is silent as the ICCA continues to allow actions for breach of contract or express warranty.[403]

B. Application of the ICCA to Previously-Raised Claims Against Fast Food Companies

Since no person has filed a fast food suit in Illinois under the ICCA, the best way to determine the significance of the ICCA's similarities to and differences from the Model Bill is to hypothetically apply it to claims that have already been filed.[404] Therefore, this section first applies the ICCA to the consumer protection claims raised in *Barber,*

395. *See infra* notes 396–99 and accompanying text (discussing the different liability exclusions of the ICCA and the Model Bill).

396. MODEL BILL, *supra* note 320, at § 2(a).

397. ICCA §§ 5, 10.

398. *See supra* notes 361–66 and accompanying text (discussing the Amendment to the Original Bill that expressly removed manufacturers from liability protection).

399. *See supra* notes 361–66 and accompanying text (discussing the Amendment to the Original Bill that expressly removed manufacturers from liability protection).

400. *See infra* notes 401–03 and accompanying text (comparing the Model Bill and the ICCA).

401. *Compare* MODEL BILL, *supra* note 320, at § 2(c), *with* ICCA, Pub. Act No. 93-848, 2004 Legis. Serv. 2347 (West).

402. *Compare* MODEL BILL, *supra* note 320 at § 2(c), *with* ICCA, Pub. Act No. 93-848, 2004 Legis. Serv. 2347 (West).

403. ICCA § 15(b); *see also supra* notes 160–86 and accompanying text (discussing the elements of breach of contract causes of action in Illinois).

404. Cohen v. McDonald's Corp., 808 N.E.2d 1, 1 (Ill. App. Ct. 1st Dist. 2004), was dismissed in February 2004, immediately after State Rep. Fritchey's Original Bill was introduced into the Illinois General Assembly.

Pelman, and *Cohen.*[405] Then, this section applies the ICCA to the negligence claims raised in *Pelman.*[406] Next, it evaluates the strict liability theories discussed by Judge Sweet in the *Pelman* case.[407] Finally, this section considers the possibility of raising NLEA and breach of contract claims under the ICCA.[408]

1. Consumer Protection Claims

In *Barber, Pelman,* and *Cohen,* all of the plaintiffs claimed that a fast food restaurant violated state consumer protection laws.[409] The ICCA expressly continues to permit claims based on violations of consumer protection statutes.[410] However, the ICCA requires plaintiffs to now demonstrate that the defendant fast food restaurant "knowingly and willfully" violated those statutes.[411] This element creates some new impediments to future fast food suits in Illinois.[412] A traditional CFDBPA analysis does not require a finding that the seller intentionally deceived the buyer.[413] Instead, it is enough that the seller innocently or negligently deceived the buyer, as long as the seller intended the buyer to rely upon the statement.[414] Under the ICCA consumer protection violation exception, however, plaintiffs must now demonstrate an intent to deceive.[415]

Illinois consumers and courts can look to traditional common law fraud elements for guidance on how to deal with the ICCA's knowledge and willfulness requirement.[416] As discussed above, under Illinois

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405. *See infra* Part IV.B.1 (analyzing the application of the ICCA to the types of consumer protection claims raised in *Barber, Pelman,* and *Cohen*).

406. *See infra* Part IV.B.2 (considering the manner in which the ICCA would affect the negligence claims raised in *Pelman*).

407. *See infra* Part IV.B.3 (examining how strict liability claims might operate in Illinois under the ICCA).

408. *See infra* Parts IV.B.4–5 (discussing the future of NLEA and breach of contract claims under the ICCA).

409. *Barber Complaint, supra* note 234 and accompanying text (discussing the claims in the *Barber* complaint); *Pelman I,* 237 F. Supp. 2d 512, 516 (S.D.N.Y. 2003); *Cohen,* 808 N.E.2d at 4; *see also supra* Part II.C.1–4 (discussing the causes of action raised in each of the fast food litigation suits).

410. ICCA, Pub. Act No. 93-848 § 15(a), 2004 Legis. Serv. 2347 (West) (to be codified at 745 ILL. COMP. STAT. 43/15).

411. *Id.*

412. *See infra* notes 415–30 and accompanying text (discussing the potential difficulties in proving a knowing and willful violation of consumer protection statutes).

