

APF Disorder in the Court

Pushing Regulation Through Litigation to the Edge:

The Gaming Industry, Fast Food and Alcoholic Beverages

by Victor E. Schwartz

“Regulation through litigation” is a term of art coined by former Secretary of Labor Robert Reich.¹ “Regulation through litigation” occurs when judges twist the fundamental purpose of the tort system – compensating people who have been wrongfully injured by a defendant – into the threat of massive liability exposure intended to force changes in the behavior of a particular industry. Liability law is turned upside-down from its true purpose – compensation – into a purpose that is assigned to the legislative branch under the Constitution of the United States and state constitutions. Judges, in effect, are using the tort system to legislate their own agenda.

The modern era of “regulation through litigation” began with tobacco. An unusual alliance of state attorneys general and wealthy personal injury lawyers facilitated this initiative. The core of the cases was an attempt by states to recover state Medicaid costs

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allegedly caused by smoking. Fundamental legal principles that stood for more than 140 years dictated that the right of states to recover for Medicaid costs allegedly caused by smoking could not be greater than the right of an individual smoker to sue for his or her own injury. Nevertheless, some courts believed that the legislative branch had failed to adequately regulate tobacco. These judges altered fundamental principles of tort law to give states greater rights to sue than individual smokers. States would not be subject to defenses based on smoker choice. States would not have to connect an individual’s smoking with an individual’s injury. General and often questionable data would supply that link. Further, states would not have to identify which particular manufacturer caused which particular injury. All of these fundamental tort rules were swept away. Some judges believed they were the only public officials who could make the tobacco industry change its marketing practices. These judges made changes in law with little public notice. The industry had become very unpopular with a significant portion of the public, and the public did not object.

When the state cases were ultimately settled, the settlement did not involve merely the transfer of a massive amount of money, \$206 billion. It also required changes in behavior about how companies advertise, market their products, place their products in stores, and many other regulatory controls that had been considered but rejected by Congress.

At the time the tobacco cases occurred, I suggested that the trend of “regulation through litigation” would not end with tobacco. At the time, personal injury lawyers, anti-tobacco ad-

vocates and state attorneys general indicated that their target was solely tobacco. The rhetoric was simple: "Tobacco is the only product that can kill people when it is used as intended."² I pointed out that this was not necessarily true. A triple hamburger's purpose is not to be thrown but to be eaten. If it is eaten, it can be potentially deadly for people who are subject to heart disease and cholesterol buildup. The anti-tobacco advocates put these suggestions aside; for example, anti-tobacco John Banzhaf told the *Washington Times* that tobacco was a unique case.³

If the state were given greater powers to sue than an individual, it could use these powers against other industries. For example, if a state decided that Medicaid suffered huge costs due to accidents caused by automobiles driven at high speeds (90, 100 or even 130 miles an hour), the state might be able to put that Medicaid cost on an automobile company. An individual who drove at high speeds obviously could not pass his costs to an automobile company, because he chose to do so.

"Regulation Through Litigation" Moves Forward

After the tobacco cases were resolved, a number of communities brought cases against manufacturers of guns. This, too, was classic "regulation through litigation." The principal purpose of the lawsuits was not to collect money from the gun industry, but to make the specter of liability so vast that the industry would agree to gunlocks, security protections and other limitations on the use of their products. These cases are still fermenting in the various states. Most have not been

successful, but some have shown the possibility of moving forward.

Health maintenance organizations (HMOs) also came into the sights of "regulation through litigation" judges and lawyers. Although only one attorney general participated, personal injury lawyers brought claims against HMOs seeking to change their behavior with the threat of massive liability. These cases are still pending.

At least one attorney general, Sheldon Whitehouse of Rhode Island, has attempted a "regulation through litigation" action against manufacturers of lead paint. Lead paint has not been manufactured for over 50 years and children are exposed to lead paint occurs because landlords have not acted to remove old, decaying paint on walls. Nevertheless, a lower court in Rhode Island has given Attorney General Whitehouse a taste of success. The judge held that at least one claim of a public nuisance may survive a motion to dismiss. The trial has a long way to go, but the judge's ruling gave hope to the Attorney General.

