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HBR CASE STUDY AND COMMENTARY

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Should Peter tell  
CEO Ed Malanga  
that Southland  
needs to recast its  
product lines?

Four commentators offer  
expert advice.

## Taking the Cake

by Ben Gerson

Reprint [R0403A](#)

*Southland Baking Company makes lots of dough—from dough that is drenched in trans fats. Now consumer activists and hungry litigators want to take both away.*

HBR CASE STUDY

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# Taking the Cake

by Ben Gerson

His house, a handsome Victorian, stood on a low hill in the bedroom community of Bethesda, Maryland. With a pair of good binoculars he could make out, through any of the three dormer windows in his finished attic, the distinctive contours of the Capitol dome. It was one of the minor pleasures of owning this house in this town—at least it had been until last month, when an outsized interpretation of the Governor's Mansion in Williamsburg, Virginia, flaunting four chimneys instead of the historically accurate two, fully materialized next door.

Its owner was a glad-handing plaintiff's lawyer named Alex Kezenas, age 64, who had made a career-crowning killing in 1999. His client was an 18-year-old West Virginia high school shortstop who had developed a fatal case of tongue cancer from habitual use of chewing tobacco. Kezenas had persuaded a rural jury to assess actual and punitive damages against the Old

Cherokee Tobacco Company totaling \$12.1 million. His contingency fee came to a sixth of that and helped finance the brick obstruction he dwelled in today.

Sitting on the edge of his bed this Sunday morning, gazing distractedly out the window, Peter Schmidt reminded himself that it was Alex's house he minded, not his chosen livelihood, even though he was in no mood for litigators at the moment. A grandstanding New York lawyer had just sued a packaged foods company not unlike Peter's for supposedly making his client fat. The suit seemed laughable. But every lawsuit, he thought, no matter how baseless, was a headache and an expense for the company being sued. Alex was different. Tobacco was a real health menace. More power to Alex.

The phone rang. It was Richie Snell, Southland Baking Company's director of government affairs. "Peter, I have a problem," he said.

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*HBR's cases, which are fictional, present common managerial dilemmas and offer concrete solutions from experts.*

"The House subcommittee on food and drugs is holding hearings tomorrow at 10 AM on child obesity and the fat content of baked goods, and we need to know what's going on. But I've got a sit-down with Senator Fullenwieder at the same hour. Can you go? You know the players even better than I do."

"Of course, Richie," Peter replied, masking his irritation. Surely Richie could have given him a little more warning. The reason he hadn't was probably his customary inattentiveness, although the thought crossed Peter's mind that Richie's intention may have been to maneuver him into saying yes. Before joining Southland's small legal department a decade earlier, Peter had been counsel to the subcommittee. When he left, he thought he'd be spending most of his time at Southland on compliance issues. But two and a half years into his tenure, Aunt Emmy's, a Tennessee pie company in which Southland had recently acquired a majority interest, blew up, and Peter was sent to Murfreesboro to run the place until it emerged from Chapter 11. In short order, Peter had paid its creditors 94 cents on the dollar and restored profitability.

Soon after, CEO Ed Malanga asked Peter to return to Baltimore as Southland's vice president and general counsel, the previous occupant having been dismissed for his due-diligence lapses. Ed had been generous in helping Peter grow into his corporate duties, but he never got over his impatience with the legal department's hairsplitting objections to one or another of Ed's schemes. "Stop thinking like a lawyer!" he'd shout.

Peter's broader corporate duties were evidence that he had indeed learned to stop thinking like a lawyer. "I guess in Ed's eyes I've succeeded," he reflected, with a kind of rueful pride.

### A House Divided?

"Hello, Peter."

"Hello, Congressman."

The same exchange occurred several times as Monday's session broke up. The subcommittee's membership had changed very little in almost ten years, thanks to the wonders of incumbency. To Peter's practiced eye, the members had listened with a mixture of amusement and feigned and genuine concern to the testimony of scientists, educators, and consumer advocates. The most vociferous had

been the president of MOOK (Mothers Opposed to Obesity in Kids), a fortyish woman wearing a Chinese-red pantsuit.

