

## Opinion: Big Food bears some responsibility

By PAUL L. MCDONALD

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In its report, [The New LawsUIT Ecosystem](#), the U.S. Chamber of Commerce cited, as an example of future trends, my proposal that state attorneys general seek partial reimbursement for Medicaid spending on obesity from select food manufacturers. States spend tens of billions treating obesity-related illnesses under Medicaid, and the financial burden on state taxpayers is sure to grow if, as projected, the obesity rate doubles by 2030.

Two weeks ago, my proposal reached a broader audience through POLITICO's report, "[The plot to make Big Food pay.](#)"

Perhaps predictably, there is some confusion and misrepresentation about my objectives and approach. Let me clear the air.

No fair-minded, informed and honest observer would contend that food manufacturers bear absolutely zero responsibility for the problem of obesity. In fact, the food industry's own health-related product modifications are an acknowledgment of some responsibility. I believe that whatever level of responsibility that some food manufacturers bear — supported by evidence, and taking into account personal responsibility — is their fair share of reimbursement owed to states obligated to treat obesity-related illnesses under Medicaid. That percentage may be on the lower end, e.g., 25 percent, or the higher end, e.g., 75 percent. It is not zero.

But while food manufacturers bear some responsibility, taxpayers are currently bearing 100 percent of the costs, paid for by higher state taxes, reduced state services, or both. Tens of billions, and growing. I don't believe that is sustainable, or fair.

My approach is cautious and studied. Before filing any lawsuit, state attorneys general should conduct a thorough investigation using their subpoena powers, and consult with experts, to determine whether or not there is sufficient evidence to target specific, limited categories of high-impact foods and beverages produced by manufacturers. There is no need to speculate. The proof will be in the pudding.

We already know from research, and investigative reporting, documented by Kelly Brownell, dean of Duke University's Sanford School of Public Policy, former FDA Commissioner David Kessler, and New York Times reporter Michael Moss, to name a few, that manufacturers manipulate additives and ingredients, and that studies link such manipulation to illnesses, e.g., linking added sugar to diabetes.

Much of what we know is based upon food industry whistleblowers, who have given interviews and produced only some of the industry's secret documents. The public deserves to know what the industry knows, and my investigation approach is aimed at insuring that public policy decisions are fully informed.

If, after an investigation, there is sufficient evidence to proceed, then any lawsuit should be further limited to manufacturers having more than marginal market share in the affected Medicaid population. All others, e.g., small businesses, would be exempt.

The state *parens patriae* action that I propose is a public claim, on behalf of the public fisc, for which there is no private right to damages. In other words, any recovery is to be paid to the state, not to individuals.

It is not a consumer class action. In fact, it leaves in place any restrictions on consumer suits, such as "Cheeseburger Bills."

It is an entirely different legal action, in which the state is not subject to defenses that might prevent an individual from recovery. This is so because the state is not suing on behalf of any individual, but rather to protect the state's quasi-sovereign interests in the health and well-being — both physical and economic — of taxpayers in general, and in the fair and equitable treatment of the state under federal programs, like Medicaid.

Congress intended Medicaid to be a payer of last resort. Medicaid regulations require states to "look to third parties to reimburse taxpayer funds," "ascertain the legal liability of third parties," and "seek reimbursement ... to the extent of such legal liability."

My proposal meets states' obligations to their taxpayers and under Medicaid, and arguably is an economic imperative.

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