During the past year, the pharmaceutical industry has come into the gun sights of at least 19 attorneys general. The issues are complicated, but the aims of the attorneys general are not. Their claims seek to change the behavior of pharmaceutical companies and the way they market and price their products.

When the specter of "regulation through litigation" began, I suggested that at some time in the future, products like fatty foods or liquor could be adversely affected by "regulation through litigation." I did not believe such claims would occur in the near future because these are generally popular products. Essential ingredients for

success by “regulation through litigation” proponents is that the industry is vilified and becomes unpopular with the public.

The unpopularity of the industry gives a judge “political cover” to engage in “regulation through litigation.” If an individual judge overrules more than 240 years of precedent, nobody cares much if the industry is unpopular. But if the industry is very popular with the public, it is more difficult for a judge and subsequently a jury to change the way we entertain ourselves, what we eat, and what we do.

My speculation about the survivability of popular industries may prove wrong. During the past several months, early movements have been made against gambling and fast food. Theories for reaching “regulation through litigation” in the liquor industry are waiting in the silos of professors’ theories and some personal injury lawyers’ dreams.

Fast And Fatty Food

The storm clouds are gathering for potential suits against producers of fast and high fat foods. In the early 1990s, one heard over and over that smoking was responsible for 300,000 deaths a year. Whether it was true or not, that was the number. Now, former Surgeon General David Thatcher states that *obesity* translates into 300,000 premature deaths each year.⁴ The former Surgeon General adds that taxpayers pay \$117 billion in fat-related “health bills for eating-related diseases like adult-onset diabetes and cholesterol-clogged arteries.”⁵ The cost to society, particularly to Medicaid, was also the predicate for the lawsuits against big tobacco.

Somewhat like certain charities that have conquered one disease but do not want to go out of business as a result, both anti-tobacco advocate John Banzhaf and Richard Deynard’s tobacco products liability project at Northeastern University Law School appear to be focusing on fatty foods. It has been reported that John Banzhaf is leading a movement of “trial lawyers and public-health activists who are marshaling the strategies used against tobacco to go against fast food restaurants and food producers that sell ‘fatty’ food, candy, soft drinks and other consumables deemed politically incorrect.”⁶ At Northeastern University, Professor Deynard works with students “to develop possible strategies that could be used to bring obesity-related claims against foodmakers.”⁷

Early cases have focused on misrepresentation by fast food chains. For example, a Hindu group sued McDonald’s because McDonald’s stated its French fries were cooked in vegetable oil. McDonald’s did not tell the public that although its French fries were cooked in vegetable oil, they had been coated with a meat-based substance to add flavor. If one looks very carefully what McDonald’s said, it was true they were cooked in vegetable oil. For that reason, it would be very difficult to make an actual case of fraud. Nevertheless, McDonald’s is reported to have settled the case for over \$10 million.⁸

It is a leap from an allegedly misleading advertising claim to claims based on harms inherent in the food itself. That leap was made in tobacco. Will it be made with fast food?

There are at least two major obstacles to overcome before such cases can be

successful. First, it will be very difficult to show that any one purveyor of fast food would be responsible for an individual's ill health. To overcome this hurdle, "regulation through litigation" courts or legislatures will have to help plaintiffs pave the way and if that help is coming, it is most likely to be granted to states, not individuals, just like in tobacco litigation. Statutes enacted in Florida, Maryland and Vermont granted huge tort law leaps for states; the states could ignore a smoker's voluntary behavior and did not have to prove a direct connection between a defendant's acts and the state's alleged loss of revenue. More importantly, "regulation through litigation" courts provided the same leap. Will legislatures or courts do the same for fast food?