"The food companies have a neat phrase for letting themselves off the hook," she announced from the witness table. "They say their products are 'part of a balanced diet.' But who today provides children with the rest of that diet? Not working parents, who don't have time to shop for raw vegetables and healthy protein, and who get home too late to cook them. Could it be the public schools? They're busy turning over their lunchrooms to fast-food franchisees and installing vending machines in their hallways. They even allow food advertising to run on the TV monitors the food companies have donated. Just listing ingredients on the sides of packages isn't going to stop kids from gobbling up their worthless contents. There is only one answer—to mandate warning labels on all foods containing sugars and saturated fats and to ban advertising of all such products on children's TV programs."

She paused to bring a bottle of Evian to her lips. "We know that eating habits get established early. Obese children grow into obese adults. A diet high in saturated fats often results in heart disease. And science is beginning to learn about diet's role in predisposing people to certain kinds of cancers." Citing the work of a Yale medical professor, she concluded: "Obesity alone will kill more people than alcohol and tobacco combined."

"Mrs. Newland," Representative Ray Slocum, a slow-talking New Hampshire Republican, began. "It sounds to me like you're asking us to construct a mommy state, where it's assumed citizens are unable to inform themselves about what's good for them. Since 1990, the Food and Drug Administration has required food companies to list the levels of calories, fat, cholesterol, sodium, and heaven knows what else on their packaging and, starting in 2006, to state the levels of trans fats. That seems to me quite enough protection for a nation of free citizens. I don't understand how you can suggest treating food the same as tobacco."

Later, Peter buttonholed the last committee member to leave the dais, Chicago Democrat Larry Fischer, an old ally. "Level with me, Larry: Where is the sentiment on the committee heading? Do we need to get involved in a big lobbying push? Or should we accept some

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kind of warning mandate as inevitable?”

“Peter, as with most issues, you don’t have too much to worry about if the public remains more or less indifferent. But you’d know better than I how Southland’s customers are spending their food dollars these days.”

### What’s Eating Consumers?

Southland was not a huge operation, but it was a prosperous one. As the third-largest independent cookie company in the United States, it had a strong foothold in second- and third-tier markets in the Southeast as well as the middle Atlantic states. Walk into any grocery store between Hagerstown, Maryland, and Chattanooga, Tennessee, and chances are you’d find three or four Southland SKUs on the shelves. The land of fried chicken and hush puppies liked its snacks and desserts steeped in fat, and Southland saw no reason not to oblige.

But to Lou Salvador, the company’s vice president of marketing, sometimes the “southland” seemed a world away from Washington, DC, where he made his home, not to mention New York or California, where trends usually began. Lou took an intense interest in competitors’ product innovations. He was the only executive at headquarters to have a television in his office, and it was usually tuned to MTV. But most of Lou’s marketing budget went toward trade promotion. Ed Malanga didn’t see the point of spending millions on advertising when Southland’s product lines were so well established.

Southland’s best-selling product was the Mellobar, which was introduced in 1975 as an instant breakfast food, but which over the years had been made smaller and sweeter and now qualified as a snack. In the 1970s, “mellow” was the state of mind people under the age of 30 aspired to achieve, but the name now had a vaguely dated air, and the cookie’s original nutritional claims had disappeared from its wrapper.

Peter picked up his office phone and rang Lou. “Would you like to grab some lunch? What do you say we go to that sushi joint over at Harborplace? Oh, I see. All right, then. Rudy’s it is.”

As soon as Lou’s prime rib was placed in front of him, Peter began. “I may be making something out of nothing, but yesterday I sat through a hearing on the Hill about the fat

content of food and its connection to health. I couldn’t really tell if there was just a codependency thing going on between the do-gooders and the members or if the subcommittee was getting ready to brand our products the latest health hazard. Ray Slocum stood up for us, but he was really the only one. It probably won’t amount to anything unless public sentiment starts to turn. But that’s what I wanted to ask you about. Are your salespeople getting any signals?”

