

A CLASS-ACTION LAWSUIT AGAINST ASPARTAME MANUFACTURERS: A REALISTIC POSSIBILITY OR JUST A SWEET DREAM FOR TORT LAWYERS?

I. INTRODUCTION

Over the years, there have been numerous class-action products liability suits filed in America. Claims were filed over numerous injuries, real or imagined, inflicted upon unwary consumers. The longtime efforts of plaintiff litigators finally came to fruition with the widely publicized tobacco settlements of the late 1990's. Most recently, and some would say not surprisingly, some products liability litigators are switching their focus from the tobacco industry to fast food, claiming that fast food companies should be held liable for the terrible health suffered by some of their customers. Given these efforts by products liability attorneys, especially in recent years, one cannot help but wonder where their efforts will be focused next.

Most people have heard whispers and rumors over the years about the artificial sweetener known as aspartame (or NutraSweet®). Depending upon what person or what source one is consulting, this artificial sweetener is either completely harmless or potentially deadly. Given the trends of products liability litigation in recent years, as well as the persistent perception that aspartame is dangerous, could a wave of products liability litigation against the aspartame industry be possible?

This Comment will examine the feasibility of successful products liability lawsuits being brought against the aspartame industry. These lawsuits will be collectively referred to as "aspartame litigation." Part II will examine the history and assorted legal claims of tobacco litigation which may serve as a model for aspartame litigation. Part III will scrutinize potential parallels with fast food litigation. Part IV will determine the likelihood of success in aspartame litigation by examining different legal claims that could be brought and by drawing upon the lessons learned from tobacco and fast food.

II. THEORIES OF LIABILITY FROM TOBACCO LITIGATION

Many of the distinguishing characteristics of the tobacco litigation saga, especially in its earliest years, would parallel fledgling aspartame litigation more than one would initially believe. Thus, an examination of the legal theories, litigation strategies, and public opinion shifts that have defined the progression of this dynamic area of tort law are highly relevant.

As has been stated by many commentators, tobacco litigation has existed in three distinctive waves,¹ each with its own unique drama. For our purposes, the focus shall be placed upon those legal theories and societal events which would likely be paralleled in aspartame litigation.

A. The First Wave: Something is Definitely Wrong Here

Breach of implied warranty was one of the most prominent claims alleged in the “first wave” of tobacco liability.²

Breach of implied warranty was first raised in *Green v. American Tobacco Co.*³ Green, who had smoked Lucky Strike cigarettes for about thirty years, claimed the defendant’s product caused him to develop cancer in his left lung.⁴ His son, who was substituted as plaintiff after his father’s death, claimed a breach of implied warranty.⁵ The Fifth Circuit held that a manufacturer or dealer would not be held liable for breach of implied warranty when it neither had knowledge, nor could have acquired such knowledge through reasonable foresight, of the potentially harmful effects of its product.⁶ Thus, foreseeability was the lynch-pin for determining breach of implied warranty.⁷ This twisting of warranty law was characteristic of judges’ attitudes during this “first wave.” The Fifth Circuit later confirmed this approach to implied warranty liability in *Lartigue v. R.J. Reynolds Tobacco Co.*⁸

¹ There are numerous articles that provide an in-depth account of tobacco litigation. See, e.g., Ingrid L. Dietsch Field, Comment, *No Ifs Ands or Butts: Big Tobacco Is Fighting for Its Life Against a New Breed of Plaintiffs Armed with Mounting Evidence*, 27 U. BALT. L. REV. 99 (1997); Tucker S. Player, Note, *After the Fall: The Cigarette Papers, the Global Settlement, and the Future of Tobacco Litigation*, 49 S.C. L. REV. 311 (1998); Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853 (1992); Marcia L. Stein, *Cigarette Products Liability Law in Transition*, 54 TENN. L. REV. 631 (1987).

² See Field, *supra* note 1, at 100-01.

³ *Green v. Am. Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962).

⁴ *Id.* at 72.

⁵ *Id.* at 71.

⁶ *Id.* at 76.

⁷ The Fifth Circuit certified the question of whether foreseeability was necessary for liability in breach of implied warranty cases to the Florida Supreme Court. *Id.* at 86. The UCC had not been adopted by Florida at this time. The Florida Supreme Court held foreseeability to be completely irrelevant in determining liability for breach of implied warranty. *Green v. Am. Tobacco Co.*, 154 So. 2d 169, 170 (Fla. 1963). In spite of this, the Fifth Circuit later held tobacco to be a merchantable product, which effectively ended any potential victory that could have come from the Florida Supreme Court’s decision. See *Green v. Am. Tobacco Co.*, 409 F.2d 1166 (5th Cir. 1969) (affirming the judgment of the lower court based on the rationale of Judge Simpson’s dissenting opinion in *Green v. Am. Tobacco Co.*, 391 F.2d 97 (5th Cir. 1968)).

⁸ *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir. 1963). The Fifth Circuit later found tobacco to be a merchantable product based in large part on of RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965). *Green*, 391 F.2d at 110.

Another claim made by plaintiffs during this period was breach of express warranty. One classic example was *Pritchard v. Liggett & Myers Tobacco Co.*,⁹ which also persisted through multiple appeals over many years.¹⁰ For over fifty years, the plaintiff had smoked roughly one carton of Chesterfield brand cigarettes per week.¹¹ The plaintiff claimed that express warranties had been made in a series of advertisements that contained such declarations as, “Chesterfields Are As Pure As The Water You Drink And The Food That You Eat,” and “Nose, Throat, and Accessory Organs Not Adversely Affected By Smoking Chesterfields.”¹² The advertisements “contained assurances that the affirmations were based upon extensive research and the opinions of medical specialists.”¹³ By the advertisements, the plaintiff was led to believe the cigarettes had no adverse effects upon one’s health.¹⁴

Each time this case went before the court of appeals, the court was willing to take very pro-plaintiff approaches in evaluating whether the advertisements served as an inducement to purchase the cigarettes.¹⁵ Unfortunately, due to depleting their legal resources, the plaintiff had to abandon the claim and never recovered any damages.¹⁶

Toward the end of this “first wave,” three major events occurred outside the courtroom that would shape the next thirty years of tobacco litigation: publication of the *Report to the Surgeon General on Smoking* (“Report”),¹⁷ publication of *Restatement (Second) of Torts § 402A* (“Restatement”),¹⁸ and the enactment of the Federal Cigarette Labeling and Advertising Act.¹⁹ These events formed the defense that would

⁹ *Pritchard v. Liggett & Myers Tobacco Co.*, 370 F.2d 95 (3d Cir. 1966), *cert. denied*, *Liggett & Myers Tobacco Co v. Pritchard*, 386 U.S. 1009 (1967).

¹⁰ Rabin, *supra* note 1, at 862.

¹¹ *Pritchard*, 350 F.2d at 482.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Rabin, *supra* note 1, at 862.

¹⁶ *Id.*

¹⁷ U.S. DEPT OF HEALTH, EDUC., & WELFARE, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (1964), available at http://www.cdc.gov/tobacco/sgr/sgr_1964/sgr64.htm. [hereinafter *1964 Report*]. This report represented a formal finding, by a highly reputable source, that smoking tobacco was injurious to human health.

¹⁸ RESTATEMENT (SECOND) OF TORTS § 402A (1965). “(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” *Id.*

¹⁹ Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) [hereinafter *1965 Act*]. This Act was subsequently amended in 1969 to require a warning to appear on each package of cigarettes, with the states unable to require any other type of labeling language on the packages. Public Health Cigarette Smoking Act of

render the tobacco companies seemingly undefeatable: assumption of risk.²⁰

Although the Third Circuit had earlier held that assumption of the risk was a viable defense to breach of implied warranty claims,²¹ such a defense was inapplicable, as the harmful effects of tobacco, if any, were deemed unknown to the general public.²² However, the Attorney General's well-publicized report combined with the warning label placed on cigarette packages by the Labeling Act effectively put the public on notice of the potential harm caused by tobacco.²³ Section 402A of the Restatement seemed, at first, to give the plaintiffs an advantage by imposing liability for harm caused by products which were "in a defective condition unreasonably dangerous."²⁴ However, there was great debate in the American Law Institute (ALI) as to how this language would affect the vitality of the tobacco industry.²⁵ The Restatement drafter's opinion was that tobacco itself caused health problems, not the manner in which cigarettes were made.²⁶ Hence, there was no reason tobacco manufacturers and dealers should be blamed for a characteristic of their product over which they had no control.²⁷ This led to the insertion of comment i, which immunized the tobacco industry from strict liability for its product by stating tobacco was not unreasonably dangerous:

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 characteristic. 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 fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely

1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) (codified as amended at 15 U.S.C. §§ 1331-36, 1338-40) [hereinafter *1969 Act*].

