CASE 12
Fast-Food Industry Woes

At their quarterly meeting, McDonald's executives were much pleased with the first quarter 2003 results. Although the profits went up only slightly, sales registered a big increase. The executives however, were concerned about a different problem, which in the long run, could become a major headache. It is to do with the obesity suit against the company.

In fall 2002, a New York City attorney Sam Hirsch filed a suit against McDonald's on behalf of a class of obese and overweight children. He alleged that the fast-food chain negligently, recklessly, carelessly and/or intentionally marketed to children food products that were high in fat, salt, sugar and cholesterol while failing to warn of those ingredients' links to obesity, diabetes, coronary heart disease, high blood pressure strokes, elevated cholesterol intake, related cancers and other conditions.

Although the suit was dismissed, it tapped into something very big. Could years ahead tobacco-like litigation challenge the company and indeed the entire food industry extending beyond fast-foods to snack foods, soft drinks, packaged goods and dietary supplements? The general counsel of the company remarked: "The precedents, the ammo, the missiles are already there and waiting in a silo marked tobacco."

OBESITY PROBLEM

Junk food might not be addictive in the same way that tobacco had been. But weight, once gained, is notoriously hard to lose and childhood weight patterns strongly predict adult ones. Rates of overweight among small children—to whom junk-food companies aggressively market their products—had doubled since 1980; rates among adolescents had tripled.

In 1999 physicians began reporting an alarming rise in children of obesity-linked type 2 diabetes. Once an obese youngster developed diabetes, he or she would never get rid of it. That was a lot more irreversible than a smoking addiction.

Though many people recoiled at the idea of obesity suits—eating habits were a matter of personal responsibility, they protested—the tobacco precedents showed that such qualms could be overcome. Yes, most people knew that eating a Big Mac wasn't the same thing as eating a spinach salad, but most people knew that smoking was bad for them too.

And yes, diet was only one risk factor out of many that contributed to obesity, but smoking was just one risk factor for diseases for which the tobacco companies were forced to fork over reimbursement to Medicaid. (The industry's share of the blame was statistically estimated and then divvied up among companies by market share.) The tobacco companies eventually agreed to pay $246 billion to the states, and juries had been ordering them to pay individual smokers eight-digit verdicts too.

By the Surgeon General's estimate, public-health costs attributable to overweight and obesity came to about $117 billion a year—fast approaching the $140 billion stemming from smoking. Suing Big Food offered allures to contingency-fee lawyers that rivaled those of Big Tobacco, and the implications of that were pretty easy to foresee.

While the food industry was not apt to be socked with anything like the penalties that hit tobacco, companies would face consumer protection suits that might cost them many tens of millions of dollars and force them to significantly change marketing practices.

The triggering event occurred in December 2001. That's when the Surgeon General, observing that about 300,000 deaths per year were now associated with overweight and obesity, warned that those conditions might soon cause as much preventable disease and death as smoking. The report prompted journalists to call John Banzhaf III, an antismoking activist and a law professor at George Washington University School of Law, to see whether tobacco-style litigation might be in the offing.

Banzhaf said it was not the same with fast-food industry since there were important differences between fast-food and tobacco.

But even as he talked, he began to change his mind. Another key academic strategist in the tobacco wars, Northeastern University law professor Richard Daynard, was soon drawn into the foray. At a conference in April 2002 to discuss Marion Nestle's new book, Food Politics, he was asked to talk about possible obesity-related litigation. (Nestle, who chaired the nutrition department at New York University and whose name was pronounced NESSel, was not related to the founders of the food company.)

Daynard, like Banzhaf, at first saw no analogy to tobacco. But as he read Nestle's book, he, too, began to change his mind.

Here is Nestle's argument. For at least the past 50 years public-health authorities had wanted to deliver a simple, urgent message to the American people: Eat less. They had been thwarted from doing so, however, by political pressure from the food industry. The meat industry alone spent millions a year on lobbying, apparently with great success. Instead of forthrightly saying, "Eat less red meat," government health authorities were forced to say, "Eat more lean meat." Food companies compounded the confusion by advertising that their products could be part of a balanced and nutritional diet, even though they knew that their products were not typically consumed that way. Any food could theoretically be part of a balanced diet if you kept the portions tiny enough and ate lots of fruits, vegetables and grains.

As Daynard well knew, advertising claims that were literally true, but misleading when viewed in a real-world context, could

violate state consumer-protection laws. In some states, like California, plaintiffs could force companies to disgorge all profits attributable to advertising that employed such statements and the plaintiff could win without having to prove that even a single individual was actually tricked by the statement.