413. Smith v. Prime Cable, 658 N.E.2d 1325, 1335 (Ill. App. Ct. 1st Dist. 1995); *see also supra* Part II.B.1.b (discussing the elements of a CFDBPA violation).

414. *Id.*

415. ICCA § 15(a).

416. *See infra* notes 417–29 and accompanying text (discussing the ways in which courts can

common law fraud, a plaintiff must show that the defendant knowingly made a materially false statement or concealed a material fact in order to induce reliance.[417] The CDFBPA eliminated the "knowing" element in an attempt to broaden the reach of consumer protection to cover even innocent or negligent misrepresentations.[418] Now the ICCA has reincorporated that element.[419] As a result, the post-ICCA consumer protection claim resembles a hybrid of a common law fraud complaint and a CFDBPA cause of action.[420]

For example, to assert consumer protection claims similar to those raised in *Barber, Pelman* and *Cohen* under the ICCA, plaintiffs would need to include several additional allegations.[421] First, and most similar to a regular CFDBPA claim, the plaintiff would need to allege that the fast food restaurant deceptively advertised its food products and intended for customers to rely on the advertisement in making purchasing decisions.[422] The plaintiff could demonstrate the deceptive nature of the advertisement by either alleging that the fast food company misstated the nutritional content or concealed a material characteristic of its food.[423] For example, the plaintiff could possibly allege that the advertisement highlighted certain positive characteristics of the fast food restaurant's products yet failed to disclose other harmful characteristics of the same foods.[424] Such an allegation would satisfy the pleading requirements of the CFDBPA portion of post-ICCA

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use common law principles to meet the new requirements of the ICCA); *see also supra* Part II.B.1.a (discussing the elements of common law fraud in Illinois) and Part II.B.1.b (examining the elements of a CFDBPA cause of action in Illinois).

417. *See supra* Part II.B.1.a (listing the elements of a common law fraud cause of action in Illinois).

418. *Smith,* 658 N.E.2d at 1335; *see also supra* Part II.B.1.b (discussing the intent to broaden recovery under the CFDBPA by eliminating the reasonable reliance element of a fraud action).

419. ICCA § 15(a).

420. *See infra* notes 421–25 and accompanying text (proposing a way to reinstate common law allegations of knowledge into a CFDBPA claim in order to meet ICCA requirements); *see also supra* Part II.B.1.a (discussing the elements of common law fraud in Illinois) and Part II.B.1.b (examining the elements of a CFDBPA cause of action in Illinois).

421. *See infra* notes 422–29 and accompanying text (discussing the elements a plaintiff would have to state in a post-ICCA consumer protection complaint).

422. *See supra* notes 125–34 and accompanying text (discussing the elements of a CFDBPA cause of action).

423. 815 ILL. COMP. STAT. 505/2 (2002) (creating a cause of action for either the misstatement or concealment of a material fact); *see also supra* notes 125–34 and accompanying text (discussing the elements of a CFDBPA cause of action).

424. Williams v. Bruno Appliance & Furniture Mart, Inc., 379 N.E.2d 52, 54 (Ill. App. Ct. 1st Dist. 1978); Garcia v. Overland Bond & Inv. Co., 668 N.E.2d 199, 203 (Ill. App. Ct. 1st Dist. 1996); *see supra* notes 135–50 and accompanying text (discussing the *Williams* and *Garcia* cases and the courts' holdings that technically-true statements omitting other material facts still constitute fraudulent concealments under the CFDBPA).

consumer protection claim against fast food companies.[425]

Next, the plaintiffs would need to incorporate common law fraud elements into their claim to demonstrate the "knowing and willful" character of the fast food restaurant's deception.[426] When dealing with an advertisement that allegedly misstated the nutritional content or health effects of the food, for example, the plaintiffs could allege that the restaurant had information documenting the falsity of that statement.[427] Or, when dealing with an advertisement that allegedly failed to disclose material information about the restaurant's fast food, the plaintiffs could allege that the restaurant knew that the concealed information was material to the decision to purchase and consume the food.[428] Further, the plaintiff would have to allege that the restaurant had a duty to disclose the information because of its position of superior knowledge regarding the food's undisclosed characteristics.[429]