²⁰ Meaning the "voluntary exposure to an obvious or known danger which negates liability." *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479, 484 (3d Cir. 1965).

²¹ *Id.* at 485.

²² *Id.*

²³ These were not the first inklings the public received that tobacco was potentially harmful. Numerous reputable publications, such as *Time*, *Newsweek*, and *Reader's Digest*, spoke out about the health hazards of smoking. Franklin E. Crawford, Note, *Fit for Its Ordinary Purpose? Tobacco, Fast Food, and the Implied Warranty of Merchantability*, 63 OHIO ST. L.J. 1165, 1181 (2003). This journalistic scrutiny of the tobacco industry may have played a role in bringing about the Surgeon General's study.

²⁴ See RESTATEMENT (SECOND) OF TORTS, *supra* note 18.

²⁵ Crawford, *supra* note 23, at 1181-82.

²⁶ See *id.* at 1182.

²⁷ *Id.*

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.²⁸

In addition to these three major events, there were three other factors in the “first wave” which deserve some consideration: the mistakes made by the courts, the scientific knowledge regarding the effects of tobacco on human health, and the litigation strategies employed by the tobacco companies.

The general rule of implied warranties focuses on causation, not foreseeability, in determining liability.²⁹ Nevertheless, it seems that the courts of that era were not ready to impose strict liability upon merchants.³⁰ Had the courts properly applied the rule of law, causation would likely have been the sole question for the courts to resolve.³¹ Yet even if the focus had been upon causation, the health consequences of smoking, as shown through credible scientific data, would still have been necessary.

Although it may seem laughable in hindsight, science could give no definite answer (at least prior to the Surgeon General’s 1964 Report)³² to the question of tobacco’s effects on health. This was evidenced in the *Green* decision, where eight “eminent” medical doctors testified for each side and were in “sharp disagreement” over whether scientific knowledge had advanced to the point that tobacco companies could know smoking was injurious.³³ In fact, the *Lartigue* decision made reference to “the great-cancer smoking debate.”³⁴ It seemed that each side of this “debate” could acquire medical testimony to reinforce its own position, without either side’s experts prevailing. Yet, were it not for the initial lawsuits filed against the tobacco companies and the steady diet of anti-smoking commentary from the media,³⁵ the Surgeon General’s study might not have been done. At the least, it likely would not have been done until many years later.

²⁸ RESTATEMENT (SECOND) OF TORTS § 402A CMT. I (1965).

²⁹ See *supra* note 7.

³⁰ Rabin, *supra* note 1, at 861.

³¹ Prosser and Keeton note that courts during this era struggled to avoid applying contract law principles to warranties in the case of physical injury because contract law was so intertwined with the idea of the warranty. Thus, when there was no contract between the manufacturer and the injured consumer (as found in the tobacco cases), the courts had a difficult time finding any basis for liability. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER & KEETON ON THE LAW OF TORTS 690 (5th ed. 1984). Perhaps this explains the negligence-like emphasis on foreseeability, rather than strict liability-like emphasis on causation.

³² See *supra* note 17.

³³ *Green v. Am. Tobacco Co.*, 304 F.2d 70, 72 (5th Cir. 1962).

³⁴ *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19, 39 (5th Cir. 1963).

³⁵ Crawford, *supra* note 23, at 1181.

Another factor, which impacted the outcome of tobacco litigation during this time, was the strategy used by the tobacco lawyers. Using arguably the oldest tricks in the book, the tobacco representatives would use their considerable financial means to file every pre-trial motion, to challenge every procedure, to propound lengthy interrogatories, and to do anything else that would postpone or prolong the litigation in an attempt to exhaust the often limited financial resources of the plaintiffs.³⁶ This strategy resulted in only ten out of approximately 150 filed cases being brought to trial during this period, without one plaintiff victory.³⁷

B. The Second Wave: New Roads Lead to the Same Place

With the close of the “first wave” of tobacco litigation, the tobacco industry seemed unshakeable. Plaintiff attorneys appropriately tried other theories of recovery, including strict liability and failure to warn. Additionally, the general public attitude towards smoking began to change during this time, though not in the plaintiffs’ favor.

As a result of Restatement § 402A, tobacco was not viewed as unreasonably dangerous; this view was expanded by the courts to mean that cigarettes were merchantable.³⁸ Due to the foreseeability problems encountered during the “first wave” cases, plaintiffs’ lawyers saw that a continued assault by way of warranty liability would be useless.³⁹ With the advent of economic analysis, plaintiffs’ lawyers now attempted to invoke a risk-utility analysis in order to circumvent the foreseeability problem.⁴⁰ This risk-utility analysis suggested that manufacturers should bear the health costs of tobacco—even when there was no safer design available and the warning was adequate—in a strict liability sense if the health-related costs of the tobacco products—including such broad elements as the number of people who died each year from tobacco use—outweighed the individual benefits derived from their use.⁴¹ In addition, there was a possibility that fault-based defenses such as assumption of risk would not apply under a risk-utility analysis.⁴² This approach had some potential since courts were using such economic analysis more and more regularly.⁴³

³⁶ Rabin, *supra* note 1, at 857-59.

³⁷ Field, *supra* note 1, at 101.

³⁸ *See supra* note 7.

³⁹ Rabin, *supra* note 1, at 866.

⁴⁰ *Id.*

⁴¹ Player, *supra* note 1, at 315.

⁴² Rabin, *supra* note 1, at 867.

⁴³ *Id.*

To combat this approach, tobacco lawyers used numerous methods, including zealously emphasizing comment i of section 402A.⁴⁴ The tobacco industry argued that a risk-utility analysis should not be used because no safer design had been shown for tobacco products.⁴⁵ This argument was effective in many courts,⁴⁶ but the most effective argument remained assumption of the risk.⁴⁷ The tobacco lawyers vigorously maintained that the tobacco industry should not be held liable if the consumer public continued to use their product despite the known risks involved.⁴⁸

Failure to warn was also a lost cause to smokers due to the standard warning label now placed on each cigarette package. Now even the smokers who only gave a cursory glance to the news could not claim they were ignorant of the health problems tobacco could cause. However, the question still remained whether such a claim could be brought on behalf of those who had smoked or contracted smoking-related health problems before the warning labels were standard. This question was answered in *Cipollone v. Liggett Group, Inc.*⁴⁹ Rose Cipollone had smoked since 1942 and eventually died of lung cancer.⁵⁰ There was a question of whether the 1965 and 1969 Acts⁵¹ preempted Cipollone's state law claims. The Supreme Court of the United States granted certiorari to answer that question.

In a plurality decision, the Court found that the 1965 and 1969 Acts were primarily concerned with state regulation of cigarette warnings, not common law damage actions.⁵² The 1969 Act was found to broaden the 1965 Act.⁵³ However, the phrase "no requirement or prohibition," found in the 1969 Act, made no distinction between state regulation and state common law claims.⁵⁴ Thus, some state common law claims may be preempted as well.⁵⁵ Certain common law claims could still be brought provided the claims were analyzed with a "strong presumption against

⁴⁴ Player, *supra* note 1, at 316.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 317.

⁴⁸ *Id.*

⁴⁹ *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 504 (1992) (plurality opinion).

⁵⁰ *Id.* at 508.

⁵¹ See 1965 Act and 1969 Act, *supra* note 19.

⁵² *Cipollone*, 505 U.S. at 521 n.19.

⁵³ *Id.* at 520-21.

⁵⁴ *Id.* at 521.

⁵⁵ *Id.* at 523.

preemption.”⁵⁶ Among the common law claims which could be brought were failure to warn and breach of express warranty.⁵⁷

As during the “first wave,” there were events other than court decisions that shaped the “second wave.” Foremost was the unsympathetic attitude of juries during this period. Jurors had little sympathy for plaintiffs who had smoked for years despite the common knowledge of its adverse health effects.⁵⁸ Smokers were now seen by jurors as having weak character.⁵⁹

Of course, many plaintiffs did not even make it to the jury. The tobacco companies continued the “first wave” strategy of exhausting the plaintiff’s resources by filing every discovery motion, oral deposition, and everything possible to exhaust the plaintiff’s war chests.⁶⁰

C. The Third Wave: Surprise Revelations

After years of litigation and no success, the “third wave” of tobacco litigation brought victory to the tune of roughly \$246 billion dollars.⁶¹ This triumph was due to Medicaid lawsuits and class-action lawsuits.⁶²

The Medicaid lawsuits were premised on the idea that tobacco companies should reimburse the state Medicaid funds for the billions of dollars spent treating tobacco-related healthcare problems.⁶³ Recall that the tobacco industry had heretofore repelled every action brought against it by claiming the consumer had assumed the risk of whatever damages were at issue. Plaintiffs now claimed the Medicaid agencies were “damaged” by tobacco through no fault of their own (they had no choice but to incur the costs of such health problems), which made the Medicaid agencies “blameless” victims.⁶⁴ For the plaintiffs, this was a

⁵⁶ *Id.*

⁵⁷ *Id.* at 524-27. Failure to warn claims could be brought to the extent such claims were based upon “testing or research practices or other actions unrelated to advertising or promotion.” *Id.* at 524-25. Breach of express warranty claims had been brought by Cipollone based on different statements made in cigarette advertisements. *See Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 574-76 (3d Cir. 1990); *Cipollone v. Liggett Group, Inc.*, 683 F. Supp. 1487, 1497 (D.N.J. 1988). These claims were not preempted because they were based on contractual duties. *Cipollone*, 505 U.S. at 525-27.

