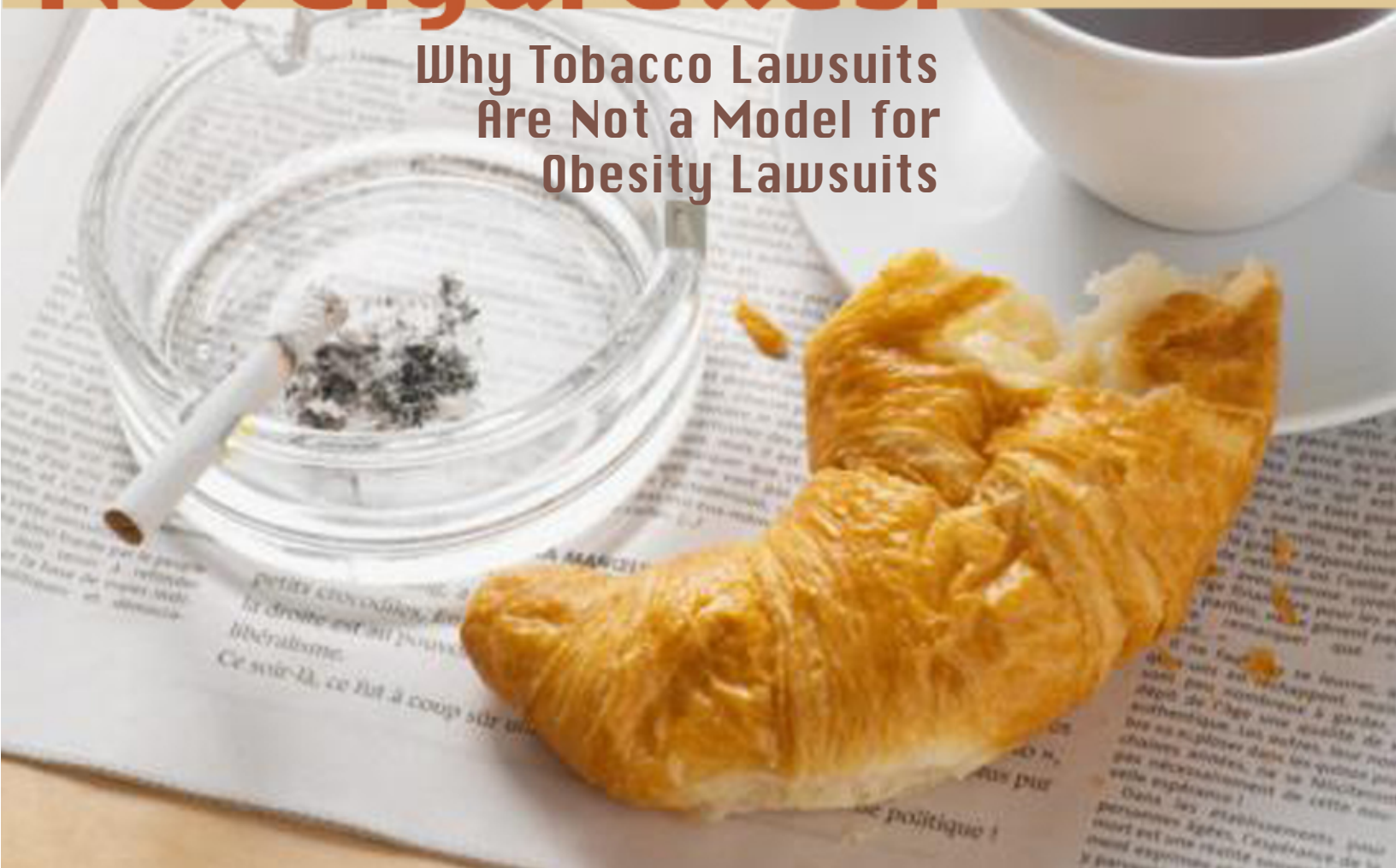


Foods Are Not Cigarettes:

Why Tobacco Lawsuits
Are Not a Model for
Obesity Lawsuits



ACSH PRESENTS

Foods Are Not Cigarettes: Why Tobacco Lawsuits Are Not a Model for Obesity Lawsuits

