

PERSONAL RESPONSIBILITY IN FOOD CONSUMPTION ACT

HEARING BEFORE THE SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

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PERSONAL RESPONSIBILITY IN FOOD CONSUMPTION ACT

THURSDAY, JUNE 19, 2003

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:05 a.m., in Room 2141, Rayburn House Office Building, Hon. Chris Cannon (Chair of the Subcommittee) presiding.

Mr. CANNON. We are about ready to start, so if we can get people to their seats that would be good. We thank you all for coming out today to this hearing on H.R. 339, the "Personal Responsibility In Food Consumption Act." I am going to give an opening statement and then yield time to Mr. Watt for a statement. Then I believe Mr. Coble would like to say something. And then we have with us today Mr. Keller, who is a Member of the full Committee, not a Member of this Subcommittee, but we will give him a period to make an opening statement. And then we will turn to our witnesses.

Recently the food industry has been targeted by a variety of legal claims alleging it should pay monetary damages and be subject to equitable remedies based on legal theories holding it liable for overconsumption of its legal products by others. Our hearing today will explore the threat the food industry faces from frivolous litigation, the threat to personal responsibility posed by the proliferation of such litigation, and the need for H.R. 339, the "Personal Responsibility in Food Consumption Act."

H.R. 339 currently has 61 sponsors. A similar bill was signed into law by Louisiana Governor Mike Foster on June 2, 2003, with huge bipartisan support. Every Republican in both State legislative chambers voted for the measure as did 93 percent of Democrats in the Louisiana House and 83 percent of Democrats in the Louisiana Senate.

Recent history shows why similar legislation might be necessary at the Federal level. The tobacco industry once faced lawsuits brought by 48 States, and it was ultimately forced to settle those cost-prohibitive and potentially bankrupting cases for \$246 billion. Lawyers demonized the tobacco industry throughout that time, and today Ralph Nader compares fast food companies to terrorists, telling New York Times that the double cheeseburger is, quote, a weapon of mass destruction, unquote.

Starting tomorrow, from June 20 to June 22, personal injury lawyers from across the country, including John Banzhaf, who is a witness here today, will gather at a conference designed to, quote, encourage and support litigation against the food industry, unquote. Attendees must sign an affidavit in which they agree to keep the information they learn confidential and to refrain from consulting with or working for the food industry before December 31, 2006, which is apparently a deadline for bringing the food industry to its knees in a nationally coordinated legal attack.

The frivolous litigation we have seen already against the so-called fast food industry if allowed to proliferate will lead by their false logic to lawsuits against the food industry generally. According to the Journal of the American Medical Association, even the portion sizes of foods cooked at home have grown substantially in the last two decades. As one commentator has written, quote, one should understand who is at risk, who big food really is. It is not just McDonald's, KFC, Burger King and Wendy's, it is every food company in the country. If McDonald's is liable for selling high caloric meals, then so are local pizzerias and grocery stores, unquote.

Some say these lawsuits will soon reach your own backyard barbecue unless Congress acts. It is clear that obesity is a problem. Equally clear, however, is that obesity is caused by a combination of too much consumption and too little exercise. Recent findings drawn from Government databases and presented at the Scientific Conference of the Foundation of American Societies for Experimental Biology showed that over the past 20 years teenagers have on average increased their caloric intake by 1 percent. During that same period of time, the percentage of teenagers who said they engaged in some sort of physical activity for 30 minutes a day dropped 13 percent. Not surprisingly, teenage obesity over that 20-year period increased by 10 percent, indicating that it is not just junk food that is making teenagers fat, but rather their lack of activity.

Public schools could offer more physical education classes of course, but according to John Banzhaf, one of the witnesses who will be here with us today, school boards will be the next targets of obesity-related lawsuits because they allow vending machines in schools. These lawsuits will take money away from the schools just when they need more physical education programs and transfer that money to personal injury attorneys.

And since inactivity is the leading cause of childhood obesity, who might be sued after school boards? Television manufacturers and those who produce popular television shows? Manufacturers of comfortable couches?

Besides threatening to erode values of personal responsibility, the legal campaign against the food industry threatens the separation of powers. Nationally coordinated lawsuits seek to accomplish through litigation that which cannot be achieved by legislation and the democratic process.

As the now familiar John Banzhaf has said, if the legislatures won't legislate, then the trial lawyers will litigate, and then I suspect that the House of Representatives will oversee this with greater and greater incisiveness.

The House recently passed H.R. 1036, the "Protection of Lawful Commerce in Arms Act," by a large bipartisan vote. That bill bars frivolous lawsuits against the firearms industry for the misuse of its legal products by others. H.R. 339, which similarly seeks to bar frivolous lawsuits against the food industry for the overconsumption of its legal products by others, may also be an appropriate congressional response to a growing legal assault on the concept of personal responsibility.

I look forward to hearing from the testimony of our witnesses today. And now, Mr. Watt, we would be happy to yield to you for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman. I confess that I have trouble finding 5 minutes of things to say about this. I am almost speechless at the arrogance of the state of mind of some of my colleagues who believe that they can just undo anything. They don't like the Constitution, so we constantly drop bills that suggest that we arrogantly think that we are brighter than the Founding Fathers, even though at the same time we are saying we believe in States rights. We don't like the results of the lawsuits, so we try to do away with our entire system of common law remedies that exist in our country. We arrogantly think that we somehow have a better way to do this. And I just—I am just flabbergasted by it.

In fact, I started laughing when I heard—when my legislative aide told me that we were having this hearing today. This is laughable. And it is counterproductive, I think, because if you follow the proposed legislation the only likely result that I could think of is that you will get to more regulation because the checks and balances that exist in our legal system that allow private litigants and businesses to work these things out in the course of business won't get you there because it will be undermined by what we are here trying to do today. So you will end up with more regulations defining what the acceptable parameters are rather than juries or litigants making those definitions as common law has allowed to play out throughout the history of this country.

Well, suffice it to say, I mean I am here. I am the Ranking Member of this Subcommittee and I found it my obligation to be here and I believe in the system that we have in this Congress where we explore these ideas. Maybe somebody will tell me something that is enlightening today. And so I will just shut up and yield back the balance of my time and hope that that happens as a result of this hearing, Mr. Chairman. I guess I am happy to be here. I haven't decided that yet, but we will see.

Mr. CANNON. I think it will be at least an interesting hearing. We appreciate the fact that you are here. The gentleman yields back.

Mr. Coble, did you want to speak for a moment?

Mr. COBLE. Mr. Chairman, unlike my friend from North Carolina, I am glad to be here and I regret that I can't stay. I have to go to a drug task force briefing, so unfortunately I am going to miss a good part of this and I regret that.

Mr. WATT. I will brief my friend.

Mr. COBLE. I will let you and the Chairman brief me.

Mr. Chairman, you touched somewhat in your opening statement when you talked about physical activity and staying in shape, per-

sonal discipline. I still think a lot has to be said for that. As far as I know, Mr. Chairman, there hasn't been a verdict handed down where the cause of action was consumption of fatty food. Perhaps there have been settlements entered into, but I don't think a verdict has been handed down in this country.

I will admit, Mr. Chairman, in some of this area I am not completely objective. I represent an area that is known throughout the country as the Tobacco Belt, and I have always found it worrisome for want of a better way of saying it that a person can consume a tobacco product say for 25 years and then, my gosh, he is sick. Tobacco has caused him problems after having voluntarily consumed it for a quarter of a century. Granted, I am not objective about it, but I would like to learn more about that. And I think there may be some sort of analogous comparison to that to what we are about to discuss today. And I don't mean to imply, Mr. Chairman, that I am uncaring about people who have suffered health problems as a result of tobacco. But I do think that there is something to be said for assumption of risk or contributory negligence as we go down this slippery slope.

And I thank you for calling this hearing, and again I apologize that I have to depart.

Mr. CANNON. Would the gentleman yield? I would like the audience to know that the Ranking Member and I are very good friends. We have debated over a long period of time, and I have the utmost respect for him. But let me suggest there is an alternative view of history, and that is that the Founding Fathers worked very, very hard to come up with a Government context that would last for centuries and I think they have done a remarkable job. But after the Constitution was ratified some of them had second thoughts, including John Jay, who was the first Chief Justice of the Supreme Court, and did nothing remarkable on purpose because he believed that the courts probably had too much power under the constitutional system that he had been a very significant part of setting up.

In fact, when you have the ability to find one judge and one jury in one place and create law for the rest of the world, you have to have—we have to look at our responsibility in the legislature as imposing a burden to help straighten that out so we don't have, as the trial bar has suggested, the ability to legislate by finding predisposed judges. So I think this is an extraordinarily important issue. We have dealt with it in guns and dealt with it in many other areas. And we will deal with it, I think, in this context although I will tell the panel and others that we are looking for the right answer.

And we have language before us, and Mr. Keller has worked very hard to come up with that language. He assures me he is open to figuring out how to do this in a better way and we are looking at this point in time not cramming down an idea that has been well developed, as was the case I believe in the firearms manufacturers legislation that we recently passed.

With that, I yield back.

Mr. COBLE. Mr. Chairman, let me reclaim my time and I will get with you and Mr. Watt and pick your respective brains about what

I missed, and I thank the panel for being here. And thank you, Mr. Chairman.

Mr. CANNON. Mr. Flake, did you want to make an opening statement?

Mr. FLAKE. I plan to conduct my own extensive search for those weapons of mass destruction at the local Burger King after arriving at the airport today.

Mr. CANNON. May I suggest upsizing to the macho size? It is a little more manly.

Mr. BANZHAF. May I suggest you look in Iraq.

Mr. CANNON. Mr. Feeney, did you want to make a statement?

Mr. FEENEY. Not at this time.

Mr. CANNON. We have with us Mr. Keller, the author of the bill, who is a Member of the full Committee and not a Member of this panel. And without objection, we will have Mr. Keller make a statement.

Mr. KELLER. Thank you, Mr. Chairman, and I would like to begin by thanking all of the witnesses for appearing before our Committee today and providing us with their thoughts and insights regarding the Personal Responsibility in Food Consumption Act, which I had the happy privilege of authoring.

This legislation provides that a seller of food shall not be subject to civil liability where the claim is premised upon an individual's weight gain resulting from the long-term consumption of food or nonalcoholic beverages. The gist of the legislation is that there should be common sense in a food court not blaming people in a legal court whenever there is an excessive consumption of fast food. Most people have enough common sense to realize if they eat an unlimited amount of super size fries, cheeseburgers, milk shakes and chocolate sundaes, it may lead to obesity. In a country like the United States, where freedom of choice is cherished, nobody is forced to super size their fast food meals or choose less healthy options on the menu. Similarly, nobody is forced to sit in front of the TV all day like a couch potato instead of walking or bike riding.

Because eating habits and exercise are a matter of personal responsibility and common sense, it is not a surprise that my personal responsibility in food consumption legislation recently received broad bipartisan support in the Louisiana Democratically controlled legislature where 94 percent of the legislators voted yes in favor of the legislation. It was signed into law by the Louisiana Governor on June 2, 2003.

While this is certainly a positive step in the right direction, it does create the potential for creative lawyers to engage in forum shopping by bringing lawsuits in other jurisdictions, which brings me to the subject of lawyers and why we are here.

Some of the same lawyers who went after the tobacco industry now have the goal of seeking \$117 billion from the food industry, which is the amount the Surgeon General estimates as the public health-related costs attributable to being overweight. Based on the contingency fee of 40 percent, these lawyers would stand to recover \$47 billion for themselves in attorneys' fees. Of course, this litigation against the food industry would not make a single individual any skinnier. It would, however, make the trial attorneys' bank accounts much fatter.

Starting tomorrow, from June 20 to June 22, lawyers from all across the United States are gathering in Boston for what they call the First Annual Conference on Legal Approaches to the Obesity Epidemic. Their goal is to bring lawsuits against the food industry. And in fact to attend the legal strategy workshop each must sign an affidavit which states that the workshop is, quote, intended to encourage and support litigation against the food industry and that information acquired at this workshop is considered to be confidential, close quote.

Indeed, lawsuits have already been filed against McDonald's, Burger King, Wendy's and KFC. The New York lawsuits against McDonald's were brought by a 400-pound 15-year-old boy and a 272-pound, 56-year-old man named Cesar Barber. Mr. Barber recently appeared on the CBS TV show "60 Minutes." he had this to say:

"Barber: I want compensation for pain and suffering."

"60 minutes: How much money do you want?"

"Barber: Maybe \$1 million." That is not a lot of money right now."

Most recently a lawsuit was even brought against Kraft Nabisco seeking to bar children from buying Oreo cookies. Mr. Banzhaf, one of our witnesses today, who will be a featured speaker at this food litigation conference in Boston on Saturday, recently told one publication that our public schools that allow vending machines will be the next target of these obesity-related lawsuits. Apparently, even the explicit labeling on diet Cokes showing zero calories and zero carbs is not enough for these cash strapped public schools to immunize themselves from certain trial lawyers seeking to make a buck.

There is a real and present danger of an uncontrollable avalanche of frivolous lawsuits against restaurants, pizza parlors, grocery stores and companies that make ice cream, soft drinks and cookies. Of course, the consequences of these lawsuits against the food industry is that consumers would pay a higher price at restaurants and grocery stores for food costs.

These lawyers attempt to justify their quest to get money from the deep pockets of the restaurant industry by making three claims. First, they say more nutritional information is needed to be made available. In reality nutritional information is now available to anyone who asks for it at the restaurant's counter. It is available at the fast food company Web sites, and all products sold in grocery stores already have the nutritional labeling. Yet we still see suits against companies that make Oreo cookies and the threats of suits against public schools with vending machines.

The second argument they make is that no new laws are needed since judges can throw out frivolous suits. In reality it is the job of Congress to make the laws and it is up to the judges to interpret the laws. Right now there are no laws on the books to give judges any guidance in this uncharted territory. So decisions are being made on the vague elements of negligence and State consumer statutes.

And, third, some cynics have implied that this sort of common sense legislation must be some sort of political payoff to the restaurant industry. Well, the largest fast food company in the country is McDonald's. Last cycle, according to opensecrets.org, a non-

partisan organization which tracks campaign donations, the trial attorneys out contributed McDonald's by a ratio of 45 to 1.

In summary, we need laws such as the Personal Responsibility and Food Consumption Act to make it tougher for lawyers to file frivolous lawsuits. We need to care about each other more and sue each other less. We need to get back to the principles of freedom of choice, common sense and personal responsibility, and get away from the culture where people always try to play the victim and blame other people for their problems.

This legislation is a step in the right direction, and again I thank the witnesses for taking time out of their busy schedules to appear before us today, and I yield back, Mr. Chairman.

Mr. CANNON. I thank the gentleman. Our first witness is Professor John Banzhaf of George Washington University Law School. Professor Banzhaf, according to his official biography, was the, quote, master mind of lawsuits against the tobacco industry. Presently Professor Banzhaf is co-counsel in several lawsuits against such restaurants as McDonald's and Pizza Hut, which again, quoting from his official biography, seek to hold the fast food industry accountable for the unhealthy consequences of overconsumption of its products. Among the courses he teaches is one entitled "Legal Activism," in which students are tasked with suing someone.

Our second witness is Victor Schwartz. Mr. Schwartz is a member of the American Law Institute. He has served on the Advisory Committee of the Restatement—Advisory Committee to the Restatement, Third, of Torts: Products Liability, and he continues to serve on the Advisory Committee to the Restatement of Torts—got restaurants on the mind here—Restatement of Torts: General Principles.

For over two decades he has been co-author of the most widely used torts casebook in the United States, Prosser, Wade, and Schwartz's Cases and Materials on Torts. He has authored hundreds of law review articles and speaks before national and international audiences interested in civil justice reform.

Mr. Schwartz also co-chaired the Civil Justice Reform Committee of the American Legislative Exchange Council and chairs the American Bar Association's Legislative Subcommittee of the Products Liability Committee. He is also a partner at Shook, Hardy & Bacon.

Our third witness is Christianne Ricchi, whose restaurant i Ricchi in Washington, D.C. has been presented with the Insegna del Ristorante Italiano Award of Excellence, meaning it is a darn good Italian restaurant. My staff tells me we need to get down there and investigate. That is the investigative staff. My personal staff is also interested in the topic. i Ricchi was named one of the best Italian restaurants in the world outside of Italy. It took Ms. Ricchi over 25 years and a lot of hard work to reach that milestone since her first trip to Italy in 1971 where she worked at a restaurant in the hills outside of Florence.

In addition to her duties at the restaurant, Ms. Ricchi served as the former Chairman of the Distinguished Restaurants of North America, and she currently serves on the Board of the National Restaurant Association, for whom she is testifying today.

Our fourth witness is Richard Berman of the Center for Consumer Freedom. He is also the Executive Director of the Employment Policies Institute and General Counsel to the American Beverage Institute. Mr. Berman was previously employed as the Executive Vice President of Public Affairs for the Pillsbury Restaurant Group, where he was responsible for the Government relations programs of all restaurant operations. Mr. Berman has also worked for the U.S. Chamber of Commerce.

I look forward to hearing your testimony today. Let me point out that there is a little timer on the desk before you. That will be set for 5 minutes. After 4 minutes elapse, you will have 1 minute remaining. A yellow light will appear. And at the end of the 5 minutes a red light will appear. I will tap the gavel just to remind you that that has happened. You don't have to just stop. This is not—if you could finish up your thought or thoughts, and that will allow us to move on through the rest of the body.

Let me also point out that you are not under oath but of course the law, Federal criminal law, requires honest testimony and we do have a perjury type penalty and we want to make that clear to our witnesses. Nothing in particular with this panel, I think we always try to do that same statement. In any event we look forward to your testimony.

Mr. Banzhaf, you have 5 minutes.

**STATEMENT OF JOHN BANZHAF, PROFESSOR,
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL**

Mr. BANZHAF. Mr. Chairman, before I begin the testimony, before the clock starts running, I would like to respectfully lodge an objection to the procedure which is being used with regard to this hearing.