⁵⁸ *Id.* at 317.

⁵⁹ Rabin, *supra* note 1, at 864.

⁶⁰ *Id.* at 867.

⁶¹ *See Barry Meier, Lawyers in Early Tobacco Suits to Get \$8 Billion*, N.Y. TIMES, Dec. 12, 1998, at A1; *46 States Agree to \$206 Billion Tobacco Settlement*, LIABILITY WK., Nov. 13, 1998, at 1, available at 1998 WLNR 3654580. Minnesota, Mississippi, Texas, and Florida reached individual settlements—exceeding \$40 billion—bringing the total settlements the tobacco companies paid out among the states to \$246 billion. *See id.*

⁶² Bryce A. Jensen, Note, *From Tobacco to Health Care and Beyond – A Critique of Lawsuits Targeting Unpopular Industries*, 86 CORNELL L. REV. 1334, 1343-47 (2001).

⁶³ *Id.* at 1344.

⁶⁴ *Id.*

wonderful status which deprived the tobacco companies of their previously impenetrable defense: assumption of the risk.⁶⁵ Soon there were Medicaid suits being filed by states all over the country.⁶⁶ Settlements totaling \$40 billion were reached with Mississippi, Florida, Texas, and Minnesota prior to trial.⁶⁷ In November of 1998, realizing other states were likely to file Medicaid suits as well, the tobacco industry agreed to an unprecedented \$206 billion settlement to be paid over twenty-five years to the remaining forty-six states.⁶⁸ Thus, success finally came to the plaintiffs' lawyers.

Another change seen during the "third wave" was the use of the class-action suit. During the prior waves, tobacco suits had been brought by solo practitioners who often buckled quickly against the superior financial resources of the tobacco industry lawyers. This changed with *Castano v. American Tobacco Co.*,⁶⁹ in which over 60 law firms represented plaintiffs from across the nation.⁷⁰ Even though the Fifth Circuit later dismissed the case due to concerns over group certification,⁷¹ the use of class-action suits in tobacco cases had been established.

Outside of the courtroom, the most startling development in the history of tobacco litigation occurred during this wave. In 1994, an anonymous source known only as "Mr. Butts" shipped thousands of Brown & Williamson Tobacco Corporation documents to Professor Stanton Glantz of the University of California at San Francisco.⁷² These documents shockingly revealed that Brown & Williamson, as well as other tobacco companies, had known about the harmful effects of tobacco for over thirty years.⁷³ In addition, they showed that the tobacco companies knew that nicotine had addictive effects upon smokers.⁷⁴ To make matters even worse, the documents revealed how the tobacco companies purposely manipulated nicotine levels in its product⁷⁵ so that

⁶⁵ *Id.*

⁶⁶ Richard L. Cupp, Jr., *A Morality Play's Third Act: Revisiting Addiction, Fraud and Consumer Choice in "Third Wave" Tobacco Litigation*, 46 U. KAN. L. REV. 465, 476 (1998).

⁶⁷ See Jensen, *supra* note 62, at 1343-47..

⁶⁸ *Id.*

⁶⁹ *Castano v. American Tobacco Co.*, 160 F.R.D. 544 (E.D. La. 1995), *rev'd* 84 F.3d 734 (5th Cir. 1996).

⁷⁰ Field, *supra* note 1, at 115.

⁷¹ *Castano*, 84 F.3d at 752.

⁷² Field, *supra* note 1, at 120.

⁷³ *Id.* at 120-21.

⁷⁴ *Id.*

⁷⁵ Player, *supra* note 1, at 322.

smokers would presumably continue to buy more and more cigarettes.⁷⁶ While the medical community had no positive knowledge of tobacco's effects prior to the Surgeon General's report, the tobacco industry's knowledge of the effects its product had on human health (it was, after all, their creation) was far ahead of its time.⁷⁷ After having asserted for years that nicotine was not addictive and that smoking had not been shown to cause health problems,⁷⁸ the tobacco industry was now seen as a deceptive, even evil, industry which tricked its customers into purchasing a harmful product. This was especially damaging during the "third wave" lawsuits.

III. FAST FOOD LITIGATION

In July of 2002, America was both shocked and amused when a lawsuit commenced against the McDonald's Corporation for, of all things, causing obesity in children. In *Pelman v. McDonald's Corp.*,⁷⁹ the petitioners (consisting of minor children and their parents) claimed that they had become morbidly obese, in addition to a multitude of other health problems, as a result of McDonald's business practices.⁸⁰ In effect, the plaintiffs asserted that McDonald's caused their obesity by creating unhealthy food and encouraging them to eat it. McDonald's predictably filed a motion to dismiss.⁸¹ Although there is still debate as to whether this new genre of products liability will take off,⁸² there is no denying that it is a theory that has come in the wake of tobacco liability. Additionally, some of the claims and policy theories could be implemented in aspartame litigation.

A. *The Causes of Action from Pelman*

The plaintiffs in *Pelman* consisted of two extremely overweight children and their parents.⁸³ In charging that McDonald's was responsible for their terrible obesity, two claims were made which are of particular relevance for our purposes: McDonald's food is unreasonably dangerous, and McDonald's failed to warn of the dangers present in its product.⁸⁴

⁷⁶ *Id.*

⁷⁷ Field, *supra* note 1, at 120-21.

⁷⁸ *Id.* at 121.

⁷⁹ *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003).

⁸⁰ *Id.* at 519.

⁸¹ *Id.*

⁸² See generally Samuel J. Romero, *Obesity Liability: A Super-Sized Problem or a Small Fry in the Inevitable Development of Product Liability*, 7 CHAP. L. REV. 239 (2004).

⁸³ *Pelman*, 237 F. Supp. 2d at 519.

⁸⁴ *Id.*

1. Unreasonably Dangerous Product

An allegation was made by the plaintiffs that McDonald's food was unreasonably dangerous due to the high levels of cholesterol, fat, salt, and sugar.⁸⁵ McDonald's countered that the public was well aware of such elements in fast food, meaning McDonald's could not be liable for such inclusion.⁸⁶ McDonald's, in the tradition of the tobacco companies preceding it, cited Restatement 402A, comment i.⁸⁷ McDonald's also emphasized section 402A's statement that "[a] seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized."⁸⁸

Because the potential that continual fast food consumption may lead to poor health was found by the court to be public knowledge,⁸⁹ the plaintiffs had to allege "either that the attributes of McDonalds 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."⁹⁰ Because the plaintiffs failed to demonstrate either claim, no liability attached to McDonald's for failure to warn of its products' content.⁹¹

In addition, McDonald's pressed for the dismissal of this allegation due to the lack of proximate cause.⁹² Beyond mentioning that they ate McDonald's food at least three to four times per week,⁹³ the plaintiffs were unable to establish that consumption of McDonald's food was a substantial cause of their morbid obesity. The question remained whether a host of other factors might have contributed to their weight, such as heredity, eating at other restaurants, and physical activity (or lack thereof).⁹⁴ Despite eating such gargantuan amounts of fast food, there was still a possibility that the plaintiffs' excessive weight, and all the negative repercussions therefrom, could have been caused by something else.⁹⁵

⁸⁵ *Id.* at 531.

⁸⁶ *Id.*

⁸⁷ *Id.* at 531-32. *See supra* note 28 and accompanying text.

⁸⁸ RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965).

⁸⁹ *Pelman*, 237 F. Supp. 2d at 532-33.

⁹⁰ *Id.* at 532.

⁹¹ *Id.*

⁹² *Id.* at 537.

⁹³ *Id.* at 538 n.28.

⁹⁴ *Id.* at 537 n.27. *See also id.* at 538-39.