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TABLE OF CONTENTS

Executive Summary	01
Introduction	01
The History of Tobacco Litigation	02
The History of Obesity-Related Food Litigation	03
Differences Between Tobacco and Food	03
Tobacco, Food and Health	03
Differences in the Structures of the Industries	04
Simple vs. Complex Causes	04
The Role of Addiction	06
Summary and Perspective	08

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Executive Summary

- Starting in the 1950s, people suffering from smoking-related diseases have sued cigarette companies. More recently, people with obesity and obesity-related medical problems have sued companies in the food industry. Some attorneys and activists view anti-cigarette litigation as a model that may be applicable to obesity. However, food is not tobacco, and there are important differences between the two health issues and the two forms of litigation.
- Cigarettes are unique among consumer products in that they are deadly when used as intended. Food, in contrast, is healthful when used appropriately. Cigarettes are not a necessary product; food is. These differences between food and cigarettes are significant not just philosophically but also legally, making it less likely that food companies will be held liable for a plaintiff's ill health.
- Most smokers consistently choose a single brand of cigarettes. In contrast, most people eat a wide variety of foods, produced by many different companies. Thus, placing blame for adverse effects is far more difficult in the case of food than in the case of cigarettes.
- Cigarette smoking is the predominant and sometimes the only risk factor for some of the diseases that it causes, particularly lung cancer. In contrast, obesity is attributable to numerous and complex factors, including physical inactivity; genetics; metabolic and hormonal factors; and cultural, socioeconomic, psychological, and behavioral influences; as well as diet. It is much easier to prove liability in instances where the relationship between a causative agent and a harmful effect is straightforward than in circumstances where a multitude of contributing factors may have played roles in causing the harmful effect.
- The proven addictive power of nicotine lends credibility to the argument that cigarette smoking is not fully a matter of choice for the user, except initially; the idea that food might be similarly addictive requires a misinterpretation of the meaning of addiction, and is not supported by sound scientific evidence.
- Because of the factors described above, obesity-related litigation against food companies is much less likely to be successful than lung cancer-related litigation against cigarette companies. In addition, it is likely that bringing claims against food companies for obesity would actually harm those whom the litigation was intended to help. If such litigation convinces the public that obesity is attributable solely to overeating and that overeating is an addiction, it would perpetuate misinformation and could convince people that they are powerless to control their own behavior.

Introduction

The use of tobacco, particularly in the form of cigarettes, is the number one preventable health threat in the United States today. Smoking causes nearly 440,000 deaths each year and accounts for more than \$75 billion in direct medical costs, according to the federal government's Centers for Disease Control and Prevention (CDC).

Obesity is also a major health concern. According to the CDC, 30 percent of U.S. adults and 16 percent of school-age children and teens are obese. Obesity may aggravate a variety of serious health problems, including high blood pressure (hypertension), diabetes, and heart disease. A study in JAMA has reported that the prevalence of obesity among both adults and children has increased in recent decades.¹

In addition to their roles as major public health issues, tobacco and obesity now also share the

following commonality: lawsuits. Starting in the 1950s, people suffering from smoking-related diseases have sued cigarette companies. More recently, people with obesity and obesity-related medical problems have sued companies in the food industry. Some attorneys and activists view anti-cigarette litigation as a model that may be applicable to obesity. However, food is not tobacco, and there are important differences between the two health issues and the two forms of litigation.

In this report, the American Council on Science and Health examines the similarities and differences between litigation against cigarette companies and obesity-related litigation against food companies. The report is based primarily on, and adapted from, a technical report entitled "Food Is Not Tobacco: Contrasts Between Litigation Against Tobacco Companies and Food Companies," written by Joseph P. McMenamin, M.D., J.D., and Andrea Tiglio, Ph.D., J.D.

1. Ogden CL, Carroll MD, Curtin LR, et al. Prevalence of overweight and obesity in the United States, 1999-2004. JAMA 2006;295:1549-1555.