“Well,” Lou said, frowning, “I’d have to say the signals are mixed. So far this quarter, revenues are 11% over last year’s, which should allow me to relax. But if you check out the stores that carry us, even a few of the out-of-the-way ones, you see these odd little brands cropping up—Debbie’s Blondies, or Greg’s Passion Cakes, or Pacific Maca-mania Bits. It’s all stuff made with honey instead of sugar or corn syrup and with canola or palm oil that hasn’t been hydrogenated. Individually, they don’t amount to much. Collectively, though, it must be adding up to some real money. The question is, How do we define success? If it’s market share, and it includes these guys, we’re losing ground.”

“What about the majors?” Peter asked. “Are they noticing?”

“Maybe they’re not looking over their shoulder at Pacific Maca-mania Bits, but their research is telling them that people are getting smarter about ingredients and more worried about the connection between eating habits and health. Sweetena is starting to roll out line extensions with half the fat of the original product.” Lou was referring to Mellobar’s biggest rival, the market leader. “So I guess you could say we’re about to be squeezed from both directions. In fact, our margins are already being squeezed—the slotting fees we have to pay for good placement have gone up 17% this year.”

Lou turned his attention back to his lunch for a while, then glanced at Peter’s worried face. “Listen,” he said, “if you really want to know, I’ve already asked Fred and his outfit to knock off a leaner version of our Chizzlewits. Keep quiet about this, but we’re about to test it on a bunch of seven-year-olds. You can come along if you want.”

### The Cookie Crumbles

On one side of the one-way mirror sat Fred

*A grandstanding lawyer had just sued a packaged foods company not unlike Peter’s for supposedly making his client fat. The suit seemed laughable.*

*The land of fried chicken and hush puppies liked its snacks and desserts steeped in fat, and Southland saw no reason not to oblige.*

Rangle, Southland's chief scientist, along with Peter, Lou, one other member of the marketing department, and six Baltimore mothers. On the other side sat six boys and girls, name tags pinned to their shirts, and Mary Cairncross, the Southland dietician who would ply them with Fred's new, improved Chizzlewits. Brittany picked one up and chewed thoughtfully. Caitlin tentatively licked the edge of hers. Brian nibbled a corner and frowned. Kevin broke his into pieces and refused to eat any. Keisha ate the whole thing and burst into tears. And Arthur, scowling, spat a large wad onto the table in front of him and declared, "It looks like a Chizzlewit, but it doesn't taste like one!"

The mothers were embarrassed. Lou was dismayed. Fred, however, looked triumphant. After the mothers were escorted out, Fred addressed Lou. "You think it's the words on the package that moves cookies. It's not. It's taste. People won't eat food they don't like, however good it's supposed to be for them—kids in particular, as we've just seen. Fat carries flavor. You can't get away from it."

"I think that's a bit simplistic," Lou replied. "With all due respect, Fred, I'd like to hear Millie's angle on this." Millie Lepore was Southland's chief dietician. "Let's the four of us meet sometime next week—you, Millie, Peter, and me."

### Science Versus Nature

Everyone at Southland knew there was no love lost between Millie and Fred. Fred was a believer in better living through chemistry. He was famous for saying "What doesn't kill me makes me stronger." In discussions about what the levels of cholesterol and fats in the company's products should be, Millie, who had played a significant role in formulating the original version of the Mellobar, always came down on the side of nutrition. If Southland's products fell short, it wasn't for lack of trying on Millie's part.

The four of them gathered in Lou's spacious office the following Monday. Lou reached up and doused his MTV. "As you know, Millie," he began, "Peter doesn't usually get involved in questions of product formulation and their impact on marketing and sales. But he's been picking up some worrying signs of increasing regulatory interest in snacks, beverages, and fast foods, so Fred and I are trying to give him

a sense of how much latitude we might have in placating Congress and the FDA."

"We have very little," Fred interrupted. "Everyone's worried about saturated fat, but it is the basis of our products. The pure polyunsaturated vegetable oils Millie would like us to use are expensive and can turn rancid on the shelf. We have a wonderful process that forces hydrogen into liquid oil in the precise amounts needed to produce the flavor intensity and mouth sensation we want in the baked goods we sell. Any change in our processes or formulas risks driving up costs and driving away our most loyal customers. And they're not, Lou, I'd remind you, the kinds of people who can pay premium prices."