⁹⁵ *Id.*

2. Failure to Warn

The plaintiffs further alleged that McDonald's had a duty to warn them of the negative consequences that could come from over-consuming McDonald's food.⁹⁶ The court made a final observation that liability should not attach to a manufacturer unless there is a withholding of information, other than common knowledge, necessary for the consumer to make an informed choice whether to use the product.⁹⁷ Under New York law, a manufacturer has a duty to warn of unintended misuses of its product that are reasonably foreseeable.⁹⁸ A manufacturer's failure to warn must be the proximate cause of the injury, but a finding of proximate cause is precluded where the risk is open and obvious to the user.⁹⁹ Because the plaintiffs failed to demonstrate that McDonald's products were dangerous in any respect other than that which was open and obvious (*i.e.*, the common knowledge that eating a lot of fast food is bad for your health), this count was dismissed as well.¹⁰⁰

B. Developing Product Liability as a Result of this Case

Although fast food litigation has nothing close to the history, congressional involvement, and court precedent that tobacco litigation does, there has, nevertheless, been a great deal of pontificating about this fledgling area of products liability law. Among the most interesting observations, for our purposes, are those advocating the liability of the fast food industry and advising a means to successfully impose that liability.

Obesity (a condition where thirty percent or more of total body weight is composed of fat) has been described as America's new epidemic, with an estimated 300,000 deaths attributed to it annually.¹⁰¹ There is no denying that fast food is eaten by Americans in enormous quantities.¹⁰² Inspired by the successful Medicaid litigation against the tobacco industry,¹⁰³ one theory looks to hold fast food companies liable for the billions of dollars spent by taxpayers for treating health problems related to obesity.¹⁰⁴ These opinions are obviously inspired by the

⁹⁶ *Id.* at 540.

⁹⁷ *Id.* at 540-41.

⁹⁸ *Id.* at 540.

⁹⁹ *Id.* at 541.

¹⁰⁰ *Id.* at 541-42.

¹⁰¹ Jeremy H. Rogers, *Living On The Fat of the Land: How to Have Your Burger and Sue it Too*, 81 WASH. U.L.Q. 859, 862 (2003).

¹⁰² See Romero, *supra* note 82, at 270.

¹⁰³ Rogers, *supra* note 101, at 883.

¹⁰⁴ John Alan Cohan, *Obesity, Public Policy, and Tort Claims Against Fast-Food Companies*, 12 WIDENER L.J. 103, 106 (2003).

successful Medicaid lawsuits brought against the tobacco industry by the states. Whether such a maneuver would be successful against the fast food industry, given that eating fast food is not quite as vilified as smoking, is anyone's guess.

It has been proposed by some commentators that the best path to success for fast food litigation would be class-action lawsuits, rather than individual lawsuits.¹⁰⁵ The thought is that massive lawsuits against the fast food industry could most readily be brought by the states in order to offset the massive healthcare expenses incurred by their Medicaid programs due to fast food related health problems.¹⁰⁶ While one may question whether this is a wise course of action to take, it is a maneuver which has already proven effective in the tobacco lawsuits.¹⁰⁷

Another strategy that has been encouraged by the proponents of this fledgling area of products liability law is to bring more suits. As the idea that the fast food industry should be held liable for creating such a product is repeatedly stated like a mantra, the public will be more and more inclined to believe it. According to Professor Banzhaf, a major advocate of fast food litigation, "[I]nitial suits have real difficulties because the public has real problems accepting new ideas and concepts. . . . It took us many years to get us to the point of educating juries about tobacco, [but] now they are."¹⁰⁸

On the other hand, recall that the turning point in the attitudes of juries toward tobacco litigants came after the revelations about the tobacco industry's knowledge were made. While the fast food industry is obviously not going to advertise that a person could develop poor health from consuming its products, it has made no attempts to discount or counteract such assertions. Thus, it would seem that repeatedly claiming the fast food industry should be held responsible for the bad health of its customers gives an impression of indoctrination more than education.

IV. FEASIBILITY OF ASPARTAME LITIGATION

At this point, the American public is no doubt growing weary of products liability suits being filed over what many people consider to be a lack of common sense. As Judge Sweet¹⁰⁹ said, "Where should the line

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See discussion *supra* Part II.C.

¹⁰⁸ Geraldine Sealey, *Obese Man Sues Fast-Food Chains: Fast Food Chains Blamed for Obesity, Illness*, ABCNEWS.COM, July 26, 2002, <http://abcnews.go.com/US/story?id=91427&page=1> (reporting class-action lawsuit filed against McDonald's, Burger King, Wendy's, and KFC by Caesar Barber over illness he claimed to suffer due to fast food).

¹⁰⁹ *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 515 (S.D.N.Y. 2003).

be drawn between an individual's own responsibility to take care of herself, and society's responsibility to ensure that others shield her?"¹¹⁰

It seems that almost everyone has heard the whispers and rumors about aspartame. Beliefs abound, though few can articulate their source, that aspartame is somehow harmful to the human body. Two questions immediately present themselves: are these rumors true, and, if so, can any action be brought?

To answer these questions, let us examine a brief history of aspartame, the effects it is said to have on health, and the applicability of litigation and individual strategies from both the tobacco and fast food litigation.

A. *The Creation and FDA Approval of Aspartame*

Aspartame, also known as NutraSweet,¹¹¹ was discovered in 1965 by G.D. Searle and Company while researching amino acids in an attempt to develop a treatment for ulcers.¹¹² A researcher licked his thumb while working in the Searle research lab and found the substance to be incredibly sweet.¹¹³

The FDA approval of aspartame was riddled with consumer demands, lawsuit saber-rattling, and new FDA review methods.¹¹⁴ In 1974, Searle gained FDA approval to use aspartame in "dry" use (meaning it would be used to sweeten foods).¹¹⁵ However, questions were raised about the safety of aspartame by Dr. John Olney (a psychiatrist at Washington University in St. Louis),¹¹⁶ James S. Turner (author of *The Chemical Feast*¹¹⁷ and co-founder of the Center for Study of Responsive Law)¹¹⁸ and Legal Action for Buyer's Education and Labeling ("LABEL").¹¹⁹ As a result, the FDA stayed the aspartame approval in 1975 and prepared to have an evidentiary hearing.¹²⁰ Additionally, an FDA audit of Searle clinical methods revealed what the FDA described

¹¹⁰ *Id.* at 516.

¹¹¹ The NutraSweet Company, What is aspartame?, <http://www.nutrasweet.com/articles/search.asp?Id=35&srch=aspartame>. (last visited Oct. 22, 2005) (explaining the history of aspartame).

¹¹² The NutraSweet Company, NutraSweet Overview, <http://www.nutrasweet.com/company.asp> (last visited Oct. 22, 2005) (explaining the history of NutraSweet).

¹¹³ *Id.*

¹¹⁴ For an in-depth discussion of this process, see Todd R. Smyth, Note, *The FDA's Public Board of Inquiry and the Aspartame Decision*, 58 IND. L.J. 627 (1983).

¹¹⁵ 21 C.F.R. § 121.1258 (1975). Code section was changed to its current designation, § 172.804, in 1977.

¹¹⁶ Smyth, *supra* note 114, at 633.

¹¹⁷ JAMES S. TURNER, *THE CHEMICAL FEAST* (1976).

¹¹⁸ Smyth, *supra* note 114, at 633.

¹¹⁹ *Id.* at 634 nn.70-72.

¹²⁰ *Id.* at 634 n.73.

as “sloppy” research methods performed on aspartame.¹²¹ FDA Commissioner Dr. Alexander Schmidt stated the FDA had:

“found different discrepancies of different kinds. Some favored the product (Aspartame) and some [did not].” In some cases, the numbers in animal-test results didn’t add up correctly. . . . In some other cases, the agency had questions over the animal-testing plan itself, and in other circumstances . . . pathologists . . . had differing interpretations of animal data.¹²²

Olney, Turner, and LABEL waived their right to a full evidentiary hearing in exchange for a hearing before a public board of inquiry (“Board”). This was one of the first times the FDA had ever used such a method.¹²⁴ The FDA’s acting director selected a panel to serve on the Board from a list of nominees submitted by Olney, Seale, and the Bureau of Foods.¹²⁵ The Board was established in 1979¹²⁶ and conducted hearings in 1980.¹²⁷ Any decisions by the Board would become final unless the petitioning parties (Olney, Turner, and LABEL) filed exceptions, in which case the FDA Commissioner would make his own determination.¹²⁸ The questions before the Board were:

1. [W]hether the ingestion of aspartame, either alone [sic] or together with glutamate, poses a risk of contributing to mental retardation, brain damage, or undesirable effects on neuroendocrine regulatory systems.
2. [W]hether the ingestion of aspartame may induce brain neoplasms in the rat.
3. Based on answers to the above questions,
 - (a) Should aspartame be allowed for use in foods, or, instead should approval of aspartame be withdrawn?
 - (b) If aspartame is allowed for use in foods, i.e., if its approval is not withdrawn, what conditions of use and labeling and label statements should be required, if any?¹²⁹

The Board, evaluating the research done by Searle, concluded that aspartame did not increase the risks of brain damage or endocrine dysfunction.¹³⁰ However, the Board was concerned that aspartame might

¹²¹ *Id.* at n.72.