The History of Tobacco Litigation

The threat of litigation provides a powerful incentive for any manufacturer to reduce risks associated with use of its product or to warn people very specifically about those risks. Yet until very recently, the industry that produces cigarettes — which are responsible for more deaths than any other consumer product — never paid any damages related to the harm caused by its products, despite decades of litigation.

The first wave of lawsuits against cigarette companies began in the mid-1950s, soon after cigarettes were definitively shown to be hazardous to health. In these early cases, the plaintiffs who sued the cigarette companies had a difficult time convincing juries that smoking caused a substantial number of cases of lung cancer, and the cigarette industry did not lose any cases.

A second wave of lawsuits began in the 1980s. By this time, the scientific evidence linking smoking and cancer was definitive, and product liability litigation in general had expanded greatly, thus creating a climate that might seem more favorable for plaintiffs suing the industry. However, the cigarette companies fought the lawsuits with all of the extensive resources at their disposal — resources that exceeded those of the plaintiffs suing them — and the companies' arguments were buttressed by the government-mandated warning label on cigarette packages. Ever since the labels were first required in the 1960s, tobacco companies have been able to argue that the mandated federal health warning label prevents them from providing more complete information on risk; thus, the companies contend that they cannot be held liable for damages due to failure to warn. During the second wave of litigation, the cigarette industry lost only one case, but even in this instance no damages were paid because the plaintiffs did not have the resources to continue to pursue the case after the verdict was appealed. In all other instances, the industry won.

In the third wave of litigation, beginning in the 1990s, the tobacco industry no longer prevailed in all instances. In some third-wave cases, the states themselves were the plaintiffs, filing lawsuits seeking reimbursement for the healthcare costs of treating smoking-related illnesses. In 1998, 46 states and the industry reached the Master Settlement Agreement, under which the cigarette companies agreed to pay the states about \$10 billion per year, with the amount tied to the quantity of cigarettes sold, and to restrict some types of cigarette advertising and marketing. It can be argued, however, that this deal actually favored the cigarette companies by allowing them to, in effect, pay a fine and continue to conduct business, while at the same time making state governments economically dependent on the sale of cigarettes.

Perhaps more important, during the third wave of litigation, plaintiffs continued to file personal injury suits against cigarette companies, and several won their cases. For example, in a California case involving a smoker dying of cancer, a jury initially awarded \$3 billion in punitive damages. During the appeals process, the award was reduced to \$50 million. In March 2006, the U.S. Supreme Court refused to consider overturning the award. Other cases are still under appeal, so their full impact cannot yet be assessed. However, it is evident that the tobacco industry can no longer be regarded as invulnerable to lawsuits.

The History of Obesity-Related Food Litigation

The history of obesity litigation is much shorter than the history of cigarette litigation. Only a few cases specifically related to obesity have been filed. The best known of these was a case filed in 2002 that alleged that the McDonald's fast food chain was responsible for the obesity and obesity-related health problems of two New York City teenagers. The court dismissed the complaint, although a portion of it was later revived by an appeals court.

More recently, Kellogg's and Viacom (which owns Nickelodeon) were sued by plaintiffs claiming that their advertising of cereals to children violated a Massachusetts consumer protection statute.

Plaintiffs' lawyers, including some who have been involved in tobacco cases, are believed to be planning additional litigation. In response to the threat that numerous suits like the McDonald's case could be brought, several states have passed laws that prohibit lawsuits seeking personal injury damages related to obesity. However, these laws may not necessarily preclude other types of litigation, such as suits based on state consumer protection laws.

Differences Between Tobacco and Food

Stark contrasts exist between tobacco and food in terms of the roles of the two substances in health, the roles of various companies in their production, their interactions with other risk factors for disease, and the concept of addiction or chemical dependency.

Tobacco, Food, and Health

Cigarettes are unique among consumer products in that they are deadly when used as intended.