The idea of bringing such suits against the food industry was not unprecedented. In 1983, for instance, the California supreme court green-lighted a suit brought by an advocacy group against General Foods over the way such breakfast cereals as Sugar Crisps and Cocoa Pebbles—which contained 38% to 50% sugar by weight—were being marketed to children. The plaintiffs argued that, although promoted and labeled as ''cereals,'' the products were in fact more accurately described as sugar products, or candies. The court suggested that ads even implicitly claiming that such products were nutritious or healthful were plausible lawsuit targets. (After the ruling, the case settled.)

In July 2002, Daynard attended an informal meeting of lawyers and public-health advocates in Banzhaf's office in Washington. ''The first question at the meeting was, 'Is there a there there?''' Daynard recalls. What persuaded them was, in a sense, the media. This thing was so radioactive in terms of media attention that cases would bring in other lawyers and bring in other cases.

In August 2002, a lawyer who'd never heard of Banzhaf or Daynard crashed their party. Sam Hirsch, who ran his small practice in New York City, had become interested in food issues after an overweight associate referred to a burger as a ''fat bomb.'' Though Hirsch, 54, had never brought a class action, he now filed two, one in Brooklyn and another in Bronx. The suits, brought on by classes of obese people, named McDonald's, Burger King, KFC, and Wendy's as defendants.

The press loved the story. The industry was ferocious. The Coalition for Consumer Freedom, a trade group of restaurants and food and beverage suppliers (McDonald's was not a member), promptly took out aggressive full-page ads in newsmagazines. One showed a man's bloated, bare gut spilling over a belted waistline. The copy read: ''Did you hear the one about the fat guy suing the restaurants? It's no joke.''

For plaintiffs lawyers and nutrition activists, the Hirsch suit was a mixed blessing. Some worried that it was such a laughing stock that it might strengthen the forces pushing for tort reform. As a tool for public education, on the other hand, the Hirsch suit was a landmark. Even if the industry was winning the talk-show shoutfests, its arguments about personal responsibility sent a double edged message: ''If you are stupid enough to use our products, you deserve to get diseases our products cause.''

In September 2002, Banzhaf invited Hirsch to the second meeting of his group. Afterward Hirsch decided not to pursue his two lawsuits, which had been filed on behalf of adults, and to bring instead a new class-action suit on behalf of obese children. He focused this suit on Mc Donald's alone.

One prospective class member, 400-pound, 15-year-old Gregory Rhymes, who suffered from type 2 diabetes, stated in an affidavit that he had eaten at McDonald's ''nearly every day'' since he was 6. Neal Barnard, a doctor who headed a vegetarian advocacy group, submitted a declaration asserting that the consumption of McDonald's products had significantly contributed to the development of (Rhymes's) obesity and diabetes.

McDonald's mounted a spirited defense, stating that every reasonable person understands what is in products such as hamburgers and fries. McDonald's lawyers also argued that people understand the consequences to one's waistline and potentially to one's health, of excessively eating those foods over a prolonged period. The lawyers also warned that the plaintiff's theories, if accepted, would usher in an uncontrollable avalanche of litigation against other restaurants and food providers, as well as other industries (such as the pizza, ice cream, cheese and cookie industries). In a statement to *Fortune*, McDonald's said that it had long made nutritional information available to customers upon request. Its nutrition professionals said that McDonald's food could be and was a part of a healthy diet based on sound nutrition principles of balance, variety and moderation. The court has not yet ruled.

Targeting the children was the food industry's Achilles' heel. Fast-food, snack food and soft drink companies focused their marketing on children and adolescents through Saturday morning TV commercials; through cuddly characters like Ronald McDonald (the second most recognized figure among children after Santa Claus); through contracts to advertise and serve soft drinks and fast-food in schools; through ever-changing toys included in Happy Meals.

If misleading advertising could be linked to the childhood disease, the industry could be in big trouble. Food industry insiders came forward to speak to Hirsch about disturbing marketing practices. He claimed that we were not bringing down the fast-food industry next Tuesday, but there were legitimate legal issues here.

Hirsch's case was like the earliest tobacco and asbestos cases, which failed because the damning evidence had not yet come out. But once cases progress into the discovery stage, smoking-gun documents sometimes begin to emerge, showing that the companies knew more than the general public about the impact that their products and advertising were having on children's health. As discovery goes forward, the plaintiffs' lawyers may find documents that, if held up in isolation, make it look like the industry has something to hide. That would give the case heft. According to an expert, it could take about five years to reach that point.