¹²² *Id.*

¹²⁴ Smyth, *supra* note 114, at 627.

¹²⁵ *Id.* at 634.

¹²⁶ *Id.* at 634.

¹²⁷ *Id.* at 635.

¹²⁸ *Id.*

¹²⁹ Aspartame: Commissioner’s Final Decision, 46 Fed. Reg. 38,285, 38,286 (July 24, 1981).

¹³⁰ Smyth, *supra* note 114, at 635.

cause cancer.¹³¹ The FDA Commissioner and the Board differed greatly on that issue.¹³² The Board was only able to consider three studies, all of which were done by Searle.¹³³ The studies, performed on lab rats, were troubling to the Board because they felt the studies indicated an unusually high incidence of brain tumors and a possible dose-effect relationship between the tumors and the aspartame.¹³⁴ The Board accordingly decided aspartame should not be marketed until further safety testing could be done.¹³⁵ All petitioning parties filed exceptions.¹³⁶

Meanwhile, Searle had already invested millions of unrecoverable dollars into production and distribution facilities for aspartame.¹³⁷ Rumors that Canada might approve aspartame and take a large share of the fledgling market in the process added to Searle's worries.¹³⁸ The culmination of these pressures was the threat of a lawsuit against the FDA, in order to force a final decision in Searle's favor.¹³⁹ The commissioner overruled the board,¹⁴⁰ overruled the objections of the parties, and approved the marketing of "dry" use aspartame on July 18, 1981.¹⁴¹

The following year, Searle requested approval for the "wet" use (flavoring liquids) of aspartame in carbonated beverages.¹⁴² The FDA very quickly approved the new use.¹⁴³ When numerous parties voiced objections to this speedy approval, the FDA denied their requests for a hearing.¹⁴⁴ Searle was acquired by the Monsanto Company in 1985¹⁴⁵

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 635-36.

¹³⁴ *Id.* at 636.

¹³⁵ *Id.* at 635.

¹³⁶ *Id.*

¹³⁷ *Id.* at 634 n.72.

¹³⁸ *Id.*

¹³⁹ *Id.* at 635 n.85.

¹⁴⁰ Sidney A. Shapiro, *Scientific Issues and the Function of Hearing Procedures: Evaluating the FDA's Public Board of Inquiry*, 1986 DUKE L.J. 288, 311-12 (1986). The commissioner believed the Board had misinterpreted the results of some tests conducted by Searle. *Id.* at 312. Recall that the Board felt that one of the three studies, in which some test animals developed brain tumors, implied a causal relationship between the tumors and aspartame. Because the commissioner had now announced that he believed these results were misinterpreted, the objections were dismissed and a causal relationship was deemed to not exist. *Id.*

¹⁴¹ Smyth, *supra* note 114, at 635.

¹⁴² G.D. Searle & Co.: Filing of Food Additive Petition, 47 Fed. Reg. 46,140 (Oct. 15, 1982).

¹⁴³ 21 C.F.R. § 172.804(c)(6) (1984).

¹⁴⁴ See Food Additives Permitted for Direct Addition to Food for Human Consumption; Aspartame, 49 Fed. Reg. 6672 (1984).

and was later acquired by J.W. Childs Equity Partners II L.P. in May 2000.¹⁴⁶

B. The Rumors about Aspartame: Sweet Nothings or Bitter Reality?

As is stated on the NutraSweet website, aspartame is composed of two ingredients: phenylalanine and aspartic acid.¹⁴⁷ Aspartame is used in a variety of different foods and drinks.¹⁴⁸ The NutraSweet Company has loudly proclaimed that aspartame is not harmful to the human body in any way. In fact, on its website the NutraSweet Company states:

Aspartame's safety has been documented in more than 200 objective scientific studies. The safety of aspartame has been confirmed by the regulatory authorities of more than 100 countries, including the U.S. Food and Drug Administration (FDA) and Health Canada, as well as expert committees such as the European Commission's Scientific Committee on Food and the United Nations' Food and Agricultural Organization and World Health Organization Joint Expert Committee on Food Additives.¹⁴⁹

The site also provides hyperlinks to numerous organizations claiming to have studied aspartame and found it safe for human consumption; however, many of these studies are either no longer posted or out of date.¹⁵⁰ The FDA link provided on the NutraSweet Company's website contains a statement released in 1996.¹⁵¹ That statement largely relies upon the 1981 FDA approval of aspartame to legitimize the continued approval of the substance, though it states the agency would be "ready to act if credible scientific evidence" were presented.¹⁵² The FDA recently released another statement about aspartame, but it also

¹⁴⁵ Special to the New York Times, *Consumer Division of Searle for Sale*, N.Y. TIMES, Sept. 18, 1985, at D5.

¹⁴⁶ Jessica Madore Fitch, *NutraSweet Takeover Complete*, CHI. SUN-TIMES, May 31, 2000, at Financial, p.71.

¹⁴⁷ The NutraSweet Company, Statements, What is aspartame made of?, <http://www.nutrasweet.com/articles/article.asp?Id=36> (last visited Oct. 22, 2005) (describing the makeup of aspartame)

¹⁴⁸ The NutraSweet Company, What is aspartame? *supra* note 111.

¹⁴⁹ The NutraSweet Company, Statements, Is Aspartame Safe?, <http://www.nutrasweet.com/articles/article.asp?Id=45> (last visited Oct 22, 2005) (describing the various sources which assert that aspartame is safe).

¹⁵⁰ The NutraSweet Company, <http://www.NutraSweet.com> (last visited Oct. 22, 2005) (providing numerous studies under the "links" section which supposedly support the company's claims of safety).

¹⁵¹ FOOD AND DRUG ADMIN., U.S. DEPT. OF HEALTH AND HUMAN SERV., FDA TALK PAPER: FDA STATEMENT ON ASPARTAME (1996), <http://www.fda.gov/bbs/topics/answers/ans00772.html> (containing a study which reaffirms the FDA approval of aspartame). *See also* John Schwartz, Report Linking Sweetener to Brain Cancer is Disputed, FDA Finds No Reason to Question Aspartame's Safety, WASH. POST, Nov. 19, 1996, at A2.

¹⁵² FOOD AND DRUG ADMIN., *supra* note 151.

relied upon the 1981 FDA approval to establish that aspartame is still safe for consumption.¹⁵³

If any damage is being caused by aspartame, it obviously starts after the substance enters the body. The NutraSweet Company explains:

Upon digestion, aspartame breaks down into its components—the amino acids, aspartic acid and phenylalanine, and methanol—which are then absorbed into the blood. These components are used in the body in exactly the same ways as when they are also obtained from common foods and beverages. Neither aspartame nor its components accumulate in the body over time.¹⁵⁴

The FDA reports that the acceptable daily limit of aspartame is fifty milligrams per kilogram of body weight, which basically means that “a 150 pound person would have to consume sixteen 12-ounce cans of a beverage containing aspartame to reach this level of intake.”¹⁵⁵ Even then, the FDA reports that nothing adverse would happen provided that level of consumption was only occasional.¹⁵⁶

An internet search will reveal numerous websites purporting to explain the dangers of aspartame consumption. Most of these sites lack any indicia of credibility due to their outlandish claims. One website, for example, blames the FDA’s supposed unwillingness to re-examine aspartame on Donald Rumsfeld¹⁵⁷ and claims that O.J. Simpson was suffering from aspartame-induced dementia when he allegedly murdered his wife.¹⁵⁸

Other organizations, however, are much more credible. The American Academy of Pediatrics expresses concern that certain women who have undiagnosed Phenylketonuria (“PKU”) may be at risk for birth defects caused by aspartame.¹⁵⁹ PKU is a genetic disorder which

¹⁵³ Is Aspartame Safe?, <http://www.cfsan.fda.gov/~dms/qa-adf9.html> (last visited Oct 22, 2005).

¹⁵⁴ The NutraSweet Company – Statements, How is aspartame handled by the body?, <http://www.nutrasweet.com/articles/article.asp?Id=37> (last visited Oct. 22, 2005) (describing the manner in which aspartame is processed by the human body).