I was called on Monday and asked whether I would testify on a bill called 339, and I was told that the majority insisted that my testimony had to be in writing by noon on Tuesday. I worked all night Monday analyzing bill 339 and submitted my testimony on time. That testimony pointed out, A, that the original version of 339 was full of loopholes, B, may well be unconstitutional. Now I gather from your remarks we are not looking at 339.

Mr. CANNON. Let me help you understand a couple of things. The way the system works here is that when we have a hearing typically on a bill, the fact that we are looking at the law means that we are looking for guidance from people who have experience like you do. Secondly, we have an agreement with the minority whereby we choose, depending upon the circumstances, two or three of the witnesses and they choose at least one. And so their choice and the time of the choice is something we can't control.

We appreciate the fact that you are willing to work hard and get something to us in advance. You are not limited to the testimony that you submitted and you are going to be able to share a great deal of your expertise through the questioning process. And I am sure Members will have significant questions, many of those directed to you. So you will have an opportunity regardless of the time, which we don't begrudge you at this point, to have your concerns known. I think it is fairly clear here what we are trying to do is figure out how to stop the lawsuits that you and your fellow

trial lawyers want to bring. We are looking to you for guidance, and there is nothing that would ramrod anything. And if the timing was short for you, our appreciation is that much greater for your willingness to be here and be involved.

Mr. BANZHAF. If I may finish the objection——

Mr. CANNON. It is not a matter of objection. This is not a trial or court. This is a hearing where we are gathering information. You don't control.

Mr. BANZHAF. I will give the testimony.

Mr. CANNON. Pardon me, this is Congress and we have rules and procedures. This is not a court.

Mr. BANZHAF. And you substituted a new bill at the last minute.

Mr. CANNON. This is not a matter of argument. It is an opportunity for you to express yourself. You are not compelled to stay. We appreciate the fact that you are here. We would appreciate now your testimony. That will be a 5-minute allotment of time.

Mr. FEENEY. Mr. Chairman, if I could raise an objection. It is obvious that Mr. Banzhaf doesn't like the democratic process and doesn't like the representative process. But having said that, he doesn't have standing to raise objection.

Mr. WATT. Can we proceed with regular order here?

Mr. FEENEY. Well, the regular order here would not be for a law professor to come down and lecture Congress.

Mr. WATT. Can we go on with the regular order?

Mr. CANNON. We appreciate your comment and now, Mr. Banzhaf, if you would be so kind to grace us with your testimony.

Mr. BANZHAF. Mr. Chairman and Members of the Committee, in 2001 the U.S. Surgeon General issued a report showing that the United States was suffering from an epidemic of obesity which annually killed 300,000 people and cost us over 100 billion a year. Since that time, Congress has done virtually nothing of consequence to deal with this problem, just as for many years it did nothing of consequence to address the problem of smoking.

However, since I first proposed that legal action could be a powerful weapon against obesity and as I suggested and then helped prove that it could be a powerful weapon against the public health problem of smoking, three fat lawsuits have been won, two are poised to be won, one is going to be heard in court later this month. More importantly, numerous articles and reports have noted that the very threat of these lawsuits have already prompted many food companies to take steps likely to reduce obesity. Yet some Members not content to shrink Congress' responsibility to do something meaningful about America's second most preventable health problem, now support an industry-sponsored bailout and protection bill to end what seems to be one of the few effective tools against the problem.

With all due respect, shame on you. If it ain't broke, don't fix it, especially until Congress is prepared to step in and adopt comprehensive legislation and save taxpayers some 50 billion annually in obesity costs.

This bill is premised on two faulty assumptions. The first is that the problem of obesity is caused solely by lack of personal responsibility. But virtually everyone agrees that obesity and obesity-related diseases occurred suddenly within the past 15 to 20 years.

There is no evidence that there has been a sudden corresponding drop in personal and parental responsibility.

The second faulty assumption is that contrary to virtually every serious study, the fast food industry, with its ubiquitous advertising, misleading advertising, failure to identify ingredients, as most foods do, or to provide any kinds of warnings that this is such an insignificant cost of our current problem of obesity, contrary to every report, that they should be given unprecedented immunity from all liability. And let me emphasize we are not seeking to hold them liable for all the liability, only their fair share, as we did with tobacco.

Now neither proposition can be seriously advanced, much less proven. And the public, according to recent surveys, is about willing to hold them liable. There is liability now. Juries are about to hold them liable as they are in tobacco suits.

The industry and their spokesmen claim on the one hand that all these suits are frivolous, but industries don't need protection from suits which are truly frivolous, only those which judges, juries and appellate court judges are likely to take seriously. And let me remind you that the smoker suits, the nonsmoker suits, the suits by the States against the tobacco industry all were originally called frivolous. A member of this panel once said they were frivolous and we would never even get to court. But they have all proven their worth and they have helped to do something about the problem of smoking, which is more than I can say for the United States Congress.

In this bill, prematurely, Congress assumes that it can predetermine that in no set of facts involving obesity litigation should any company be held liable even for its fair share of those costs. This is presumptuous as well as preposterous. It departs also from the 200-year-old tradition in which courts initially decide product liability cases and then the legislature steps in only if the results seem to be clearly contrary to the public interest. This is especially egregious here because the bill unnecessarily and unreasonably interferes with the rights of the sovereign States to have their courts decide these product liability issues at least initially. And it seems to affect matters which have no relationship to interstate commerce and, as the Supreme Court has recently reminded us, therefore may be beyond Congress' ability to legislate.

For all of these reasons, I respectfully suggest that it is very premature for Congress at this time when not a single judgment has been held, not a single trial has been held, for you suddenly to step in and say on the one hand the suits are frivolous, on the other hand the danger is so imminent that Congress has to adopt unprecedented legislation to grant immunity, something Congress wisely refused to do with the tobacco industry.

There are a wide variety of different legal theories, different pieces of evidence, many of which you have not seen. And you are going to prejudge and say no one is entitled to their day in court. Instead, I would very respectfully suggest that Congress before it wants to grant immunity consider comprehensive legislation aimed at America's epidemic of obesity. Wait to see what the effect of these legislative remedies and of the fat litigation is and then and only then if the litigation truly is as bad as you make it out, Mr.

Chairman—and you have demonized me. I hope you can repeat those comments so I can respond to them, because some of them are wrong and may even be slander, but I would like to suggest that before you adopt new legislation you do something that you are supposed to do and deal with the problem.

[The prepared statement of Mr. Banzhaf follows:]

PREPARED STATEMENT OF JOHN H. BANZHAF, III

In 2001 the U.S. Surgeon General issued a report showing that the U.S. was suffering from an epidemic of obesity which annually killed about 300,000 Americans and cost us over \$100 billion a year.¹ Since that time Congress has done virtually nothing of consequence to deal with this problem, just as for many years it did nothing of consequence to address the problem of smoking.

However, since I first proposed that legal action could be a powerful weapon against the public health problem of obesity, just as I had suggested—and then helped prove—that it could be a powerful weapon against the problem of smoking, the mere threat of legal action has proven to be very effective. For example, numerous articles and reports have noted that the threats of law suits have already prompted many food companies to take steps likely to reduce obesity.²

Yet some Members, not content to simply shirk Congress' responsibility to do something meaningful and effective about America's second most important and expensive preventable health problem, now support an industry-sponsored³ bailout and protection bill to end what seems to be one of the few effective tools against this problem. FOR SHAME! If it ain't broke, don't fix it, especially until Congress is prepared to adopt comprehensive legislation to help save taxpayers more than \$50 BILLION annually in obesity costs.⁴

This bill is based upon two faulty assumptions. The FIRST is that the problem is caused by a lack of personal responsibility. But virtually everyone agrees that this epidemic rise in obesity and in obesity-related diseases⁵ occurred largely within the past 15–20 years, and there is no evidence that there has been a corresponding drop in personal and/or parental responsibility.⁶

The SECOND faulty assumption is that, contrary to virtually every serious study, the fast food industry—with its misleading advertising,⁷ failure to clearly and conspicuously disclose nutritional information (as all other foods do)⁸ and/or to provide

¹ See, <http://www.surgeongeneral.gov/news/pressreleases/pr—obesity.htm>

² See generally, <http://banzhaf.net/obesitylinks> See also page 6 *infra*.

³ “The **National Restaurant Association** is leading the effort to build support for this bill [H.R. 339] on Capitol Hill. See if your lawmaker is a cosponsor of H.R. 339 and take action to encourage them to sign on if they haven't already.” See: <http://www.restaurant.org/government/issues/lawsuits—food.cfm>

⁴ Fast food companies are responsible for more than 65% of the rise in American obesity, and for more than \$50 billion of the annual health care costs obesity imposes on taxpayers, according to a new study for the National Bureau of Economic Statistics. As the New York Times reported: “In analyzing the relationship of weight to incomes, food prices, restaurants, workforce participation and other variables, the economists concluded that the growth of fast food accounted for 68 percent of the rise in American obesity.” **Belt-Loosening in the Work Force**, *New York Times* [3/2/03].

⁵ Although some have tried to argue that the huge increase in obesity was caused merely by a change in the definition of “obesity,” there has also been a corresponding very large increase in obesity-related diseases such as Type 2 Diabetes—a fact-based phenomena which obviously was not caused by a mere change in definitions.

⁶ If there were some kind of precipitous decline in personal responsibility (or in parental responsibility) during the past 15–20 years, one would also expect to see it manifested in a huge increase in other risky personal behaviors such as the use of illicit drugs, the failure to use seat belts, boating and rafting accidents, accidental gun shot injuries, drunk driving accidents, etc. But this has not occurred. Thus one is asked to believe that this relatively-recent epidemic of obesity was caused by a dramatic decline in personal and/or parental responsibility for which there is no evidence, and which does not appear to manifest itself with regard to other risky personal choice behaviors.

⁷ See, e.g., Judge Sweet's initial opinion in *Pelman v. McDonald's*: <http://banzhaf.net/docs/sweet1>

⁸ The fast food industry lobbied vigorously and successfully to be virtually excluded from the statute which requires all foods sold in stores to provide prospective consumers with nutritional information, including the amount of calories, fat, and saturated fat. Thus, as Judge Sweet himself pointed out, potential consumers may well be deceived into believing that chicken dishes have less fat than beef entrees, and many customers are totally unaware of the large amounts of fat which are increasingly being found in dishes which purport to be “healthful.” [see *Ibid.*]

Continued

any warnings of the type common to many other products which present risks which are less serious but even better known⁹—is such an insignificant cause of obesity in all cases (including those regarding children)¹⁰ that it deserves unprecedented absolute immunity from all liability.¹¹

Neither proposition can be seriously advanced, much less proven, and the public seemingly is rejecting them and is prepared to hold the industry liable in law suits.¹³

The industry and its spokesmen claim that all such law suits are frivolous, but industries do not need protection against law suits which are truly frivolous,¹⁴ only those law suits which judges, juries, and appellate courts are likely to take seriously. In this regard note that the smoker law suits, the non-smoker law suits, and the law suits by the states against the tobacco industry, all were initially called friv-

As the business-oriented Wall Street Journal recently noted in **“That Veggie Wrap You Just Chowed Down Is More Fattening Than a Ham Sandwich”** [1/14/03]: “HERE’S A FAST-FOOD nutrition quiz. Which has the fewest calories: a McDonald’s Quarter Pounder with Cheese, Panera’s Smoked Ham and Swiss sandwich, or Baja Fresh’s grilled chicken salad? Surprisingly, it’s a Quarter Pounder. The answer is likely to shock diners who are flocking to trendy new eateries such as Fresh City, Baja Fresh Mexican Grill and Panera Bread, all of which promise fresh, nonfried and healthy-sounding fare . . . the truth is that these and other wraps, salads and sandwiches being hyped as a healthy alternative to fast food are loaded with calories and fat. . . . While the restaurant chains don’t make any specific claims about the healthfulness or calorie content of their menu items, they nonetheless give consumers the impression that they are offering healthier food. . . . **But consumers are being fooled.** . . . But making the healthy choice can be tough. Most restaurants don’t display nutrition information inside the restaurant, and the menu offerings often are deceptive. . . . Nutritionists argue that calorie information should be available at the ordering counter. [emphasis added].”

⁹Courts have held that step ladder manufacturers can be held liable not only for failing to provide warnings about falling off the top step—a danger even clearer and more clearly common knowledge than the danger of eating too much fattening food—but even for failing to provide adequate warnings. Similarly, failure to warn about the danger of electrocution from reaching into the back of the television set, or using an electric hair dryer around ground pipes, or of infants eating lead-based paint, have all been held to create potential liability.

Warnings, after all, are not designed only for the best and brightest, but also for those with less education; less wisdom, judgment or maturity; and those who may be momentarily forgetful.

¹⁰It is impossible to argue that young children should be held fully responsible for their own lack of judgment or immaturity. Even the simplest contracts they enter into are void or voidable, and girls under the age of consent (often 18) cannot validly consent to engage in sexual intercourse because we conclusively presume that they cannot understand the consequences of their acts. Yet it appears that most girls of 17 understand the consequences of having sex far better than they understand the consequences of eating out often at fast food restaurants.

For those who then argue that food companies should escape all liability because children’s obesity is caused solely by a lack of parental responsibility, the simple answer is that the law does not blame children for the lack of care of their parents, so long as the harm was reasonably foreseeable by the defendant. For example, when McDonald’s gives out tiny action figures with its children’s meals, it is very careful to warn in big letters of the choking danger present if the toys are given to infants—even though that danger is clearly common knowledge. McDonald’s knows that, if a child choked on a part from the toy and suffered brain damage, McDonald’s would be held liable for its fair share of the medical costs—despite the clear negligence of the parents—provided that it could have foreseen that this would happen.

With regard to meals served to children, and even meals like Happy Meals and Mighty Kids Meals intended solely for children, McDonald’s provides no warnings whatsoever.

¹¹Congress wisely denied just such immunity to the tobacco industry, even after several multi-million dollar verdicts. The only other instances of industry immunity—shielding gun makers from lawsuits for “harm caused by the criminal or unlawful misuse” of a firearm, limiting the liability of airlines if armed pilots accidentally shoot a crew member or passenger; and limiting the nuclear industry’s liability in the event of a catastrophic accident—are all clearly distinguishable.

¹³One recent survey shows that almost half of the public already blame fast food companies for contributing to the current epidemic of obesity, and another says that jurors are almost as likely to vote against defendants in fat suits as against defendants in tobacco suits. See: <http://banzhaf.net/obesitymediareleases#Jurors—Support—Fat—Suits>

¹⁴“Frivolous” has been defined as “Unworthy of serious attention; trivial.” But these law suits and the threat of future suits are being taken very seriously by many major business and general interest publications (including one new publication, Obesity Policy Report, devoted primarily to this topic) <http://www.obesitypolicy.com/> The law suits are also being taken very seriously by industry and stock analysts. See generally <http://banzhaf.net/obesitylinks>

The industry itself has paid for full-page ads in national magazines attacking the suits, and has written Op-Ed pieces opposing them. But their very concern and attention to these legal actions clearly belies any suggestion that the industry regards them as merely frivolous.

olous.¹⁵ But they have all proven their worth, and helped to make a significant dent in the public health problem of smoking.¹⁶

In this bill Congress assumes that it can pre-determine that in no set of facts involving food litigation should any company be held liable, even for its fair share of the resulting costs.¹⁷ This is presumptuous as well as preposterous, since the bill covers many situations in which most would agree that there should be liability. It also departs from the 200-year-old tradition of letting courts first decide new cases as they arise, and then stepping in to “correct” the process only if the results prove to be clearly contrary to the public interest.

This is especially egregious here because the bill unreasonably and unnecessarily interferes with the rights of states to have their courts decide these issues, at least initially, and is so broad that it seems to affect matters having no relationship to “interstate commerce” and therefore may be, as the U.S. Supreme Court has recently reminded us, beyond Congress’ ability to legislate.

For all of these and other reasons, it is respectfully suggested that it is premature—if not presumptuous and preposterous—for Congress at this time to conclude that the one weapon against the war on obesity which appears to be having an impact should be eliminated; that it can decide without waiting for state court trial and appellate judges to consider the myriad of factual situations, legal arguments, and still-undiscovered evidence which may be presented in these trials that no such plaintiffs should even have their day in court; and that an industry should be given unprecedented immunity from all liability without any showing of harm or even serious danger.

Instead, Congress should consider comprehensive legislation aimed at America’s epidemic of obesity [see next page], wait to see what the effect of the legislative remedies and of fat litigation may be, and then and only then even consider some form of limited immunity. Fortunately, this bill is so ill-considered that it contains several unintended loopholes.

Both the author and those involved in the movement to use legal action as a weapon against obesity have frequently stated that legislation is far preferable to litigation. Legislation can accomplish more, be applied fairly across the board, and affect many practices that litigation cannot reach. Here are only a few proposals which Congress may wish to consider before it abdicates its own responsibility to regulate, and simply grants the industry unnecessary blanket immunity:

A. Require that all fast food restaurants display information about the calories and fat in their menu items at the point of purchase when patrons are considering their choices while standing on line, not buried on a web site or on a hard-to-find pamphlet or back wall. Several state bills to require this have been introduced, and Congressional action would avoid confusion due to lack of uniformity.

¹⁵ Indeed, one of the panelists today, Victor Schwartz, once appeared on television with the author and confidently predicted that no smoker law suit against a cigarette maker would even get to trial, much less produce a verdict for plaintiff.

Even the lawyers who represented smokers in such suits were reluctant to represent NONsmokers in suits against the tobacco industry, believing that such suits had little if any chance of success. But one husband-and-wife team has already won \$300 million in the first round of a class action nonsmoker law suit, and individual nonsmoking plaintiffs are beginning to win also.