Cigarette smoking increases an individual's risk of numerous, serious health problems, including atherosclerosis (the underlying cause of many heart attacks, peripheral vascular disease, and most strokes), chronic lung diseases (emphysema and chronic bronchitis), and many kinds of cancer, especially lung cancer. To put the harm from smoking into perspective, it may be helpful to consider the impact of smoking in comparison to that of six other major causes of death in the United States: alcohol abuse, drug abuse, AIDS, motor vehicle crashes, homicide, and suicide; all six of these causes combined account for only half as many deaths each year as smoking does. There is no known safe level of cigarette smoking. Even smoking a few cigarettes per day or smoking "occasionally" (i.e., less than daily) has been shown to pose measurable health risks.

Food, on the other hand, is essential for life. It provides both energy and the building materials necessary for growth and survival. Although there are no known safe levels of cigarette use, there is no safe way to abstain from food. Food can certainly pose risks when misused, but it is beneficial when used properly — in appropriate quantities and as part of a balanced diet. Any food or beverage, no matter how potentially healthful, can be harmful in excessive quantities, and virtually any food or beverage, in moderation, can be safe (unless the consumer is allergic to it or the food is contaminated with disease-causing microorganisms). Foods that are desirable in one context may be undesirable in another. In modern Western countries, where food is available in abundance and many people are sedentary, foods that are particularly high in calories are considered undesirable; the same foods, however, would have been considered highly desirable during the many times in human history when people did not have enough to eat.

These differences between food and cigarettes are significant not just philosophically but also legally. The law of tort distinguishes between necessities and luxuries and between products that sustain life or alleviate pain and suffering

versus those that merely provide pleasure. Products that fill critical needs are viewed differently under the law from those that do not. No product is utterly safe; all products entail some risk of harm. The law does not compensate all users claiming to be harmed by a product in all circumstances, however. In general, courts are more willing to impose liability for harms arising from use of products providing only pleasure than they are for products that meet clear human needs.

Differences in the Structures of the Industries

In addition to their different roles in health, cigarettes and food differ in terms of who produces them. As a practical matter, this affects lawsuits brought against the industries.

It is often not difficult for a sick smoker to figure out which company to blame. There are only a few types of tobacco products, at least in the industrialized world, and practically all of them are produced by a handful of large companies. Brand loyalty is common; smokers often choose one brand of cigarettes and stick with it for decades. In many instances, an individual's smoking-related disease can be linked to the consumption of cigarettes produced by a single manufacturer.

The food industry — and food itself — is much more diverse. People choose from among thousands of available choices, produced by companies large and small, and make complex decisions about when, where, what, and how much to eat. Some people grow their own food, and most prepare their own, at least on some occasions. Almost everyone eats a variety of foods, produced by different growers and manufacturers; although brand loyalty exists, it operates on a different level than cigarette brand loyalty. For example, a person might always choose one particular brand of breakfast cereal, but that same person would also consume a variety of other foods in the course of day; this is quite different from the tobacco consumer who smokes one

brand of cigarette and uses no other tobacco products. Obesity, unlike certain other food-related hazards (e.g., an allergic reaction) is related to consumption of food in general and the balance between energy intake and energy expenditure rather than consumption of a specific food; this makes it difficult to pinpoint a particular company as being at fault. Thus, simply figuring out who to blame is a much more difficult question for food and obesity than it is for cigarettes and ill health.

Simple vs. Complex Causes

The law of torts states that a defendant (the party being sued) owes compensation to a plaintiff (the party bringing the suit) only if the defendant's improper conduct harmed the plaintiff. It is necessary for actual harm to have taken place, and it is necessary for the plaintiff's conduct to have played a substantial role in causing the harm. Thus, it is much easier to prove liability in instances where the relationship between a causative agent and a harmful effect is straightforward than in circumstances where a multitude of contributing factors may have played roles in causing the harmful effect or in circumstances where the role of a particular factor in causing the effect is not clear.

Many of today's most prevalent health problems, such as coronary heart disease, high blood pressure, and many types of cancer, are "multifactorial," meaning that multiple factors influence a person's risk of developing these diseases. Lung cancer in smokers, however, is an exception to this rule. Smoking is the principal risk factor for lung cancer, accounting for about 87 percent of all cases. Personal injury lawsuits against the cigarette industry usually focus on cases of lung cancer, rather than cases of other smoking-related diseases, such as coronary heart disease, for which smoking is one among several risk factors. The clear-cut relationship between smoking and lung cancer makes it easier for tobacco plaintiffs to prevail.