As a result, it is still possible to allege consumer protection violations like those raised in *Barber, Pelman,* and *Cohen* under the more stringent requirements of ICCA.[430]

2. Negligence Claims

The plaintiffs in *Barber* and *Pelman* also alleged that fast food companies negligently breached their duty to consumers by selling unhealthy foods and failing to warn consumers of the dangers of those foods.[431] The ICCA bars similar negligence claims against fast food

425. *See supra* notes 125–34 and accompanying text (explaining the elements of a CFDBPA claim in Illinois).

426. *See supra* notes 93–97 and accompanying text (discussing the elements of a common law fraud claim in Illinois).

427. *E.g.*, Neurosurgery & Spine Surgery v. Goldman, 790 N.E.2d 925, 933 (Ill. App. Ct. 2d Dist. 2003); *see supra* note 94 and accompanying text (discussing the requirement of knowledge of a false statement to find liability for a fraudulent misrepresentation under Illinois common law).

428. Miller v. William Chevrolet/GEO, Inc., 762 N.E.2d 1, 7 (Ill. App. Ct. 1st Dist. 2001) (defining materiality as anything that would typically effect how buyers make decisions); *see also supra* notes 98–101 and accompanying text (discussing the elements of a common law fraudulent concealment claim in Illinois).

429. *E.g.*, Connick v. Suzuki Motor Co., 675 N.E.2d 584, 593 (Ill. 1996); *see also supra* note 100 and accompanying text (discussing the requirement that the defendant breach a duty to disclose material information in a fraudulent concealment claim in Illinois).

430. ICCA, Pub. Act No. 93-848 § 15(a), 2004 Legis. Serv. 2347 (West) (to be codified at 745 ILL. COMP. STAT. 43/15); *see also supra* Part II.C.1 (exploring the elements of the *Barber* complaint); Parts II.C.2–3 (examining the *Pelman* cases).

431. *Pelman I*, 237 F. Supp. 2d 512, 520 (S.D.N.Y. 2003); *Barber Complaint, supra* note 234 and accompanying text (discussing the negligence claim in the *Barber* complaint); *see also supra* Part II.C.1 (exploring the elements of the *Barber* complaint); Parts II.C.2–3 (examining the *Pelman* cases).

restaurants for obesity-related injuries in Illinois.[432] First, fast food restaurants fall within the ICCA's definition of entities provided liability immunity under the law.[433] Further, the negligence action would seek recovery for obesity-related injuries caused by the fast food restaurant's breach of its duty to the plaintiff in selling unhealthy food.[434] This claim falls directly within the ICCA's definition of prohibited claims because the damages arise from the plaintiff's weight gain or obesity.[435] The ICCA does not provide an exception to the liability prohibition for negligence.[436] As a result, the ICCA likely will prevent Illinois plaintiffs from bringing negligence claims such as those raised in previous fast food litigation.[437]

3. Strict Liability

The scope of the ICCA's liability prohibition also extends to prevent strict liability claims against fast food restaurants for obesity-related injuries.[438] Judge Sweet suggested in *Pelman* that if consumers demonstrate that fast food presents a larger health risk than what is reasonably expected, consumers may establish that fast food restaurants have a duty to warn consumers about those risks.[439] However, the ICCA would prohibit such a claim for many of the same reasons that negligence claims are now prohibited.[440] For example, the strict liability claim envisioned by Judge Sweet arises from the obesity or obesity-related illnesses caused by the hidden dangers of fast food.[441] This claim is likewise barred by the ICCA's definition of the types of claims prohibited.[442] Additionally, fast food restaurants, as sellers, are

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432. ICCA, Pub. Act No. 93-848, 2004 Legis. Serv. 2347 (West) (to be codified at 745 ILL. COMP. STAT. 43).

433. *Id.* § 5 (defining "engaged in the business" and "seller" in a manner that includes fast food restaurants).

