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## Parens Patriae: A Flawed Strategy for State-Initiated Obesity Litigation

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PARENS PATRIAE: A FLAWED STRATEGY FOR STATE-INITIATED OBESITY LITIGATION

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## INTRODUCTION

In the United States today, roughly 36 percent of adults twenty years or older are obese, and 6.3 percent are considered extremely obese.<sup>1</sup> Since 1960, the number of adults who are obese has doubled.<sup>2</sup> An estimated 300,000 deaths annually are linked to obesity,<sup>3</sup> and the medical cost associated with treating obesity and its related diseases is a staggering \$147 billion per year.<sup>4</sup> Obesity is now considered an epidemic, and unlike smoking, the nation's leading cause of preventable death,<sup>5</sup> the number of obese citizens is rising.<sup>6</sup>

Government has responded to this crisis in a variety of ways. Congress proposed bills such as the Healthy Lifestyles and Prevention America Act,<sup>7</sup> the Fit for Life Act,<sup>8</sup> and the Healthy Foods for Healthy Living Act.<sup>9</sup> Several states passed bans on the

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1. CHERYL D. FRYAR, MARGARET D. CARROLL & CYNTHIA L. OGDEN, CTRS. FOR DISEASE CONTROL & PREVENTION, PREVALENCE OF OVERWEIGHT, OBESITY, AND EXTREME OBESITY AMONG ADULTS: UNITED STATES, TRENDS 1960-1962 THROUGH 2007-2008, at 1 (2012).

2. *Id.*

3. U.S. DEPT OF HEALTH & HUMAN SERVS., REPORT OF THE SURGEON GENERAL, OVERWEIGHT AND OBESITY: HEALTH CONSEQUENCES (2001), <http://www.surgeongeneral.gov/library/calls/obesity/factsheet03.pdf>.

4. *Overweight and Obesity: Causes and Consequences*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/obesity/adult/causes/index.html> (last updated Apr. 27, 2012).

5. *Tobacco Use: Evidence-Based Interventions for Your Community*, COMMUNITY GUIDE, [www.thecommunityguide.org/about/What-Works-Tobacco-fact-sheet.pdf](http://www.thecommunityguide.org/about/What-Works-Tobacco-fact-sheet.pdf) (last updated Mar. 2012); see also Phyllis Nichols et al., *The Evolution of the Steps Program, 2003-2010: Transforming the Federal Public Health Practice of Chronic Disease Prevention*, 9 PREVENTING CHRONIC DISEASE, Feb. 2, 2012, [http://www.cdc.gov/pcd/issues/2012/11\\_0220.htm](http://www.cdc.gov/pcd/issues/2012/11_0220.htm).

6. Stuart P. Weisberg, Note, *Societal Change to Prevent Obesity*, 288 JAMA 2176, 2176 (2002).

7. Healthy Lifestyles and Prevention America Act, S. 174, 112th Cong. (2011) (proposing a myriad of health- and obesity-related provisions such as promoting access to local foods in schools, providing tax credits to employers who provide their employees with wellness programs, and proposing guidelines for sodium content in certain foods).

8. Fit for Life Act of 2011, H.R. 2795, 112th Cong. (proposing health and wellness promotion through increased access to supermarkets in underserved communities and by expanding fresh fruit and vegetable programs in schools).

9. Healthy Foods for Healthy Living Act, H.R. 3291, 112th Cong. (2011) (allowing the Secretary of Agriculture to provide grants to agencies that operate in low-income areas and promote access to fresh fruits, vegetables, and other healthy food).

sale of junk food and soda in public schools.<sup>10</sup> Washington, D.C. recently enacted the Healthy Schools Act, a sweeping piece of legislation aimed at improving the quality of food served in public schools, encouraging physical activity, and promoting nutrition education.<sup>11</sup> Likewise, various executive agencies recently developed programs aimed at curbing the obesity epidemic. The Centers for Disease Control established the Division of Nutrition, Physical Activity and Obesity.<sup>12</sup> The U.S. Department of Agriculture began its “Eat Smart. Play Hard.” campaign,<sup>13</sup> and perhaps most famously, First Lady Michele Obama created the “Lets Move!” initiative.<sup>14</sup>

Paralleling the proliferation of legislative and executive responses to the obesity epidemic are “obesity lawsuits,” in which the plaintiffs allege that food producers and restaurants are responsible for making them overweight and unhealthy.<sup>15</sup> Courts tend to be skeptical of such obesity suits,<sup>16</sup> and Congress famously responded to such litigation with the American Personal Responsibility in Food Consumption Act, also known as the “Cheeseburger Bill.”<sup>17</sup>

Perhaps in response to the failure of private-party litigation, health and nutrition advocates have urged state attorneys general

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10. See, e.g., Pupil Nutrition, Health, and Achievement Act of 2001, CAL. EDUC. CODE § 49431.1-.2, .5 (West 2001); MASS. GEN. LAWS ANN. ch. 111, § 223 (West 2011).

11. Healthy Schools Act of 2010, D.C. CODE §§ 38.821.01 to .828.02 (2011).

12. See *Division of Nutrition, Physical Activity, and Obesity: About Us*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nccdphp/DNPAO/aboutus/index.html> (last updated Dec. 20, 2012).

13. *About Eat Smart. Play Hard.*, U.S. DEP'T AGRIC., <http://www.fns.usda.gov/eatsmartplayhardhealthy lifestyle/about.htm> (last visited Mar. 24, 2013).

14. See *Learn the Facts*, LET'S MOVE!, <http://www.letsmove.gov/learn-facts/epidemic-childhood-obesity> (last visited Mar. 24, 2013).

15. Brooke Courtney, *Is Obesity Really the Next Tobacco? Lessons Learned from Tobacco for Obesity Litigation*, 15 ANNALS HEALTH L. 61, 63-64 (2006). Perhaps the most well known of these obesity lawsuits is *Pelman v. McDonald's Corp.*, in which plaintiffs argued that McDonald's deceptive practices about its unhealthy food caused the restaurant's patrons to become obese. 237 F. Supp. 2d 512, 516 (S.D.N.Y. 2003); see also Courtney, *supra*, at 73-74.

16. See, e.g., David Burnett, *Fast-Food Lawsuits and the Cheeseburger Bill: Critiquing Congress's Response to the Obesity Epidemic*, 14 VA. J. SOC. POLY & L. 357, 377-80 (2007); Ben Falit, *Fast Food Fighters Fall Flat: Plaintiffs Fail to Establish that McDonalds Should Be Liable for Obesity-Related Illnesses*, 31 J.L. MED. & ETHICS 725, 725 (2003).

17. See Personal Responsibility in Food Consumption Act, H.R. 554, 109th Cong. (2005); Burnett, *supra* note 16, at 387. Nearly twenty other states have passed similar legislation. See *'Cheeseburger Bill' Puts Bite on Lawsuits*, CNN (Oct. 20, 2005), [http://articles.cnn.com/2005-10-20/politics/cheeseburger.bill\\_1\\_cheeseburger-bill-fast-food-chains-food-industry?\\_s=PM:POLITICS](http://articles.cnn.com/2005-10-20/politics/cheeseburger.bill_1_cheeseburger-bill-fast-food-chains-food-industry?_s=PM:POLITICS).

to sue the food industry under their *parens patriae* authority.<sup>18</sup> Under the common law doctrine of *parens patriae*, a state attorney general may bring an action against a party that has harmed the health or economic well being of the citizens of the attorney general's state.<sup>19</sup> Proponents of attorney general-initiated *parens patriae* obesity suits look to the tobacco litigation of the mid-1990s as a template for such obesity litigation.<sup>20</sup> In the tobacco cases, state attorneys general sued the tobacco industry under their *parens patriae* authority to recover funds spent by their states in connection with treating smoking-related illnesses.<sup>21</sup> The lawsuits resulted in one of the largest civil settlements in United States history,<sup>22</sup> in which the tobacco industry agreed to pay the intervening states nearly \$10 billion per year for an indefinite period of time.<sup>23</sup> Because the tobacco lawsuits settled, however, the legal theories underlying the litigation went untested.<sup>24</sup> Thus, one should not presume that tobacco litigation would provide an adequate template for state-initiated obesity lawsuits.

Nonetheless, some advocates for attorney general-led obesity litigation argue that states could pursue a similar strategy in obesity litigation and sue the food industry to recoup money states spend on treating their citizens' obesity-related illnesses.<sup>25</sup> This Note, however, contends that such an argument overlooks critical limitations of the *parens patriae* doctrine. This Note will address these limitations and explain why proponents of state-initiated obesity litigation should not expect to rely on the tobacco litigation as a template for their suits. In doing so, this Note will ultimately argue

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18. See, e.g., Jennifer L. Pomeranz & Kelly D. Brownell, *Advancing Public Health Obesity Policy Through State Attorneys General*, 101 AM. J. PUB. HEALTH 425, 426-27 (2011) (noting that attorneys general have the power to use *parens patriae* and that it may form a proper basis for litigation).

19. Romualdo P. Eclavea, Annotation, *State's Standing to Sue on Behalf of Its Citizens*, 42 A.L.R. FED. 23, § 2a, at 27-28 (1979).

20. See Pomeranz & Brownell, *supra* note 18, at 427.

21. *Id.*

22. U.S. GEN. ACCOUNTING OFFICE, GAO-01-851, TOBACCO SETTLEMENT: STATES' USE OF MASTER SETTLEMENT AGREEMENT PAYMENTS 3 (2001).

23. Jess Alderman & Richard Daynard, *Applying Lessons from Tobacco Litigation to Obesity Suits*, 30 AM. J. PREVENTATIVE MED. 82, 83 (2006).