Not everyone on the defense side was worried. Thomas Bezanson of New York's Chadbourne & Parke, who had defended tobacco, alcohol, and pharmaceutical companies, thought that what happened to the tobacco industry was unique. You had a very powerful attack made by plaintiffs bar, the press, the politicians, and the state attorneys general. That only worked since they were able to use all of those in a coordinated way to persuade society that the object of attack was some kind of pariah. It would be difficult to lodge such an attack against food companies. There was another difference between tobacco and food. The tobacco industry could not make a safe cigarette but fast-food companies could do almost everything requested without going broke. They could issue warnings, they could post fat and calorie content on menu boards, and they could put more nutritious things on their menus. In fact, they already were. For instance, McDonald's reduced trans-fatty acids in its fried foods and introduced low-fat yogurt and fruit roll-up desserts.

A McDonald's press release touts the yogurt as a "good source of calcium" and states that the fruit desserts provide 25% of the daily-recommended value of vitamin C. As a mom and registered dietician, a McDonald's staffer said in the release, "I know the importance of having this type of nutrient value in a snack food that kids enjoy."

Such gestures were themselves fraught with legal peril, however. If companies that produced high-calorie and high-fat foods were worried about future lawsuits, they were not saying. PepsiCo, Cadbury Schweppes, and Kraft all declined to comment. Their trade group was less shy and said, "We advocate getting good messages to parents to help children to develop good eating and exercise habits. What we think is counter productive is finger pointing, reckless accusations, and lawsuits that won't make anyone thinner. All the same, prudent food companies might do well to start scrutinizing their advertising and packaging, tweaking product lines, and, yes, squirreling away some reserves for potential judgments."

Meanwhile, the court in New York rejected Hirsch's suit. But it still was not O.K. for McDonald's since new suits might be filed.

CHANGING EATING HABITS

Human diets had been eminently changeable; they changed all the time, and there was nothing inexorable about the national drift toward bloat. There was also nothing immutable about the swill that people bought in supermarkets and restaurants. A generation ago it was almost impossible to get a good cup of coffee in America. Yuppies fixed that. Beer too.

What will it take to transform our diet on a national scale? The problem is huge and depressingly simple: The U.S. food industry provides about 3,900 calories per person per day (the figure is for 2000, the latest available). Allowing for waste and losses in cooking, the USDA estimates that the average American consumes roughly 2,750 calories per day—a full Big Mac beyond its recommendation of 2200 calories for most children, teenage girls, active women, and sedentary men. Of course, diet and exercise are matters of individual choice, but cultural circumstances—car travel, post-industrial jobs, passive entertainment—push us collectively toward eating more calories than we burn. So does the roughly $4.5 billion a year the food industry spends on advertising and the $50 million a year it spends lobbying in Washington D.C.

Successful dieters, like those in the National Weight Control Registry—a database of more than 2000 people who have lost at least 30 pounds and kept them off for at least a year—generally report that their weight loss was triggered by a specific incident or milestone, often painful. Is there some incident that could make us change the way we eat as a nation? Some dietary Sputnik on the horizon that would do for food education what the Soviet satellite launch did for science education? An across-the-board defeat in the Olympics perhaps?

Actually, it might already be here, in the epidemic of obesity and the rise of Type 2 diabetes (which used to be called "adult onset") in children. The Surgeon General's 2001 Call to Action against obesity reported that 13% of young children and 14% of adolescents were overweight, with the number of overweight adolescents having tripled in two decades. That changed the politics of the debate: With children in the picture—children spammed every day with marketing messages for sugar and fat—it was no longer so simple to argue that diet was purely a matter of individual responsibility.

As long ago as the early 1980s, Romans watching American tourists walk by could be overheard muttering, "*Culo Americano*" (American butt). It was about that time, in fact, that the USDA recorded the first big jump in calories in the U.S. diet since it began tracking food consumption in 1909. Today the biological issue is no different than it was then. But since the Centers for Disease Control identified obesity as an "epidemic" in 1999, the politics of girth appear to be changing.

Declaring an epidemic would seem to call for a policy response. Some school districts in California banished soft drinks from vending machines. Activists were pushing for restrictions on the advertising of junk food to children. They were also getting ready to fight for changes in the Food Guide Pyramid, in the USDA's dietary guidelines, and in the federal school lunch program, all of which were up for review in the next few years. And, of course, some Americans were taking the fat fight to the courtroom.