The second hurdle, in this author's view, is even greater. Fast food and fatty foods are popular with the public. It would be very difficult to persuade juries to impose liability now. But public opinion could change, as it did with tobacco. In the late 1980s, a survey showed that more people knew that tobacco was dangerous for your health than knew the name of Jesus Christ. In general, the public regarded smoking as a self-indulgent behavior and if a harm occurred, it was the responsibility of the individual who smoked. But constant negative focus by the media on the tobacco industry changed the view of many in the public. The focus shifted, from a person who continued to smoke despite knowledge of its risks, to perceptions of tobacco companies hiding information from the public.

If fast food chains or manufacturers of fatty food can be subject to the same vilification, it is possible that potential juror attitudes will change. If they do,

the fast food industry and those who produce fatty foods could be at significant risk.

Gambling

Gambling is also a matter of choice. How can "regulation through litigation" attack that industry? The path is being blazed by former anti-tobacco Massachusetts Attorney General Scott Harshbarger, now president of the Common Cause citizens lobbying group in Washington. He has said the gaming industry "is going to lead to a major health crisis."⁹ In essence, Mr. Harshbarger is claiming that some who lose at the tables are "victims" and can't help themselves. They are induced into gaming by advertising and the glitter of Las Vegas, Atlantic City and other cities with bright and attractive casinos. There also have been rumors, perhaps well-founded, that Harshbarger's group has worked with the Association of Trial Lawyers of America (ATLA) on a media campaign to persuade the public that some gamblers are truly "victims" and the casinos are the enemies.¹⁰ While ATLA spokespersons have denied this claim, Harshbarger's words and those allied with him have planted the seed.

Most recently, a Ohio state-sponsored study conducted by a group called the Gambling Institute Committee strongly suggested that the gaming industry should bear the cost of payments for the "treatment of gambling addiction." This group is not merely some trial lawyer "front" but a legitimate public body.

Will state "regulation through litigation" cases be brought against the gaming industry and will they succeed? It will depend, in part, on the involvement of states. Since states themselves have

sponsored lotteries and have derived tax revenue from legal gaming, they may be perceived as acting hypocritically in pursuing “regulation through litigation” tort claims against the gaming industry. Nevertheless, states have become quite robust due to state cigarette taxes. That did not block states in pursuing the tobacco industry in tort claims.

Like fast food, gambling is popular in many quarters and it will be very difficult to vilify the industry. In ten years, the gambling or gaming situation may make it possible for appropriate “victims” to be characterized as blameless and rounded up by aggressive personal injury lawyers who find willing jurists to bend rules of law. If that occurs, they may be successful. Advocates of “regulation through litigation” directed at the gaming industry are likely to look for reductions in advertising and inducements by the industry, such as free “comps” and coupons, and increase their “concern” and outreach to those who might be compulsive gamblers.

Alcoholic Beverage Industry

When individuals with alcohol-related illnesses have brought cases against the alcohol industry, they have generally failed in their claims. Cases with the greatest promise have been brought by persons whose illnesses are not those normally associated with alcoholism. In general, however, judges and juries believe that people are aware of alcohol risks and the health dangers that may occur as a result of excessive drinking. For that reason, the overwhelming numbers of cases brought against the industry have failed.

It seems unlikely that individual “drinker” cases will succeed against the industry except in a scenario where an

illness that is not normally thought of as an alcohol-related disease can be proven to be associated with normal alcohol use. If claims are to be successfully brought against the alcohol industry, they will be more likely to come from those whose injuries were caused by people who drink too much. Already, the legal literature proclaims that more than 20,000 auto fatalities per year are associated with drinking.¹¹ The public has sympathy for those killed or injured by drunk drivers. Organizations such as Mothers Against Drunk Driving are already in place to protect the interests of those who have been or could be killed by drunk drivers.