24. Pomeranz & Brownell, *supra* note 18, at 427.

25. See *id.*

that state attorneys general will likely not have standing under *parens patriae* for obesity litigation.

Part I of this Note discusses the origins of *parens patriae* and how state attorneys general relied upon this doctrine in tobacco litigation. Part II.A of this Note suggests that, unlike tobacco litigation, there is no adequate causal link between the conduct of the food industry and the obesity-related costs ultimately incurred by states to justify standing under *parens patriae*. Part II.B of this Note proposes that any action against the food industry under *parens patriae* would violate the doctrine's geographic limitations. A state may only bring an action under *parens patriae* for harms that its citizens experience that are causally connected to their citizenship in that intervening state, and no such connection would exist in obesity litigation. Part II.C of this Note argues that the underlying tort upon which state attorneys general based their tobacco suits, public nuisance, is not an adequate tort for *parens patriae* obesity litigation. Taken together, these factors suggest that state attorneys general will not be able to bring obesity suits under their *parens patriae* powers.<sup>26</sup>

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26. Other scholars have researched the viability of *parens patriae* standing within the context of obesity litigation. Such research, however, has been confined to a narrow application of *parens patriae* actions—namely, when the state must intervene on behalf of a minor because that minor's parent or legal guardian has failed to provide adequate care for that child. See, e.g., Shireen Arani, *State Intervention in Cases of Obesity-Related Medical Neglect*, 82 B.U. L. REV. 875, 875-76 (2002); Edieth Y. Wu, *McFat—Obesity, Parens Patriae, and the Children*, 29 OKLA. CITY U. L. REV. 569, 569, 571-79 (2004); Elizabeth J. Sher, Note, *Choosing for Children: Adjudicating Medical Care Disputes Between Parents and the State*, 58 N.Y.U. L. REV. 157, 157-60 (1983). These scholars have argued that the state must intervene when the food industry harms minors by supplying them with unhealthy food and the parents of those children do not prevent them from eating such food. Wu, *supra*, at 577. Indeed, it is well-settled law that a state is allowed to intervene in order to protect a child's mental and physical health, and this issue often arises in cases of medical neglect. Arani, *supra*, at 875-76. Because obesity is a medical condition, it seems likely that a state would have the legal authority to intervene in cases of obesity-related medical neglect of minors. *Id.* at 887. As mentioned below, one of the traditional formulations of the doctrine of *parens patriae* was to provide a state, originally the king, legal authority to intervene on behalf of minors who could not otherwise protect themselves. See *infra* text accompanying notes 27-30. Thus, it is likely that such intervention by the state comports with the current doctrinal boundaries of *parens patriae*.

This Note, unlike the aforementioned analyses, however, focuses not on state intervention under *parens patriae* for the benefit of minors but rather on state-initiated litigation for the purpose of vindicating its quasi-sovereign interest in the health and well being of all of its citizens. Thus, state standing under *parens patriae* for the purposes of this Note focuses on

## I. HISTORY OF PARENS PATRIAE AND DEVELOPMENT OF THE MODERN DOCTRINE

Parens patriae, which translates to “parent of the country,”<sup>27</sup> is a common law doctrine originating in England that, at its inception, allowed the king to assume a general guardian role over his subjects.<sup>28</sup> Initially the Crown used this legal theory to protect minors and incompetents, but parens patriae later evolved into a “sweeping common-law theory of Prerogative Regis” whereby the king had broad authority to regulate and control “almost everything” that happened within his jurisdiction.<sup>29</sup> American courts slowly adopted parens patriae, and over time it evolved into a catchall cause of action that lacked clear doctrinal parameters.<sup>30</sup> One scholar noted that the expansion of parens patriae occurred “incrementally and almost stealthily,”<sup>31</sup> and that the body of law was, for a time, a “precedential miasma.”<sup>32</sup> Thus, for much of its history as part of American jurisprudence, the boundaries and appropriate uses of parens patriae have been poorly defined.

### A. Modern American Doctrine of Parens Patriae

The Supreme Court established the parameters of the current formulation of parens patriae in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*.<sup>33</sup> In *Snapp*, Puerto Rico asserted claims against Virginian orchardists for refusing to hire Puerto Rican workers in violation of a federal statute.<sup>34</sup> Puerto Rico alleged that such a refusal amounted to economic discrimination that harmed the Puerto Rican economy and thereby granted Puerto Rico standing

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state-initiated obesity litigation with an essentially regulatory purpose, not state intervention for the purpose of acting as a de facto guardian of a minor.

27. See Pomeranz & Brownell, *supra* note 18, at 426.

28. See Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847, 1850 (2000).

29. *Id.*

30. See *id.* at 1850-52.

31. *Id.* at 1850.

32. *Id.* at 1852.

33. 458 U.S. 592, 607-08 (1982).

34. *Id.* at 597-98.



under *parens patriae*.<sup>35</sup> Responding to this claim, the Court defined the elements necessary to maintain standing under *parens patriae*:

[A] State must articulate an interest apart from the interests of particular private parties, [that is], the State must be more than a nominal party. The State must express a quasi-sovereign interest ... [such as its] interest in the health and well-being—both physical and economic—of its residents in general....

... Although more must be alleged than injury to an identifiable group of individual residents, the indirect effects of that injury must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population....

... [T]he State has an interest in securing observance of the terms under which it participates in the federal system. In the context of *parens patriae* actions, this means ensuring that the State and its residents are not excluded from the benefits that are to flow from participation in the federal system.<sup>36</sup>

Although the Court refrained from defining precisely what constitutes a quasi-sovereign interest, and instead held that this was to be determined on a “case-by-case” basis,<sup>37</sup> a general rule emerged. The rule recognizes that states have certain quasi-sovereign interests and, under some circumstances, they will have standing to intervene under their *parens patriae* authority to vindicate those interests.<sup>38</sup> A state will not, however, have standing under *parens patriae* when intervening as a nominal party to protect its proprietary or private interests.<sup>39</sup> Thus, on its face, the *parens patriae* doctrine, as the Court defined it in *Snapp*, seems to grant state attorneys general broad authority so long as a state can articulate a sufficient sovereign or quasi-sovereign interest. There are, however, other doctrinal limits to *parens patriae* that the Court did not

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35. *See id.* at 594.

36. *Id.* at 607-08.

37. *Id.* at 607.

38. Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1866-67 (2000).

39. *Id.* at 1865.

address in *Snapp*. These limits, as applied to obesity litigation, are the focus of this Note.<sup>40</sup>

### *B. Parens Patriae and Tobacco Litigation*

Tobacco litigation seemed to fit neatly within the general parameters of a valid parens patriae action.<sup>41</sup> The intervening states were not nominal parties to the litigation because of the expenses they incurred in treating tobacco-related illnesses.<sup>42</sup> Moreover, the intervening states had a valid quasi-sovereign interest in the health and welfare of their citizens and, therefore, under the *Snapp* factors, they had standing to pursue their claims under parens patriae.<sup>43</sup> Finally, even if the aforementioned factors were satisfied, as with all causes of action, there must have been some breach of a legal duty in order to have standing under parens patriae.<sup>44</sup> In order to meet this requirement, states that were party to the tobacco litigation relied upon the tort of public nuisance.<sup>45</sup>

As this Note discusses below, public nuisance cannot be as easily applied to state-sponsored obesity litigation. The deficiencies unique to parens patriae obesity suits—diffuse causation, lack of a geographic connection between the harms experienced by citizens and their citizenship in the intervening state, and reliance on the tort of public nuisance—become particularly apparent when compared to the tobacco litigation. The result is that state attorneys general

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40. See *infra* Part II.A-C. This Note does not focus on whether obesity litigation satisfies the *Snapp* factors. Instead, this Note focuses primarily on other long-standing doctrinal limits of parens patriae that were not explicitly addressed in *Snapp*. *Snapp* is mentioned not as a way to frame the arguments contained herein but rather as an introduction to the modern doctrine of parens patriae.

41. See Leyoub & Eisenberg, *supra* note 38, at 1866.

42. See *id.* at 1865-66; see also Michael L. Rustad & Thomas H. Koenig, *Parens Patriae Litigation to Redress Societal Damages from the BP Oil Spill: The Latest Stage in the Evolution of Crim torts*, 29 UCLA J. ENVTL. L. & POL'Y 45, 87 (2011) (noting that states can bring a suit under parens patriae if “the state’s interest is independent of the rights of private parties”).

43. See Leyoub & Eisenberg, *supra* note 38, at 1865-66.

44. See *id.* at 1883 (“[T]here remains the requirement that defendants breach some legal duty that harms a state’s *parens patriae* interest. *Parens patriae* doctrine helps articulate the state’s legal interests. It does not define the defendant’s legal duties.”).

45. See Lauren E. Handler & Charles E. Erway III, *Tort of Public Nuisance in Public Entity Litigation: Return to the Jungle?*, 69 DEF. COUNS. J. 484, 487 (2002).

likely will not have the authority under their *parens patriae* powers to bring obesity suits against the food industry.

## II. INADEQUACIES OF PARENS PATRIAE AS A STRATEGY FOR OBESITY LITIGATION

### A. *Deficient Causation*

Perhaps the most onerous obstacle that *parens patriae* obesity suits face is establishing causation between the conduct of various members of the food industry and obesity-related health problems.<sup>46</sup> Many of the seminal *parens patriae* cases arose from conduct that was directly connected to the harms that were the basis for such suits.<sup>47</sup> The same cannot be said for *parens patriae* obesity suits. The lack of such a direct causal connection will likely diminish a state's ability to have standing under *parens patriae* for obesity litigation.