Finally, even anti-tobacco lawyers were so sure that state law suits against the industry could not possibly succeed that most refused to take them on, and the few that did were called “crazy.” Today, of course, we call them multi-millionaires, since these law suits—likewise termed “frivolous” in their day—have now resulted in a settlement of over \$240 BILLION dollars.

As one reporter, after talking to many legal experts of all sides of the issue put it: “All the legal experts I talked to agreed on one thing: After tobacco overturned years of legal precedent, you can’t say any lawsuit is impossible.” **Can We Sue Our Own Fat Asses Off?:** <http://salon.com/tech/feature/2002/05/24/fastfoodlaw/index.html>

¹⁶ See, e.g., *Where the Public Good Prevailed, The American Prospect* [04/01].

Many articles and reports have suggested that more progress has been made regarding the problem of smoking than any other major public health problem: e.g, abuse of alcohol, illicit drug use, teenage pregnancies, etc. Clearly this is due in large part to the effective use of a wide variety of different kinds of legal actions—exactly what is being planned now with regard to obesity.

¹⁷ It should be noted that plaintiffs in fat suits—like plaintiffs in tobacco suits—do not necessarily contend that they bear no responsibility, and/or that the defendant is solely responsible and should pay all of the costs. Instead, plaintiffs in the fat suits—like plaintiffs in the tobacco suits—simply argue that the defendants’ failure to clearly and conspicuously provide necessary information, or to provide appropriate warnings, etc., was at least in some part a cause of the resulting medical problem, and that the defendant therefore should bear its fair share of the costs.

B. Require that all fast food restaurants provide appropriate warnings about the danger of eating fattening fast food too often. PepsiCo has promised to do this, and McDonald's is already doing it in France.

C. Require that all fast food restaurants provide more nutritious alternative menu choices for people who find it inconvenient to eat elsewhere and who want to avoid the many fattening foods which all too frequently are their only choices.

D. Require that all food items intended for young children—e.g., Mighty Kids Meals, Lunchables, etc.—provide information about fat and calorie content not only in terms of adult nutritional requirements but also in terms of the vastly lower requirements for young children so that parents can knowledgeably exercise the parental responsibility they are urged to.

Should the fast food restaurants do these things—either voluntarily or as a result of uniform legislation—it would appear that they would largely insulate themselves from potential liability. This is a far better approach than simply granting them unearned immunity.

ATTACHMENT 1

Prof. John Banzhaf: Using Legal Action Against Obesity

<http://banzhaf.net/obesitylinks>

PROFESSOR JOHN F. BANZHAF III

Using Legal Action to Help Fight Obesity



John F. Banzhaf III is a nationally-known professor and practitioner of public interest law, see <http://banzhaf.net>

He has been in the news about using legal action against the problem of obesity in some of the same ways he pioneered in its use against the problem of smoking, see <http://ash.org>

He summarized his views on this topic (with more links) [here](#)



Seattle School Board Under Fire Over Contract to Peddle Coke for Kickbacks: [CNN](#), [S.P.I.](#), [S.PL2](#), [2 Ltrs.](#), [FTimes](#), [STimes](#), [WTimes](#), Editorials: [One](#), [Two](#)

Addiction Letter Sent to Major Fast Food Giants: [Daily Telegraph](#), [CNN](#), [CNNfn](#), [Today Show](#), [AP](#), [Letter](#)



Restaurants Put on Notice Of Potential Addictive Effects of Foods At Major Food Policy Conf. [Telegraph](#), [UPI](#), [Am. Med. News](#), [Rest. News](#), [CNBC](#), [Chicago Trib](#)



[TIME](#): Novel legal theories revive the case against McDonald's — and spur other big food firms to slim down their menus

[Ice Cream Cos Threatened](#)

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[Banzhaf's Novel Law Class](#)

[Coke Nixes Contracts](#)

[Suits Not Frivolous: NYT](#)

Kraft and Other Big Food Companies Beginning to Yield to Legal Threats: [USA Today](#), [Chi. ST](#), [Miami H](#), [NY Daily News](#), [Good Morning America](#)

Banzhaf Testimony Opposes Immunity: [C-Span](#), [SL Trib](#), [Wash Times](#), [Econ Times](#), [Testimony](#), [Fox News](#), [Today](#)



Law & Obesity Conference Effective: [Wash Times](#), [Wash Times II](#), [Reuters](#), [Article I](#), [Reuters II](#), [Article II](#), [Conf Info](#)

RECENT ARTICLES AND DEVELOPMENTS	OLDER NEWS LINKS
CLICK IMAGES TO READ ARTICLES Obesity case ruling whets appetite of food activist: Judge almost acts as coach for new try against industry, <i>Chicago Trib.</i> [2/2/03] Fast food is addictive in the same way as drugs, say scientists, <i>The Independent</i> [1/31/03] Fast-food industry has a fat fight on its hands, <i>Toronto Star</i> [2/9/03] Fat Suits Weighs In, Mac Headed Down Tobacco Road? <i>National Law Journal</i> [2/11/02] Crossfire, <i>CNN</i> [1/24/03] Food companies urged to act to deflect blame for the nation's increase in obesity, <i>NY Times</i> [12/4/02] Dan Abrams Report, <i>MSNBC</i> [1/21/03] Washington Times Editorial and response McDONALD'S WARNS CONSUMERS, DON'T EAT AT McDONALD'S MORE THAN ONCE A WEEK [see ad] McDonald's France Says Slow Down on the Fast Food, <i>New York Times</i> [10/30/02] MANY SUGGEST FOOD IS ADDICTIVE: Super-sized junk food addiction: Gotta have a Big Mac? Maybe you're going through withdrawal, <i>Daily Telegraph</i> [2/05/03]	McDonald's to Offer Lower-Fat Fries [citing law suits], <i>MSNBC</i> link [09/03/02] Battle of the Widening Bulge, Eye on America, CBS-TV Evening News, [08/08/02] text AND VIDEO Fat Chance; Lawyers Want to Sue Food Industry for Making People Fat, CBS Sunday Morning [08/11/02] link First Cigarettes, Now Burgers, The Early Show, CBS-TV [07/15/02] link The Man Who Is Taking Fat to Court, Herald [7/14/02] link ["Banzhaf, it must be said, is far from you stereotypical litigation lawyer, forever looking out for an opportunity to screw a corporation or public institution and make a fast buck. Not only does he not make a cent from the suits that he inspires, he would, in fact, much rather not bring them in the first place. He would love it if the government would overhaul the food industry to make people healthier, just as he would have preferred the government to take action on smoking unprompted."] Is Big Food To Blame?, <i>Ediet News</i> [mailed to 10,000,000 subscribers] link ["Posting the nutritional values in plain view. Issuing warning labels on fast food. Offering healthier alternatives to the traditional fatty fare. Banzhaf claims these are 'the profits' he hopes to earn through litigation. He tells eDiets he won't make a dime from the suits. And that's fine with him."] Tobacco wins set table for fast-food suits, <i>Chicago Tribune</i> [08/26/02] link Fast food on trial, NPR [08/08/02] link The scary fat end of the wedge: A US 'obesity bill could make foodmakers liable for the health problems of overweight Americans, <i>Financial Times of London</i> [7/12/02] link Fat Nation Fights Back--Sort Of, <i>U.S. News & World Report</i> [07/01/02] link Fast Food Nation: An Appetite For Litigation, The US lawyer John Banzhaf was the first to sue the tobacco companies in the mid-Sixties. But now he wants to prosecute the junk-food industry for making Americans obese. <i>The Independent (London)</i> [06/04/02] link Junk Deal: Could Junk-Food Manufacturers Soon
McDonald Law Suit Dismissal Only Temporary Judge Permits Amendment to Correct Problems, and Offers Suggestions A "Pyrrhic Victory" and "Roadmap to New Complaint" - Obesity Report NY Post Calls It a "Hollow Victory" The judge who dismissed the law suit against McDonald's acknowledged that the dismissal was only temporary, and was not based upon any fundamental flaw in the legal theory. Rather, he said the suit had to be dismissed at this time only because the plaintiffs had not alleged that some of <i>"the dangers of McDonald's products were not commonly well known"</i> by consumers. He not only granted them thirty days to cure the pleadings by adding these allegations, but even went so far as to suggest some of the dangers which are not commonly known -- creating what one impartial report called a <i>"roadmap"</i> for winning. For example, the judge said that <i>"Chicken McNuggets,</i>	

rather than being merely chicken fried in a pan, are a Frankenstein creation of various elements not utilized by the home cook. . . . Chicken McNuggets, while seemingly a healthier option than McDonald's hamburgers because they have 'chicken' in their names, actually contain twice the fat per ounce as a hamburger. It is at least a question of fact as to whether a reasonable consumer would know -- without recourse to the McDonald's website -- that a Chicken McNugget contained so many ingredients other than chicken and provided twice the fat of a hamburger."

Then, after being equally critical of the hidden dangers of McDonald's french fries, the judge concluded: *"If plaintiffs were able to flesh out this argument in an amended complaint, it may establish that the dangers of McDonald's products were not commonly well known and thus that McDonald's had a duty towards its customers."* In other words, adding those allegations to the complaint could easily result in the case still going forward.

A similar but impartial analysis was provided by the respected "Obesity Policy Report Weekly" which said: *"A federal judge dismissed a major obesity lawsuit against McDonald's this week, but practically invited the plaintiffs to file an amended complaint based on a novel theory that processed foods are more dangerous than their 'plain jane' versions. And, the court said an example of advertising to kids that was belatedly offered to the court might also provide adequate grounds for a lawsuit."*

After concluding that the court's decision may be only a "pyrrhic victory" for McDonald's, the Report said that, *"in two critical areas, the court's decision practically gives the plaintiffs a roadmap to file a new complaint."* [link](#)

Similarly, the New York Post, which editorially opposed the law suit, nevertheless termed it "Mickey D's Hollow Victory," saying:

Unfortunately, the judge's ruling was based primarily on a legal technicality - and he generously gave the plaintiffs a chance to try their luck again. . . . In fact, Sweet appeared actually to urge further litigation by calling attention to, in some detail, McDonald's Chicken McNuggets - which he termed a 'McFrankenstein creation.' There you go: New York isn't litigious enough that a federal judge has to blaze trails for the trial lawyers. Indeed, look for this suit to be re-filed in 30 days or so - with Sweet's jurisprudential roadmap followed tittle and jot. Why Sweet is encouraging the plaintiffs to take a second bite from the burger should be a matter for whomever supervises judges at that level." [link](#)

Banzhaf helped win the first McDonald's case, and is an advisor on this one. [To read the court opinion, [click here](#)] [To read the original complaint, [click here](#)]

Jurors Will Hold Fast Food Companies Liable for Obesity

Be Facing Tobacco-Style Lawsuits? Some People Think It's Time, Men's Health Magazine [7-8/2002] [p1](#) [p2](#) [p3](#) [p4](#) [p5](#) [image](#)

Can We Sue Our Own Fat Asses Off?, Salon.com [05/24/02] [link](#)

Food Companies Caving In - Tobacco Showed the Way The Times of London [link](#)

Whose Fault Is Fat?: Experts Weigh Holding Food Companies Responsible for Obesity, athenews.com [02/22/02] [link](#)

Lawyers See Fat Payoffs in Junk Food Lawsuits, Fox News Channel [01/23/02] [link](#)

Law Suit Against McDonald's, Canadian TV [2 minute news clip] [03/23/02] [link](#)

Fatuous Response to Obesity, San Francisco Chronicle [link](#)

Fast Food Industry Hit With Lawsuit, CROSSFIRE on CNN [09/02/02] [link](#)

Professor Brings the Classroom to the Courtroom The Hatchet [4/15/02] [link](#)

Are Fast-Food Chains in Danger of Becoming the Targets of Enormous Lawsuits, Just Like the Tobacco Industry, Fox News Videoclip [01/25/02] [link](#)

Hannity & Colmes Discuss Suits Against the Fast-Food Industry With Prof. John Banzhaf, Fox News Transcript [01/24/02] [link](#)

Payback Time: The O'Reilly Factor Discusses the McDonald's Law Suit With Prof. John Banzhaf, Fox News Transcripts [01/29/02] [link](#)

Is There a Fat Tax in Your Future?, Scripps Howard [04/30/02] [link](#)

Legal Eagles Eye Fat of the Land, Courier Mail [07/03/02] [link](#)

The Anti-Big Mac Attack, National Review [07/14/02] [link](#)

THE INFLUENCE INDUSTRY: Slimming down America Activists seek federal help to curb high obesity rates, The Hill [07/03/02] [link](#)

- Surveys

Support For Plaintiffs Same in Obesity and Tobacco Cases

Surveys show that potential jurors are about as likely to vote for plaintiffs in obesity law suits as they are to support smokers suing tobacco companies, even before hearing any evidence, and even prior to any court-ordered discovery of incriminating fast food documents.

"This is a remarkable finding, since we have had many years of successful tobacco litigation, public revelations about widespread wrongdoing by cigarette manufacturers, and literally tons of very incriminating and damaging tobacco industry documents, while the obesity law suits and public understanding about them are still in their infancy," says public interest law professor John Banzhaf of George Washington University Law School.

A 2002 survey by The National Law Journal found that 53% of potential jurors would side with tobacco companies if they were sued by a smoker, and only 28% said that they would vote for the plaintiff. Now, a new March 2003 survey of potential jurors by the litigation research firm Brown DecisionQuest shows that, in a suit by an obese person against a fast food chain, 56.5% would vote for the defendant, and 24.4% would award damages to the plaintiff.

"This virtually identical result is astonishing, given that McDonald's and others have called the fat suits 'frivolous' and 'senseless,' and that most potential jurors don't yet know about studies showing that fast foods are the major cause of obesity; that fast foods can produce addictive effects — like nicotine — in many users, and that the chains deliberately manipulate the foods to make them far more dangerous and habit-forming than they would otherwise be," says Banzhaf, whose law students won the first fat law suit against McDonald's.

Although a bare majority of potential jurors -- 56.5% -- did say they would vote for the fast food defendant, this response was elicited without hearing any of the plaintiff's evidence, and only after respondents were asked a question which may have inadvertently colored their response. The potential jurors had been asked if parents and caretakers, not restaurants, should be blamed if children become overweight from eating too much fast food. But, argues Banzhaf, that question falsely suggests that the law recognizes only one cause for an injury or illness.

On the contrary, he says, all jurisdictions recognize that there can be two or more causes of injuries or illnesses, and in such situations each cause is held responsible for its fair share of the damages. This occurs very frequently when the driver injured in an automobile accident, as well as the other driver, was negligent, but is still able to recover damages.

It also occurs when careless people fall off the top step of step ladders, or are electrocuted by using electric hair dryers around water faucets or even in the shower. In such cases

Fast Food Industry Faces Lawsuits As Anger Grows Over Fat America, Scotland on Sunday [07/07/02] [link](#)

Too Many Americans Are Obese, So Call In The Lawyers, La Repubblica.it [English/Italian](#)

"Fat Fraud" Lawsuits Could Fatten Wallets, Los Angeles Times [08/03/02] [link](#)

Professor sues McDonald's, [09/16/02] [Hatchet](#)

McDonald's To Settle Suits on Beef Tallow in French Fries, New York Times [03/09/02] [link](#)

In Bid to Improve Nutrition, Schools Expel Soda and Chips, New York Times [05/20/02] [link](#)

Using Legal Action to Fight Obesity, Chronicle of Higher Education [04/19/02] [link](#)

Big Mac Legal Attack, The Connection, NPR (National Public Radio) [link](#)

Moneyline on CNN [06/04/02] [Transcript](#)

Big Food Fight, Insight [cover](#) [07/15/02] [link](#)

Fast Food Law Suits, Abrams Report, MSNBC-TV [07/22/02] [link](#)

Burger fans view lawsuit as bum steer, San Diego Union Tribune [08/04/02] [link](#)

For Hindus and Vegetarians, Surprise in McDonald's Fries, New York Times [05/20/01] [link](#)

Waistline Deadline, The Australian , [06/20/02] [link](#)

Gefundenes Fressen: 30 Jahre lang hat John Banzhaf die Tabakkonzerne bekriegt, um ihnen Milliardenentschädigungen abzutrotzen. Nun hat der US-Rechtsprofessor die Fast-Food-Industrie im Visier, DER SPIEGEL [06/10/02] [link](#)
[Computer translation from German to English](#)

Le fast-food au banc des accusés - Un chausson avec ça? [link to original site](#), [link to mirror site](#), [Computer translation from French to English](#)

Chewing the Fat, New Republic, [06/17/02] [link](#)

Food Makers Get Defensive About Gains in U.S. Obesity, Wall Street Journal [06/13/02] [link](#)

manufacturers are also held liable if they -- like fast food companies -- failed to provide any warnings of the risks of using the products, even though these dangers are at least as clear, obvious, and well known as the dangers of eating fast foods.

Cigarette manufacturers are routinely being held liable for millions -- and in some cases billions -- of dollars in suits brought by smokers even though, in virtually every case, the smokers admitted that their negligent conduct was one of the causes of their illness. Moreover, in the tobacco cases the plaintiffs are adults, whereas in the McDonald's case in which Banzhaf is serving as an advisor, the plaintiffs were young children when they used the product.

Banzhaf also notes that the law does not blame children for the negligence of their parents. "McDonald's is careful to provide very clear notices with the small toys it distributes warning that they are not to be given to young children because of the dangers of choking. If they failed to provide such a warning and the child choked, McDonald's would almost certainly be held liable for failing to provide a clear and conspicuous warning, even though the danger was obvious and the parents were clearly negligent for giving the toys to their infants."

If the survey respondents were asked whether fast food companies bear -- along with parents and caretakers -- some responsibility for the sudden epidemic of obesity in children, and were then asked if the companies should be held liable for their fair share of the resulting costs, the number of potential jurors willing to vote for the plaintiffs almost certainly would have been far higher, even before they hear the evidence, suggests Banzhaf.