The uproar had only begun. The first thing that's necessary was for the public to be sensitized and even angry about the current situation. The key to getting mad was having victims. And the victims were children. Some experts recommended two things. One, prohibit fast-food and soft drinks in schools. The other would be to create a nutrition superfund to advertise and market healthy food. For example, we could pay Michael Jordan for promoting vegetables rather than McDonald's. Then at least it would be closer to a level playing field.

Healthy food was not just more expensive than unhealthy food but less convenient. Imagine, for instance, that a crazed vegan were to burst into your office with a gun and demand that you produce, within four minutes, some fresh fruit. Could you do it? How about a soft drink?

There's no reason that the food companies should be expected to look out for the nation's health. On the contrary, the market's logic suggested that if food companies were to grow, so must we. In a way, it was a mirror-image of the problem of overfishing: Each restaurant and food company has an incentive to get more stuff on to our plates; an individual company, like an individual fisherman, has no interest in cutting back for the benefit of a species. Only in this case the species that suffered is not swordfish. It's us.

We have national health plans for reducing obesity but no implementation plan. The government could develop an implementation plan and assign an agency to be responsible and accountable for it. We don't have that now.

THE INDUSTRY SITUATION

2002 was a lousy year for burgers and fries. McDonald's stock traded near its seven-year low, its chief executive quit, and in the nine months ended Sept. 30 its global same-store sales were off

2.1%. Burger King, meanwhile, was sold to an investor group at a $700 million discount from the original sale price.

Subway, promoting its (foot-long) sandwiches as a lower-fat alternative to burgers, now had more U.S. franchises than McDonald's. Wendy's had added enough low-fat items to its menu to earn a nice profile in the magazine of the American Diabetes Association.

Something like a backlash was certainly underway in the food business, and it led to curiosities. Seven-Eleven stores in California were selling sushi. Pepsi was pushing organic Tostitos. Whole Foods Markets, the Austin supermarket chain that sold mostly natural and organic groceries, led its sector with profit growth of 20% last year. Heinz and General Mills were waging a premium-priced organic ketchup war.

So far, though, all this was change at the margins. From a health standpoint, America's food supply was still seriously out of whack. According to Department of Agriculture data for 2000, the most recent available, the national food supply (both domestic and imported) provided 280 pounds of fruit per person. Adjusted for losses and waste, that amounted to less than half the person per day minimum for fruit recommended by the Food Guide Pyramid. Yet consumption of added sugars reached 31 teaspoons per person per day, far above the six- to eighteen-teaspoon maximum recommended.

The government wasn't doing too well in its effort to explain what healthy eating involves. Take the Food Pyramid's recommendation to eat six to eleven servings a day from the grain group. What was a serving? The actual size depended on the individual person. In the Food Pyramid, which the USDA developed, a serving of cooked pasta was one-half cup, cooked. In the Nutrition Facts label on a box of pasta, which was regulated by the Food and Drug Administration, it was twice that. No wonder diners were confused.

For the many people who didn't pay especially close attention, a serving was what you were served. Further, restaurants were using larger dinner plates, bakers were selling larger muffin tins, pizzerias were using larger pans, and fast-food companies were using larger drink and French-fry containers.

As a civilization, we had never had huge amounts of food before. Used to be, in the winter you had to eat dried salmon or figs. There had ever been a society that when presented with an endless stream of free cheeseburgers would have said, No.

Abundant food had benefits. People were fatter, but the people who were strong were also stronger. Actors and actresses are really buff now. You go look at an old Elvis movie, and he's supposedly this avatar of masculinity, and he had baby fat all over his torso. Even Leonardo DiCaprio, who is supposedly feminine, is in better shape that Elvis was. DiCaprio could kick Elvis's butt.

Knowledgeable people predict that if the obesity epidemic is ever to be reversed, it will be through some technological fix like a "fat pill" rather than a general expression of national willpower. The very idea of willpower is under attack by some researchers, who argue that the brain might dictate appetite the way it does other sorts of behavior, like drinking and excreting the right amounts of water to maintain a balance in the body.

Of course, cultures do evolve. Perhaps a decade from now this health calamity will have turned us all into mindful epicures. But at the moment we are on our own and we are going to have to pay attention. For lifelong health we must teach people about their own calorie thermometers. But the problem is what tools are available for that.

Actually there is an interesting new one, developed by a Colorado heart-lung transplant surgeon named James Mault. When Mault was working through his way through college in the 1980s, he had a job at a hospital wheeling around a "metabolic cart," a big, cumbersome machine for measuring patients' resting metabolic rates—the daily calories their bodies burned when at rest. Some of the patients were being fed intravenously, with their caloric needs determined by height and weight tables developed in 1919. With his machine, Mault found that some people's actual caloric needs deviated by as much as 1,000 calories a day from what the tables predicted: Despite, the hospital's best efforts, some were being overfed, and others starved. He dreamed of a simple handheld device that would measure the resting metabolic rate (RMR) and indicate precisely how many calories a day that person could take in without gaining weight. "You can't manage what you can't measure," he pointed out.