#### 1. *Strong Causation in Early and Modern Parens Patriae Jurisprudence*

Many of the foundational *parens patriae* cases suggest that the causal connection between the conduct of the food industry and the obesity epidemic may be too attenuated for states to maintain standing under *parens patriae*. For example, in *Louisiana v. Texas*, a case that helped lay the groundwork for the modern American version of *parens patriae*,<sup>48</sup> Louisiana alleged that various quarantine regulations imposed by the Governor of Texas were directly aimed at harming the businesses and overall economy of Louisiana.<sup>49</sup> In particular, Louisiana argued that the quarantine regulations were specifically designed to boost the shipping industry of Galveston, Texas at the expense of the economy of New Orleans.<sup>50</sup> Although the Court ultimately dismissed the complaint on other

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46. See Alderman & Daynard, *supra* note 23, at 85 (“[C]ausation issues in food litigation are more complicated than those in tobacco cases.”).

47. See *infra* Part II.A.1.

48. Ratliff, *supra* note 28, at 1851.

49. 176 U.S. 1, 6-9 (1900).

50. *Id.* at 8.

grounds, it affirmed that Louisiana had standing under *parens patriae* to vindicate these kinds of direct, economic harms.<sup>51</sup>

Likewise, in *Georgia v. Pennsylvania Railroad Co.*, Georgia alleged that various railroad companies fixed their rates for the shipment of goods through Georgia to favor the ports of other states.<sup>52</sup> The effect of such rate fixing was “to deny to many of Georgia’s products equal access with those of other States to the national market ... [and] to hold the Georgia economy in a state of arrested development.”<sup>53</sup> The Court noted that Georgia’s interest in this case was “not remote,” but rather was “immediate” and affirmed that Georgia had standing under *parens patriae* because of the economic harm caused by the rate fixing.<sup>54</sup>

More recent case law further suggests that the conduct of the food industry may be too remote from the obesity epidemic for a state to have *parens patriae* standing. For example, *South Carolina v. North Carolina* arose over a dispute regarding the apportionment of the Catawba River watershed.<sup>55</sup> South Carolina opposed the division of the watershed and had standing to do so under its *parens patriae* authority.<sup>56</sup> The Court noted that “a State’s sovereign interest in ensuring an equitable share of an interstate river’s water is precisely the type of interest that the State, as *parens patriae*, represents.”<sup>57</sup> Thus, the harm to the environment and people of South Carolina that would result from the proposed division of the watershed was direct and clear enough to allow South Carolina *parens patriae* standing.<sup>58</sup>

In contrast, parties have been denied *parens patriae* standing in products liability actions because the harms underlying such suits

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51. *See id.* at 19 (“It is in this aspect that the bill before us is framed. Its gravamen is not a special and peculiar injury such as would sustain an action by a private person, but the State of Louisiana presents herself in the attitude of *parens patriae*, trustee, guardian, or representative of all her citizens.... [T]he State is entitled to seek relief in this way because the matters complained of affect her citizens at large.”).

52. 324 U.S. 439, 444-45 (1945).

53. *Id.* at 444.

54. *See id.* at 447, 450-51.

55. 130 S. Ct. 854, 858 (2010).

56. *Id.* at 867-68.

57. *Id.* at 867.

58. *Id.*

were too remote from the defendants' conduct.<sup>59</sup> For example, in *Ganim v. Smith & Wesson Corp.*, the city of Bridgeport, Connecticut sued various handgun manufacturers, alleging that the production and distribution of handguns caused the city to suffer "irreparable harm and financial harm, including additional expenses for police services, emergency services, and expenses for pension benefits, health care, social services and necessary facilities."<sup>60</sup> The court reached its conclusion that Bridgeport lacked *parens patriae* standing by focusing on the attenuated chain of causation between the defendants' conduct and the harm underlying the suit.<sup>61</sup> The court noted that the attenuated chain of causation consisted of the following links:

The manufacturers sell the handguns to distributors or wholesalers .... The distributors then sell the handguns to the retailers .... [T]he retailer then sells the guns either to authorized buyers, namely, legitimate consumers, or, through the "straw man" method or other illegitimate means, to unauthorized buyers .... Next, the illegally acquired guns enter an "illegal market." From that market, those guns end up in the hands of unauthorized users. Next, either the unauthorized buyers misuse the guns by not taking proper storage precautions or other unwarned or uninstructed precautions, or the unauthorized buyers misuse the guns to commit crimes or other harmful acts. Depending on the nature of the conduct of the users of the guns, the plaintiffs then incur expenses for such municipal necessities as investigation of crime, emergency and medical services for the injured, or similar expenses. Finally, as a result of this chain of events, the plaintiffs ultimately suffer the harms delineated previously, namely, increased costs for various municipal services.<sup>62</sup>

Unlike the intervening states in *Louisiana v. Texas*, *Georgia v. Pennsylvania Railroad Co.*, and *South Carolina v. North Carolina*, the city of Bridgeport was unable to show a sufficiently direct causal

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59. See Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 935 (2008).

60. 780 A.2d 98, 109 (Conn. 2001); see also Gifford, *supra* note 59, at 935.

61. *Ganim*, 780 A.2d at 129 ("[T]he plaintiffs lack standing because the harms they claim are too remote from the defendants' misconduct, and are too derivative of the injuries of others.").

62. *Id.* at 123.

connection between the harm that served as the basis for its suit and the ultimate economic consequences.<sup>63</sup> The number of steps in the chain of causation is what distinguishes *Ganim* from the aforementioned cases. In *Louisiana v. Texas*, Texas's quarantine regulations prohibited the shipment of all goods from New Orleans into Texas.<sup>64</sup> Such action had a direct and easily discernible effect on the shipping industry of New Orleans and the economy of Louisiana in general.<sup>65</sup> Likewise, the rate-fixing practices at issue in *Georgia v. Pennsylvania Railroad Co.* had an obvious adverse impact on the economy of Georgia by restricting the state's ability to ship its goods throughout the nation.<sup>66</sup> In contrast, the conduct of the defendants in *Ganim* may have had *some* link to the harms ultimately suffered by the plaintiffs, but the connection was so attenuated that the State could not maintain standing under *parens patriae*.<sup>67</sup>

The costs incurred by states in treating the obesity epidemic are likely more akin to the kinds of harms complained of in *Ganim* than those at issue in *Louisiana v. Texas*, *Georgia v. Pennsylvania Railroad Co.*, and *South Carolina v. North Carolina*.<sup>68</sup> Much like the financial harms suffered by the city of Bridgeport, the financial obligations a state incurs as a result of obesity have a complex amalgam of causes, only one of which is food consumption.<sup>69</sup> Although the conduct of various members of the food industry may have had *some* connection to the costs incurred by states in treating obesity, such conduct is by no means the direct, predominant cause of the obesity

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63. See *id.* at 123-24.

64. 176 U.S. 1, 4 (1900).

65. *Id.* at 8-9.

66. 324 U.S. 439, 450 (1945) ("If the allegations of the bill are taken as true, the economy of Georgia and the welfare of her citizens have seriously suffered as the result of this alleged conspiracy. Discriminatory rates are but one form of trade barriers. They may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams. They may affect the prosperity and welfare of a State as profoundly as any diversion of waters from the rivers. They may stifle, impede, or cripple old industries and prevent the establishment of new ones. They may arrest the development of a State or put it at a decided disadvantage in competitive markets.")

67. See *Ganim*, 780 A.2d at 129-30; see also Gifford, *supra* note 59, at 935.

68. Compare *Ganim*, 780 A.2d at 129-30, with *South Carolina v. North Carolina*, 130 S. Ct. 854, 867 (2010), *Pa. R.R. Co.*, 324 U.S. at 444-45, and *Louisiana*, 176 U.S. at 7-9.

69. See *infra* Part II.A.3.

epidemic.<sup>70</sup> Thus, because a state's claim in an obesity suit would be based on a more attenuated, *Ganim*-like chain of causation, it is unlikely that state attorneys general will have *parens patriae* standing to pursue such claims.

## 2. *Strong Causation in State-Initiated Tobacco Litigation*

To further illustrate the limitation that deficient causation would place on *parens patriae* obesity litigation, it is useful to analyze state-initiated tobacco litigation. In tobacco litigation, the conduct of the defendants and the harms suffered by the citizens of the intervening states had a clear and direct causal nexus. For example, medical research has tied various health problems directly to the use of cigarettes.<sup>71</sup> It is generally well accepted that diseases like emphysema and dysrhythmias are caused by long-term cigarette use,<sup>72</sup> and numerous surgeon general reports directly link causes of certain cancers to smoking.<sup>73</sup> Furthermore, tobacco consumption trends and the business practices of tobacco defendants strengthened the causal connection in tobacco litigation.<sup>74</sup> For example, among cigarette users, loyalty to a particular brand of cigarettes was quite common.<sup>75</sup> In addition, many of the tobacco companies deliberately concealed the dangers of smoking through deceptive advertising practices.<sup>76</sup> Most importantly, however, the five companies and their subsidiaries that were defendants in the tobacco litigation, and ultimately parties to the Master Settlement

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70. See, e.g., Courtney, *supra* note 15, at 96.

71. Joseph P. McMnamin & Andrea D. Tiglio, *Not the Next Tobacco: Defenses to Obesity Claims*, 61 FOOD & DRUG L.J. 445, 446 (2006).

72. Richard A. Daynard et al., *Food Litigation: Lessons from the Tobacco Wars*, 288 JAMA 2179, 2179 (2002); McMnamin & Tiglio, *supra* note 71, at 446.