Those who are trying to develop theories against the alcohol industry have followed the “bystander” injury theme. Recoveries should be made not by those who drink too much but by those who cause harm while driving intoxicated. These advocates look to cases that have been brought for harm caused by second-hand smoke. These advocates argue the cases brought by persons who have been hurt or injured by drunk drivers are stronger than cases brought by persons exposed to second-hand smoke. Advocates point that causation issues are absolutely clear with alcohol where they are foggy, at best, with second-hand smoke. Second, they argue that the type of risks associated with bystander injury from alcohol is more serious than injuries caused by secondary smoke.¹²

Mitigating against imposing liability for injuries to bystanders on alcoholic beverage manufacturers are long-standing precedents that state that the action of the drunk driver is an independent supervening cause that insulates the manufacturers from liability. As we

have seen in cases involving tobacco, guns, and other “unpopular” products, long-standing precedents can be swept aside if a court is bent on increasing regulation of an industry. The attempt to overregulate alcohol has been part of history and has failed. Prohibition did not work. For that reason, at least for the foreseeable future, courts are unlikely to abandon precedent to pursue an alcohol regulatory goal.

Are there any circumstances where this could change? Change will depend on the activities of the industry and the aggressiveness of persons who wish to pursue it. A danger for the industry is in its advertising; if advertising is perceived to target minors, it can create a problem for the industry. This is particularly true if the advertising targets appear to be college-age students who engage in binge drinking which, in turn, brings about serious injury to the person imbibing the beverage and potential danger to others. Estimates reflect that approximately 7,500 bystanders were killed in alcohol-related deaths in one year.¹³

A second engine that may be pushed by personal injury lawyers who find alcohol manufacturers to be appealing targets is the alcohol-addicted victim. This is not a new target, and the problem of alcoholism has been studied and recognized for hundreds of years. In general, the public believes that alcoholics do have a choice to be treated or not. If public opinion shifts on this issue, it may become a risk for the industry.

There is danger for pharmaceutical companies, HMOs and the tobacco manufacturers; less danger for the producers of fast foods and the gaming industry, and, least of all, for alcohol.

One reason is that personal injury lawyers themselves enjoy fast food, occasional gaming and alcohol. Some have admitted to this fact in the media. The old expression “the jury is out” applies to these industries. If public opinion shifts, whether through the force of personal injury lawyers and their allies or through industry missteps, potentially substantial liability could move into areas that are now considered ordinary and welcome pleasures of our society.

Endnotes

¹ Robert B. Reich, *Regulation is out, litigation is in*, U.S.A. Today, Feb. 11, 1999, at 15A.

² See John Berlau, *Big Food Fight*, Insight on the News, June 24, 2002.

³ See Frank J. Murray, *Other risky products may be ripe for lawsuits*, Wash. Times, June 21, 1997, A1.

⁴ See Shelly Branch, *As Obesity Concerns Mount, Companies Fret Their Snacks, Drinks May Take the Blame*, Wall Street Journal June 13, 2002; Lance Gay, *Is A Fat Tax The Answer To Obesity Epidemic?* Scripps-Howard News Service, April 29, 2002.

⁵ See Lance Gay, *supra* at 11.

⁶ See John Berlau, *Big Food Fight*, Insight on the News, June 24, 2002.

⁷ See Shelly Branch, *supra*.

⁸ See Shelly Branch, *supra*.

⁹ See CASINO JOURNAL “GAMING SUMMARY,” *Casino Exec: Watch Threat of Addition Suits*, June 17, 2002.

¹⁰ See CASINO JOURNAL, *supra*.

¹¹ Gary T. Schwartz, *Cigarette Litigation’s Offspring: Assessing Tort Issues Related to Guns, Alcohol & Other Controversial Products in Light of the Tobacco Wars*, Beyond Tobacco Symposium: Tort Issues in light of the Cigarette Litigation, 27 PEPPERDINE L. REV. 751 (2000).

¹² Robert F. Cochran, *From Cigarettes to Alcohol: The Next Step in Hedonic Product Liability*, 27 PEPPERDINE L. REV. 701 (2000).

¹³ See Robert F. Cochran, *supra*, at 702.