In fact, there is lots of very powerful evidence that jurors would hear which would also likely help persuade the undecided -- and even those who now potentially side with the fast food chains -- to vote for plaintiffs, says Banzhaf. This includes:

- ‡ a careful economic study showing that the proliferation of fast food restaurants -- and not personal responsibility, lack of parental responsibility, eating habits at home or in traditional restaurants, etc. -- is responsible for over 65% of the current epidemic of obesity;

- ‡ numerous scientific studies showing that frequent eating of fast foods can produce addictive-like effects -- similar to those of nicotine or even heroin -- not only in humans, but even in laboratory animals which have been made to experience withdrawal symptoms;

- ‡ testimony about how fast food chains deliberately alter foods to increase the amount of fat, saturated fat, and calories to dangerous amounts far higher than most consumers realize;

- ‡ economic evidence that obesity costs the American public more than \$115 billion a year, and that much of it paid for by people -- like most jurors -- who are not obese, in the form of

McDonald's and Coke Fund Healthy-Eating Drive
The Guardian [06/14/02] [link](#)

Oskarzony McDonald's przeprosza: Czy koncern fast food zaplaca wysokie odszkodowania? [link](#)

The Twinkie Offense [5/13/02] [link](#)

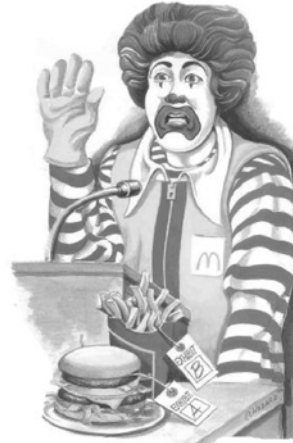
Fast food - przysmak ryzykanta, [forumonet.pl](#)[link](#)

Fat Chance: Food Cops and Closing in, [link](#)

AND Big Fat Attack [link](#)

AND Today Big Tobacco, Tomorrow Big Mac
[link](#) **ALL in Washington Times**

Fat chance: food cops are closing in, [Townhall.com](#)
[07/24/02] [link](#)



higher taxes and vastly inflated health insurance premiums, since obesity balloons the cost of medical care for each obese person by approximately \$1,500 a year.

Banzhaf suggests that potential defendants are certainly acting as if they worry that jurors may hold them liable for their fair share of the \$115 billion annual cost of obesity:

McDonald's in France is warning consumers not to eat at their fast food restaurants more than once every week, and PepsiCo will warn customers about overeating their junk foods; McDonald's will list the fat and calorie content of its menu items in Great Britain;

More healthful menu choices are rapidly being added, with McDonald's now even allowing children to substitute fresh fruit for french fries with some of their Happy Meals;

Both the National Restaurant Association and the Grocery Manufacturers of America have asked Congress for protection against obesity-related law suits, and Representative Ric Keller [R-FL] has already introduced such legislation [HR 339] for fast food chains.

Every Obese Person Costs Us \$1506/yr Medical Costs

**Should Obese Pay Their Fair Share in Higher Premiums?
Fair Premiums Could Deflate \$117 Billion/yr Obesity Epidemic**

The obese have annual health care costs \$1,500 higher than similar people of healthy weight says a new study, raising the issue of whether their health insurance premiums should be correspondingly higher.

"Charging everyone the same for health insurance unfairly forces those who maintain a healthy weight to subsidize obesity, whereas charging the obese correspondingly higher premiums would not only be fairer, but provide them with a strong incentive to eat healthier and exercise more, and reward those who take steps to maintain a healthy weight," says public interest law professor John F. Banzhaf III of the George Washington University Law School.

Banzhaf's law students initiated a successful law suit against McDonald's over the fat in its french fries, and Banzhaf is serving as advisor on a new law suit against McDonald's for its role in making several children obese. The judge has granted plaintiffs in that action thirty days to correct some technical problems in their pleading in a ruling Obesity Policy Report called a "Pyrrhic Victory" and a "Roadmap to a New Complaint."

"If obese people were required to pay \$60 more each month for health insurance -- less than half the cost their obesity adds to our health care costs -- it would create a powerful incentive and frequent reminder for them to eat less and exercise more, while at the same time relieving those who maintain a healthy weight from being forced to subsidize obesity," argues Banzhaf.



**Fast Food Calorie and Fat Info. from the
Washington Post**
[Fast Food Calorie and Fat CHART](#)
[Interactive Meal Planner - Calculate for Total
Meal](#)

**Fast Food Causes Great Bulk Of Obesity - Report
Imposes Over \$50 Billion/Year Costs on
Taxpayers**

**Law Suits Seek to Force Fast Food Outlets to Bear
Their Share;
Shifting These Costs to Outlets Would Also Deter
Obesity**

Fast food companies are responsible for more than 65% of the rise in American obesity, and for more than \$50 billion of the annual health care costs obesity imposes on taxpayers, according to a new study for the National Bureau of Economic Statistics. [SEE BELOW]

This undercuts the arguments of the fast food giants who, in their defense of law suits seeking to hold them responsible for their share of the costs of obesity, claim that there are so many causes of the current epidemic that it would be impossible -- as well as unfair -- to blame them for any significant portion.

"If fast food chains are the predominant cause of the current obesity epidemic, and contribute more to it than lack of exercise, web- and channel surfing, fattening foods eaten at home and at other restaurants, and all other causes COMBINED, it is only fair to hold them liable for their fair share, especially since that share can now be estimated," said law professor John Banzhaf.

"For years tobacco companies argued that they

President George W. Bush, HHS Secretary Tommy Thompson, and aerobics creator Dr. Kenneth Cooper have all suggested the possibility of using financial incentives to help fight the nation's sudden epidemic of obesity.

Here is one way which the public might embrace because we already agree that smokers should pay more for life insurance; those who live in older wooden homes should pay more for fire insurance; and those who drive expensive cars should pay more for automobile insurance, says Banzhaf.

LINKS AND OTHER RELATED INFORMATION:

The following are links to other web sites and/or related information.

Links to news reports are in the right column.

For additional information about the class action law suit against McDonald's, check out this web site by the lawyer who brought the legal action: bbharti.com

For more information about the law students who helped to bring about the class action law suit against McDonald's, and have subsequently formed a legal-action vegan organization [VLAN], see [Vegetarian Legal Action Network](#) OR [VeggieFries](#)

To read an interesting judicial opinion in which a court upheld a complaint that ads for sugary cereals aimed at children were deceptive, click on : [Comm. for Children's Television Inc. v. General Foods Corp., 673 P.2d 660 \(1983\) \(Supreme Court of California\)](#)

As of June 2000, 17 states — including California and New York — Chicago, and the District of Columbia already have special taxes on soft drinks or snack foods. [link](#)

NEW CLASS-ACTION LAW SUIT FILED AGAINST MAJOR FAST FOOD COMPANIES:

On Thursday, 7/25/02, a complaint was filed against the major fast food companies for causing obesity and related diseases. See, [FAT SUIT FILED, Fast Food Chains Blamed For Obesity, Illnesses, ABCNEWS.COM \[07/26/02\]](#) [link](#)

OR Would You Like Fries With That?, American Morning With Paula Zahn, CNN [07/26/02] [link](#); Who's To Blame For Obesity, Crossfire, CNN [07/26/02] [link](#)

To read the complete legal complaint, [click here](#)

To read the new legal complaint on behalf of children who were lured into obesity, [click here](#)

shouldn't be held liable to smokers because there are many causes of lung cancer, but they lost on that issue when it became plain that smoking was the predominate cause, and therefore the most likely cause under the 'predominance of the evidence test'." Now that we can show that fast food restaurants are the predominant cause of obesity -- more responsible than all of the other causes combined -- the same result should occur, says Banzhaf, who masterminded the first successful fat suit against McDonald's, and is an advisor on two (including one by obese children) which are still pending.

He also notes that, since obese people tend to eat at fast food restaurants more often than the average American, fast foods may be more than 70% or even 75% responsible for their weight problems. For example, the child plaintiffs in the pending law suit claim that they frequently ate at McDonald's many times a week.

Forcing fast food restaurants to pay even 10% of the costs their products impose on innocent taxpayers -- over \$5 billion a year -- would cause them to raise their prices, thereby discouraging the consumption of the major cause of obesity in the U.S., argues Banzhaf

from *Belt-Loosening in the Work Force*, *New York Times* [3/2/03]

In analyzing the relationship of weight to incomes, food prices, restaurants, workforce participation and other variables, the economists concluded that the growth of fast food accounted for 68 percent of the rise in American obesity.

See: *An Economic Analysis of Adult Obesity*



Prof. John Banzhaf: Using Legal Action Against Obesity

<http://banzhaf.net/obesity/links>

GROUP FORMED TO PROMOTE LEGAL ACTIONS
AGAINST THE PROBLEM OF OBESITY;
Fast-Food Restaurants Face Legal Grilling - Lawyers
explore whether the fast-food industry should be liable for
the effect its meals and marketing have on public health,
Christian Science Monitor [08/08/02] [link](#)

ADDITIONAL REFERENCES AND INFORMATION:

Fast Food Nation, Book Review [link](#)

Food For a Fat Nation, USA Today [link](#)

Fighting Big Fat, Newsweek [link](#)

To return to the main web page about Prof. John V. Banzhaf III of the GWU Law School, [click here](#)

ATTACHMENT 2

Obesity News Releases - Prof. John F. Banzhaf III

Page 1 of 7

RECENT NEWS RELEASES RELATED TO USING LAW AS A WEAPON AGAINST OBESITY
Prepared as a public service by public interest law professor John F. Banzhaf III ; <http://banzhaf.net>
For More Information, and Links to Many Published Media Reports, go to:
<http://banzhaf.net/obesitylinks>

BIG FAT SOLUTIONS: Discriminate Against Obese, State Law Suits, and Dram Shops Acts
Various Options Discussed In Prelude to Next Week's Conference on Bringing Fat Law Suits

As more public attention continues to be focused on America's growing epidemic of obesity and the huge costs it imposes on society and on the majority of taxpayers who are not obese, interesting new approaches to fighting the problem continue to emerge. [Big_Fat_Solutions_Continued](#)

AMA SEEKS FAT TAX : British Medical Assn Backs Plan - Mars Bars Fat in Candy

Alarmed by the growing epidemic of obesity, and studies showing that most of its huge costs are born by taxpayers who are not obese, the AMA and the British Medical Association are both recommending a fat tax as a "shock tactic" to help keep overweight down. Sri Lanka already has a tax on unsaturated fat products. The British Medical Association is asking the government to impose a 17.5% additional tax on fatty foods. [AMA_Seeks_Fat_Tax_Continued](#)

JURORS SUPPORT FAT SUITS: Almost Half Blame Fast Food Companies for Obesity : As Likely to Vote for Plaintiffs as in Tobacco Suits

Plaintiffs have already won three of the seven current fat law suits, and are in line to win at least two more, says public interest law professor John Banzhaf, whose law students instigated the first winning fat law suit against McDonald's, and who is advising on another which will go to court within several weeks.

Meanwhile, one recent survey shows that almost half of the public already blame fast food companies for contributing to the current epidemic of obesity, and another says that jurors are almost as likely to vote against defendants in fat suits as against defendants in tobacco suits. [Jurors_Support_Fat_Suits_Continued](#)

OBESE MUST PROMISE TO DIET : Fat Patients Must Pledge to Eat Balanced Diet to Promote Personal Responsibility

Overweight patients in Great Britain may soon be required to sign written pledges to eat a more balanced diet and to exercise more. The plan is part of a Labour party policy document being prepared for the next general election, and apparently has the approval of the health secretary, Alan Millburn. [Obese_Must_Promise_to_Diet_Continued](#) [Return to Top of Page](#)

BIG FAT SOLUTIONS:

Discriminate Against Obese, State Law Suits, and Dram Shops Acts
Various Options Discussed In Prelude to Next Week's Conference on Bringing Fat Law Suits

As more public attention continues to be focused on America's growing epidemic of obesity and the huge costs it imposes on society and on the majority of taxpayers who are not obese, interesting new approaches to fighting the problem continue to emerge.

For example conservative law professor Richard Epstein of the University of Chicago recently proposed allowing employers, schools, insurers and other similar institutions to "discriminate against any person who is obese." HHH Secretary Tommy Thompson previously endorsed at least part of this suggestion, proposing that health insurance companies charge obese persons more than those who maintain a healthy weight.

Public interest law professor John Banzhaf, whose law students helped win over \$12 million from McDonald's in the first fat suit, and who is serving as a consultant on a second major law suit against McDonald's to be argued later this month, had previously helped persuade the National Association of Insurance Commissions to advocate requiring health insurance companies to force the obese to pay more, just as some of them are now beginning to require smokers to pay more for their health insurance.

<http://banzhaf.net/obesitymediareleases>

9/2/2003

Reasononline columnist Ronald Bailey thinks discriminating against obese people is a good idea for at least two reasons. He writes: "First, this policy would impose the costs for being overweight on individuals, giving them stronger incentives to slim down. (I know from personal experience that such policies work. For example, I decided to quit smoking shortly after I got turned down for a job because I was a smoker.) Second, since most employers want a healthy workforce, it would give them an incentive to help employees control their weight, perhaps by doing things like restricting what's served in the company cafeteria, or offering exercise facilities."

Michael Greve, a scholar at the American Enterprise Institute, thinks that some state attorneys general will soon begin to sue fast food companies, making use of legal theories similar to those used in the hugely successful state law suits against cigarette makers. These suits forced the tobacco companies to pay hundreds of billions of dollars to states to compensate them and their taxpayers for the huge costs smoking imposes on them, and to make significant changes in the way their products were advertised and promoted. Said Greve: "It won't be too long before state attorney generals get in on this. There's too much money on the table."

Columnist Walter E. Williams said that the movement might even go further, possibly to the point of limiting the sale of fattening products to obese people. "Maybe as an alternative to taxes, there might be a call for laws similar to what's called the Dram Shop Act in some states, which prohibits the sale of alcohol to intoxicated persons. Applied to food, that law might ban the sale of hamburgers and fries to a fat person . . ."

These suggestions come as lawyers and policy makers prepare to gather in Boston for the first conference on using legal action as a weapon against the problem of obesity. Public interest law professor John Banzhaf said that legislation to fight obesity is preferable to litigation but, "if legislators don't legislate, then litigators will litigate" -- noting that he pioneered the very successful use of legal action against smoking because legislators refused to take effective steps.

He said that three so-called fat law suits had already been won, that pressure from the law suits and the publicity the movement is getting has already pressured McDonald's into paying over \$10 million to charity, warning people not to eat at McDonald's more than once a week, agreeing to list the calorie and fat content of meals on the wrappers, and offering many healthier alternatives, including fresh fruit.

"At least we lawyers are doing something about this problem which others are wringing their hands and praying that a sudden exponential increase in personal and parental responsibility will miraculously halt the obesity epidemic," he argued. [Return to Top of Page](#)

AMA SEEKS FAT TAX

British Medical Assn Backs Plan -Mars Bars Fat

Alarmed by the growing epidemic of obesity, and studies showing that most of its huge costs are born by taxpayers who are not obese, the AMA and the British Medical Association are both recommending a fat tax as a "shock tactic" to help keep overweight down. Sri Lanka already has a tax on unsaturated fat products.

The British Medical Association is asking the government to impose a 17.5% additional tax on fatty foods.

There is also growing evidence that fear about fat taxes and fat law suits -- three of which have already been successful -- are prompting food companies to make significant changes.

McDonald's for example, in addition to warning customers not to eat at their fast food outlets more than once a week, has already introduced healthier menu choices, including fresh fruits

More recently, the menu for Mars bars has been changed amid health concerns over a fatty ingredient. Hydrogenated vegetable fat has been removed from the popular chocolate bar because of its links with high cholesterol levels and heart disease.

<http://banzhaf.net/obesitymediareleases>

9/2/2003

AMA Vice President Mekesh Haikerwal said that the Australian Medical Association is preparing to discuss its proposal with the federal government. A tax on fatty food would help to create a healthier society but "shock tactics" were needed to arrest the spread of obesity, he said.

"The discussion needs to be had," Dr Haikerwal said. "There needs to be a giant wake-up call, obesity is a major drain on our resources, on our health systems and workplaces."

Australian health ministers will meet next month to consider a national strategy -- including possible fat taxes -- to battle obesity levels with new evidence showing that within the next decade four-out-of-ten children will be overweight. Diabetes Australia spokesman Alan Barclay said the plan was "definitely worth considering for the battle against diabetes".

There also appears to be growing support in the U.S. for taxes on fattening foods, says public interest law professor John Banzhaf, who helped initiate one of the three fat law suits which has already been successful.

He is also a consultant on the pending law suit charging McDonald's with contributing to the obesity of minors.

The authors of a study in the May/June issue of HEALTH AFFAIRS contend that governmental action is needed to curb the \$93 billion obesity contributes to health costs each year, with more than half being paid by taxpayers for funding obesity-related medical expenses under Medicare and Medicaid.

"If people want to be 200 pounds, then that's their choice, but ultimately, if the taxpayer is paying for those choices, certainly, in my mind, that is where the justification for government involvement comes from," said economist Eric Finkelstein, who conducted the research with Ian Fiebelkorn of RTI International and Guijing Wang of the CDC."

FOX NEWS also reports: "'You now have a report that says the taxpayer is being hurt because of obesity. Ah, now the federal government will have to step in to protect people from their habits,' said Tom DeWeese, president of the American Policy Center, a civil libertarian watchdog group based in Virginia.

"There are a lot of forces at work here -- some will work in the courts, some through legislation -- he said. "What you'll find is the report is the smoking gun for all these forces to use." [Return to Top of Page](#)

JURORS SUPPORT FAT SUITS - STUDIES

Almost Half Blame Fast Food Companies for Obesity As Likely to Vote for Plaintiffs as in Tobacco Suits

Plaintiffs have **already won three of the seven current fat law suits, and are in line to win at least two more**, says public interest law professor John Banzhaf, whose law students instigated the first winning fat law suit against McDonald's, and who is advising on another which will go to court within several weeks.