73. Alderman & Daynard, *supra* note 23, at 82.

74. Courtney, *supra* note 15, at 82 (“[T]he most critical factors influencing high smoking rates appear to be the addictive nature of cigarettes and intense tobacco industry marketing and advertising.”).

75. Alderman & Daynard, *supra* note 23, at 85.

76. *Id.* at 86 (“[T]he major tobacco companies had a ‘gentleman’s agreement’ not to compete on safety and launched a massive disinformation campaign to deny the product’s dangers.”); Courtney, *supra* note 15, at 95 (“[I]t is a well-documented and well-accepted belief that tobacco companies have deceived the public about the addictiveness and the dangers of using tobacco products.”); John F. Banzhaf III, *Who Should Pay for Obesity?*, S.F. DAILY J., Feb. 2, 2002.



Agreement, together comprised nearly 100 percent of the tobacco market in the United States.<sup>77</sup> Taken together, these medical and business-related factors helped establish a sufficiently direct causal connection between the conduct of the tobacco industry and the harms suffered by cigarette users.<sup>78</sup> Without such a direct causal connection, however, tobacco litigation likely would not have been as successful.

### *3. Causation Discrepancies Between Tobacco and Obesity Litigation*

Unlike the tobacco litigation, parens patriae obesity suits do not have such an easily traceable chain of causation between the conduct of the food industry and the obesity epidemic. Perhaps the most formidable obstacle to establishing causation is that there are many different environmental, lifestyle, and uncontrollable genetic causes of obesity.<sup>79</sup> The Centers for Disease Control and Prevention states that “[t]here are a variety of factors that play a role in obesity” and lists among these factors an individual’s balance of caloric intake, environment, genetics, diseases, and drug use.<sup>80</sup> Moreover, technological advances that mechanize formerly human-powered tasks can also contribute to obesity.<sup>81</sup>

Thus, unlike tobacco litigation, in which the harm caused by smoking was directly related to cigarette use, the harm caused by obesity derives from a much more diffuse combination of factors.<sup>82</sup>

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77. See F.A. Sloan, C.A. Mathews & J.G. Trogdon, *Impacts of the Master Settlement Agreement on the Tobacco Industry*, 13 TOBACCO CONTROL 356, 356 (2004) (discussing which cigarette companies were party to the Master Settlement Agreement); *U.S. Tobacco Market Share 1995, 2000*, TOBACCO.ORG, <http://archive.tobacco.org/Resources/mktshr.html> (last updated Apr. 5, 1996) (showing the market share of Philip Morris, R.J. Reynolds Tobacco Company, Brown & Williamson, Lorillard, and Liggett Group in 1994, 1995, and 2000); see also Courtney, *supra* note 15, at 95 (“For the most part, the tobacco industry is an oligopoly. With just a few major companies controlling most of the tobacco market, it is fairly easy to point the finger at who is to blame for smoking-related conditions.”).

78. Cf. Alderman & Daynard, *supra* note 23, at 83 (noting that plaintiffs found success in the 1990s and won large punitive damages from defendant tobacco companies).

79. See Burnett, *supra* note 16, at 381; *Overweight and Obesity*, *supra* note 4.

80. See *Overweight and Obesity*, *supra* note 4.

81. Theodore H. Frank, *A Taxonomy of Obesity Litigation*, 28 U. ARK. LITTLE ROCK L. REV. 427, 438 (2006).

82. See Courtney, *supra* note 15, at 96.



Because someone's overall lifestyle contributes to obesity, and food consumption is only one cause of obesity, establishing sufficient causation between the conduct of the food industry and the obesity epidemic may be an insurmountable hurdle for *parens patriae* obesity suits.<sup>83</sup>

Even assuming, for the sake of argument, that food consumption is the only cause of obesity, there are still significant barriers to establishing a viable chain of causation between the conduct of the food industry and the obesity epidemic. For one, no food, if consumed in moderation, is entirely harmful.<sup>84</sup> Although restaurants like McDonald's, Wendy's, and Burger King sell food that is generally considered unhealthy, fast food alone "will not necessarily cause obesity."<sup>85</sup> Thus, an argument for the inherent danger of certain food products would be flawed because all foods have some beneficial nutritional value, "unlike tobacco which has no essential physiological value."<sup>86</sup> Moreover, unlike studies of tobacco products, there is conflicting research as to what foods are considered "good" foods and what foods are "bad" foods.<sup>87</sup> It is also entirely possible that a food producer may sell a categorically "good" food product that a consumer simply overeats.<sup>88</sup> Even if the food industry alone is responsible for the obesity epidemic—an assumption that is almost assuredly false given the myriad causes of obesity<sup>89</sup>—the variables among food consumption patterns and food quality suggest a tenuous causal nexus.<sup>90</sup>

The sheer number of food companies and food producers further weakens the causal connection between the conduct of the food industry and obesity. Unlike the tobacco industry, which was essentially an "oligopoly," the food industry has many different players, "consisting of numerous manufacturers, restaurants, and retailers of various sizes," all of whom in some way may have contributed to

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83. See MARION NESTLE, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH* 361 (Darra Goldstein ed., 2002).

84. See Burnett, *supra* note 16, at 381; Daynard et al., *supra* note 72, at 2179.

85. See Burnett, *supra* note 16, at 381.

86. *Id.* at 381-82.

87. See Alderman & Daynard, *supra* note 23, at 85; McMenemy & Tiglio, *supra* note 71, at 457.

88. Daynard et al., *supra* note 72, at 2179.

89. See *Overweight and Obesity*, *supra* note 4.

90. See Alderman & Daynard, *supra* note 23, at 85.

the obesity epidemic.<sup>91</sup> Moreover, not only are there many different food producers, but there are more than 320,000 food items on the market in the United States.<sup>92</sup>

In addition, unlike the tobacco industry, there is scant evidence that the food industry has deliberately tried to deceive consumers about the adverse health effects of various food products.<sup>93</sup> Often food companies voluntarily disclose the ingredients of the food they produce, and several fast-food restaurants publicize information such as the trans fat content of their products.<sup>94</sup> Notably, the court in *Pelman v. McDonald's Corp.* found these factors compelling in dismissing the plaintiff's complaint.<sup>95</sup> The court reasoned that the plaintiff should have no cause of action because, among other things, he failed to allege "that the danger of the McDonalds' products were [sic] not well-known," and because "McDonalds' products consumed by the plaintiffs were [not] dangerous in any way other than that which was open and obvious to a reasonable consumer."<sup>96</sup> Thus, greater transparency regarding the content and quality of food certainly plays a crucial role in further weakening causation between the food industry and the obesity epidemic.

In sum, it appears that causation may be an insurmountable hurdle for state-initiated obesity litigation. It is unlikely that causation in such suits would be as clear and direct as in most doctrinal parens patriae cases, and it is nearly certain that causation in obesity litigation would not be as easily established as it was in its tobacco counterpart. However, even if causation does not bar obesity litigation, these suits have other fatal deficiencies that are discussed below.

### *B. Parens Patriae and Its Geographic Limitations*

Historically for a state to have parens patriae standing, the harm that justified intervention had to be in some way unique to that

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91. Courtney, *supra* note 15, at 96 ("[T]he food industry is much more complex, ... [making] it much more difficult to determine which product company is responsible for obesity.").

92. NESTLE, *supra* note 83, at 361; Alderman & Daynard, *supra* note 23, at 86.

93. Courtney, *supra* note 15, at 95 & n.244.

94. *Id.*

95. 237 F. Supp. 2d 512, 540-41 (S.D.N.Y. 2003).

96. *Id.* at 539-41.

intervening state.<sup>97</sup> Justice Holmes alluded to this geographic limitation when he noted in his opinion in *Georgia v. Tennessee Copper Co.* that a state intervening under *parens patriae* does so because it has “an interest independent of and behind the titles of its citizens. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.”<sup>98</sup> At first blush, his comment appears to apply only to causes of action deriving from environmental harms. However, the principle underlying his observation—that the harm justifying intervention must be unique to that intervening state—appears to be a well-settled prerequisite for *parens patriae* standing. Indeed as one scholar has noted, in most, if not all, of the seminal *parens patriae* cases, “the harms suffered by the original victims were causally connected to their residency within that particular [intervening] state.”<sup>99</sup> No such geographic connection would exist in obesity litigation.<sup>100</sup>

### *1. Economic Harms and the Geographic Limits of Parens Patriae*

There are many *parens patriae* cases in which the citizens of a particular state suffered economic harm by virtue of their citizenship in that intervening state.<sup>101</sup> For example, in *Pennsylvania v. West Virginia*, the Supreme Court enjoined the enforcement of a West Virginia act that would have cut off the supply of natural gas from West Virginia to Pennsylvania and Ohio.<sup>102</sup> The Court held that the economic harms that would be suffered by the people of Pennsylvania and Ohio, if enforcement of the act was not enjoined, sufficiently justified Pennsylvania and Ohio’s intervention under *parens patriae*.<sup>103</sup> Similarly, in *Minnesota v. Standard Oil Co.*, the

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97. See Gifford, *supra* note 59, at 937. Many of the cases cited in Section II.B of this Note were initially found in the *American Law Reports* overview article on the doctrine of *parens patriae*. See generally Eclavea, *supra* note 19.

98. 206 U.S. 230, 237 (1907).

99. Gifford, *supra* note 59, at 937.

100. See *infra* Part II.B.4.

101. Gifford, *supra* note 59, at 935-37.

102. 262 U.S. 553, 600 (1923).