Now it was Millie's turn. "Fred, you forgot to mention that partial hydrogenation produces trans fats, which have zero nutritional value. Worse, they elevate LDL levels in the blood while suppressing HDL levels, which could otherwise help the body handle all that 'bad' cholesterol. I've never said this before, but I think it's irresponsible to use trans fats when reasonable alternatives exist."

"Such as?" Fred inquired.

"One hundred percent palm oil, which is already semisolid."

"Did you know that Malaysia, where most of it comes from, has been clearing rain forest to make room for oil-palm plantations? What do you think the activists would do with that little fact?"

"All right. Dried plum powder. The sorbitol, I've heard, holds moisture, and the mastic acid enhances flavor."

"Give me a break."

The meeting broke up before Peter got to say a word.

### The New Tobacco

The past week or so had been a detour, albeit an educational one, for Peter. Now legal matters were piling up—an OSHA violation in the Knoxville plant; a trademark infringement by a Miami company; a lease renewal for the Baltimore space. And though he sensed the risk was small, a couple of days earlier he'd asked Naomi Berlin, his in-house litigation counsel, to prepare a legal memorandum on the potential liabilities food companies faced for their products' health effects.

Naomi entered Peter's office and sat down. "Of course I plan to read your memo, Naomi,

*“I could imagine a court allowing a class action suit against us to proceed because, in effect, we failed to warn potential customers not to buy our cookies!”*

but I’ve got to figure out our position very soon. Apparently Ray Slocum called Ed to ask him for a campaign contribution, and he mentioned he’d seen me on the Hill last week. Ed figures it had to be a really important hearing to require my presence. I need to call him back, so give me the bottom line. How would regulation affect our liabilities?”

Naomi launched into a summary. “It would set a baseline. If we didn’t cross it, which we would not, we’d be in the clear. Naturally, all of our competitors would have to comply as well. Thaxton’s got in trouble only because they said their fries were vegetarian when there were traces of beef tallow in the cooking oil. The problem is that courts tend to play policy maker when Congress doesn’t. It used to be that a company had a duty to warn only the purchasers of its products about any possible safety hazards. Not any longer. It would be hard to prove that the fat content of some company’s cookies is the proximate cause of a particular kid’s health problems. But I could imagine a court allowing a class action suit against us to proceed because, in effect, we failed to warn *potential* customers not to buy our cookies!”

“Is there an analogy to tobacco?” Peter asked.

“Well, Congress, as you know, has required cigarette packs to carry warning labels since the 1960s. The duty to warn about fats, if a court should find one, at the moment would fall on us. The cigarette companies tried to develop a safe cigarette, but they were afraid to say so because it would imply their current brands were unsafe. Besides, it tasted terrible.

So, by the way, do our new, improved Chizzlewits, or so I hear.”

Peter groaned as he recalled seven-year-old Arthur spitting out the Chizzlewit he’d chewed.

“Speaking of Chizzlewits,” Naomi continued, “the big tobacco settlement forbade marketing to minors, and we know most of our consumers are kids.”

“Anything else?” Peter asked.

“Yes. The trans fats in our products seem to present a special case. They’re not a food. The FDA refuses to set a daily level for them. They’re an artifact of the manufacturing process. Cigarettes carry warnings and are heavily taxed because they aren’t good for us. You could say the same thing about trans fats.”

### **Busted**

Peter left for Bethesda early that day. The aged pipes in his Victorian required the plumber’s attention. As he pulled into the driveway, he saw Alex operating his leaf blower. So that’s how retired millionaires fill their weekday afternoons, Peter mused. Alex shut off the noisy machine and walked toward him, looking grave. “Bad break.”

“What do you mean, Alex?”

“I just got a call from an old pal. Didn’t you hear? About an hour ago, a trial lawyer in West Virginia filed suit against Southland.”

### **Should Peter tell CEO Ed Malanga that Southland needs to recast its product lines?**

• Four commentators offer expert advice.