434. *See supra* notes 233–37 and accompanying text (discussing the possible elements of a negligence claim against a fast food restaurant for obesity-related illnesses); *see also* Lucker v. Arlington Park Race Track Corp., 492 N.E.2d 536, 538 (Ill. App. Ct. 1st Dist. 1986) (discussing the common law definition of negligence).

435. ICCA § 5 (defining "qualified civil liability").

436. *Id.* § 15 (listing the exceptions to the limited liability of fast food restaurants).

437. *Id.*

438. *Id.* § 10; *see also supra* Part II.B.4 (defining strict liability in Illinois).

439. *Pelman I*, 237 F. Supp. 2d 512, 532–33 (S.D.N.Y. 2003); *supra* notes 278–79 and accompanying text (discussing Judge Sweet's belief that it might be possible for plaintiffs to draft a viable strict liability complaint against a fast food restaurant based on the hidden dangers of fast food).

440. *See supra* notes 433–37 and accompanying text (discussing that negligence claims against fast food restaurants for obesity-related illnesses are prohibited by the ICCA).

441. *Pelman I*, 237 F. Supp. 2d at 532–33.

442. ICCA §§ 5, 10 (defining the types of claims prohibited widely enough to include strict

exempted from liability under the law.[443] Finally, like the negligence claims, the ICCA does not list strict liability in its provided exceptions to the liability prohibition.[444] Consequently, the ICCA bars future strict liability claims against fast food restaurants in Illinois for obesity-related illnesses.[445]

4. NLEA Claims

The *Cohen* complaint alleged that McDonald's violated the CFDBPA by violating NLEA labeling requirements.[446] The ICCA will likely not have any effect on future NLEA claims.[447] NLEA creates federal labeling requirements for food products.[448] The ICCA continues to allow claims against fast food restaurants based on violations of federal labeling requirements.[449] As a result, fast food restaurants may continue to face liability for violations of NLEA requirements.[450]

5. Breach of Contract Claims

Finally, fast food restaurants continue to face potential liability for breach of contract claims under the ICCA because the ICCA expressly permits such claims.[451] Under the ICCA, Illinois consumers can continue to file suit against fast food restaurants for obesity-related injuries on any of the breach of contract theories discussed above—express warranty, implied warranty of merchantability and fitness for an original purpose and implied warranty of fitness for a particular purpose.[452]

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liability claims).

443. *Id.*

444. *Id.* § 15.

445. *See supra* notes 440–44 and accompanying text (considering the likely effect of the ICCA on strict liability claims against the fast food industry for obesity-related claims).

446. Cohen v. McDonald's Corp., 808 N.E.2d 1, 4 (Ill. App. Ct. 1st Dist. 2004); *see supra* Part II.C.4 (discussing the *Cohen* case and the causes of action it raised).

447. *See infra* notes 448–50 and accompanying text (discussing why the ICCA will not effect claims of NLEA violations).

448. NLEA, Pub. L. No. 101-535, 104 Stat. 2353 (codified as amended in scattered sections of 21 U.S.C.) (2000).

449. ICCA § 15(a) (allowing exceptions to the liability exemption for actions "in which a seller of a qualified product knowingly and willfully violated a federal or State statute applicable to . . . labeling").

450. *Id. But see supra* notes 195–203 and accompanying text (discussing the possible conflict in NLEA provisions regarding when a restaurant becomes subject to NLEA regulations and when it remains subject to state regulations).

451. ICCA § 15(b).

452. *See supra* Part II.B.2 (discussing the various breach of contract claims and their requisite elements).

In summary, the ICCA eliminates a plaintiff's ability to bring either a negligence or a strict liability claim against the sellers in the fast food industry in Illinois for obesity-related illnesses.[453] However, the ICCA does not eliminate a plaintiff's ability to bring a consumer protection violation claim against a fast food restaurant if the plaintiff can show that the violation was knowing and willful[454] and expressly authorizes the filing of breach of contract claims.[455] As a result, the ICCA does not serve to entirely insulate the fast food industry from obesity-related litigation in Illinois.[456]