¹⁵⁵ David G. Hattan, Letters to the Editor: Aspartame Limits, FDA Consumer, May-June 2002, http://www.fda.gov/fdac/departs/2002/302_ltrs.html (FDA response updated 2004) (describing the FDA assessment of aspartame safety).

¹⁵⁶ *Id.*

¹⁵⁷ Aspartamekills.com, <http://www.aspartamekills.com> (last visited Oct. 22, 2005) (explaining how Donald Rumsfeld supposedly used his political muscle to get aspartame approved and is responsible for the neurological disorders people have reportedly suffered ever since). Donald Rumsfeld was the CEO, President, and Chairman of the Searle company from 1977 to 1985. The White House, Secretary of Defense Donald Rumsfeld, <http://www.whitehouse.gov/government/rumsfeld-bio.html> (last visited Oct. 22, 2005).

¹⁵⁸ Aspartamekills.com, *supra* note 157.

¹⁵⁹ Committee on Genetics, *Newborn Screening Fact Sheets*, 98 PEDIATRICS 473, 490 (Sept. 1996), available at <http://www.medicalhomeinfo.org/screening/Screen%20Materials/newbornfactsheets.pdf>.

prevents a person's body from properly converting phenylalanine, causing the substance to build-up in the bloodstream and brain tissue. That build-up can cause mental retardation and different nervous system problems.¹⁶⁰ If this condition is treated soon after a child's birth, most of the potential problems from this disorder can be avoided.¹⁶¹ However, this is not much of a concern since the FDA, recognizing the danger faced by individuals with PKU, required warning labels (directed at people with this condition) to be placed on aspartame-infused products.¹⁶²

Other sources worry about the effects of aspartame in all individuals.¹⁶³ They claim aspartame is not safely processed by the body after digestion. After digestion, the substance is broken down into its two components: phenylalanine and aspartic acid.¹⁶⁴ The amino acids, which are found along with phenylalanine in normal foods, are not found in aspartame, which means, similar to individuals with PKU, phenylalanine does not break down in the safe manner it normally would.¹⁶⁵ Rather, it is claimed, the phenylalanine accumulates in the bloodstream and the brain tissue, leading to a host of health problems, both physical and cognitive. For these reasons, many commentators strongly urge pregnant women to stay away from aspartame.¹⁶⁶

Keeping in mind the acceptable daily consumption of aspartame established by the FDA,¹⁶⁷ a person would have to weigh about nine pounds in order to consume more than a safe dose of aspartame from a single 12 ounce can of Diet Coke®, for example. The most likely candidate would therefore be a child still in its mother's womb. Given that a child in its mother's womb shares everything its mother eats and drinks, the maximum daily dosage of aspartame could easily be exceeded by having two cans of aspartame-sweetened beverages. This amount is

¹⁶⁰ MyWebMD, What is Phenylketonuria (PKU)?, http://my.webmd.com/hw/raising_a_family/hw44747.asp (last visited Oct. 22, 2005) (describing PKU, its effect on the brain, and how to lessen its impact).

¹⁶¹ *Id.* This condition is estimated to occur in one out of every 14,000 to 20,000 live births per year in the United States. *Id.*

¹⁶² 21 C.F.R. § 172.804(e)(2) (1975). This provision is currently found in § 172.804(d)(2).

¹⁶³ Focus-on-Nutrition, Aspartame—is it safe?, <http://www.focus-on-nutrition.com/aspartame.shtml> (last visited Oct. 22, 2005) (containing a report by Dr. Christine Lydon, MD concerning the effects she believes aspartame to have on the human body); Mercola, Aspartame: Aspartame Disease: An FDA-Approved Epidemic, http://www.mercola.com/2004/jan/7/aspartame_disease.htm (last visited Oct. 22, 2005) (containing numerous studies which claim aspartame causes numerous physical and neurological problems).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *See supra* note 163.

¹⁶⁷ *See supra* note 151 and accompanying text.

increased even more if the mother consumes other food or beverage items containing aspartame. As mentioned above, there is concern that the aspartame could accumulate in the fetal tissue and lead to all manner of health problems for the child. Dr. H.J. Roberts, a notable researcher, compiled over 1,000 pages of research that purportedly points to conclusions such as these.¹⁶⁸

A group of scientists in Scotland urged the Food Standards Agency to conduct new investigations into aspartame, in light of numerous reports that the sweetener was causing a host of neurological problems.¹⁶⁹ In Europe, the growing suspicion over aspartame has prompted numerous questions about the sweetener¹⁷⁰ and even prompted Kings College of London to begin a formal research study, which will be completed by approximately 2007.¹⁷¹

Most of the published scientific studies on aspartame have not indicated a negative effect on health. However, many of these studies are many years old.¹⁷² Is it unreasonable to believe that scientific knowledge could have progressed over the twenty years since aspartame's approval? Whatever the case, it is likely that research by a credible, independent organization will have to be produced before there is any hope of plaintiff victory against the aspartame industry.

C. Aspartame Litigation: Could Some Liability Theories Succeed Where Tobacco and Fast Food Liability Failed?

The claims brought against the aspartame industry would likely be very similar to those brought against the tobacco and fast food industries. However, cases filed against the aspartame industry have not advanced far enough to parallel the tobacco and fast food litigation. The earliest aspartame case involved an attempt to compel the FDA to reconsider its approval of aspartame in 1985, which ended in failure because it failed to raise any new objection to the FDA approval.¹⁷³ Two more recent cases were brought by individuals who claimed to suffer from aspartame-related injuries.

¹⁶⁸ See generally DR. H.J. ROBERTS, ASPARTAME DISEASE: AN IGNORED EPIDEMIC (2001).

¹⁶⁹ Kirsty Mcluckie, *Leaving A Bad Taste*, THE SCOTSMAN, Aug. 31, 2000, at 11.

¹⁷⁰ Jonathan Leake, *Top Sweetener Condemned By Secret Report*, TIMES NEWS-PAPERS LTD., Feb. 27, 2000, at 1.

¹⁷¹ Miriam Stoppard, *Are Low-Calorie Drinks a Danger?*, THE MIRROR, Sept. 20, 2004, http://www.mirror.co.uk/sexandhealth/miriam/tm_objectid=14661867%26method=full%26siteid=94762-name_page.html (last visited Oct. 22, 2005).

¹⁷² See *supra* note 151 and accompanying text.

¹⁷³ *Cnty. Nutrition Inst. v. Novitch*, 773 F.2d 1356 (D.C. Cir. 1985).

In the first case, *Ballinger v. Atkins*,¹⁷⁴ the plaintiff claimed to suffer from “neurological and physical ailments, including tachycardia, dizziness, anxiety, panic attacks, blurred vision, inability to concentrate, loss of memory, and shooting pains in his left arm.”¹⁷⁵ He claimed these symptoms began after he started consuming aspartame in puddings, desserts, and liquids as part of the Atkins diet.¹⁷⁶ Because one expert witness did not have the appropriate research background, and the other had not done adequate testing to establish the presence of neurological disorders in the plaintiff, the NutraSweet Company’s motions to exclude testimony were granted.¹⁷⁷ The litigation proceeded no further after these expert witnesses were excluded.

The plaintiff in the second case, *Ross v. Altria Group Inc.*,¹⁷⁸ alleged that Altria used aspartame to manufacture Crystal Light without warning consumers of the possible health risks associated with aspartame.¹⁷⁹ The plaintiff also alleged fraud and breach of warranty.¹⁸⁰ Although the analysis of these claims would have been very interesting, the case was dismissed due to a lack of personal jurisdiction over the defendant.¹⁸¹

Despite their dismissal due to various technicalities, those two cases would effectively be the first cases to be categorized as “aspartame litigation” (“aspartame litigation”). Given the persistence of the belief in aspartame as a health hazard, there is a good chance more cases will be filed in the future; however, plausible scientific proof will be necessary to give such cases wings. Beyond that, their success will be contingent upon the legal arguments and social stratagems employed by either side. This Comment will now examine some of those legal theories and predict the success of each under the assumption that some credible scientific evidence of aspartame’s harmful effects could be presented in each case. Social and strategic considerations that could or should occur while pursuing aspartame litigation will then be considered.

¹⁷⁴ *Ballinger v. Atkins*, 947 F. Supp. 925 (E.D. Va. 1996).

¹⁷⁵ *Id.* at 926.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 927-29.

¹⁷⁸ *Ross v. Altria Group Inc.*, No. C 04-01453 SI, 2004 U.S. Dist. LEXIS 18558 (N.D. Cal. Sept. 3, 2004).

¹⁷⁹ *Id.* at *2.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at *17.