See **Case Commentary**

## Case Commentary

by Kenneth B. McClain

## Should Peter tell CEO Ed Malanga that Southland needs to recast its product lines?

*Southland's decision to place partially hydrogenated oils in its products for "flavor intensity" puts sales ahead of health.*

Laughable as they might seem, lawsuits like the one filed against Peter Schmidt's company are not at all far-fetched. American law has developed a very clear social contract that requires manufacturers to make their products reasonably safe. Although the laws of various states have different nuances, they generally hold manufacturers to the standard of an expert. Thus, companies must make their products as free from defects as possible. In this way, the law promotes products that are safe and prods manufacturers to make them safer.

Obesity is a national problem. Approximately 20% of adults are classified as obese, a 61% increase since 1991. When a problem becomes as widespread as this, the argument that dealing with it is simply a matter of personal responsibility is difficult to make. After all, few people choose to be fat. Most Americans want to be thin, yet every year our waistlines get a little bigger. This is particularly true of children, who now are reportedly fatter than at any time in U.S. history.

Looking at the facts of this case study, I can readily see a basis for a defective-product claim. Before they are manufactured into food, many substances contain high levels of saturated fat. It may seem unlikely that a company could incur liability for a decision to market products containing such substances, particularly if the fat content is disclosed. But Southland's decision to place partially hydrogenated oils in its products to produce "flavor intensity and mouth sensation" is a design choice that puts sales ahead of health. Millie Lepore, Southland's chief dietician, recognizes that. Her suggestion that reasonable alternatives exist is something that the company should explore. The company can't escape responsibility by saying that its attempt to reformulate Chiz-zlewits using less fat was unsuccessful. Naturally, it takes time for consumers to adjust to design changes, particularly when they relate to food. Two examples from the food industry will illustrate why.

I once deposed a former research director of

a major cigarette manufacturer who had been instrumental in creating the first generation of a safer cigarette. The project stalled when people in the initial test market failed to accept the product. The research director had a background in the food business and saw parallels. He told me that when diet sodas were introduced, people hated them because they were inferior in taste to regular soft drinks. Even so, some people bought diet sodas because they wanted to limit their intake of calories, sugar, or both. Today, millions of Americans make Diet Coke, Diet Pepsi, or Pepsi One their only soft-drink choice.

Sugar-free chewing gum is another obvious example. Anybody over 40 will attest that sugar-free gum when it first appeared was an inferior product with little market appeal. However, after its health benefits became clear and improvements in flavor were made, sugar-free gum came to outsell regular chewing gum.

The fact that Debbie's Blondies, Greg's Passion Cakes, and Pacific Maca-mania Bits are moving into Southland's market space demonstrates that consumers can be persuaded to try these kinds of healthier products as well. Such evidence may not assure the success of a plaintiff's claim, but it does show that a feasible alternative was available to Southland. Because the risks posed by Southland's traditional products outweigh their commercial utility, they provide a basis for a defective-product-design case.

Obesity is a societal problem. We can't just cluck our tongues and watch our collective waistlines explode. Like it or not, the manufacturers who create national health problems will be made to deal with them—either by creating healthier products or by paying large liability verdicts.

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## Case Commentary

by Laurian J. Unnevehr

## Should Peter tell CEO Ed Malanga that Southland needs to recast its product lines?

Peter Schmidt should tell his CEO that Southland's executives need to stop fighting the food-culture wars within the company and move forward with a strategy that integrates product development and marketing. The marketing manager has already noticed that a product innovation squeeze is under way, but he is unable to bring about a change in strategy due to the company's entrenched and outmoded attitudes toward product development. Whether or not Southland faces legal liability, there are clearly marketing strategy questions the company must address immediately.

Southland seems to have been asleep for the last 20 years. In that time, the food market marched on. The requirements of the Nutrition Labeling and Education Act of 1990 provided consumers with more consistent product information and spurred product innovation. Food companies tried to communicate nutrition information to consumers through initiatives such as the cereal-bran education campaign in the 1980s and the successful marketing of calcium-enhanced orange juice in the 1990s, and these efforts, too, changed the American diet. Although that diet remains deficient in many ways, Americans consume less fat as a percentage of calories now than they did 25 years ago.

As the links between diet and health are better understood, informed and motivated consumers spur industry efforts to reformulate products and to offer more choice. Such consumers respond quickly to new health data, including information from product vendors, and as they embrace new products, other consumers follow.