Meanwhile, one recent survey shows that almost half of the public already blame fast food companies for contributing to the current epidemic of obesity, and another says that jurors are almost as likely to vote against defendants in fat suits as against defendants in tobacco suits.

According to one recent survey, 87% of Americans say that children and teenagers are more overweight today than in the past, and 68% agree it is a "major health problem." Even more importantly, half of all Americans say that the epidemic of childhood obesity is caused by eating unhealthy food, and of those 41% "blame children's consumption of fast food" in whole or in part. Forty eight percent of Americans believe that "children are eating more fast food than you [parents] did," while only 32% think their children are getting less exercise. Actually, over 65% of those surveyed think that children are getting the same amount of exercise - or more - than their parents did when they were young.

This means that the fast food industry's primary answer to the childhood obesity problem - i.e., it's the children's fault
<http://banzhaf.net/obesitymediareleases> 9/2/2003

for watching too much television and playing too many video games or web surfing - isn't likely to persuade most juries, says Banzhaf. "Indeed, if almost half of all prospective jurors are already willing to put some - or even most - of the blame on the fast food industry, just think how many will be willing to award damages when we show them the misrepresentations, half truths, and sneaky tactics we've already uncovered which the fast food companies engage in," he said.

Two recent surveys show that potential jurors are about as likely to vote for plaintiffs in obesity law suits as they are to support smokers suing tobacco companies, even before hearing any evidence, and even prior to any court-ordered discovery of incriminating fast food documents.

"This is a remarkable finding, since we have had many years of successful tobacco litigation, public revelations about widespread wrongdoing by cigarette manufacturers, and literally tons of very incriminating and damaging tobacco industry documents, while the obesity law suits and public understanding about them are still in their infancy," says Prof. John Banzhaf of George Washington University Law School.

A 2002 survey found that 53% of potential jurors would side with tobacco companies if they were sued by a smoker, and only 28% said that they would vote for the plaintiff. Now, a new March 2003 survey of potential jurors by a litigation research firm shows that, in a suit by an obese person against a fast food chain, 56.5% would vote for the defendant, and 24.4% would award damages to the plaintiff.

"This virtually identical result is astonishing, given that McDonald's and others have called the fat suits 'frivolous' and 'senseless,' and that most potential jurors don't yet know about studies showing that fast foods are the major cause of obesity; that fast foods can produce addictive effects -- like nicotine -- in many users; and that the chains deliberately manipulate the foods to make them far more dangerous and habit-forming than they would otherwise be," says Banzhaf, whose law students won the first fat law suit against McDonald's.

"Although a bare majority of potential jurors -- 56.5% -- did say they would vote for the fast food defendant, this response was elicited without hearing any of the plaintiff's evidence, and only after respondents were asked a question which may have inadvertently colored their response. The potential jurors had been asked if parents and caretakers, not restaurants, should be blamed if children become overweight from eating too much fast food. But, argues Banzhaf, that question falsely suggests that the law recognizes only one cause for an injury or illness.

On the contrary, he says, all jurisdictions recognize that there can be two or more causes of injuries or illnesses, and in such situations each cause is held responsible for its fair share of the damages. This occurs very frequently when the driver injured in an automobile accident, as well as the other driver, was negligent, but is still able to recover damages.

It also occurs when careless people fall off the top step of step ladders, or are electrocuted by using electric hair dryers around water faucets or even in the shower. In such cases manufacturers are also held liable if they -- like fast food companies -- failed to provide any warnings of the risks of using the products, even through these dangers are at least as clear, obvious, and well known as the dangers of eating fast foods.

Cigarette manufacturers are routinely being held liable for millions -- and in some cases billions -- of dollars in suits brought by smokers even though, in virtually every case, the smokers admitted that their negligent conduct was one of the causes of their illness. Moreover, in the tobacco cases the plaintiffs are adults, whereas in the McDonald's case in which Banzhaf is serving as a advisor, the plaintiffs were young children when they used the product.

Banzhaf also notes that the law does not blame children for the negligence of their parents. "McDonald's is careful to provide very clear notices with the small toys it distributes warning that they are not to be given to young children because of the dangers of choking. If they failed to provide such a warning and the child choked, McDonald's would almost certainly be held liable for failing to provide a clear and conspicuous warning, even though the danger was obvious and the parents were clearly negligent for giving the toys to their infants."

If the survey respondents were asked whether fast food companies bear -- along with parents and caretakers -- some

responsibility for the sudden epidemic of obesity in children, and were then asked if the companies should be held liable for their fair share of the resulting costs, the number of potential jurors willing to vote for the plaintiffs almost certainly would have been far higher, even before they hear the evidence, suggests Banzhaf.

In fact, there is lots of very powerful evidence that jurors would hear which would also likely help persuade the undecided -- and even those who now potentially side with the fast food chains -- to vote for plaintiffs, says Banzhaf. This includes:

* a careful economic study showing that the proliferation of fast food restaurants -- and not personal responsibility, lack of parental responsibility, eating habits at home or in traditional restaurants, etc. -- is responsible for over 65% of the current epidemic of obesity;

* numerous scientific studies showing that frequent eating of fast foods can produce addictive-like effects -- similar to those of nicotine or even heroin -- not only in humans, but even in laboratory animals which have been made to experience withdrawal symptoms;

* testimony about how fast food chains deliberately alter foods to increase the amount of fat, saturated fat, and calories to dangerous amounts far higher than most consumers realize;

* economic evidence that obesity costs the American public more than \$115 billion a year, and that much of it paid for by people -- like most jurors -- who are not obese, in the form of higher taxes and vastly inflated health insurance premiums, since obesity balloons the cost of medical care for each obese person by approximately \$1,500 a year.

Banzhaf suggests that potential defendants are certainly acting as if they worry that jurors may hold them liable for their fair share of the \$115 billion annual cost of obesity:

* McDonald's in France is warning consumers not to eat at their fast food restaurants more than once every week, and PepsiCo will warn customers about overeating their junk foods;

* McDonald's will list the fat and calorie content of its menu items in Great Britain;

* More healthful menu choices are rapidly being added, with McDonald's now even allowing children to substitute fresh fruit for french fries with some of their Happy Meals;

* Both the National Restaurant Association and the Grocery Manufacturers of America have asked Congress for protection against obesity-related law suits, and Representative Ric Keller [R-FL] has already introduced such legislation [HR 339] for fast food chains. [Return to Top of Page](#)

OBESITY MUST PROMISE TO DIET:

Fat Patients Must Pledge to Eat Balanced Diet to Promote Personal Responsibility

Overweight patients in Great Britain may soon be required to sign written pledges to eat a more balanced diet and to exercise more. The plan is part of a Labour party policy document being prepared for the next general election, and apparently has the approval of the health secretary, Alan Millburn.

The Labour Party made it clear that patients, particularly overweight people and smokers, must begin accepting some responsibility for their own health problems, and the written pledges are designed to remind them of their role in caring for themselves. The document says: "Agreements could be drawn up to help people to cut down or quit smoking, to lose weight, to take more exercise or to eat a more nutritious diet."

"Many critics of the fat suits I have been encouraging -- **three of which have already been won** -- argue that it is unfair to blame obesity on food manufacturers, and that the cause of the obesity epidemic is lack of personal

responsibility. It will be very interesting to see, therefore, how many support this modest governmental step of seeking to impose more personal responsibility on those who are obese," said public interest law professor John Banzhaf, whose law students won the first McDonald's fat suit, and who is advising on the fat law suit against McDonald's scheduled to go to court later this month.

There is certainly good reason for the government to be concerned about the health costs of caring for those with obesity-related diseases, especially since tax payers are forced to bear so much of this cost in the form of much higher taxes and inflated health insurance premiums, says Banzhaf.

Indeed, a new study documenting that obese patients are contributing to skyrocketing Medicare and Medicaid outlays, and costing thin taxpayers tens of billions of dollars each year, is leading to calls from many quarters for actions to reduce the escalating epidemic of obesity, and/or to force those responsible to bear their fair share of the almost \$120 billion a year it burdens the American public.

In addition to so-called fat law suits, there appears to be growing support for **taxes on fattening foods**, and for discouraging overindulgence by **charging the obese more for health insurance**, says Banzhaf, who helped initiate one of the three fat law suits which has already been successful. He is also a consultant on the pending law suit charging McDonald's with contributing to the obesity of minors.

The authors of the study, in the May/June issue of **HEALTH AFFAIRS**, contend that governmental action is needed to curb the \$93 billion obesity contributes to health costs each year, with more than half being paid by taxpayers for funding obesity-related medical expenses under Medicare and Medicaid. "If people want to be 200 pounds, then that's their choice, but ultimately, if the taxpayer is paying for those choices, certainly, in my mind, that is where the justification for government involvement comes from," said economist Eric Finkelstein, who conducted the research with Ian Fiebelkorn of RTI International and Guijing Wang of the CDC."

FOX NEWS also reports: "You now have a report that says the taxpayer is being hurt because of obesity. Ah, now the federal government will have to step in to protect people from their habits," said Tom DeWeese, president of the American Policy Center, a civil libertarian watchdog group based in Virginia. "There are a lot of forces at work here -- some will work in the courts, some through legislation -- he said. "What you'll find is the report is the smoking gun for all these forces to use."

In addition, **HHS Secretary Tommy Thompson** recently told **CBS-TV News**: "I also would like to see health insurance companies, you know, and health insurance, to give people credit on their health-insurance cost for being healthier. Why don't we get a credit on our health insurance if we live a healthy lifestyle?"

"Charging the obese more for health insurance -- just like smokers pay more for life insurance, people with wooden homes pay more for home insurance, and drivers with easily-damaged expensive cars pay more for automobile insurance -- makes sense for several reasons," argues Banzhaf.

First, it stops forcing the majority of people who maintain a normal weight to subsidize the unhealthy and very expensive obese lifestyle of a few, and there are several judicial opinions which suggest that failing to charge lower rates where they are clearly justified by cost data constitutes unlawful discrimination.

Second, higher insurance premiums would provide a very powerful and immediate financial incentive for the obese to lose weight, especially if they were forced to pay a substantial portion of the additional \$1500 their obesity adds to their individual medical care costs each and every year.

Finally, the imposition of such differential health insurance rates -- which are already being applied in some cases to smokers -- would be a very effective way of educating and reminding people of the major risks obesity poses to their health.

Many are also beginning to argue that, just as we impose large taxes on cigarettes and alcoholic beverages to deter their

consumption, perhaps we should also impose higher taxes on foods which are especially fattening. This would both discourage consumption, and provide money for health education messages to partially counteract the tens of billions of dollars spent each year to convince people to eat fattening foods.

"Alcoholic beverages, like fattening foods, are consumed by the majority of the population and, when used in moderation, are not dangerous to health. Yet we nevertheless impose high taxes on them to deter consumption, particularly by those who might use them in excess," argues Banzhaf.

To those who ask why thin people should be forced to pay more for their cheeseburgers simply to discourage over-consumption by the obese, Banzhaf suggests that those who eat fattening fast foods only occasionally will actually save money if fat taxes were adopted. "The added cost to a person who eats a fattening cheeseburger at a fast food outlet only once a month will be more than made up by his savings in taxes and health insurance from discouraging frequent consumption of those burgers by the obese," says Banzhaf. [Return to Top of Page](#)

Mr. CANNON. Mr. Schwartz.

STATEMENT OF VICTOR SCHWARTZ, SHOOK, HARDY & BACON

Mr. SCHWARTZ. Good morning, Mr. Chairman and Mr. Watt. Thank you for inviting me here today. As you suggested in your opening remarks, my experience in the law has been on both sides of the aisle. I have been a law professor. I also serve as General Counsel to the American Tort Reform Association, but I do want to make clear my views are simply my own today.

John and I were actually colleagues in Columbia Law Review and chose Columbia Law School. We might have slightly different views today. We were permitted to do so when we were on Law Review together and we feel the same way today.

Very recently, the American Law Institute, which is the fountain head for restating the law of torts, and this is tort law, restated the law after a 30-year-period of time. And the people who are involved in that are judges and lawyers and plaintiff's lawyers, purportedly the best in the Nation, and they look at the case law, they look at American case law. And what they decided was food manufacturers and food sellers can be liable in three instances.

If they have something in food, there is a pebble in a can of tuna fish or there is a needle in food you ate in a restaurant, the company is liable. And if you fail to warn about something that people may not know about, such as an allergen or coloring, you are liable. And if you violate regulations that are there to protect people, you are liable.

Now that sums up 200 years of American law on food. In law school it takes about 16 weeks, but professors try to hide the ball real good so you don't know where it is. But there is a new trend in American tort law and we have seen it in other areas and it began, I think, in modern times with John's work in tobacco, what the former Secretary of Labor Reich calls regulation through litigation. Now here tort law is not directed at what we were thinking about in the restatement, and that is compensating somebody for an injury they have had because they have been hurt by a product. The focus is not on compensation, but it is on regulating an industry through tort law. And some people favor it. In fact, Secretary Reich favored it at first. But as he thought about it, and for the record I will indicate and give you his op ed from the Wall Street Journal, he said that regulation through litigation, which is really changing what we have to eat, changing what products we may be able to obtain, violates the fundamentals of the democratic process, because he appreciates—and here is a little bit of a response of what Mr. Watt suggested in his opening remarks—that you can do things that courts can't do.

You are having a hearing today. You can hear from all sides. Courts don't do that. You can hear from all different points of view. You can recall witnesses. You can cross-examine them. Courts are not in a position to do that. They have two lawyers before them in a case. So if you are dealing with a matter of national policy, which has to do with what warnings are going to be on our food, what food is going to be available, what school children should or should not have, that is something that is in this arena and it is the proper arena for it. And if you don't do your job the voters have a very

good weapon that they don't have against judges; they can decide to elect somebody else. So when it comes to food and what fat content should be and what we are going to do about obesity, this is really the right forum to do it.

Now some lawsuits have been brought up already, and has been suggested by a number of people here they are in a very early and a very nascent stage. And I believe the fat lawsuits have very big hurdles to climb. First, the person is going to have to prove that if he or she is obese, it was because of food, not because of inactivity or genetics or 101 other things, and that is not easy. The second thing they are going to have to prove, and this is even more difficult, is that their harm was caused by eating a particular food.

I doubt you will have a suit against yourself, Ms. Ricchi, because you serve good food and it is going to be very hard for anybody to prove that. But targeting fast food companies seem to work because people do go there repeatedly, it is low cost, and maybe they think they can show that they were hurt by a McDonald's hamburger. I personally think it is going to be very, very difficult to climb that mountain. And finally courts are going to have to throw out 240 years of law, take the restatement and burn it and say we are going to have a totally new way of imposing liability.

With all of those hurdles, though, we have seen in American tort law that no matter how frivolous something may seem a court may do it and get into it. And for that reason it is an appropriate time to look at this subject because change can be right around the corner and having a preemptive effect may be sound public policy.

[The prepared statement of Mr. Schwartz follows:]

PREPARED STATEMENT OF VICTOR E. SCHWARTZ

Mr. Chairman, thank you for your kind invitation to testify today about how to prevent frivolous lawsuits against manufacturers, distributors and sellers of food. Although I serve as General Counsel to the American Tort Reform Association and we oppose frivolous lawsuits against anyone—including teachers, who, thanks to members of this Committee, are now protected under the Paul D. Coverdell Teacher Protection Act of 2001, volunteers, charities or product manufacturers—my views today are my own. Let me state the basis for those views.

For the first 14 years of my professional life, I worked part-time as a plaintiffs' attorney and full-time as a professor of law. I served as dean of the University of Cincinnati College of Law, and for more than twenty-five years, I have co-authored the most widely used torts casebook in America, *Prosser, Wade & Schwartz's Torts*. I also have served on all three Advisory Committees for the American Law Institute's new *Restatement of Torts, Third*, including the project on product liability.

I worked under the Ford and Carter Administrations, chairing the Inter-Agency Task Force on Product Liability, and the Department of Commerce's Task Force on Accident, Compensation and Insurance.

Currently, I chair the Public Policy Group in the Washington office of the law firm of Shook, Hardy & Bacon LLP. Shook, Hardy & Bacon is principally a defense firm, and has helped me gain the perspective of those who are sued in our legal system.

No fast food chain has retained us. The views I state today are based on my background and experience in developing public policy in tort law, not on the dictates of any company, entity or trade association.

LIABILITY OF COMMERCIAL SELLERS AND DISTRIBUTORS FOR HARMS CAUSED BY DEFECTIVE FOOD PRODUCTS

The American Law Institute's (hereinafter "ALI") new *Restatement of Torts, Third: Products* (hereinafter "*Restatement Third*"), Section 7, is the clearest and most accurate description of the liability of commercial sellers of food. As the *Restatement Third* appreciates, purveyors of food were the first group to be subject to strict products liability. If food contains a manufacturing defect—such as a can of peas that contains a pebble, or a bowl of soup that contains a nail—and the defect

injured a person, the seller is liable. There are no excuses. Sellers of food also may be subject to liability for failure to warn. An example is provided in the *Restatement Third*. If a seller of food fails to inform a consumer that a dye applied to the skins of oranges contained a well-known allergen, the manufacturer may be subject to liability, if the consumer becomes sick from the coloring. Sellers of food also may be subject to liability when their product fails to conform to applicable safety statutes or administrative regulations.

Until very recently, the only real issue in food cases arose when an ingredient that caused a plaintiff's harm was an inherent aspect of the product (*e.g.*, a chicken bone in a chicken enchilada or a fish bone in chowder). There was much debate in the case law about what was or was not "inherent" in a food product. The *Restatement Third* looked to a thoughtful line of cases to address those situations. It moves away from what is or is not inherent, and focuses on whether a reasonable consumer would expect the food to contain that ingredient. If the consumer has that expectation, the seller is not liable. If any of its contents come as a surprise (*e.g.*, an inch-long chicken bone in the middle of a three inch chicken sandwich), the seller is liable. That is a quick summary of more than two hundred years of food law.