1. Legal Claims for Aspartame Recoveries

a. Implied Warranty of Merchantability

Presently, a claim for breach of the implied warranty of merchantability would likely be brought under section 2-314 of the *Uniform Commercial Code* (“UCC”), which states:

- (1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
- (2) Goods to be merchantable must be at least such as
 - (a) pass without objection in the trade under the contract description; and
 - (b) in the case of fungible goods, are of fair average quality within the description; and
 - (c) are fit for the ordinary purposes for which such goods are used; and
 - (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
 - (e) are adequately contained, packaged, and labeled as the agreement may require; and
 - (f) conform to the promise or affirmations of fact made on the container or label if any.
- (3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.¹⁸³

Obviously, there has been no attempt by the aspartame companies to exclude implied warranties of merchantability,¹⁸⁴ nor is there any concern over whether an aspartame manufacturer would be considered “a merchant with respect to goods of that kind.”¹⁸⁵ Thus, a plaintiff would need only to establish that the aspartame was not merchantable.¹⁸⁶ Although the UCC does not provide an absolute definition of “merchantable,” it could be fairly assumed that such a definition would encompass not causing health problems for a consumer.

Assuming hypothetically that a claim based on the above legal theory were brought today, this claim would give plaintiffs two major advantages which plaintiffs in the “first wave” of tobacco litigation did not have. First, courts today would most likely not hesitate to impose

¹⁸³ U.C.C. § 2-314 (1977).

¹⁸⁴ *Id.* § 2-314(1).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* § 2-314(2).

liability upon an entire industry.¹⁸⁷ Second, unlike the “first wave” of tobacco litigation, today’s courts would be unlikely to excuse the aspartame industry from their breach even if the industry claimed they had no scientific knowledge that their product caused health problems.¹⁸⁸

However, in the hypothetical case above, there are two main defenses to the breach of implied warranty of merchantability: assumption of the risk and the four year statute of limitations.¹⁸⁹ Assumption of risk could be overcome because common knowledge of aspartame’s harmful effects¹⁹⁰ does not presently exist. The statute of limitations defense is more likely to be used, as the aspartame industry could argue that the statute of limitations had expired prior to the commencement of the suit. On the other hand, the plaintiffs could argue that a specific intake of aspartame within the past four years was the lynchpin dose that caused the onslaught of poor health.¹⁹¹ This is an issue which would have to be determined early on by the courts, but it seems likely that this cause of action would be successful in aspartame litigation.

Recall that the defense used most successfully by the tobacco industry during the “first wave” of tobacco litigation was a complete ignorance of adverse health effects caused by smoking.¹⁹² While foreseeability plays no role in modern implied warranty jurisprudence, the aspartame industry litigators would not hesitate to emphasize their supposed ignorance of aspartame’s injurious nature to juries in an effort to save themselves from liability. Plaintiff litigators will have to be sure to reinforce the fact that foreseeability should not be considered in evaluating breach of implied warranty of merchantability.

b. Express Warranty of Merchantability

An express warranty is much more particular than an implied warranty. According to UCC section 2-313:

- (1) Express warranties by the seller are created as follows:

¹⁸⁷ See *supra* note 30 and accompanying text.

¹⁸⁸ *Green v. Am. Tobacco Co.*, 304 F.2d 70, 72 (5th Cir. 1962).

¹⁸⁹ U.C.C. § 2-725 (1977).

¹⁹⁰ Again, for the purposes of this section we are assuming that positive, credible research indicating the harmful effects of aspartame has been produced.

¹⁹¹ See *Ward v. Desachem Co.*, 771 F.2d 663 (2d Cir. 1985) (holding same); *Howard v. Huxley Dev. Corp.*, No. 80-3298, 1981 U.S. App. LEXIS 14453 (6th Cir. Apr. 9, 1981) (holding the statute of limitations, in cases of harmful exposure to asbestos, began running on the date of last exposure to the substance). *But see Bendix v. Stagg*, 486 A.2d 1150 (Del. 1984) (holding the statute of limitations began running when the harmful effects of the gradual exposure first manifested).

¹⁹² See discussion *supra* Part II.A.

- (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
 - (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
 - (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
- (2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warranty” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.¹⁹³

Although the aspartame industry does not regularly advertise its product by way of radio, television, and billboard advertisements with the same regularity which the fast food industry (and to a lesser extent, the tobacco industry) does, it could still be claimed that the aspartame industry has made express warranty promises to its customers. On its official website,¹⁹⁴ the NutraSweet Company provides web-links to numerous studies which proclaim that NutraSweet has no negative side effects (with the exception of people with PKU).¹⁹⁵ In addition, the website makes numerous positive affirmations about aspartame, including: “Aspartame’s safety has been documented in more than 200 objective scientific studies;” “[u]pon approval of aspartame, the FDA concluded that it was safe for the general public including children, pregnant and nursing women, and diabetics;” and “[h]ealth organizations, such as The American Medical Association’s Council on Scientific Affairs, the American Diabetes Association and the American Dietetic Association have reviewed research on aspartame and found the sweetener to be safe.”¹⁹⁶

Just as in *Pritchard*, these statements could be viewed as “an affirmation of fact or promise made” to the customers by the seller that aspartame is completely safe for use.¹⁹⁷ In effect, it could be argued that

¹⁹³ U.C.C. § 2-313 (1977).

¹⁹⁴ <http://www.NutraSweet.com>.

¹⁹⁵ See *supra* notes 158-165 and accompanying text.

¹⁹⁶ See *supra* note 149.

¹⁹⁷ See *Pritchard v. Liggett & Myers Tobacco Co.*, 370 F.2d 95 (3d Cir. 1966), *cert. denied*, *Liggett & Myers Tobacco Co v. Pritchard*, 386 U.S. 1009 (1967).

this particular company is promising the customers viewing the website that the sweetener will not cause any adverse health problems. Plaintiffs could argue that such promises served as an inducement to purchase products sweetened by aspartame, effectively becoming a basis of the bargain.¹⁹⁸ Once the plaintiffs established aspartame was the underlying cause of their health problems, their case would be won.

On the other hand, the aspartame industry could argue that the website was meant to be informational rather than an advertisement. They could buttress this claim by the fact that there is no massive marketing campaign underway to promote their product amongst the general public. Yet such a claim would likely be defeated by pointing to such statements as: “[A]spartame offers one more simple step to help people move closer to achieving a more healthful diet.”¹⁹⁹ Such statements could arguably be said to target consumers rather than just provide disinterested scientific analysis. Such a defense could definitely be defeated if discovery proceedings revealed internal memorandums desiring such a website to serve as a promotional tool to stimulate demand.

Another possible defense by the aspartame industry could be to claim the statements made on their website are merely their opinion (or, in the case of the web-links to the different studies, the opinions of other organizations) of the goods and do not create a warranty.²⁰⁰ Of course, for this defense to work, it would have to be shown that the statements were meant to be the opinion of the company rather than an affirmation of fact. The difficulty the defense would have in establishing that the listing of studies reporting the safety of aspartame (as well as the statements maintaining that the use of aspartame was more wholesome than other sweeteners) was not meant as an affirmation of fact (*i.e.*, that aspartame is safe for consumption) is obvious.

c. Unreasonably Dangerous Product

Plaintiffs suffering from aspartame-related illnesses would likely have no trouble claiming aspartame is unreasonably dangerous. Assuming credible research were to establish a causal connection between aspartame and certain health problems, plaintiffs would be

¹⁹⁸ See *Pake v. Byrd*, 286 S.E.2d 588 (N.C. Ct. App. 1982) (holding that the buyer's decision to purchase was based on assurances the seller made prior to sale).

¹⁹⁹ The NutraSweet Company, Healthcare and Nutrition Professionals, <http://www.NutraSweet.com/professionals/index.asp> (last visited Oct. 22, 2005).

²⁰⁰ See *Boud v. SDNCO, Inc.*, 54 P.3d 1131 (Utah 2002) (holding that stating a yacht is the best in its class, and similar statements of opinion, does not create an express warranty).

developing health problems simply by eating and drinking everyday foods.

Under Restatement § 402A,²⁰¹ the aspartame industry would be liable to the consumers. The chance that the aspartame could ultimately be digested by these consumers is absolutely foreseeable to the manufacturers, as that is the reason this artificial sweetener is being produced.