103. *Id.* at 591 (“The attitude of the complainant States is not that of mere volunteers attempting to vindicate the freedom of interstate commerce or to redress purely private grievances. Each sues to protect a two-fold interest—one as the proprietor of various public institutions and schools whose supply of gas will be largely curtailed or cut off by the

court held that Minnesota could maintain a *parens patriae* action against the defendant for allegedly overcharging Minnesota residents for oil purchases.<sup>104</sup> The court reasoned that a state may act under *parens patriae* whenever it has to vindicate a quasi-sovereign interest, and protection of the economic welfare of its citizens was such an interest.<sup>105</sup> Likewise, in *Snapp*, the Court allowed Puerto Rico standing under *parens patriae* because its citizens were harmed by the Virginia orchardists' preference to hire workers from states other than Puerto Rico.<sup>106</sup> As in *Pennsylvania v. West Virginia* and *Minnesota v. Standard Oil Co.*, the injuries sustained by Puerto Rican workers were clearly a consequence of their citizenship of Puerto Rico. The Puerto Rican workers who were discriminated against would not have experienced such discrimination if they were citizens of Virginia.<sup>107</sup> Similarly, the Pennsylvanians and Ohioans who would have been harmed by West Virginia cutting off the flow of gas would not have experienced such harm if they were residents of, say, Florida.<sup>108</sup> In each of these cases, the economic injuries experienced by the citizens of intervening states had some causal connection to their citizenship in those states.<sup>109</sup>

## 2. *Environmental Harms and the Geographic Limits of Parens Patriae*

A similar geographic limitation is apparent in many environmental *parens patriae* cases.<sup>110</sup> For example, in *Georgia v. Tennessee Copper Co.*, the Court held that Georgia had standing under *parens patriae* to enjoin the defendant from “discharging noxious gas from

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threatened interference with the interstate current, and the other as the representative of the consuming public whose supply will be similarly affected. Both interests are substantial and both are threatened with serious injury.”)

104. 568 F. Supp. 556, 563 (D. Minn. 1983).

105. *Id.* (“[T]he *parens patriae* doctrine allows a state to maintain a legal action where state citizens have been harmed, where the state maintains a quasi-sovereign interest.... Minnesota has a quasi-sovereign interest in protecting the economic health of its citizens.”).

106. Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 608 (1982).

107. *See id.* at 597-98 & n.5.

108. *See supra* notes 103-04 and accompanying text.

109. *See* Victor E. Schwartz et al., *Can Governments Impose a New Tort Duty to Prevent External Risks? The “No-Fault” Theories Behind Today’s High-Stakes Government Recoupment Suits*, 44 WAKE FOREST L. REV. 923, 938 (2009).

110. *See* Gifford, *supra* note 59, at 937.

their works in Tennessee over the plaintiff's territory."<sup>111</sup> Similarly, in *Maine v. M/V Tamano*, the court sustained Maine's right to sue under *parens patriae* for the defendant's wrongful conduct that resulted in 100,000 gallons of oil being spilled into a bay off of the Maine coastline.<sup>112</sup> Likewise, in *South Carolina v. North Carolina*, the Supreme Court allowed South Carolina standing under *parens patriae* to challenge North Carolina's proposed diversion of certain waters in a watershed shared by the two states.<sup>113</sup> South Carolinians were injured by North Carolina's apportionment of their watershed precisely because they lived in South Carolina. Likewise, residents of Maine who were harmed by the oil dump in *M/V Tamano* would not have suffered such harm if they lived in, say, North Dakota. Like the aforementioned economic *parens patriae* cases, the harms that justified state action in these environmental cases were harms that citizens suffered as a consequence of their citizenship in the intervening states.<sup>114</sup>

### *3. Health-Related Harms and the Geographic Limits of Parens Patriae*

Health-related *parens patriae* cases also require the harm that justifies state intervention to be unique to that particular state. In *Missouri v. Illinois*, the Supreme Court held that Missouri had *parens patriae* standing to request an injunction against the discharge of sewage into the Mississippi River by the sanitary district of Chicago.<sup>115</sup> The Court affirmed that when the health of the citizens of a particular state is threatened, that state has standing under *parens patriae* to seek an injunction against the harmful behavior.<sup>116</sup> Likewise, in *New York v. New Jersey*, the Supreme

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111. 206 U.S. 230, 236 (1907).

112. 357 F. Supp. 1097, 1099 (D. Me. 1973) ("[The defendants'] assertion is essentially that the State has no sufficiently independent interest in its coastal waters and their marine life to permit it to sue as *parens patriae* on behalf of its citizens. The Court disagrees.").

113. 130 S. Ct. 854, 867-68 (2010) ("[A] State's sovereign interest in ensuring an equitable share of an interstate river's water is precisely the type of interest that the State, as *parens patriae*, represents on behalf of its citizens.").

114. See Schwartz et al., *supra* note 109, at 938.

115. 180 U.S. 208, 241 (1901).

116. *Id.* ("An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the State of

Court upheld New York's standing under *parens patriae* to enjoin New Jersey from dumping sewage into the New York Harbor because of the adverse health effects that this practice had on the citizens of New York.<sup>117</sup> Thus, in the context of health-related injuries, states can maintain standing under *parens patriae* to vindicate the harms that their citizens experienced because of their citizenship in that intervening state.<sup>118</sup>

#### 4. *Geographic Limits in Parens Patriae Obesity Litigation*

State-initiated obesity litigation is well outside of *parens patriae*'s geographic limitations because the harms of the obesity epidemic are not unique to any particular state. For example, a person's residency in North Carolina as opposed to, say, Michigan does not influence the likelihood of that person becoming obese.<sup>119</sup> Assuming that the market for food is nationwide, that certain states do not have significantly greater access than other states to good foods, and that there is a meaningful distinction between good and bad foods,<sup>120</sup> a person's residency in one state likely does not increase or decrease that person's chances of becoming obese.<sup>121</sup> Notably, in the few cases in which a State intervened under *parens patriae* explicitly to vindicate harms done to the health of that state's population, the

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Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant State. But it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them.”).

117. 256 U.S. 296, 301-02 (1921). The Court in this case did not explicitly say that New York had standing to seek an injunction against New Jersey, but the implication of its holding supports such a conclusion. *Id.* (“[T]he right of the State to maintain such a suit as is stated in the bill is very clear. The health, comfort and prosperity of the people of the State ... being gravely menaced, ... the State is the proper party to represent and defend such rights by resort to the remedy of an original suit in this court.”).

118. See Ieyoub & Eisenberg, *supra* note 38, at 1869 (“Justice Holmes’s reference to ‘health’ is made in a context that establishes health as an interest that a state may clearly defend through *parens patriae* actions.”).

119. See, e.g., *Overweight and Obesity*, *supra* note 4 (failing to list geography or a person’s state of residence as a cause of obesity); cf. Gifford, *supra* note 59, at 937 (“[A]ssuming that the marketplace for tobacco products is nationwide (a seemingly safe assumption), a victim’s residence in Iowa neither increases nor decreases that victim’s risks of contracting a tobacco-related illness. In other words, the victim’s residence in a state is unrelated to the harm suffered.”).

120. See *supra* text accompanying note 87.

121. Cf. Gifford, *supra* note 59, at 937 (making the same analysis for tobacco cases).

harms experienced by the people of that intervening state were in some way a consequence of their citizenship in that state.<sup>122</sup> This, however, would not be true for obesity litigation.

Admittedly, in some states a person's chance of being obese may be higher than in other states. For example, some states may have greater access to fresh produce than others, or affluent states may have more farmers' markets and high-quality grocery stores than poorer states.<sup>123</sup> But, for the purposes of *parens patriae* analysis, obesity is not an injury that a state's citizens suffer uniquely because of their citizenship in that particular state. This is unlike, for example, the health-related harms that the citizens of New York experienced because of their citizenship in that state when New Jersey dumped sewage in the New York harbor.<sup>124</sup> In other words, successful *parens patriae* actions derive from intentional conduct that has a direct, adverse consequence on the citizens of the intervening state. Lack of high-quality grocery stores or farmers' markets is not the result of intentional culpable conduct. Rather, it is the result of the economic consequences of affluence or lack thereof.

Thus, because there is no causal connection between a person's state citizenship and that person's risk of becoming obese, state-initiated obesity litigation would likely be beyond the scope of *parens patriae*.<sup>125</sup> If states can maintain standing under *parens patriae* in their obesity suits, then any generalized harm that may affect a sufficiently substantial portion of a state's population would provide state attorneys general with *parens patriae* standing. Such an approach would markedly broaden the current parameters of *parens patriae* and likely be an impermissible use of the doctrine.

##### 5. *Massachusetts v. EPA and the Geographic Limitations of Parens Patriae*

Critics of this view of the scope of *parens patriae* may point to the Supreme Court's recent decision in *Massachusetts v. EPA* as support for the contention that no such geographic limitation is imposed on

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122. See *supra* Part II.B.3.

123. See *Food Desert Locator: Overview*, USDA, <http://www.ers.usda.gov/data-products/food-desert-locator.aspx> (last updated Mar. 4, 2013).