REGULATION THROUGH LITIGATION

Tort law has always had a public policy component. Nevertheless, it has achieved those goals with respect to sellers of food under the standards I have outlined today. Over the past decade, however, a new phenomenon has arisen in the law of torts. Former Secretary of Labor Robert Reich aptly called this phenomenon "regulation through litigation." Here, the focus of tort law shifts away from its main purpose—compensating someone who has been injured by the wrongful conduct of another. The shift is toward having an enterprising judge to create brand new rules to empower a jury to make determinations that traditionally were the responsibility of Congress, state legislatures, or regulatory agencies.

Regulation through litigation began with a very unpopular product, tobacco. Some judges changed fundamental tort rules to facilitate suits against tobacco companies when state attorneys general sued those manufacturers. They broke traditional tort rules and gave a state a greater right to sue for an alleged economic harm than a smoker who had an alleged physical injury. At the time—actually in debates with one of the learned witnesses we will hear from today—I suggested that some day, the regulation through litigation concept could be extended to products that were much more popular, such as fast food. But, I was told more than once that "no, the concept is only to be applied to tobacco because it is the only product that could kill a consumer when it was used as intended." At the time, I suggested that if one eats enough fatty hamburgers, that too could lead to premature death. But these thoughts were treated as those of an impractical academic. Of course, we now know that regulation through litigation was not confined to tobacco. Litigation cases were subsequently brought against gun manufacturers, insurers, and pharmaceutical manufacturers, among others.

Now we are on the threshold of a new demon for "regulation through litigation" activity: fast and other potentially high caloric, fatty foods. The focus is not on food that contains a product defect, such as a pebble. It is on food that health experts believe can cause obesity, when people overeat.

Regulatory bodies can, and have, stepped in to protect certain parts of the population from high caloric foods. For example, regulatory bodies in Los Angeles have now banned traditional soft drinks in public schools. This will take effect at the beginning of 2004. While some people may vigorously disagree with that regulatory decision, it was rendered in the context of the check and balance of American politics. If people do not agree with the decision, through election or propositions in California to the Constitution, they can change it.

It is a very different process when a judge in a tort case creates a brand new regulatory rule. The judge does not hold hearings, as you have here today. He or she could not call witnesses on his or her own, nor could he or she obtain a broad public policy perspective about how food should be regulated. Also, new judge-created rules are retroactive, not prospective. One judge can subject an industry to massive liability exposure for what has been a socially acceptable norm.

A decision by a legislature or regulatory agency is markedly different than those by judges. As recognized by former Secretary of Labor Robert Reich who was, at one time, a strong supporter of regulation through litigation, "these lawsuits are end runs around the democratic process."

Let me share just one impact of one judge's use of regulation through litigation, in the area of automobile insurance. The question was whether an insurance company properly offered its insureds a non-original manufacturer part in fender-bender

cases. A huge verdict against an insurer that did so led almost all automobile insurers to offer only original equipment manufacturer replacement parts. This has led to sharp increases in the price of automobile insurance imposed on persons far removed from the original case.

WHERE IS "REGULATION THROUGH LITIGATION" TODAY FOR FOOD SELLERS?

We have at least one judicial decision suggesting that in some contexts, a successful liability case could be brought against a seller of fast food. Advocacy literature goes further and suggests that manufacturers of high fat content or high sugar content food should be subject to liability for causing obesity. Nevertheless, there are huge legal mountains to climb before such cases can be successful. Let me briefly state them.

First, if traditional rules are followed, the plaintiff is going to have to show that it is more probable than not that his or her obesity was caused by food, not by failure to exercise or other lifestyle choices, or genetics. As a practical matter, this will be very difficult to prove. Second, the plaintiff will have to show that one specific purveyor of food caused his injury. This will be even more difficult to prove. Finally, there will have to be a fundamental change in the definition of what constitutes a product defect. The *Restatement Third* rules will have to be swept away under a new wave of regulation through litigation.

In my writings, I have suggested that if precedents created in some of the tobacco state attorney general cases were applied in cases brought against sellers of fast food, a liability breakthrough could, nevertheless, occur.

SHOULD CONGRESS TAKE ACTION?

On a few occasions, Congress has worked to change current tort law, for example, in the General Aviation Recovery Act of 1994, the Paul D. Coverdell Teacher Protection Act of 2001, and the Biomaterials Access Assurance Act of 1998. All of these measures limited existing and—what was believed to be—excessive liability that created very unsound nationwide public policy.

With food cases, we have not reached that point. The issue is whether Congress should take proactive measures to prevent individual state courts from engaging in "regulation through litigation" in the area of food, and holding a seller and a manufacturer or a distributor of a food product that complies with all health and safety regulations, and is not defective, liable for obesity or other health hazards.

Again, as I have made clear, there are major bulwarks in the path of that liability. For that reason, legislation passing at this point would not have to change existing law. What it would do is solidify existing law and draw a line where experience and practical wisdom have suggested it should be drawn.

I thank you very much for your kind attention, and would be pleased to answer any questions.

Mr. CANNON. Thank you, Mr. Schwartz. That was very enlightening. I will tell you that many people from many segments of the food industry are terrified at this new trend in public policy, which I think Mr. Banzhaf was very eloquent in setting for us.

Ms. Ricchi.

**STATEMENT OF CHRISTIANNE RICCHI,
THE NATIONAL RESTAURANT ASSOCIATION**

Ms. RICCHI. Thank you, Mr. Chairman. Chairman Cannon and Members of the Committee, my name is Christianne Ricchi, and I am the owner of i Ricchi Restaurant here in Washington, D.C. I am testifying today here on behalf of the National Restaurant Association, which is the leading business association for the restaurant industry, to offer my support for H.R. 339, the "Personal Responsibility and Food Consumption Act." Together with the National Restaurant Association Educational Foundation, the Association's mission is to represent, educate and promote a rapidly growing industry that is comprised of 870,000 restaurants and food service outlets, employing 11.7 million people around the country. As a member of the Board of Directors of the Association, I am proud to say

that our Nation's restaurant industry is the cornerstone of the economy, careers and community involvement.

Mr. Chairman, I am living the American dream. I have over 30 years of experience in the restaurant industry, and I am the owner of a successful restaurant in the Nation's capital. I opened i Ricchi in 1989 after a trip to Italy several years before, where I met a family who owned a little trattoria in the hills outside of Florence. I began working in the kitchen and subsequently the wine cellar and the dining room. From the experience I became familiar with all aspects of running a restaurant and a small business.

As a restaurateur and a small business owner, there are many challenges that I and the industry face. One such issue that has surfaced that could greatly impact the restaurant and food service industry is litigation that seeks to hold the industry responsible for some individuals' health conditions relating to overweight and obesity. As absurd as this may sound, some of these suits are being filed.

Let me be clear that I am not at all minimizing the issue of obesity, which is a very complex and serious issue for some Americans. However, what the trial bar is attempting to do by capitalizing on this issue could have a significant and detrimental impact on my small business and the entire industry.

This past year in New York an attorney filed frivolous lawsuits on behalf of people who claim the food industry was responsible for their obesity-related health problems. The first suit was never filed and was publicly ridiculed for its senseless, baseless and ridiculous claims. A Federal judge recently dismissed a second lawsuit, but it was recently refiled and more copycat suits may be likely.

This type of legal action, if permitted to go forward, leaves little doubt in my mind that the costs associated with such a lawsuit could put me out of business. My restaurant is a small business employing 60 people. Most of my employees have worked in the restaurant for more than 10 years and some have been with me since the opening 14, 15 years ago. All of my employees are heads of their households. Since September 11, my business and many others in the urban fine dining category have seen a dramatic decline in business. At one point my sales were down 60 percent. Although business has come back somewhat, other factors, ranging from Orange level terror alerts to the current downturn in the economy, have presented challenges.

While I am confident we will overcome all of these obstacles, the prospect of dealing with the legal fees alone from a potential lawsuit causes me grave concern for the future of my business, my employees and our industry as a whole.

I am honored when my customers choose to dine at i Ricchi. However, the thought that someone can file a lawsuit based in part on a choice they have made regarding where to dine and what to eat is disturbing.

Perhaps no other industry offers a greater variety of choices to consumers than restaurants. One of the many strengths of the restaurant industry is the broad spectrum of cuisines and culinary options that customers are offered.

There are 870,000 restaurants in the United States, all of which provide individuals the opportunity, flexibility and freedom to

choose among a variety of high quality, safe, healthy and enjoyable types of cuisines. And once a customer enters a restaurant, an individual is presented with an array of choices designed to accommodate his or her tastes and preferences. Customers are also capable of customizing their meals, whether it is food preparation method or substitution of food items to meet individual items.

From my own perspective, my employees and I strive to provide maximum value to our customers. This starts with offering a variety of choices. We also deliver value through high quality ingredients and a variety of portion sizes. I often provide a tasting menu for my guests to sample small portions of a variety of items on my menu. Ultimately it is our job to please our customers every way we can. As anyone who is in the product delivery and customer service business can tell you, the goal is to have your customers walk away satisfied.

Not only do the lawsuits we are discussing this morning fail to acknowledge the voluntary nature of the choices customers make, they also do not address the fundamental issue of personal responsibility.

I believe it is important to recognize that personal responsibility, moderation, and physical activity are all key ingredients to a healthy lifestyle. It is important to note that 76 percent of meals are eaten at home and not outside the home. I am not a dietician, but I know that dietary experts agree that all foods can be part of a balanced diet.

The good news is that personal responsibility remains a strong American value. A convincing majority, 89 percent, say that personal responsibility is most responsible for why two out of three Americans are overweight, according to a recent survey by the Grocery Manufacturers of America. Also according to National Restaurant Association research, an overwhelming 95 percent of Americans feel they are qualified to make their own decisions what to order when dining out.

Mr. Chairman, with 11.7 million employees the restaurant industry is our Nation's largest employer outside of Government. If these lawsuits are permitted to go forward, they could very simply jeopardize my livelihood, my employees and my customers, whose freedom of choice would be infringed upon. Additionally, I fear for the industry and the impact these lawsuits could have on the economy.

Representative Keller is to be commended for introducing H.R. 339, which would help prevent these misguided lawsuits in the future. But more importantly, this legislation focuses on personal responsibility and the voluntary menu choices we all make rather than on more costly and unwarranted litigation.

Thank you, Mr. Chairman.

[The prepared statement of Ms. Ricchi follows:]

PREPARED STATEMENT OF CHRISTIANNE RICCHI

Thank you, Mr. Chairman. Chairman Cannon and members of the Committee, my name is Christianne Ricchi and I am the owner of i Ricchi Ristorante in Washington, D.C. I am testifying here today on behalf of the National Restaurant Association, which is the leading business association for the restaurant industry, to offer my support for H.R. 339—the Personal Responsibility in Food Consumption Act. Together with the National Restaurant Association Educational Foundation, the Association's mission is to represent, educate, and promote a rapidly growing industry that is comprised of 870,000 restaurant and foodservice outlets employing

11.7 million people around the country. As a member of the Board of Directors of the Association, I am proud to say that our nation's restaurant industry is the cornerstone of the economy, careers and community involvement.

Mr. Chairman, I am living the American dream. I have over 30 years of experience in the restaurant industry and I am the owner of a successful restaurant in the nation's capital. I opened i Ricchi in 1989 after a trip to Italy several years before where I met a family who owned a trattoria in the hills outside of Florence. I began working in the kitchen, and subsequently the wine cellar and the dining room. From that experience I became familiar with all aspects of running a restaurant and a small business.

As a restaurateur and small business owner, there are many challenges that I—and the industry—face. One such issue that has surfaced, which could greatly impact the restaurant and foodservice industry is litigation that seeks to hold the industry responsible for some individuals' health conditions related to overweight and obesity. As absurd as this may sound to some, these suits *are* being filed. Let me be clear that I am not at all minimizing the issue of obesity, which is a very complex and serious issue for some Americans. However, what the trial bar is attempting to do—by capitalizing on this issue—could have a significant and detrimental impact on my small business and the entire industry.

This past year in New York, an attorney filed frivolous lawsuits on behalf of people who claimed the food industry was responsible for their obesity-related health problems. The first suit was never filed and was publicly ridiculed for its senseless, baseless and ridiculous claims. A federal judge recently dismissed a second lawsuit, but it was recently re-filed, and more “copycat” suits may be likely.

Coincidentally, members of the trial bar happen to be convening tomorrow in Boston for a three-day workshop entitled “Legal Approaches to the Obesity Epidemic”. I'm told that some of the same individuals who were associated with the tobacco litigation will play a prominent role at the workshop.

This type of legal action, if permitted to go forward, leaves little doubt in my mind that the costs associated with such a lawsuit could put me out of business. My restaurant is a small business employing 60 people. Most of my employees have worked in the restaurant for more than ten years and some have been with me since the opening, 13 years ago. All of my employees are heads of their households.

Since September 11th, my business and many others in the urban/fine-dining category have seen a dramatic decline in business. At one point my sales were down 60%. Although business has come back somewhat, other factors ranging from orange-level terror alerts to the current downturn in the economy have presented challenges. While I am confident we will overcome all of these obstacles, the prospect of dealing with the legal fees alone from a potential lawsuit causes me grave concern for the future of my business, my employees and our industry as a whole.

I am honored when my customers choose to dine at i Ricchi. However, the thought that someone can file a lawsuit based in part on a choice they have made regarding where to dine and what to eat is disturbing. Perhaps no other industry offers a greater variety of choices to consumers than restaurants. One of the many strengths of the restaurant industry is the broad spectrum of cuisines and culinary options that customers are offered.

There are 870,000 restaurants in the United States—all of which provide individuals the opportunity, flexibility and freedom to choose among a variety of high quality, safe, healthy and enjoyable types of cuisine. And once a customer enters a restaurant, an individual is presented with an array of choices designed to accommodate his/her tastes and preferences. Customers are also capable of customizing their meals, whether it is food-preparation method or substitution of food items to meet individual needs.

From my own perspective, my employees and I strive to provide maximum value to our customers. This starts with offering a variety of choices. We also deliver value through high quality ingredients and a variety of portion sizes. I often provide a tasting menu for my guests to sample small portions of a variety of items on my menu. Ultimately it is our job to please our customers every way we can. As anyone who is in the product delivery and customer-service business can tell you, the goal is to have your customers walk away satisfied. Not only do the lawsuits we are discussing this morning fail to acknowledge the voluntary nature of the choices customers make, they also do not address the fundamental issue of personal responsibility.

I believe it is important to recognize that personal responsibility, moderation, and physical activity are all key ingredients to a healthy lifestyle. To solely target the restaurant industry is overly simplistic, and that is clearly underscored by the fact that 76 percent of meals are eaten at home. I'm not a dietician, but I do know that dietary experts agree that all foods can be part of a balanced diet. Therefore, it

doesn't mean that one must give up certain foods, it means setting limits on how much and how often. Healthful eating patterns are not created or destroyed by one meal or one food. It is the overall pattern of food intake and choices over time that are important to a healthy lifestyle; especially when balance and moderation are complemented by physical activity and personal responsibility.

The good news is that personal responsibility remains a strong American value. A convincing majority—89 percent—say that personal responsibility (e.g. individuals themselves, lack of exercise or watching television) is most responsible for why two out of three Americans are overweight according to a recent survey by the Grocery Manufacturers of America (GMA). Also, according to National Restaurant Association research, an overwhelming 95 percent of Americans feel they are qualified to make their own decisions on what to order when dining out.

The statistic from the GMA survey touches upon the lack of exercise. This issue has certainly raised the awareness of how important physical activity plays a role in attaining and maintaining a healthy lifestyle. The Centers for Disease Control and Prevention and numerous studies have shown that we have an incredibly sedentary society. According to the CDC, more than 40 percent of Americans are entirely sedentary. And, children are spending on average more than 4 hours a day watching TV or playing video games, instead of playing outdoors or getting some form of physical activity. These are just some of the many factors of the multi-faceted issue of obesity. And, there are numerous sensible and achievable solutions that can help address this issue much more effectively than filing frivolous lawsuits that only aim to help those who are filing them.

Mr. Chairman, with 11.7 million employees, the restaurant industry is our nation's largest employer outside of government. If these lawsuits are permitted to go forward, they could very simply jeopardize my livelihood, my employees and my customers—whose freedom of choice would be infringed upon. Additionally, I fear for the industry and the impact these lawsuits could have on the economy. Rep. Keller is to be commended for introducing H.R. 339 which would help prevent these misguided lawsuits in the future. But more importantly, this legislation focuses attention on personal responsibility and the voluntary menu choices we all make, rather than on more costly and unwarranted litigation.

Mr. Chairman and members of the Committee, thank you again for this opportunity to appear before you today. I would be happy to answer any questions.

Mr. CANNON. Thank you.

Mr. Berman, you are now recognized for 5 minutes.

STATEMENT OF RICHARD BERMAN, THE CENTER FOR CONSUMER FREEDOM

Mr. BERMAN. Thank you, sir. Batting cleanup, I think I am going to take the opportunity to put some of this in a new perspective. For example, Mr. Banzhaf testified there are 300,000 obesity deaths each year. These are actually called obesity-related deaths, and this number is taken on some aspect of an urban legend. To qualify as an obesity-related fatality the death need not have anything at all to do with body weight. If an obese man dies in a car wreck, the death is obesity-related.

The respected New England Journal of Medicine has taken issue with these statistics as well as the Department of Health and Human Services, which characterizes the same 300,000 deaths as resulting from physical inactivity.