The aspartame industry could argue that the aspartame is being changed from its original form when it is placed into food and beverage products. This could potentially free them from liability under section 402A, since the aspartame would arguably be reaching the consumers with a substantial change from that in which it was sold. On the other hand, the plaintiffs could just as easily argue that the aspartame was not substantially changed when it was placed into the food and beverage products; this leaves a question of fact for the jury to decide with the aid of expert testimony. Assuming the argument over whether aspartame was changed from its original substance was decided in the plaintiff's favor, the claim for an unreasonably dangerous product would likely be decided in the plaintiff's favor as well.

d. Failure to Warn

As was stated in *Pelman*,²⁰² manufacturers have a duty to warn their customers of potential harm that could result from reasonably foreseeable misuse of their product.²⁰³ This failure to warn must also be the proximate cause of the injury to the plaintiffs.²⁰⁴

Plaintiffs could argue that the aspartame industry could reasonably have foreseen the harm which could be caused by their product due to the consumption guidelines of the FDA (as those warnings would apply to unborn babies).²⁰⁵ On the other hand, the reasonable foreseeability requirement could work in the aspartame industry's favor. The aspartame industry could rely on the fact that all the studies it relied upon had shown aspartame to be safe, even at huge levels of consumption. Reliance upon the FDA's longstanding approval of aspartame could also serve to establish that the aspartame industry had no way of foreseeing any harm caused by the consumption of their product. This would render moot the question of whether the failure to warn was a proximate cause of the plaintiff's injury and would settle this claim in the aspartame industry's favor.

²⁰¹ See *supra* note 18.

²⁰² *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 540 (S.D.N.Y. 2003).

²⁰³ See *supra* note 98 and accompanying text.

²⁰⁴ See *supra* notes 99-100 and accompanying text.

²⁰⁵ See *supra* note 163 and accompanying text.

e. Strict Liability

One final claim that could be made is strict liability based upon a risk-utility analysis, though this would likely be a claim of last resort given that it met with no success in the tobacco litigation.²⁰⁶ The basic theory behind a risk-utility analysis is that the manufacturer should bear the burden of liability if the benefits gained from the use of its product are outweighed by the burden of the health problems its product causes.²⁰⁷

The plaintiffs could argue that the benefits gained from aspartame (such as allowing thousands of diabetic individuals to enjoy food items which they could not if regular sugar was used to sweeten them) are outweighed by the physical and cognitive problems experienced by people of every walk of life who ingest aspartame. On the other hand, the aspartame industry could assert that the benefits received by diabetics and by those individuals who do not consume a harmful level of aspartame²⁰⁸ far outweigh those individuals who were harmed by the artificial sweetener. This argument could go either way depending on which judge or jury hears the arguments.

Of course, given that this is a highly theoretical argument that has no basis in law and met with no real success during the “second wave” of tobacco litigation, there is no reason to believe this claim would bring victory to the plaintiffs.

2. Social and Strategic Considerations for Aspartame Recovery

While clever and carefully coordinated legal arguments will be essential to the success of future aspartame litigation, the efforts made outside the courtroom to shape public opinion and out-manuever the opposing side could potentially be even more critical.

a. Efforts of the First Lawsuits

Undoubtedly, the success of one, or a few, lawsuits against the aspartame industry would be the spark that would set the forest on fire. Once the initial efforts of massive aspartame litigation yield plaintiff victories, a flood of litigants suffering from aspartame-related illnesses

²⁰⁶ Recall that this theory was argued unsuccessfully during the “second wave” of tobacco litigation. *See supra* note 40 and accompanying text.

²⁰⁷ Rabin, *supra* note 1, at 866-67. *See also* O’Brien v. Muskin Corp., 463 A.2d 298 (N.J. 1983) (holding that evidence regarding alternative designs was relevant as to whether the risk posed by a product outweighed its utility).

²⁰⁸ Again, this question would depend in large part upon the findings of the credible scientific data which irrefutably establish a certain level of aspartame intake in order to cause health problems. This level would likely be lower than what is currently believed by the FDA.

(real or imagined) will come out of the woodwork seeking similar damages. But first, those initial victories must be won.

As Professor Banzhaf asserted,²⁰⁹ the first several lawsuits will undoubtedly fail, either because the public does not believe aspartame is truly to blame for the plaintiffs' maladies or just isn't ready to accept the idea that a sweetener used in so many products is harmful. Of course, one advantage would be that jurors would likely not associate weakness of character with aspartame use, as was characteristic of juries during the "second wave" of tobacco litigation. Still, these initial lawsuits would have to be pursued with vigor in order to infuse into the public psyche the awareness of aspartame-induced illnesses.

Unlike the public education Professor Banzhaf advocated, the initial lawsuits against the aspartame industry would likely serve as a teaser. They would encourage the public to take a closer look at aspartame and question its effect on human health. Such inquiries could convince many people (and many jurors) that aspartame is harmful. Alternatively, such attention could encourage more independent and updated research to be performed on aspartame, which could lead to more evidence that aspartame is harmful. Either way, more lawsuits should and must be brought if aspartame litigation is ever to make it off the ground.

b. Pre-trial Maneuvers

Aspartame is estimated to be at least a several hundreds of million dollar a year industry.²¹⁰ Whether the threat to this industry is from a few massive class-action lawsuits or a flood of individual suits, the potential loss is enormous. That being the case, it is very likely that the aspartame industry will use its considerable financial resources to stretch out pre-trial discovery, take lengthy depositions, file every possible motion, and challenge every motion made by the plaintiffs; a similar scheme did avert almost all the lawsuits during the "first wave" of tobacco litigation.²¹¹ One might even say that future plaintiffs received a foretaste of this maneuver in *Ballinger*.²¹²

The most logical approach, therefore, is to make initial thrusts at the aspartame industry by use of massive class-action lawsuits, such that the collective financial might of the plaintiffs would at least allow the suit to make it to trial. Many lawyers may be hesitant to undertake an effort of this magnitude unless there is a reasonable chance of victory. Moreover, the aspartame industry is likely to contest the results of any

²⁰⁹ See *supra* note 108 and accompanying text.

²¹⁰ See *supra* note 145.

²¹¹ See discussion *supra* Part II.A.

²¹² *Ballinger v. Atkins*, 947 F. Supp. 925 (E.D. Va. 1996).

research used by the plaintiffs, much like the tobacco industry did with the early independent research findings in the 1950's.²¹³ These considerations underscore the importance of having credible scientific evidence to the success of aspartame litigation.

c. Other Miscellaneous Considerations

Other than the use of the class-action lawsuit, much of the success in tobacco litigation came about as a result of confidential disclosures and Medicaid "blameless" victim lawsuits.²¹⁴ Although it seems unlikely that plaintiffs would have to travel the road of Medicaid reimbursement, the possibility of confidential disclosures should be considered by plaintiffs. With the release of scientific evidence clearly demonstrating a causal connection between aspartame and certain health problems, some of the potential reverberations could be congressional review of the FDA approval decision²¹⁵ and the tests performed by Searle.²¹⁶

Given that most of the research relied upon by the FDA in the initial approval of aspartame was performed by a company that had already sunk millions of dollars into production of this sweetener,²¹⁷ it is possible the industry already had knowledge of its adverse effects (if any) on health. If it can be proven that the industry knew of the harmful effects of aspartame for years, yet kept it from the public, it has great potential to sway jury opinion in favor of the plaintiffs. The aspartame industry, just as the tobacco industry before it, could be portrayed as a cold-hearted industry which could not care less about its customers health.

V. CONCLUSION

The trend in products liability law is clearly leaning toward imposing liability on entire industries for their products' cause of health problems in their customers. In some cases, such as fast food, it is debatable whether placing liability on the industry is appropriate given the common knowledge of the products' potential to cause health problems.

Whether aspartame triggers bad health is largely unknown. Though there are many older studies claiming there is no risk associated with aspartame consumption, the unproven belief that aspartame is noxious to a person's health refuses to go away. However, at this point in time, the odds are in favor of the aspartame industry. With the FDA's

²¹³ Player, *supra* note 1, at 323.

²¹⁴ See discussion *supra* Part II.C.

²¹⁵ See *supra* note 144.

²¹⁶ See *supra* notes 133-35 and accompanying text.

²¹⁷ See *supra* note 137 and accompanying text.

approval, the aspartame industry is in a position to deflect any claims brought against it.

Aspartame litigation can only progress once reliable scientific research, conducted and approved by a credible organization, establishes a clear and highly plausible causal connection between aspartame consumption and health problems. If or when such scientific findings are presented, an organized class-action lawsuit could be brought against the aspartame industry. Class-action lawsuits would be the wisest course of action since the industry would likely use their full financial resources to resist any legal action.

Once the lawsuits have made it to the courtroom, the likelihood for victory would be best with a claim for breach of implied warranty, though there are several other legal theories that could be used. Aspartame litigation is certainly a plausible new genre of products liability law, and it would certainly be in good company alongside tobacco and up-and-coming fast food litigation. However, this is a crusade that is unlikely to enter the courtroom until scientific inquiries firmly link this artificial sweetener to bad health.

*David Ellender**

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