124. See *New York v. New Jersey*, 256 U.S. 296, 301-02 (1921).

125. See *supra* text accompanying notes 82-90 (noting the causes of obesity).



the doctrine.<sup>126</sup> In that case, Massachusetts and other states sued the Environmental Protection Agency for denying a rule-making petition that would have reduced air pollution and, in theory, diminished the effects of global warming.<sup>127</sup> The Supreme Court held that Massachusetts and the other intervening states had standing to sue under *parens patriae*.<sup>128</sup> At first blush, this holding may seem to eviscerate the apparent geographic limitation on *parens patriae*; after all, the effects of global warming are ubiquitous and not unique to any particular state.<sup>129</sup> Indeed, as the D.C. Circuit Court of Appeals noted in denying Massachusetts's petition for review,

Emission of certain gases that the EPA is not regulating may cause an increase in the temperature of the earth—a phenomenon known as “global warming.” This is harmful to humanity at large. Petitioners are or represent segments of humanity at large. This would appear to me to be neither more nor less than the sort of general harm eschewed as insufficient to make out an Article III controversy.<sup>130</sup>

The Supreme Court, however, took a different view. The Court began by noting that for a litigant to have standing it must “demonstrate that it has suffered a concrete and *particularized* injury.”<sup>131</sup> It then acknowledged that the risks of climate change were widely felt and shared by many people, not just the citizens of Massachusetts.<sup>132</sup> But the Court found that the harm Massachusetts experienced was, in fact, unique to that state:

That these climate-change risks are “widely shared” does not minimize Massachusetts' interest in the outcome of this litigation. According to petitioners' unchallenged affidavits, global sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming. These rising seas have already begun to swallow Massachusetts' coastal land.

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126. See 549 U.S. 497, 526 (2007); see also Gifford, *supra* note 59, at 937 n.179.

127. *Massachusetts*, 549 U.S. at 505, 510-11.

128. *Id.* at 526.

129. See Gifford, *supra* note 59, at 937 n.179.

130. *Massachusetts v. EPA*, 415 F.3d 50, 60 (D.C. Cir. 2005) (Sentelle, J., concurring), *rev'd*, 549 U.S. 497 (2007).

131. *Massachusetts*, 549 U.S. at 517 (emphasis added).

132. *Id.* at 522.



Because the Commonwealth “owns a substantial portion of the state’s coastal property,” it has alleged a particularized injury in its capacity as a landowner.<sup>133</sup>

According to the Court, despite the fact that the effects of global warming were ubiquitous in some respects, Massachusetts experienced a sufficiently unique, particularized harm. That the Court rested its opinion on this view of the effects of global warming suggests that *Massachusetts v. EPA* actually reaffirms, rather than undermines, the geographic limitation of *parens patriae*.

### *C. Public Nuisance as the Underlying Tort for Parens Patriae Actions*

Even if states can establish sufficient causation and show that obesity suits do not violate the geographic limitations of *parens patriae*, these states still must prove that the food industry breached some legal duty to have a viable cause of action.<sup>134</sup> In tobacco litigation, attorneys general relied upon the tort of public nuisance as the basis of their suits.<sup>135</sup> Tobacco litigation, however, will likely not serve as a useful template for obesity litigation in this regard. Courts have begun to cut back on the expansive notion of public nuisance and now require that an actionable public nuisance claim fit within the tort’s traditional parameters.<sup>136</sup> The result for obesity litigation is that public nuisance is likely too narrow of a tort upon which to base *parens patriae* obesity suits, and state attorneys general will need to find a different legal breach to justify their intervention.<sup>137</sup>

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133. *Id.* (citations omitted).

134. See Schwartz et al., *supra* note 109, at 939 (“The United States Supreme Court has made it clear that a claim cannot be resolved simply by reference to the general principle of *parens patriae*; like everyone else, the government must state a legitimate cause of action against a culpable party.”).

135. See Rustad & Koenig, *supra* note 42, at 85.

136. See *infra* Part II.C.2-5.

137. See *infra* Part III.

### *1. Public Nuisance and Its Historical Background*

In its original formulation, the tort of public nuisance was a basis for government intervention to rectify harmful conduct that injured real property or interfered with a public right.<sup>138</sup> In the context of public nuisance, a public right referred to the general population's right to uninhibited use of resources such as air, water, or public rights of way.<sup>139</sup> Moreover, public nuisance actions generally involved "non-trespassory invasions of the public use and enjoyment of land."<sup>140</sup> Such conduct included keeping sick animals, not treating a malarial pond, storing explosives, and operating a brothel.<sup>141</sup> Other traditional public nuisances include "blocking a public roadway[,] ... dumping sewage into a public river or blasting a stereo when people are picnicking in a public park."<sup>142</sup> Public nuisance is a "conduct-based tort ... and has most often been used in the absence of local ordinances prohibiting certain conduct."<sup>143</sup> The tort was normally employed by the government to protect its citizens from wantonly harmful or disruptive conduct,<sup>144</sup> and at its most fundamental level, "public nuisance is an unreasonable interference with a right common to the general public."<sup>145</sup>

Over time, however, public nuisance evolved into a catchall cause of action that appeared to lack clear doctrinal boundaries.<sup>146</sup> As one commentator noted, public nuisance "had become an 'impenetrable jungle' in which the word 'nuisance' had meant 'all things to all people, and has been applied indiscriminately to everything from an

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138. Handler & Erway, *supra* note 45, at 484-85.

139. State v. Lead Indus. Ass'n, 951 A.2d 428, 455 (R.I. 2008).

140. Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 545 (2006).

141. See Handler & Erway, *supra* note 45, at 485.

142. Schwartz & Goldberg, *supra* note 140, at 541.

143. Victor E. Schwartz et al., *Game Over? Why Recent State Supreme Court Decisions Should End the Attempted Expansion of Public Nuisance Law*, 62 OKLA. L. REV. 629, 630 (2010).

144. See Rustad & Koenig, *supra* note 42, at 84 ("A public nuisance is 'conduct regarded as so inimical to so many people' as to warrant remedies such as abatement, injunctions, and criminal prosecution.").

145. RESTATEMENT (SECOND) OF TORTS § 821B (1979).

146. See Handler & Erway, *supra* note 45, at 485.

alarming advertisement to a cockroach baked in a pie.”<sup>147</sup> Two scholars liken the broadening of public nuisance to a chameleon that frequently changes to fit facts of each case in which it is invoked,<sup>148</sup> and some argue that litigants have erroneously attempted to morph public nuisance into an unbridled “super tort.”<sup>149</sup>

## 2. *Public Nuisance and Tobacco Litigation*

It is possible that the attorneys general who initiated the tobacco litigation relied upon public nuisance as the primary underlying tort for their *parens patriae* actions because of its doctrinally ambiguous limits.<sup>150</sup> The advantage of basing such suits on public nuisance was that it allowed the state attorneys general to bypass traditional tort defenses, such as assumption of risk and contributory negligence.<sup>151</sup> These defenses would normally preclude an individual plaintiff from tort recovery.<sup>152</sup> Under public nuisance, however, the state has no obligation to prove that the harmed individuals misused or overused the allegedly harmful products.<sup>153</sup> The harmful conduct alone is sufficient to have a viable claim for public nuisance.

Because the state-initiated tobacco suits settled, the use of public nuisance as an underlying tort for *parens patriae* actions was never thoroughly tested.<sup>154</sup> Notably, however, in one of the few state-initiated tobacco suits that did not settle, the court rejected the overly broad interpretation of public nuisance that had evolved over time and reasserted the traditional doctrinal formulation of this tort.<sup>155</sup> The court held:

[T]he State has not pled a proper claim [for public nuisance], because it has failed to plead essential allegations under Texas public nuisance law. Specifically, the State failed to plead that

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147. *Id.* at 485 (quoting PROSSER & KEETON ON TORTS § 90, at 643-44 (W. Page Keeton et al. eds., 5th ed. 1984)).

148. Schwartz & Goldberg, *supra* note 140, at 541.

149. Schwartz et al., *supra* note 143, at 631.

150. See Gifford, *supra* note 59, at 940.

151. Rustad & Koenig, *supra* note 42, at 86.

152. See Gifford, *supra* note 59, at 945.

153. See Rustad & Koenig, *supra* note 42, at 86.

154. See *supra* text accompanying note 24.

155. See *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997); see also Schwartz et al., *supra* note 143, at 638.

Defendants improperly used their own property, or that the State itself has been injured in its use or employment of its property. The overly broad definition of the elements of public nuisance urged by the State is simply not found in Texas case law and the Court is unwilling to accept the state's invitation to expand a claim for public nuisance beyond its ground in real property.<sup>156</sup>

Thus, Texas could not pursue a claim against the tobacco industry based upon a public nuisance theory because the harm that Texas was suing to vindicate did not affect real property and, therefore, did not fit within the doctrinal limits of public nuisance.<sup>157</sup> States bringing obesity suits would face a similar problem. The harms underlying such suits would not be based on harm to or arising from real property, and in this sense would not be a traditional public nuisance claim.

### *3. Products Liability Jurisprudence and Public Nuisance*

Public nuisance has received a particularly chilly reception in recent years in the context of products liability actions brought by government entities.<sup>158</sup> For example, in *In re Lead Paint Litigation*, twenty-six municipalities and towns brought claims against lead paint manufacturers to recoup medical costs they incurred in providing medical care to their citizens suffering from illnesses related to lead paint exposure.<sup>159</sup> The municipalities brought their claims under a theory of public nuisance.<sup>160</sup> The Supreme Court of New Jersey flatly rejected their argument. The court held that allowing such claims to proceed would “stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance.”<sup>161</sup>

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156. *Am. Tobacco*, 14 F. Supp. 2d at 973 (citation omitted).

157. *Id.*

158. See, e.g., *In re Lead Paint Litig.*, 924 A.2d 484, 494 (N.J. 2007); *State v. Lead Indus. Ass'n*, 951 A.2d 428, 455-56 (R.I. 2008); see also Gifford, *supra* note 59, at 918.

159. 924 A.2d at 486-87.