The causes of obesity are not nearly as well understood as the causes of lung cancer. The scientific evidence indicates, however, that obesity is attributable to numerous and complex factors, including diet; physical activity; genetics; metabolic and hormonal factors; cultural, socioeconomic, psychological, and behavioral influences; and a variety of other factors, as follows:

- *Diet.* In simplest terms, weight gain or loss depends upon the balance between the supply of and demand for energy (calories). Since the supply side of this balance comes from food, diet obviously plays a role in obesity. This is not a novel or foreign idea — a fact that is important with regard to litigation. Legally, a product is not considered unreasonably dangerous when its inherent dangers are widely recognized. Most people know that overeating contributes to overweight (and that certain types of food, including some foods served at fast food restaurants, such as deep-fried foods, are high in calories). Moreover, the near-universal recognition that obesity has many causes, overeating among them, tends to defeat both claims that the food industry is uniquely at fault and claims that food companies are under a duty to warn people about what they already know.
- *Physical inactivity.* Lower rates of energy expenditure predispose an individual to obesity. In fact, inactivity may prove to be a more significant factor than overeating in the development of obesity. Data from U.S. government surveys indicate that children are eating only slightly more than they did 20 years ago but exercising substantially less; this likely ties in with the increased rate of obesity in this age group. Sedentary behavior, in both children and adults, is associated with overweight, and some studies indicate that the difference in physical activity patterns between obese and lean people is much greater than the difference in the amount of food they eat. If physical activity is a crucial determinant of body weight, as much evidence indicates that it is, the argument that the food industry is at

fault for causing obesity is substantially weakened.

- *Metabolic and hormonal factors.* Scientific knowledge developed in the last two decades indicates that an elaborate metabolic control system involving multiple hormones regulates body weight, much in the way that similarly complex systems regulate body temperature and the composition of the blood. Hormones involved in this system include leptin, cholecystokinin, insulin, serotonin, and many others. Because of the existence of this hormonal control system, blaming the food industry for obesity seems overly simplistic. The true underlying problem may be that our weight control system evolved when people faced frequent food shortages and is therefore ill-suited to the current situation in which a large proportion of the population in many parts of the world never goes hungry. The existence of hormonal regulatory mechanisms also weakens the analogy with smoking-related diseases, since no such mechanisms exist for tobacco.
- *Genetics.* Abundant scientific evidence indicates that genetics plays an important role in the control of body weight. Most of the variation in the incidence of obesity is attributable to genetic factors. Studies of twins have shown that the similarities between the weights of identical twins raised apart are greater than those between fraternal twins raised together, a finding that emphasizes the importance of heredity. There are at least 20 types of genetic defects that cause syndromes characterized by obesity. These syndromes represent only a very small proportion of all cases of obesity, but they powerfully illustrate the importance of genetic influences on body weight. Many factors pertinent to obesity, including basal metabolic rate, changes in energy expenditure in response to overeating, enzyme activity, rates of fat breakdown, and even physical activity and food preferences, are partly heritable.

- *Cultural, socioeconomic, psychological, and behavioral influences.* Attitudes toward food are shaped by culture. Many psychological, social, and environmental factors affect eating. For example, there are substantial weekly and seasonal variations in food intake; people eat more on weekends than on weekdays, and they eat slightly more during autumn than during other seasons. Social interaction is associated with higher food intake (that is, people eat more at meals eaten in the company of others than at meals eaten alone). Quantities also vary with the identities of one's companions; people tend to eat more when in the company of family or friends than when dining with coworkers, for example. Eating patterns have changed in recent decades with the increase in two-earner families and the decrease in the number of children per family. These changes have increased families' discretionary income but have also led to a decrease in the time available to prepare meals; both factors have affected food choices. All of these factors and others may influence food intake and therefore the risk of obesity.

- *Other factors.* Other factors that may influence food intake include the following:

- ◊ *Medications.* Although most medications have no significant impact on body weight, some may. For example, steroids, antidepressants, and especially some antipsychotics may promote weight gain.