Two key questions for Southland are: How will demand for its products change as new information about trans-fatty acids is made public? And how should Southland shape the product content and product-specific information it gives consumers?

The upcoming requirement to put trans-fatty acid content on the nutrition label will enable millions of consumers to avoid this ingredient. Southland's competitors are surely already investing in product reformulation as a result. The choices are not as stark as the unproductive

argument between Fred Rangle and Millie Lepore would suggest. For example, genetic manipulation of the oil profile in oilseeds, which could reduce the trans-fatty acids resulting from hydrogenation, is already under way. Southland may not find it feasible to replace trans-fatty acids completely: Just reducing their amount per serving should better position Southland products in the future. Now is the time to investigate the trade-offs among flavor, shelf life, nutrient content, and ingredient sourcing that reformulation is bound to entail.

Yet statements by several Southland executives reveal their ignorance about the nature of trans-fatty acids. Consequently, the company is poorly prepared for the growing number of consumer questions that it will have to address publicly. A progressive corporate information strategy, based on the best nutritional science, is needed to help consumers understand the health benefits of any reformulation and how Southland's products fit within a balanced diet. The company should designate a spokesperson to answer questions about Southland's ingredients and sources.

The negative publicity that will be generated by the newly filed lawsuit should prompt Southland's executives to ask who its customers are and what possibilities exist for growth outside its established lines. Do its most loyal customers belong to a group that is slowly disappearing? Or, by building on its reputation for reliable quality, could Southland develop more nutritious products that appeal to its present customer base? It may be easier to develop new, satisfying offerings with fewer trans-fatty acids than to reengineer existing products. Assuming that the return on investment looks promising, why not acquire the Pacific Maca-mania Bits snack? It is clear that such a possibility has not crossed the mind of anyone at the company. It should, and soon.

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*Southland should ask about possibilities for growth outside its established lines.*



## Case Commentary

by Pam Murtaugh

## Should Peter tell CEO Ed Malanga that Southland needs to recast its product lines?

*A baking company that eliminated the ingredients and textures that give pleasure would be cutting its own throat.*

Southland's initial marketing and lobbying efforts should be directed at distinguishing trans fats from other fats. As the company's litigation counsel, Naomi Berlin, points out, trans fats are altered fats. Because they interfere with the blood's healthy functioning, they can be considered for regulation. Once Southland has dissociated natural fats and oils from the harmful trans fats in the public's mind, it can start using palm oil in its products, at least for the near term. Of course, palm oil, which is highly saturated, comes with its own hazards. Though natural and derived from a vegetable source, it can raise cholesterol levels. And oil palm cultivation, according to chief scientist Fred Rangle, could at some point become an environmental issue. However, adoption of palm oil, which will protect the traditional flavor and mouth sensation of Southland's products, should buy the company time to position itself as sensitive to health considerations.

Southland could do this mainly by waging a branded public relations campaign advocating exercise, which burns off excess calories from snacking and fats, and a balanced diet, which would keep consumers from wanting between-meals cookies and other treats. Exercise also produces endorphins, which elevate mood. When enough of them are circulating in our bodies, we have less need for the emotional lift cookies and snacks provide.

While such programs, if followed, could in the short term lead to some decline in units sold, that would be preferable to reformulating Southland's product lines using low-fat oils, which would cheat consumers of the eating experiences they pay for. Realistically speaking, few consumers are likely to transform their lives after gaining greater health awareness. The pressures and routines of modern life make that too difficult. A baking company that eliminated the ingredients and textures that give pleasure would be cutting its own throat.

The reason to trumpet the benefits of exercise and a balanced diet is that any language about product reformulation on Mellobars or

Chizzlewits packaging is liable to interfere with a consumer's enjoyment of the contents. After all, it's only seconds between a glance at the wrapper and the placing of a cookie at one's mouth. If the packaging signals a change in the product's composition, the consumer is likely to anticipate a compromised experience. Southland should try to influence the purchasing decision without influencing the eating experience.