160. *Id.* at 487.

161. *Id.* at 494; see also Gifford, *supra* note 59, at 918-19.

In a similar case involving health problems deriving from lead paint, the Supreme Court of Rhode Island likewise reaffirmed that public nuisance claims must comport with the tort's traditional doctrinal parameters.<sup>162</sup> The court emphasized that there were three necessary elements for a viable claim of public nuisance: "(1) an unreasonable interference; (2) with a right common to the general public; (3) by a person or people with control over the instrumentality alleged to have created the nuisance when the damage occurred."<sup>163</sup> Rhode Island's action for recovery of lead paint-related medical costs failed because such harm did not infringe on a public right, nor did it harm real property.<sup>164</sup> The court adhered to "the long-standing principle that a public right is a right of the public to shared resources such as air, water, or public rights of way."<sup>165</sup> Much like obesity litigation, in these lead paint cases, States intervened to vindicate health-related harms caused by a private party's misconduct.<sup>166</sup> As the courts' holdings suggest, however, a private party's conduct that causes many people to suffer a generalized health-related harm is not a sufficient basis for a public nuisance claim.<sup>167</sup> A litigant may sue under public nuisance only to vindicate harms against traditional public rights, such as the right to free enjoyment of air, water, and public rights of way.<sup>168</sup>

#### 4. *Environmental Jurisprudence and Public Nuisance*

Environmental harms are fertile ground for public nuisance claims, largely because environmental claims tend to fit squarely within public nuisance's traditional doctrinal parameters.<sup>169</sup> Surprisingly, however, even within the context of environmental

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162. *Lead Indus.*, 951 A.2d at 455; see also Gifford, *supra* note 59, at 918-19.

163. *Lead Indus.*, 951 A.2d at 446.

164. *Id.* at 455.

165. *Id.*

166. See *In re Lead Paint Litig.*, 924 A.2d at 486-87 (noting that the State brought suit against private lead paint manufacturers to assist residents suffering from lead paint poisoning); *Lead Indus.*, 951 A.2d at 434-35 (discussing the state's goal to recover damages for resident children suffering from lead poisoning as a result of paint used by the private defendant companies).

167. See Schwartz et al., *supra* note 143, at 646-52.

168. See *Lead Indus.*, 951 A.2d at 455.

169. See Handler & Erway, *supra* note 45, at 485; *supra* notes 138-45 and accompanying text.

harms, some courts have held that public nuisance is not an adequate basis to redress harms related to intentional pollution.<sup>170</sup> In *City of Bloomington v. Westinghouse Electric Co.*, the court rejected the plaintiff's claim that it could sue under public nuisance, even though the manufacturer-defendant produced harmful chemicals that contaminated plaintiff's watershed.<sup>171</sup> Only the party that actually had control of the chemicals when they were spilled could be sued for a claim of public nuisance.<sup>172</sup> Likewise, in *E S Robbins Corp. v. Eastman Chemical Co.*, the court denied the plaintiff's request for relief under a claim of public nuisance.<sup>173</sup> It reasoned that, although the defendant produced the hazardous materials that contaminated a watershed, the defendant sold the chemicals to the party that actually spilled them and thus was not in control of those chemicals when the harm occurred.<sup>174</sup> The court reiterated that "the gravamen of a claim of public or private nuisance ... is that there has been an intrusion which interferes with a landowner's use of the property"; thus a defendant not in control of the chemical at the time of the spill could not be liable for public nuisance.<sup>175</sup> The plaintiff's claim did not fit within the tort's traditional parameters, and as a result there could be no claim of public nuisance.<sup>176</sup>

These environmental cases are important for two reasons. First, they illustrate how litigants have attempted to stretch the doctrinal limits of public nuisance to fit their particular claims.<sup>177</sup> As the holdings suggest, to have an actionable claim under a theory of public nuisance, the defendant must be in control of the product that actually causes the harm.<sup>178</sup> This was not the case in *Westinghouse* or *E S Robbins*, and thus the plaintiffs could not rely on

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170. See Handler & Erway, *supra* note 45, at 485.

171. 891 F.2d 611, 614 (7th Cir. 1989); see also Schwartz et al., *supra* note 109, at 941 & n.122.

172. *Westinghouse*, 891 F.2d at 614.

173. 912 F. Supp. 1476, 1494 (N.D. Ala. 1995); see also Handler & Erway, *supra* note 45, at 485.

174. *E S Robbins*, 912 F. Supp. at 1494.

175. *Id.*

176. *Id.*; see also Handler & Erway, *supra* note 45, at 485.

177. See Schwartz et al., *supra* note 143, at 631, 663-65.

178. See *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611, 614 (7th Cir. 1989); *E S Robbins*, 912 F. Supp. at 1494; see also Schwartz et al., *supra* note 143, at 633, 635-36.

public nuisance.<sup>179</sup> Second, and more importantly, these cases show that even within the context of environmental torts, an area in which public nuisance is generally considered a viable cause of action,<sup>180</sup> courts are reluctant to allow public nuisance claims that do not fit within the tort's traditional doctrinal limits.<sup>181</sup>

### *5. Modern Public Nuisance and Parens Patriae Obesity Litigation*

The tobacco, products liability, and environmental cases suggest that courts have reigned in the use of public nuisance in recent years.<sup>182</sup> Indeed, in an article analyzing several high-profile public nuisance cases, the authors conclude that in each of these cases, "the attempt to expand public nuisance beyond its original moorings failed.... The rulings and legislative enactments issued to date make clear that courts and legislatures are unwilling to redefine public nuisance or morph it into a 'super tort.'"<sup>183</sup> They further add that "[t]hese cases should signal to state attorneys general ... that public nuisance is not a catch-all cause of action capable of circumventing traditional tort principles and defenses."<sup>184</sup>

Thus, state attorneys general who plan to sue the food industry under their *parens patriae* power will likely be unable to rely upon public nuisance as the underlying legal breach to justify such suits. Obesity litigation does not derive from harmful conduct committed against real property. Harm against real property is what public nuisance is traditionally used to rectify,<sup>185</sup> and the court in *American Tobacco* found the lack of such harm dispositive.<sup>186</sup> Additionally, the lead paint litigation made clear that states cannot sue under a theory of public nuisance to rectify health-related harms that were

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179. See *Westinghouse*, 891 F.2d at 614; *E S Robbins*, 912 F. Supp. at 1494.

180. See Handler & Erway, *supra* note 45, at 485.

181. See Schwartz et al., *supra* note 143, at 639-40, 665.

182. *Id.* at 630.

183. *Id.* at 630-31.

184. *Id.* at 665.

185. Handler & Erway, *supra* note 45, at 484-85.

186. See *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997); see also Handler & Erway, *supra* note 45, at 487.



caused by a dangerous product.<sup>187</sup> Such conduct did not infringe upon a traditional public right like the right to air, water, and public rights of way, and thus an action for public nuisance could not stand.<sup>188</sup> The same would be true for obesity litigation. Like the lead paint cases, in obesity litigation states would intervene to recover money they spent treating obesity-related illnesses. Such underlying harm has no connection to traditional public rights.

Finally, the environmental cases demonstrate that in order to have a viable claim of public nuisance, the defendant must actually be in control of the product at the time it caused the harm.<sup>189</sup> Like the defendants in *Westinghouse* and *E S Robbins Corp.*, the defendants in obesity litigation would obviously not have control over the food products when those products harm consumers. The food industry's lack of such control would likely preclude an action of public nuisance.

If viewed in reference to only one of the three aforementioned areas of law—tobacco, products liability, and environmental—the argument that public nuisance would not be a viable cause of action for state attorneys general pursuing obesity litigation may not be as compelling. Taken together, however, it is clear that courts today generally allow public nuisance claims only when its traditional elements are met.<sup>190</sup> The result for state attorneys general bringing obesity *parens patriae* suits is that they must find a different common law cause of action upon which to base their suits.

Moreover, even if a suitable alternative legal theory is found, it is unlikely to allow the attorneys general to bypass traditional tort defenses.<sup>191</sup> Such a conclusion is buffered by the holding in *Pelman v. McDonald's Corp.*, in which the court denied the private plaintiffs' claim that McDonald's was responsible for their obesity-related

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187. See *In re Lead Paint Litig.*, 924 A.2d 484, 494 (N.J. 2007); *State v. Lead Indus. Ass'n*, 951 A.2d 428, 455-56 (R.I. 2008); see also Schwartz et al., *supra* note 109, at 944-45.

188. See, e.g., *Lead Indus.*, 951 A.2d at 455.

189. See *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611, 614 (7th Cir. 1989); *E S Robbins Corp. v. Eastman Chem. Co.*, 912 F. Supp. 1476, 1494 (N.D. Ala. 1995); see also *Handler & Erway*, *supra* note 45, at 485.

190. See *Handler & Erway*, *supra* note 45, at 485 (“[Prosser] suggested that courts dismiss nuisance claims ‘not connected with land or with any public right.’ More recently, courts have adhered to this suggestion and ‘the scope of nuisance law appears to have returned to its more narrow focus.’”).

191. See *Rustad & Koenig*, *supra* note 42, at 86.



health problems.<sup>192</sup> The court rejected the claim because the dangers of eating McDonald's food were not "dangerous in any way other than that which was open and obvious to a reasonable consumer," implying that the consumer had assumed the risk associated with eating the food.<sup>193</sup> Under public nuisance, such a defense could be avoided because all that must be shown is that the defendant performed the conduct that harmed real property or injured a public right.<sup>194</sup> However, the vulnerability of other tort claims to such affirmative defenses diminishes the likelihood that attorneys general will have standing under *parens patriae* in obesity litigation.