V. PROPOSED FUTURE OF FAST FOOD LITIGATION IN ILLINOIS

Even under the ICCA, fast food litigation can continue in Illinois.[457] The ICCA has precluded the use of many common law causes of action and has narrowed consumer protection claims.[458] However, the legislation in fact may filter fast food litigation more quickly towards causes of action more viable for plaintiffs.[459] This Part first proposes what the response of advocates of fast food litigation should be in shaping an effective cause of action.[460] Next, this Part proposes equally-effective steps the fast food industry should take in reaction.[461]

A. Consumer Litigation Tactics

Even before the ICCA eliminated many common law causes of action, advocates of fast food litigation recognized the benefits of filing

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453. *See supra* Part IV.B.2–3 (discussing the ICCA's prohibition on negligence and strict liability claims).

454. *See supra* Part IV.B.1 (discussing the continued ability to file consumer protection violation claims under the ICCA).

455. ICCA § 15(b).

456. *See supra* Part IV.B (explaining that some claims are still permitted in suits against fast food restaurants in Illinois after the ICCA).

457. *See supra* Part IV.B (identifying the continued ability of plaintiffs to file breach of contract and consumer fraud complaints against the fast food industry for obesity-related injuries).

458. *See supra* Part IV.B (reviewing how the ICCA has added an element to CFDBPA claims against the fast food industry for obesity-related injuries and how the ICCA disallows suits against the fast food industry for obesity-related injuries based on negligence or strict liability).

459. Bradford, *supra* note 61. For example, legal observers already recognized the better potential for success in filing consumer protection claims rather than personal injury claims and recognize that "food companies may be vulnerable to lawsuits that allege they have engaged in misleading advertising—whether by misstating calorie information or failing to disclose health risks when describing a food as nutritious." *Id.*

460. *See infra* Part V.A (proposing future litigation tactics under the ICCA).

461. *See infra* Part V.B (identifying the most reasonable reaction of the fast food industry to the ICCA).

consumer protection claims over negligence or strict liability claims.[462] As a result of the new litigation limits imposed by the ICCA, advocates should now focus significant attention on developing consumer protection claims.[463]

The key for future plaintiffs in fast food litigation is to show that fast food restaurants deceptively advertised the character of fast food or the consequences of its consumption.[464] First, they should demonstrate that the nutritional content of fast food is a material characteristic of that food considered in the decision to purchase.[465] They should also demonstrate that the fast food restaurants knew, or reasonably should have known, that the information was material.[466] Next, the plaintiffs must show not only the failure of fast food restaurants to disclose that information in advertisements intended to attract customers but also the unreasonableness of an assumption that customers could obtain sufficient nutritional information from website disclosures.[467] By alleging that the fast food companies knowingly concealed material information about their food in advertisements, plaintiffs will state valid claims against fast food restaurants for obesity-related injuries, even under the ICCA.[468]

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462. Parker, *supra* note 155. Reviewing recent fast food litigation, one observer noted that "[t]he most promising legal avenue is to invoke state consumer protection laws to accuse companies of misleading consumers about calories or nutritional value." *Id.* Further,

> [l]awsuits brought under state consumer protection laws would present a number of significant advantages to the plaintiffs. First, those statutes allow plaintiffs to sue for purely economic injuries—such as refund of the purchase price—which is much easier to prove than establishing a causal connection to some personal injury. Those statutes also generally permit awards of multiple and/or statutory damages. Second, many of these statutes do not require that the consumers prove they 'relied' on the statement to the detriment: it may be enough that the consumers were simply the recipient of a statement that was false or deceptive. Third, to the extent that individualized proof, like reliance on the statement, is not required by the relevant consumer protection statute, plaintiffs are more likely to succeed in having a class action certified than they would in a personal injury suit.

Parsigian, *supra* note 152.

463. *E.g.*, Parker, *supra* note 155.

464. *See infra* notes 465–68 and accompanying text (explaining how post-ICCA plaintiffs in Illinois should state complaints in order to recover against the fast food industry for obesity-related injuries).

465. *See supra* note 127 and accompanying text (explaining that materiality is an essential element of a CFDBPA complaint in Illinois).

466. *See supra* note 381 and accompanying text (discussing the need to show a "knowing and willful" violation of consumer protection statutes under the ICCA).