An intelligently designed cookie or snack can offer consumers an emotionally rich experience while also offering less fat or calories, or both, than its predecessors. But there is more to the eating experience than a pleasing taste. "Melt," "resistance," "duration," and "residuals" all affect satisfaction. Even a hint of bitterness, as one finds in coffee and associates with the jolt caffeine provides, can deepen the eating experience. Devising a product that hits those notes, however, requires a sophistication in market testing and food engineering that is beyond the capabilities of most food companies today.

Lou Salvador's equating of canola oil, a polyunsaturated oil, with palm oil, a saturated oil, and chief dietician Millie Lepore's endorsement of the latter, suggest that Southland lacks the expertise to launch a successful marketing program and product line without delay. Under the circumstances, Southland should investigate acquiring a food company that understands the very different kind of marketing and product development demanded by a food line preaching health. Before making any such acquisition, however, Southland should make sure that the acquired company's products have attracted repeat consumers who are mainstream—not vegans, for instance.

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## Case Commentary

by Richard Berman

## Should Peter tell CEO Ed Malanga that Southland needs to recast its product lines?

Peter Schmidt should not recommend recasting Southland's product line, since there is a near zero probability that such a move would diminish the firm's legal exposure. Rolling out a healthier cookie won't dissuade an overzealous plaintiffs' bar, which has already concocted enough causes of action to render most countermeasures meaningless.

Consider what happened to the nation's largest food company in October 2003. Less than four months after Kraft announced it would battle obesity by reformulating its product lines, a new group called the Public Health Advocacy Institute (PHAI) lectured Betsy Holden, Kraft's co-CEO at the time, about *further* steps she would be expected to take to avoid litigation. Fresh from a conference "intended to encourage and support litigation against the food industry," PHAI wrote to Kraft: "Evidence that the growth of obesity is slowing or declining and that caloric consumption is going down is necessary to demonstrate that marketing and product changes by food companies are working."

Translation: Making a good-faith effort isn't sufficient. If Americans don't actually lose weight, trial lawyers will sue. In fact, PHAI described corporate programs intended to reduce obesity as only "*possibly* precluding or minimizing the need for legal interventions [emphasis added]."

If Southland introduced spinach-tofu cookies tomorrow, it could still be taken to court for failing to warn customers about trans fat levels (Kraft was sued on that basis) or for the minimal health risks of eating its other treats.

Some lawyers have even contemplated suing companies for marketing low-fat products. They reason that the public is somehow tricked into thinking that "low-fat" is a license to eat more. As long as there are trial lawyers and fat people, no large company whose products contain dietary calories will be immune from obesity-related lawsuits.


If market research revealed genuine demand for low-fat or reduced-carb Chizzlewits or Mellobars, then product development should of course continue. Management must realize, however, that recasting an entire product line will look like an admission of guilt to a jury.

Obesity poses a business threat larger than

any single lawsuit. Regulation and legislation are genuine risks. And public-opinion shifts alone could depress sales.

Southland wasn't sued because one litigator was struck with an original idea. Obesity lawsuits went from a barroom joke to an industry-wide concern thanks to a small coterie of public-health crusaders and activist academics who want to remake the food marketplace with "sin" taxes, marketing bans, warning labels, zoning restrictions, and other tobacco-style measures. They are now nurturing lawsuits as a vehicle for their agenda.

In July 2003, opponents of snack foods, soft drinks, and pizza at the Center for Science in the Public Interest (CSPI) released a "study" that "revealed" the nutritional content of ice cream. The next day, CSPI and tobacco-lawsuit veteran John Banzhaf warned six ice cream retailers that lawsuits could result from their failure to list the calorie content of each item on their menu boards. Banzhaf, CSPI, PHAI, and others have also encouraged preemptive legal action by state attorneys general.

Instead of recasting its snack foods, Southland should encourage an industrywide effort to push back against groups like CSPI and PHAI, which couple junk science with media theatrics to foster a litigation-friendly environment. The best defense against these groups is a good offense. With a reasonable investment, Southland could marginalize their effectiveness by exposing their questionable tactics and error-riddled statistics in the court of public opinion. 

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*As long as there are trial lawyers and fat people, no large company whose products contain dietary calories will be immune from obesity-related lawsuits.*