#### *D. Why Tobacco Litigation Settled*

The fact that state attorneys general settled their suits against the tobacco industry undermines this Note's argument that *parens patriae* standing will not be available in obesity litigation. After all, the attorneys general who brought the tobacco litigation must have had standing for such suits under their *parens patriae* authority, otherwise the tobacco companies would not have settled in the first place. Furthermore, tobacco litigation is not all that different from obesity litigation.<sup>195</sup> Both involve state-initiated suits against private parties that produce harmful products that caused the citizens of those intervening states to suffer health problems.<sup>196</sup> In addition, like the tobacco cases, state-initiated obesity litigation would be aimed at recouping state-paid medical costs associated with treating obesity.<sup>197</sup> Given these similarities between obesity and tobacco litigation, one may wonder why obesity litigation should not be expected to have an outcome similar to its tobacco counterpart.

The first and perhaps most compelling response to such a challenge is that causation in tobacco litigation was clearly and firmly established between the conduct of the defendants and the harms ultimately suffered by the citizens of the intervening states. There was little doubt that the relatively small number of defendants

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192. 237 F. Supp. 2d 512, 539-41 (S.D.N.Y. 2003).

193. *Id.* at 541.

194. Rustad & Koenig, *supra* note 42, at 86.

195. See Courtney, *supra* note 15, at 92-94.

196. See *supra* notes 19-24 and accompanying text.

197. See Pomeranz & Brownell, *supra* note 18, at 427.

involved in the tobacco litigation were directly and wholly responsible for the health problems suffered by the citizens of the intervening states.<sup>198</sup> However, there are few, if any, members of the food industry that could be considered directly and wholly responsible for making people obese.<sup>199</sup> Successful *parens patriae* cases have always demonstrated a clear causal link between defendant's conduct and the harm suffered by the intervening states' citizens.<sup>200</sup> State attorneys general bringing obesity suits likely cannot demonstrate such a causal connection.

Second, tobacco litigation occurred during a period in which public nuisance was still a relatively unbounded, catchall cause of action.<sup>201</sup> Since the tobacco litigation of the mid-1990s, however, public nuisance has returned to its traditional doctrinal formulation and can only be used to rectify harms against real property or other traditional public rights.<sup>202</sup> Because of this doctrinal reconfiguration, obesity litigation likely cannot be based on a claim of public nuisance. As such, a different legal breach must be found, and whatever theory is pursued could be defeated by affirmative defenses such as assumption of risk and contributory negligence.<sup>203</sup> Because state attorneys general in obesity litigation will not be able to sidestep these defenses the way their tobacco counterparts did, they will have to show that the obese citizens of their states did not overuse or misuse the food products of the companies against which they bring suit.<sup>204</sup> Such a burden will likely be fatal to obesity litigation.

In spite of the two key differences between obesity and tobacco suits, what tobacco and obesity litigation have in common is that both likely exceed the geographic scope of *parens patriae*. Like obesity, smoking-related harms are not harms that citizens of the intervening states suffer as a consequence of their citizenship in a state.<sup>205</sup> This being the case, one may wonder why the tobacco defendants were willing to settle. The answer likely lies in the fact that

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198. *See supra* Part II.A.2.

199. *See supra* Part II.A.1.

200. *See supra* Part II.A.3.

201. *See* Handler & Erway, *supra* note 45, at 487.

202. *See id.* at 485.

203. *See* Rustad & Koenig, *supra* note 42, at 86.

204. *See id.*

205. *See supra* Part II.B.1.-4.

the tobacco defendants did not want to rely upon such a singular defense when there was such a strong causal link, and an unbridled view of public nuisance gave the attorneys general wide latitude to pursue their claims.<sup>206</sup> Although the tobacco defendants may have defeated the states' claims by arguing lack of standing because of *parens patriae's* geographic limitations, the causation and underlying legal breach theories asserted against them were formidable. As this Note argues, however, this would not be the case in obesity litigation. Attorneys general in obesity suits would have to contend with deficient causation, curtailed public nuisance, and *parens patriae's* geographic limitations.

### III. ALTERNATIVES TO PARENS PATRIAE OBESITY LITIGATION

#### A. *Other Attorney General Tools*

If *parens patriae* does not, in fact, provide state attorneys general with standing to sue the food industry for obesity related harms, there are a variety of alternative, albeit less direct, methods to enforce a similar regulatory regime on the food industry. First, a state could enact stringent consumer protection laws that would give state attorneys general broad standing to sue for breach of such laws.<sup>207</sup> Standard consumer protection laws give state attorneys general authority to move for restraining orders, subpoena documents, and impose injunctions and fines against parties that breach such laws.<sup>208</sup> Attorneys general could also engage in rule making, which is generally considered an appropriate method to "address a widespread industry practice when litigation against a single entity" will not minimize the problem.<sup>209</sup> Attorneys general could also engage in consumer education.<sup>210</sup> Although it may be the least direct and effective way to combat the obesity epidemic, the prominent

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206. See Courtney, *supra* note 15, at 88-89 ("Eventually, due to potential lawsuits by almost every state on a variety of claims, the industry settled .... While the settlement was costly for the industry, the tobacco companies involved benefitted from the certainty and predictability of the settlement, including being relieved of suits filed by state governments.").

207. See Pomeranz & Brownell, *supra* note 18, at 427.

208. *Id.*

209. *Id.*

210. *Id.* at 428.

public role of state attorneys general can provide them with a bully pulpit from which they can advocate for obesity reform.<sup>211</sup>

### *B. Subrogation*

If litigation is the preferred method of combating the obesity epidemic, state attorneys general also have the option of pursuing subrogation claims.<sup>212</sup> Generally speaking,

subrogation is the substitution of one party in place of another with reference to a lawful claim, demand or right. It is a derivative right, acquired by satisfaction of the loss or claim that a third party has against another. Subrogation places the party paying the loss or claim (the “subrogee”) in the shoes of the person who suffered the loss (“the subrogor”). Thus, when the doctrine of subrogation applies, the subrogee succeeds to the legal rights and claims of the subrogor with respect to the loss or claim.<sup>213</sup>

States bringing subrogation claims would be suing the food industry based upon the rights and claims that obese people would be able to assert against the food industry themselves. This is in contrast to the *parens patriae* suits in which states would intervene to recoup state-paid medical expenses tied to obesity related healthcare.

However, in a subrogation action the subrogee effectively steps into the place of the initial tort victim.<sup>214</sup> As a result, subrogation claims would be subject to traditional defenses such as assumption of risk and contributory negligence.<sup>215</sup> One commentator notes that in such a tobacco subrogation suit, the state’s claim would “be denied ... because of the smoker’s knowledge of the risks of smoking.”<sup>216</sup> Given this, in the context of obesity litigation it is likely that such affirmative defenses would defeat subrogation claims. In addition, in lead paint subrogation cases, “the state’s claim would always be denied in actions against lead pigment manufacturers because of

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211. *Id.*

212. See Gifford, *supra* note 59, at 933.

213. *In re Hamada*, 291 F.3d 645, 649 (9th Cir. 2002).

214. *Id.*

215. Rustad & Koenig, *supra* note 42, at 86.

216. Gifford, *supra* note 59, at 933-34.

the inability to identify the specific manufacturer that produced the product causing the individual victim's harm."<sup>217</sup> Like the lead paint litigation, it would be nearly impossible to identify which particular food producer caused the subrogor's harm in an obesity suit. These hurdles would likely be fatal to obesity subrogation claims. Therefore, if state attorneys general cannot sustain subrogation claims and cannot sue the food industry under their *parens patriae* authority, state-sponsored litigation is likely not the most effective way to fight obesity.

### *C. Legislation*

Because the aim of *parens patriae* obesity suits would ultimately be to curb the harmful practices of the food industry, such suits are actually an attempt to implement a more comprehensive food and nutrition regulatory regime. The implication of this is that state attorneys general are trying to fulfill a quintessentially legislative function.<sup>218</sup> As one scholar has noted, "[a]s imperfect as the functioning of state legislatures in reality may be, the attorney general's appropriate role within the constitutional framework is not to replace" the legislature through the exercise of his *parens patriae* authority.<sup>219</sup> The obvious conclusion is that regulation of the food industry for the purpose of curbing the obesity epidemic is within the province of state legislatures, not attorneys general. Exploring legislative alternatives to state-sponsored obesity litigation is beyond the scope of this Note; however, if, as this Note argues, state attorneys general do not have standing under *parens patriae* to bring obesity suits, legislation would likely be the most effective alternative.

## CONCLUSION

Contrary to the assertions of some obesity reform advocates, state attorneys general will not be able to rely upon tobacco litigation as a model for obesity suits because these suits would fail on standing.

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217. *Id.* at 934.

218. *See id.* at 969.

219. *Id.*

Unlike the tobacco litigation, the chain of causation between the conduct of the food industry and the people who suffer from obesity will be too attenuated to maintain standing under *parens patriae*.<sup>220</sup> Moreover, allowing an action under *parens patriae* against various members of the food industry would be beyond the doctrine's geographic limitations.<sup>221</sup> Finally, public nuisance will not be an adequate tort upon which to base *parens patriae* obesity suits, and the alternative legal theories would likely be defeated by various affirmative defenses.<sup>222</sup> As such, state attorneys general likely cannot bring obesity suits against the food industry under their *parens patriae* power, and states should pursue other methods of fighting the obesity epidemic.

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220. *See supra* Part II.A.

221. *See supra* Part II.B.

222. *See supra* Part II.C.

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