More confusion arises from the so-called body mass index, or BMI. In 1998, most people are unaware of the fact that the Federal Government shifted its definition of acceptable weight categories following considerable pressure from the World Health Organization. And as a result, 30 million Americans became overweight overnight without gaining an ounce, which has in turn fueled more of this so-called obesity epidemic hysteria.

Having said all that, we have gained some weight in this country as well as in other countries around the world. The Harvard Insti-

tute for Economic Research has found that since the 1960's the average man has gained 12 pounds and the average woman has gained 10. And whether you think this is a large increase or not, we first need to understand that this weight gain did not occur in a vacuum.

Researchers at the Natural Bureau of Economic Research have attributed 60 percent of the weight gain to sedentary lifestyles. At the turn of the century over one-third of jobs in this country involved physical labor, today only 5 percent do. More people are behind a keyboard and a computer than we would have ever imagined before in the 1960's. Adults have become sedentary by how they earn a living. Children are experiencing the same change either through television, computer games, video games, et cetera. And there is only one State in the country today that requires daily physical education for students in high school.

To make a long story short, this is not the same obesity epidemic to everyone. In fact, it is really an exercise deficit, according to most commentators, a deficit in physical activity that has resulted from some lifestyle trade-offs that we have been more than willing to make.

Mr. Banzhaf is also the proponent of the theory, which is an unusually new theory, suggesting that the food that is being offered for sale is addictive and he is seeking to somehow bridge the gap between tobacco and food by relying on this addiction argument. He is demanding that restaurants start warning their customers that their next cheeseburger could have a morphine like effect.

There are two sources for these claims. One is a pop science magazine that he has been relying on and another is a professional animal rights radical. The magazine, the New Scientist, is a British consumer magazine which published an article in February that suggested that food might have addictive qualities. The New Scientist, which I am sure you will hear about from time to time if you listen to Mr. Banzhaf, is not a scientific peer review journal like the New England Journal of Medicine or the Journal of the American Medical Association nor does it pretend to be.

The other source for Mr. Banzhaf's food addiction theory is the so-called, or the misnamed Physicians Committee for Responsible Medicine. This is a front group for the animal rights group, PETA, which shares its office space and has given it close to a million dollars in financing. The Physicians Committee which Mr. Banzhaf relies upon has been officially censured by the American Medical Association, which calls its recommendations, and I quote, irresponsible and potentially dangerous to the health and welfare of Americans. The AMA currently has two policy statements in force condemning this organization for its willful misrepresentation of medical science. The group leader, Mr. Neal Barnard, is currently promoting a book that claims that meat is as addictive as heroin and cheese is morphine on a cracker.

Incredibly, the trial lawyers currently suing chain restaurants over obesity have actually made Barnard an integral part of their case. Barnard is quoted four times in the most recent filing against McDonald's, which Mr. Banzhaf is associated with, and that filing includes two separate affidavits from Barnard as well.

If you consider the amount of misdirection, junk science and shameless deception being employed by the plaintiff's bar, it is clear that restaurants need some reasonable amount of protection from the unprincipled attacks and costs of unnecessary litigation that are about to be launched. These are costs that eventually get passed on to everyone else in the form of higher food prices.

Apparently the trial lawyers are no longer able to police themselves, and I applaud Congressman Keller for his legislation. Congress should step in and provide some adult supervision in this process.

[The prepared statement of Mr. Berman follows:]

PREPARED STATEMENT OF RICHARD BERMAN

Good morning. Thank you for the opportunity to testify before this subcommittee on the issue of obesity and the role of food retailers. It has been convenient for some commentators to target the restaurant and foodservice industries as culprits behind the so-called “obesity epidemic.” Before the nation turns to draconian solutions (whether directed at the foodservice industry or any other) we need to step back and make certain we understand the nature of the problem.

Measuring the Problem

Let’s start with the numbers. We have all heard that there are 300,000 “obesity-related” deaths each year. But to qualify as an “obesity-related” fatality, the death need not have anything at all to do with body weight. If an obese man dies in a car crash, the death is “obesity-related.” The *New England Journal of Medicine* has reported, “although some claim that every year 300,000 deaths in the United States are caused by obesity, that figure is by no means well established. Not only is it derived from weak or incomplete data, but it is also called into question by the methodologic difficulties of determining which of many factors contribute to premature death.”¹ Perhaps that’s why the Department of Health and Human Services instead characterizes the same 300,000 deaths as resulting from “physical inactivity.”²

More confusion arises from calculations: the body mass index (BMI). In 1998, the federal government shifted its definition of acceptable weight categories, following

¹ Kassirer JP, Angell M., “Losing weight--an ill-fated New Year's resolution,” Editorial, *New England Journal of Medicine*, Volume 338, January 1998, p. 52-54.

² President’s Council on Physical Fitness and Sports, “Fact Sheet: Physical Activity and Health,” available at http://www.fitness.gov/physical_activity_fact_sheet.html (citing U.S. Department of Health and Human Services and other federal agency data). Accessed 15 June 2003.

considerable pressure from the World Health Organization. As a result, 30 million Americans became “overweight” overnight – without gaining an ounce. Is this a useful definition? We need something that can truly measure the obesity problem and be an education tool for the public. Telling people that they are fat if they have bodies like Michael Jordan won’t inspire weight loss; overstating the problem will only spur us to create solutions that will have little overall impact on public health.

Is Obesity About What We Eat or What We Do?

Having said that, Harvard Institute for Economic Research has found that that since the 1960s, the average man has gained 12 pounds while the average woman has gained 10.³ Whether you think that is a large increase or not, we first need to understand that this weight gain did not occur in a vacuum. Researchers at the National Bureau of Economic Research attributed 60 percent of this weight gain to sedentary lifestyles.⁴ At the turn of the century, over one-third of jobs involved physical labor; today, only 5 percent. Automation has taken us out of the field and places us behind a keyboard. Over time, that kind of shift makes a considerable difference. Economists have found that being in a sedentary occupation for one year leads to a small increase in weight, but staying in that occupation for 14 years causes a significant increase.⁵ At an American Enterprise Institute event last week on the problem of obesity, more than one commentator noted that we once exercised to make money; now, we spend money to join health clubs.⁶

³Cutler, David M.; Glaeser, Edward L.; and Shapiro, Jesse M., “Why Have Americans Become More Obese?” Harvard Institute of Economic Research, Discussion Paper Number 1994, January 2003. Downloadable from <http://post.economics.harvard.edu/hicr/2003papers/2003list.html>. Accessed 16 June 2003.

⁴Lakdawalla, Darius, and Philipson, Tomas, “The Growth of Obesity and Technological Change: A Theoretical and Empirical Examination,” NBER Working Paper No. w8946, May 2002, p. 25.

⁵*Ibid*, p. 14.

⁶Commentators may have been collectively paraphrasing Philipson and Richard Posner from an earlier work: “...people must *pay* for undertaking, rather than be paid to undertake, physical activity.” (Emphasis

Adults may become sedentary by how they earn a living; children do the same with the help of television, video games, and computers. A recent study reported that boys were more likely to be overweight if they watched more than 4 hours of TV a day compared with those who watched less than 1 hour.⁷ According to *JAMA* (the Journal of the American Medical Association), the average high school student will spend between 15,000 and 18,000 hours in front of a television, but only spend 10,000 hours in school.⁸ Even when they are at school, children aren't required to exercise as much as they once were – and in many cases are nudged in the direction of their PCs: “We are seeing an erosion of physical education nationally at the high school and elementary level because we are adding other academic requirements, such as computers and art.”⁹ Some are prevented from exercising. Asthma rates in children have doubled since 1984 and asthmatic children are 63 percent more likely to be obese than other children.¹⁰ Even before our kids consume any food, they are already predisposed to a lifestyle where physical inactivity is the norm.

The Law of Unintended Consequences

One elephant in the room worth mentioning is the unintended consequence of our success in beating smoking. Smoking rates have dropped 60 percent since 1985. In 1980, 6

theirs). “The Long-Run Growth in Obesity as a Function of Technological Change,” Working Paper 99.8, The Irving B. Harris Graduate School of Public Policy Studies at the University of Chicago, 17 May 1999.

⁷Eisenmann, Joey C.; Bartee, R. Todd; and Wang, Min Qi; “Physical Activity, TV Viewing, and Weight in U.S. Youth: 1999 Youth Risk Behavior Survey” *Obesity Research* Volume 10, Issue 4, May 2002, p. 379-385.

⁸ Andersen, Ross E.; Crespo, Carlos J.; Bartlett, Susan J.; Cheskin, Lawrence J.; Pratt, Michael; “Relationship of Physical Activity and Television Watching With Body Weight and Level of Fatness Among Children: Results From the Third National Health and Nutrition Examination Survey” *JAMA*, Volume 279, 25 March 1998 p. 938-942.

⁹ Marybell Avery, President of National Association for Sport and Physical Education, quoted in “Whatever Happened to Recess?” *Hartford Courant*, 30 May 2000.

¹⁰ Epstein, Leonard H.; Wu, Yow-Wu B.; Paluch, Rocco A.; Cerny, Frank J.; and Dorn, Joan P.; “Asthma and Maternal Body Mass Index Are Related to Pediatric Body Mass Index and Obesity: Results from the Third National Health and Nutrition Examination Survey” *Obesity Research* Volume 8, Issue 8, November 2000, p. 575-581.

percent of the population resided in states that restrict smoking in the workplace; by 1999, the figure was up to 42 percent.¹¹ But anyone who has stopped will tell you about how quitting smoking – a known appetite suppressant – triggers at least some weight gain. Researchers have argued that the raising of tobacco taxes contributes to obesity. One analysis concludes: “A 100 percent rise in the price of cigarettes raises average BMI by 2 percent.”¹²

The Role of Restaurants

On the food intake side, the HIER study found that between 1994 and 1996, Americans ate 7 fewer calories per meal than they did between 1977 and 1978.¹³ What did increase, however, was eating between meals: 90 percent of the additional calories Americans consume are attributable to snacking. The authors found:

“The increase in caloric intake is because of greater frequency of eating, not eating more at any one sitting. The finding that increased caloric intake is from more snacks rules out two obvious accounting explanations for increased obesity. The first is that obesity is a result of increased portion sizes in restaurants (Young and Nestle, 2002). If this theory were true, calories at main meals, particularly dinner, would have increased. Similarly, the evidence also rules out the view that fattening meals at fast food restaurants have made America obese.”

¹¹ Centers for Disease Control and Prevention, as cited by Chou, Grossman and Saffer in “An Economic Analysis of Adult Obesity: Results from the Behavioral Risk Factor Surveillance System,” NBER Working Paper Series, Working Paper 9247, October 2002.

¹² Chou, Shin-Yi; Grossman, Michael; and Saffer, Henry “An Economic Analysis of Adult Obesity: Results from the Behavioral Risk Factor Surveillance System,” NBER Working Paper Series, Working Paper 9247, October 2002.

¹³ Cutler, David M.; Glaeser, Edward L.; and Shapiro, Jesse M., “Why Have Americans Become More Obese?” Harvard Institute of Economic Research, Discussion Paper Number 1994, January 2003. Downloadable from <http://post.economics.harvard.edu/hier/2003papers/2003list.html>. Accessed 16 June 2003.

The idea that Americans snack more now than they once did confirms another statistic, that Americans do only a small amount of their overall eating in restaurants at all. Americans eat just four meals a week in a restaurant.¹⁴ A *JAMA* study indicated that over the past 30 years, the calories in a restaurant hamburger went up from about 400 to 500, while the calories in an average hamburger prepared at home went from the high 300s to the low 600s.¹⁵ With this information, we can't believe additional restrictions on restaurants and food retailers will meaningfully impact the problem. As the U.S. Surgeon General said last week, "we can't blame the restaurant industry."¹⁶

But blaming the industry is big money. In just two days, trial lawyers are hosting the "First Annual Conference on Legal Approaches to the Obesity Epidemic." The program is "intended to encourage and support litigation against the food industry."¹⁷ Without some response from Congress, restaurants will be repeatedly targeted and blamed for an epidemic that is far more complex than menu portions. In reality, it is a combination of misleading statistics, byproducts of technological advances, and unintended consequences of public policy trade-offs. When the draconian solutions visited upon the restaurant industry do not produce the promised reduction in obesity, what corporations will we target next?

¹⁴ Ebbin, Robert, "Americans' Dining-Out Habits," *Restaurants US*, November 2000

¹⁵ Nielsen, Samara J., and Popkin, Barry M., Ph.D., "Patterns and Trends in Food Portion Sizes, 1977-1998," *JAMA*, Volume 289, Issue 4, 22 January 2003, p. 442-449.

¹⁶ Richard H. Carmona, U.S. surgeon general, Quoted at the American Enterprise Institute's conference, "Obesity, Individual Responsibility, and Public Policy," Washington, DC, 10 June 2003.

¹⁷ Affidavit to participate in "Legal Approaches to the Obesity Epidemic"(attached)

ATTACHMENT



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The Public Health Advocacy Institute

First Annual Conference on *Legal Approaches to the Obesity Epidemic*

The Public Health Advocacy Institute

Affidavit for the *Legal Strategies Workshop* - June 22, 2003

I, (print name), _____, being duly sworn, depose, say and swear under oath and subject to legal penalties that:

1. I understand that the *Legal Strategies Workshop* portion of the First Annual Conference on *Legal Approaches to the Obesity Epidemic* (the "Workshop") is intended to encourage and support litigation against the food industry and that information acquired at this Workshop is to be considered confidential in keeping with these interests.
2. Accordingly, I agree **not to appear as an expert witness or work as a consultant or in any other capacity for or in the food industry** before December 31, 2006.
3. I understand and agree that this affidavit may be used to prove a **conflict of interest** should I violate the previous paragraph.
4. I, and **any firm/organization for which I am working**, am not currently retained by, and hereby **commit myself and my firm/organization not to take as a client, any defendant in the food industry** case before December 31, 2006.
5. I understand and agree that this affidavit may be used to prove a conflict of interest should I or my firm/organization undertake to represent or in any manner work for a defendant in the food industry before December 31, 2006.
6. Furthermore, if another firm/organization that represents a food industry prior to December 31, 2006 employs me, I undertake to inform them of my participation in this Workshop and to avoid any participation, direct or indirect, in their representation of such a defendant.
7. I pledge that I **will not reveal what I have learned at the Workshop, or share any of the materials obtained from the Workshop**, with any person who works directly or indirectly for the food industry.
8. I agree that I **will not attempt to make any tape or other audio or video recording** of any portion of the Workshop, and that I **will report to the Workshop organizers any person whom I know or suspect of doing so**.

Signed: _____ **Date:** _____

affidavit was signed and sworn before me on this ____ day of June, 2003.

Notary Public

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Mr. CANNON. Thank you for your testimony, Mr. Berman. I am going to defer to our Ranking Member for the first set of questions.

Mr. Watt, you are recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman, and let me do a couple of things at the outset here. First of all, I want to say a special thanks to Mr. Schwartz for reminding me of the value of what we are doing here today. I didn't mean to minimize the value. I love the system in which we operate. Unfortunately, sometimes it doesn't work like we think it is supposed to operate, and I want to thank my Chairman for calling the hearing now that I understand. I believe where we are the last time we had a hearing of this kind, we had the hearing one day and the markup the next day and the markup in the full Committee the next day and the bill was on the floor a week later.

Mr. CANNON. If the gentleman would yield. This is really the first time we have had a chance to look at this issue, so it is very much an open slate.

Mr. WATT. All the more reason that I should have given my Chairman that presumption rather than presuming that we were headed in the same direction that we were headed the last time. And Mr. Schwartz reminded me of the value of that.

I want to thank Ms. Ricchi and Mr. Berman for being here and for adding context to this in a business context and taking it out of just the legal parameter that Mr. Schwartz and Mr. Banzhaf have put it in, and that is important in the fact that I am not going to ask you any questions. Doesn't mean that I don't value what you have done. I just want to dwell for a little bit on the legal side of this.

Mr. Schwartz and Mr. Banzhaf, first of all, is this just about tort law? Mr. Schwartz talked about a restatement of torts, which I think I fully understand and first good lesson I have had since I was in law school about the restatement of torts. So I needed that reminder, but it came back to me quickly. But is this only about the tort standards or are there things in this prospective litigation that deal with things other than torts, such as trade practices and false advertising and some of the claims that were being made in the tobacco context?

Mr. BANZHAF. I am sorry, I thought he was going to go first.

Mr. SCHWARTZ. There can be claims that deal with fraud, claims which is a tort—a direct misstatement or what occurred—allegedly occurred in the case with McDonald's, where the plaintiff thought that French fries were cooked in vegetable oil but they had some meat liquid applied to that and there was a settlement of that case.

That is not what is addressed in Mr. Keller's bill. Mr. Keller's bill does go to tort law, a suggestion that obesity should be a basis for a claim, and that is the core of tort law. And that has not been in any way the traditional tort law, Mr. Watt.

Mr. WATT. I am having a little trouble with that. But as I read Mr. Keller's bill, it is substantially broader than the Louisiana legislation. Are you assuming that Mr. Keller's bill is the same as the Louisiana bill?

Mr. SCHWARTZ. Yes.

Mr. WATT. The one I see here is not the same.

Mr. SCHWARTZ. There have been a number of bills and you are probably looking to the earlier 339 that was introduced. But in response to your question, I was going to the bill that was similar to the one that was in Louisiana.

Mr. WATT. You are assuming the Louisiana statute then?

Mr. SCHWARTZ. Yes, sir. And there are claims outside of the realm of tort law, companies are not—shouldn't misbrand and I don't think there should be legislation that protects them from misbranding or from fraud. So I kept my testimony to causes of action that currently are just not allowed in traditional tort law.

Mr. BANZHAF. Can I have a minute to respond because he asked us both?

Mr. CANNON. I am absolutely certain that we will have time to come back to this issue, but if you don't mind we will continue in the ordinary course here. And Mr. Flake here. Would you like to—yield you 5 minutes.