It took years before Moore's law caught up with Mault's vision, but eventually he found chips and sensors cheap enough to do the job, and in 1998 he founded HealtheTech to market a new RMR meter, called BodyGem. It's being used at fitness and health clubs around the country. A person breathes into the gizmo for a few minutes and it tells you your RMR. It's an interesting breakthrough. Once you know your personal calorie budget, you tend to look differently at the out-of-control national buffet. And that's what it's going to take, for now at least. Big government, big food, big pharma—none of them is going to help us get small. So: Eat like a Frenchman, walk like a New Yorker and hope for new technology to solve the problem.

ANTIFAT PILL

Over the past decade, researchers had made a rush of discoveries about hormones and other molecules that regulated appetite and weight. That had provided a host of targets to tweak with drugs. But given the problems with past obesity drugs—Fen-Phen, the pill combination linked to heart damage—one had to wonder: Would drugs ever deflate the gross national girth without nasty surprises?

Might be, but expect miracles. Consider leptin, the most acclaimed obesity drug candidate in recent years. A naturally occurring hormone whose gene was isolated in 1994 at Rockefeller University by Jeffry Friedman and colleagues, it was thought to convey an "eat less" signal to the brain to the burgeoning fat cells. When it was injected to congenitally obese mice, they quickly lost weight. But leptin performed much less impressively in human trials.

Another hormone, neuropeptide Y, also stirred excitement. It's a potent appetite stimulant, so drugs that blocked it seemed likely

to suppress the munchies. Yet when researchers blocked NPY in mice, the rodents continued to show perfectly healthy appetites.

None of that surprises students of Darwin. Redundant mechanisms had evolved to ensure that fuel was conserved as fat to abet survival in lean times. When we push against the fat-conserving system by losing weight, it pushes back in multiple ways: Hormones scream to the hypothalamus, the brain's appetite control center, ''Eat! Eat inch-thick steaks and cheesecake!'' Our metabolisms shift so a higher share of the calories we ingest get socked away instead of burned as fuel. Our muscles even become more efficient, according to some studies, forcing us to work harder to lose weight and keep it off.

Of course, most of us can beat this pushback for a while and shed tons of pounds. Recent data suggested that perhaps one in five who lost 10% or their weight manage to keep it off for at least a year. But that kind of long-term success typically demands Olympic feats of will, such as religiously sticking to a low-calorie diet and exercising for an hour a day.

The thermostat analogy had major implications for research on obesity drugs. For instance, if scientists could unravel the feedback loop that put us in fat-conserving mode when we lose weight, they might be able to interrupt it with medicines, making it a lot easier to keep lost pounds off. Surprisingly, leptin, the apparent dud, may be one such medicine. In a study published in Spring 2002, Leibel and colleagues showed that when leptin was administered to people who had lost 10% of their weight, hormonal signals associated with the body's fat-conserving mode were interrupted. Thus, even though leptin wasn't effective for dropping pounds, it might keep them off.

Amgen, the biotech company that owns rights to leptin, said it had no plans to test it as a weight-loss maintainer. But another medicine in late clinical tests, Axokine, might work in that role. Developed by Regeneron Pharmaceuticals in Tarrytown, N.Y., it activated the same metabolic pathways that leptin did. Unlike leptin, Axokine appeared to help people both lose weight and keep it off. And its effects seemed to linger, helping weight stay down even after doses were stopped. That prolonged efficacy worried some experts, though, for they suggested that the drug could have long-term side effects.

No single drug was likely to block all the mechanisms that kicked in when we lost weight. Instead researchers envisioned treating obesity with combinations of medicines, each of which suppressed a different part of the fat-conserving system. Such cocktails could be tailored to body chemistry, promising long-term weight loss with minimal side effects.

That's still years away. Now we might be able to stimulate some of the desired hormonal effects with lifestyle changes. For instance, obesity apparently causes the brain to become insensitive to leptin's ''eat less'' signal. But some studies indicate the insensitivity could be reversed by losing weight and exercising—so keeping off lost pounds might get easier over time. Indeed, research on weight, hormones, and the brain has made it ever clearer that obesity is basically a state of mind—and we don't necessarily need drugs to change our minds.