- ◊ *Alcohol.* Alcohol provides calories. In addition, moderate alcohol intake is associated with increased food intake, and alcohol stimulates several of the mechanisms involved in the regulation of appetite. Alcohol also influences judgment and thus may reduce an individual's discretion concerning food intake.

- ◊ *Weight at birth and in childhood.* A person's weight at birth and in childhood —

as well as the parents' weights — is often related to that person's weight as an adult. Patterns of growth during infancy may be associated with both childhood and adult obesity; infants with the highest weight or who grow rapidly in infancy are at increased risk of later obesity.

- ◊ *Infections.* There is intriguing recent evidence that a specific virus, called adenovirus 36, may play a role in some cases of obesity, perhaps by decreasing energy expenditure.

Because so many different factors contribute to obesity, it is difficult to say with certainty that an individual's eating pattern — much less a particular type of food — was the key causative factor. Thus, proving that a fast food chain or other company in the food industry was responsible for a specific individual's obesity is much more difficult than proving that a particular tobacco manufacturer was responsible for an individual's lung cancer.

The Role of Addiction

In recent decades, people have often used the word "addiction" in a very broad sense in casual conversation; they may say that someone is addicted to bingo, cell phones, or the Internet — actually, to almost anything that people might enjoy and use to such an extent that it has a noticeable impact on other aspects of their lives. Health professionals, however, define addiction more narrowly as the highly controlled, compulsive, habitual use of a substance that has psychoactive (mood-altering) effects and is not physiologically needed for survival. Often, the substance is used despite threats that it poses to the user's health. Addiction is associated with drug-reinforced behavior; that is, the addictive substance has properties that encourage the user to continue to use it repeatedly. Addictive behavior often involves stereotypic patterns of use (habitual ways of using the substance), continued use

despite harmful effects, relapse (resumption of use of the substance) after periods of abstinence, and recurrent cravings for the substance. Addictive substances typically produce tolerance (meaning that it takes increasing amounts of the substance to produce the desired effect) and physical dependence (meaning that people come to need the substance to feel normal and experience unpleasant symptoms, called withdrawal symptoms, if they discontinue use).

The use of nicotine in the form of cigarette smoking fits all the criteria for addiction, and the Surgeon General and other authorities have explicitly and repeatedly stated that nicotine is addictive. The phenomena of tolerance, withdrawal, relapse, and continued use despite harmful effects have all been amply demonstrated for nicotine. In fact, if it were not for addiction, it would be very difficult to explain why more than one-fifth of all U.S. adults continue to smoke cigarettes, even though virtually all of them know that smoking is harmful to their health and nearly 70 percent want to quit.

The concept of addiction is important for litigation because it implies that the user of a substance does not simply choose freely to keep using it. In tobacco litigation, pleading addictiveness has allowed plaintiffs to attack the tobacco industry's claim that individuals choose to smoke and are therefore responsible for any consequences that result from smoking. It has also allowed plaintiffs to claim that they did not knowingly assume the risks of smoking: although the health consequences of smoking may be common knowledge, the addictive power of nicotine may not be regarded in this way. Of courts that have made a distinction between these two types of knowledge, most have found that the dangers of nicotine addiction, as opposed to the general dangers of smoking, are not common knowledge and therefore are not risks that the plaintiffs knowingly assumed. None of the warning labels required on cigarette packages informs the public that cigarettes are at least as addictive as illicit drugs or that nicotine is so addictive that only four to five

percent of smokers who try to quit each year succeed in stopping smoking permanently.

In casual conversation, people often refer to overeating in general or overconsumption of a particular food as an "addiction." For example, people who tend to overconsume chocolate may refer to themselves as "chocoholics." Attributing overindulgence to an addiction provides a socially and personally acceptable explanation for the behavior and suggests that it is outside the person's control because of some biological effect of the food or possibly an individual susceptibility to the addiction.