467. *See supra* notes 127–34 and accompanying text (discussing the elements of a CFDBPA claim).

468. *See supra* Part IV.B.1 (discussing the ability to state a consumer protection claim under the ICCA).

In addition, plaintiffs should look towards strengthening claims based on the breach of an implied warranty.[469] For example, they could consider claims that fast food restaurants intend customers to eat fast food on a daily basis, or that fast food restaurants realize that many customers eat fast food on a daily basis.[470] By showing that the daily consumption of fast food creates serious health consequences, the plaintiffs should attempt to recover for the breach of the implied warranty that the food was fit for consumption.[471]

In the future, plaintiffs in Illinois attempting to sue for obesity-related illnesses after the ICCA must show that by failing to notify customers that fast food consumption potentially results in harmful health consequences, fast food restaurants should be liable for those illnesses.[472]

B. Fast Food Industry Tactics

Conversely, to avoid liability under the ICCA, fast food restaurants must continue to educate consumers so that claims of ignorance of fast food's health consequences are no longer reasonable.[473] For the fast food industry, consumer education holds the key to eliminating liability.[474] The fast food industry must take steps to provide customers

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469. *See supra* Part II.B (discussing implied warranties); *see also* Crawford, *supra* note 80.

470. *See supra* Part II.B (discussing the need to demonstrate either that a product was not fit for its ordinary purpose or fit for its particular purpose in order to recover for a breach of an implied warranty).

471. *See supra* Part II.B (discussing the implied warranty of wholesomeness and fitness for public consumption).

472. Munger, *supra* note 79, at 478 (stating Professor John Banzhaf's position) (citation omitted).

> It seems to me people can reasonably be expected to exercise personal responsibility only if the manufacturers of products provide meaningful disclosure and adequate warnings . . . . Without that, people have no idea how dangerous trans fat is. Without a reference, a context, simply telling people something contains trans fat isn't enough. Despite the best of intentions, warnings are not just for the best and the brightest, but for all people—forgetful, tired, fatigued.

Id.

473. *E.g.*, Neil Buckley, *Big Mac Trims Portions as Waistlines Grow*, FIN. TIMES (Mar. 13, 2004) *available at* 2004 WL 72878825. For example, after the *Pelman* cases, the book FAST FOOD NATION, and the movie SUPER SIZE ME, McDonald's eliminated "super size" portions from its menu and introduced a new salad line. *Id.* Burger King similarly introduced a lower-fat, lower-carb diet. *Id.* In a related area and "[r]eacting to rising public concerns about obesity," Kraft Foods, Inc. recently decided to limit the portion sizes of its meals and to stop marketing products to schools. Sarah Ellison, *Kraft Announces Plan for New Diet*, WALL STREET J., Jul. 2, 2003, *available at* 2003 WL–WSJ 3972880.

474. *E.g.*, Parsigian, *supra* note 152 ("Full disclosure of nutritional and ingredient information is the most logical first step for a company concerned about its exposure to obesity litigation.").

greater access to information about its food.[475] It must eliminate advertisements promoting specific health benefits of fast food and provide greater access to nutritional information.[476] By limiting arguments that the fast food industry misrepresents important health information or that it holds out its food as healthy and nutritious, the industry will weaken the suits allowed under the ICCA.[477]

VI. CONCLUSION

The Illinois Commonsense Consumption Act alters the legal theories available to consumers looking to hold fast food restaurants accountable for their obesity-related illnesses. However, it does not eliminate all ability to recover. Illinois consumers will no longer be able to sue fast food companies under common law theories such as negligence and fraud. Claims brought under the CFDBPA and claims based on breach of contract, on the other hand, continue to offer viable alternatives. These claims already have garnered attention from fast food litigation advocates as useful tools in suits against the fast food industry. As a result, fast food litigation will likely continue in Illinois under those theories.

475. *Id.*

476. *E.g.*, Romero, *supra* note 5, at 276–77 (pointing to a recent McDonald's effort to offer nutritional education programs in New York and to provide nutrition information for adults in new "Adult Happy Meals").

477. *See* Parsigian, *supra* note 152 (discussing the steps that companies must take to protect themselves against obesity litigation).

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