In obesity litigation, plaintiffs may try to strengthen their cases by claiming that overeating is an addiction. If plaintiffs' lawyers can label their obese clients "addicts," they can portray them as victims of processes that are not their fault but rather the fault of those who produce or market the "addictive" food product. However, the concept of addiction does not apply well to foods and overeating. The behavior of a true addict and the behavior of an overeater are too different for overeating to be properly classified as an addiction. People do not develop a tolerance for food; an obese individual certainly does not need to eat progressively larger quantities of food to get a "fix." There is no syndrome of withdrawal from food in a medical sense. Eating does not produce the powerful neuroadaptive effects central to drug addiction. In fact, there is no good scientific evidence to indicate that overeaters are addicts in the true sense of the word, rather than merely having a behavioral disturbance or a lack of will power.

Although food is not a psychoactive substance and overconsumption of food does not fit the medical definition of addiction, as described above, some attorneys for plaintiffs have invoked various versions of a concept called *reward deficiency theory* to support their arguments that their obese clients are victims of an addiction. This theory claims that addicting substances are attractive to users because they induce rewards through

neurochemical processes. Proponents of obesity litigation may argue that food induces similar rewards by the same mechanisms.

Reward deficiency theory postulates that using an addictive substance causes the release of specific neurotransmitters, especially dopamine, at specified sites in the brain. The argument for extending this idea to obesity states that in circumstances where the food supply is abundant and obesity is widespread, overactivation of endogenous opioid peptides (druglike substances naturally produced in the human body) causes overeating, food cravings, and resulting obesity. Food is said to cause an increase in neurotransmitter levels just as addicting drugs do. Some results of animal experiments can be interpreted as supporting this concept, but other animal and human data conflict with it. For example, if overeating were induced through an opioid-like mechanism, one would expect that opioid antagonists (the kinds of drugs used to treat heroin overdoses) would have therapeutic value in the

treatment of obesity, but these drugs do not have such an effect. Moreover, no specific addicting substance in food, analogous to nicotine in tobacco, has been identified.

As applied to obesity, reward deficiency theory is an unproven hypothesis. The discovery of physiological reward pathways and of similarities between these pathways and the metabolism of drugs does not prove that overeating is an “addictive” disorder. It does show that humans, like other animals, are motivated to eat, which would be expected since eating is essential for survival. From an evolutionary standpoint, it is not surprising that behaviors necessary for the perpetuation of the species would be perceived as pleasurable, but this does not make them addictive. Saying that eating is addictive makes no more sense than saying that breathing is addictive. The concept of addiction, which describes an abnormal state, simply does not apply to normal behaviors necessary for life.

Summary and Perspective

Litigation against food companies for causing obesity is far less viable than litigation against cigarette companies for several reasons. First, cigarettes, when used as intended, are deadly; food, on the other hand, is essential for survival. Second, tobacco products are produced by a small number of companies, and many users of tobacco products consistently choose a single brand, making it easy to identify whom to sue; food is produced by a much larger number of companies, and individuals eat a wide variety of foods. Third, cigarette smoking is the predominant and sometimes the only risk factor for some of the diseases that it causes; in contrast, many factors, including physical activity, metabolic and hormonal factors, genetics, and cultural and behavioral factors, as well as diet, influence obesity. Finally, the proven addictive power of nicotine lends credibility to the argument that cigarette smoking is not fully a matter of choice for the user; the idea that food might be similarly addictive is speculative and not supported by sound scientific evidence.

For the reasons listed above, success is less likely in suits against food companies than in

suits against cigarette companies.

Nevertheless, such litigation is expensive, and its costs may be passed on to consumers in the form of higher food prices. This, however, is not the only reason why suing food companies for causing obesity should be discouraged. More important, it is likely that bringing claims against food companies for obesity would actually harm those whom the litigation was intended to help. If such litigation convinces the public that obesity is attributable solely to overeating and that overeating is an addiction, it would perpetuate misinformation and could convince people that they are powerless to control their own behavior. Overweight people might therefore give up attempts to control their weight; might focus exclusively on food rather than other factors that contribute to obesity, such as lack of physical activity; and might be discouraged from seeking medical help for their problem. Thus, the consequences of obesity litigation would likely be harmful, rather than beneficial, to public health.

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