Mr. FLAKE. Thank the Chairman and thank those witnesses who have testified. Mr. Banzhaf, in your testimony you seem to indicate that this is preemptive and presumptive, this kind of legislation, because this would grant, as you—quoted from you, unprecedented immunity from suits before they have lost a single one. Is that your position?

Mr. BANZHAF. It is premature because at this point none of these cases has ever gone to trial. There has never been a judgment, there has never been a verdict, and what we are talking about is very wild possibility. The idea that Ms. Ricchi's restaurant could be sued is a kind of a wild one. If we are confined to the Restatement of Torts, Third, which you asked about, sir, one of the requirements in there which Mr. Schwartz pointed out is it does permit suits under the failure to warn. That is exactly one of the major theories which is now before the court in New York which will be argued in about 2 weeks.

Mr. FLAKE. This would seem to contradict testimony that you have given here, which says that, quote, there could be a powerful weapon against the public health problem of smoking or this could be like the public health problem of smoking. Three fat lawsuits have been won, two are poised to be won and one is going to court later this month.

You know, if three fat lawsuits have been won, why do you say that none of these have gone to court?

Mr. BANZHAF. Because none of them went to court, sir.

Mr. FLAKE. How can they be won?

Mr. BANZHAF. In the first case, my law students put together a lawsuit against McDonald's, which McDonald's branded as frivolous, yet they wound up settling for \$12½ million, most of which went to charity. Then they posted a public apology on their Web site and corrected the misrepresentation.

The second one involves a so-called diet food in New York, which recently settled to the tune of \$3-4 million.

The third one was the suit that someone mentioned earlier against Oreo Cookies for allegedly being in violation of California law for not disclosing that they contained trans fat and the dangers of trans fat. Once the company agreed to work to remove the trans fat, that lawsuit was dismissed.

So I would count all three of those as wins.

Mr. FLAKE. I am having a hard time then—

Mr. BANZHAF. When I get \$12½ million in a lawsuit, sir, I think that is a win. I don't have to take it to trial.

Mr. FLAKE. So the lawsuit was won, as you stated in your testimony?

Mr. BANZHAF. Because they settled for \$12½ million, giving the plaintiff everything they wanted.

Mr. FLAKE. Yet this legislation is premature?

Mr. BANZHAF. Yes, because this legislation wouldn't even cover that, sir. That is one of the problems. You keep switching the bill, and we don't know which one is which. One of them may cover it, one of them may not. Both of them have interesting loopholes, which I am very thankful for.

Mr. FLAKE. Professor Banzhaf, you also told the New York Daily News, somewhere there is going to be a judge and a jury that will buy this and once we get the first verdict, as we did with tobacco, it will open the floodgates. Is this kind of forum shopping you are doing across the country?

Mr. BANZHAF. No, sir; because exactly the same statements were made by a number of experts on the other side. In fact, I think Professor Schwartz at one point said we are likely to find a judge who is going to do this.

Mr. FLAKE. I don't think they will argue with that. I am just asking is this forum shopping?

Mr. BANZHAF. No. Because the two obesity suits, if you are talking about obesity suits, were filed in Federal court in New York, which is not one of the plaintiffs' favorites.

And in any event let me be very clear, if I may with all due respect correct the Chairman. Mr. Chairman, I am not counsel, co-counsel, or anything else on any of these lawsuits, so I didn't forum shop. So far as I know, the attorney who brought the suits happens to practice only in New York, so that is where he brought the suit.

Mr. SCHWARTZ. Mr. Flake, may I respond?

Mr. FLAKE. Yes. I would like your response on that.

Mr. SCHWARTZ. You make a very important point. Because of the time limits on testimony, I wanted to go to the highlights.

We have a system in the United States of where there are some courts in this country who could accept these lawsuits and allow them. And maybe freedom of choice works with courts, but those individual courts—one court in Madison County, Illinois can change the policy for this entire Nation.

If they say that a company is going to be liable for obesity, or a restaurant is, the policy implications of that are major. I am under retainer from one of the major investment companies in the world, only on food. Now, they are not going to be paying good money to me if they thought this was just some specter in the sky. They know that this can happen, that one lawsuit, one court in Illinois or in Mississippi, can change how we live and what we do in this Nation.

That is one reason, a key reason why this Committee and Mr. Keller and all of you should be looking at this issue.

Mr. FLAKE. So someone in a position here could be considered a principled Federalist and still apply this law to State courts as well as to Federal courts?

Mr. SCHWARTZ. That is exactly right. Because this is not an easy issue for me. Tort law is 99 percent State law. It is difficult to select when, if ever, the Federal Government should be intervening in any area of American tort law. Congress has done it a few times, and this one is certainly one that is worth your attention.

Mr. BANZHAF. And on this point I agree with Mr. Schwartz. He says in his testimony, food cases. We have not yet reached that point.

Mr. CANNON. Pardon me. But we need to keep this in response to questions and within the time frame. The gentleman's time has expired.

Mr. Watt.

Mr. WATT. May I raise a point of order here? You know I believe in the free flow of ideas, and you know that probably better than anybody. But it seems to me that if you are going to apply the rules, you got to apply them in a consistent manner. If you are going to cut somebody off in midsentence and say you can't answer just because the light went out, then you got to do it—there are five people over there on that side. Last time I checked, there is only one over here. And it just seems to me if we are going to apply the rules and apply regular order, and you are going to cut off 5 minutes as soon as the light goes on you, you got to do. You can't do it with respect to who is speaking at this particular time.

Mr. CANNON. I think that the key here is that I have been very consistent. At the end of 5 minutes we let whoever is answering the question answer the question. We have done that a couple of times.

Mr. WATT. Well, Mr. Flake was still asking his question when the light went on, and that is fine with me. I just want to make sure that you understand I am not objecting to him continuing that, but I think you have got to apply this in a fair way.

Mr. CANNON. The rationale for the fairness is that we have had several people who come, who don't have all day because they have other Committee assignments, and who have gone. So in the first round of questioning I want to try and move it.

Mr. WATT. I have got to be somewhere else, too. Other people have other business here to do, too.

Mr. CANNON. That is right. You are the Ranking Member and I am the Chairman. That is why we are here. And other people can come and go.

Mr. WATT. But that doesn't mean that I got to stay here.

Mr. CANNON. If the gentleman would like a second round, that is—

Mr. WATT. No. I am just saying, please enforce—don't cut one witness off and not cut the other witnesses off.

Mr. CANNON. What we are trying to do is—

Mr. WATT. Apply the same standard, that is all I am asking.

Mr. CANNON. Let me just suggest to the panel when the red light goes on, and the question is being asked, the person to whom the question is being asked may answer the question, and then we will

move on. But we are not going to go into a protracted debate from the panel when we have people waiting for questions.

I think that should satisfy your concern, Mr. Watt. We will certainly be available for a second round if you would like to do that. Let me point out——

Mr. WATT. I am amenable to you applying the rules, however you apply them, as long as you apply them consistently, Mr. Chairman.

Mr. CANNON. I think the way I have just explained the rules, if you looked retrospectively on all of your hearings, you will see that it has been highly consistent and it is going to be continue to be consistent.

Let me point out, Mr. Banzhaf, that you corrected my statement, but I was actually quoting from the biography that you submitted to the Committee, which says, "Presently Mr. Banzhaf"——

Mr. WATT. Where is regular order now, Mr. Chairman?

Mr. CANNON. I am the Chairman. Presently Professor Banzhaf——

Mr. WATT. But let me be clear.

Mr. CANNON. No. No.

Mr. WATT. The Chairman has certain prerogatives, but there is regular order that applies in every Committee.

Mr. CANNON. And now you are out of order.

Mr. WATT. And you are out of regular order.

Mr. CANNON. Would you like to the submit that to the panel for a vote?

Mr. WATT. I don't care who you submit it to, but I am just asking you to apply the rules in a consistent manner. That is all I am asking.

Mr. CANNON. We have—the gentleman and I have to work together over a long period of time. I would like to know what in particular, other than the fact that we have cameras here, elicits the suggestion that I am not being consistent?

Mr. WATT. Because you are not being consistent. And I suspect the people who are watching on these cameras understand that you are not being consistent.

Mr. CANNON. What you would like to have is Mr. Banzhaf——

Mr. WATT. No, I am not——

Mr. CANNON.—speak whenever he would like to speak, because he has already spoken out of order three or four times. Now, if the gentleman would yield back to regular order, we will proceed. I think it is appropriate in——

Mr. WATT. Let me be clear, Mr. Chairman.

Mr. CANNON. Pardon me——

Mr. WATT. Let me be clear, Mr. Chairman. I don't sanction what Mr. Banzhaf did any more than you sanctioned what Mr. Banzhaf did in starting this hearing. That is why I tried to get us back to regular order. But regular order must be applied consistently to both sides. That is all I want.

Mr. CANNON. I will try and do that. Now, regular order also says in this Committee that when a person is personally attacked or has a statement made, he can respond. Mr. Banzhaf had—it was appropriately suggested that I misread his record. I am going to read, and I think this is appropriate under the circumstances, his submission to this Committee which is——

MINORITY COUNSEL. I drafted it from his statement.

Mr. CANNON. I believe Mr. Banzhaf is due an apology. What I quoted from was the minority counsel's presentation of his biography to the Committee, which says that Professor Banzhaf is co-counsel in several lawsuits against such fast food restaurants as McDonald's and Pizza Hut.

Now, I take it from your statement, Mr. Banzhaf, you are not counsel but have been associated with, but not in the legal sense of being counsel?

Mr. BANZHAF. I am not counsel or co-counsel on any of these cases, sir. I am glad to hear that I will get a chance to respond to some of the other things which you said about me in the way of personal attacks.

Mr. CANNON. Well, we are going to go back to regular order at this point.

Mr. WATT. Thank you.

Mr. CANNON. We have a vote coming. And so we will try and get one more set of questioning here. Those who would like to come back after the vote will be welcome to do so.

Mr. FEENEY, would you like 5 minutes?

Mr. FEENEY. Thank you, Mr. Chairman. Glad to return to regular order. One is tempted while talking about diets to be concerned about the potentially poisonous diets that some law students at George Washington University may be exposed to.

My recollection, with respect to tort law, was—and consumption—was that there is a certain foreseeability factor. For example, there is an old case, the name of which I don't remember, that suggests that people who order seafood soup may expect to find some shells in their seafood soup, for example. But if you order tomato soup, you may have an action against the proprietor or the preparer for negligence.

But I am concerned that there is a drastic change in theory that may potentially be occurring and that basically would change the theory that an individual is responsible for what they consume and has some personal responsibility in a free society. If you are going to take away our freedom and force-feed us a diet of food, then I guess somebody else is responsible. But as long as we are going to have freedom to decide what and where we eat, then I think that it ultimately lies with the individual consumer in terms of what is good or bad for them.

It is a huge concern to me that when we talk about children, for example, if we are going to hold responsible anybody, it probably ought to be the parent. And maybe the appropriate way to expand tort law is to give some cause of action in a class action suit against every mom or dad or grandmom or granddad or uncle and aunt who has ever taken a child to a fast-food place, because it occurs to me that the dangers of overeating or overconsuming certain food products are the most easily understood of anything for an adult in our society, who has picked up any—there are dozens of magazines on the shelf at the airport that promote ways to lose weight and appropriate diets, let alone without having gone through formal training.

I would also note that it seems to me that overconsuming anything may be very dangerous. If you drink too much water you may

drown. And that all products, if used in an appropriate way by an individual that has free will and free choice and behaves responsibly, can probably be consumed fairly safely if they have been approved by the Food and Drug Administration and other protective mechanisms.

Potatoes are considered a fairly healthy vegetable and one of the starches that are appropriate in a reasonable level in our diet. But if you take them home and fry them in certain things and eat them all day, every day, ultimately you are going to have potential problems with obesity and other indicia.

Mr. Berman, I was particularly interested in your comments with respect to the fact one of the reasons for obesity in children today—you talked about how adults, in your prepared testimony, their lifestyle has changed because of the way we work, for example. A lot more of us are sedentary.

But children are much more sedentary at times. It is a constant fight sometimes. Under the theory that it is not the consumer and the adults that basically control what a child does or what the adult actually consumes, the same approach that we are about to take with respect to McDonald's and Burger King and Wendy's, if we allow this to continue, without the good Keller bill, it seems to me is a perfectly appropriate legal theory not only to sue dairy farmers and milk producers who have—according to one of the colleagues that Mr. Banzhaf quotes on a regular basis—suggests that there may be morphine in milk, and that candy and milk and cheese and other products are at least as addictive as drugs in many cases.

But not only would it be candy manufacturers and dairy farmers, soft drink sellers, and producers and restaurateurs, Ms. Ricchi; I don't know why if you are going to be held responsible that the actual cooks that work for you and the waiters and the waitresses that actually hands-on deliver this poison that the theory suggests, I don't know why they are not going to be held equally responsible.

It seems to me that anybody that touches a food product that could be abused is responsible. But not only food products, ultimately TV, computers, video games are leading to a sedentary lifestyle.

So I have two sets of questions, Mr. Chairman. I hope it is okay. Mr. Banzhaf, I think it is fair that you get a chance to correct any suggestions about your background. And I want Mr. Berman to comment on the expansion of legal theory that I suggested.

So, Mr. Banzhaf, *The Washington Post* claims that you have boasted that you have been called a legal terrorist. I don't know whether that is true or not. I want to give you a chance to respond to that.

They also suggest that you have or have had a license plate that says, "Sue the bast---s"—and it isn't completed. And also they have suggested that you are affiliated and actually the executive director of the Action on Smoking and Health, and you have paid yourself a significant salary.

Are any or all of those true? Do you want to defend those accusations? The Action on Smoking and Health, I get this from the Consumer Freedom communications. We have got a board of directors that includes 13 dead people, according to this sketch. I don't know

if any of that is true. I am giving you an the opportunity to respond.

Mr. BANZHAF. May I, Mr. Chairman?

Mr. CANNON. The rules are pretty consistent. The questions may be responded to after the gentleman's time has expired.

Mr. BANZHAF. I see. Thank you, sir.

First of all, I have never quoted from whatever this doctor is that everybody seems to be condemning with morphine and so on and so forth; don't know him, haven't met him, don't quote from him. I have examined the pleading and the—for—as I recall in the pleadings, he doesn't say anything about addiction.

I have been called a legal terrorist. I have been called the American Taliban. I have been called all kinds of things by my enemies. I am proud that my enemies do use these very forceful words against me, as I was proud of the Chairman's introduction, which seems to demonize me and suggest that I have all of these powers to change the law.

That was the first one. The second one is what, sir?

Mr. FEENEY. The license plate.

Mr. BANZHAF. Do I have a license plate that says "Sue bast---s"? Yes, sir, I do. And am I executive director of Action on Smoking and Health? Yes, I am.

Mr. FEENEY. With unanimous consent, if I can just ask a brief follow-up. Who are the "bast---s" that we are referring to in the license plate, just out of interest?

Mr. BANZHAF. "Sue the bastards" is a phrase which is used by many people. Use it two ways. First of all, if you put the emphasis on the first part, SUE the bastards, it suggests that if you are going to go after the bad guys, often suing them is a more effective way, for example than coming before Congress, at least for the little guy. That is what I am finding here this morning.

Secondly, we can put the emphasis on sue the BASTARDS, which means that if I am going to, as I do spend my life suing people, I would rather sue people who I think ought to be sued rather than simply sue people because somebody walks in my office with a check.

Mr. CANNON. Thank you. The gentleman's time has expired. We are going to take a short recess while we vote. There are apparently two votes. And so this will probably be about a 15-minute recess. We will begin as soon as we are back from the vote. Thank you.

[Recess.]

Mr. CANNON. We had talked earlier about possibly having a second of questioning. But, I think given the vote and the shortness of time and lunch coming up, we are probably going to miss that. Thank you. We appreciate the witnesses' speedy return to the table.

We are going to recognize the gentlelady from Tennessee, Mrs. Blackburn, for 5 minutes. Thank you.

Mrs. BLACKBURN. Thank you all very much for your patience with us today, as we are back and forth with our votes, and I appreciate that you all would wait until we returned so that we can continue with the questioning.

I think this is an interesting issue for all of us, those of us that are concerned about the need for tort reform, those of us that are concerned about class action lawsuits, and some of the dangers and implications that are there with those.

And, Mr. Banzhaf, I think I will go to you if you do not mind. According to the Obesity Report, you are quoted as saying: Banzhaf confirmed the suspicions and fears of many by stating flatly that school boards that allow vending machines in schools will be the next targets of obesity-related lawsuits.

Won't these lawsuits direct money away from physical education programs at those schools? And since inactivity is a leading cause of childhood obesity, who might be sued after the school boards? Also, would this take money away from nutrition education programs that are needed in those schools? And do you think that those are necessary? And can you name for me the four basic food groups and give me their importance to what you see as overall nutrition?

Mr. BANZHAF. Let me see if I remember all of those. We have announced that one of the classes of legal actions we are thinking of bringing is against school boards—not simply for selling foods, and certainly not as somebody suggested before, low-calorie foods—but when they bring onto the premises people who are selling—the companies that is—either fat burgers or sugary soft drinks, provide them to the students, sometimes exclusively, so they have no other choice, and, in any case, to a captive audience, and do it because they are being bribed to do it. They have contracts which are called “pouring rights” contracts where they get a bribe for every fat burger or sugary soft drink that is sold.

I have read many articles about it. And even those who defend it seem to say, well, it is bad; we know it is not good for the kids, but we do it for the money. We have a simple word in the English language for people who do something they know is wrong, and we call it prostituting yourself.

In law it seems to me that it is a breach of a fiduciary or quasi-fiduciary duty for a school, which is trusted by the students and the parents, to be encouraging children to engage in activities which they themselves admit are unhealthful and to do it because they are being bribed.

You said also that it has been shown that physical inactivity is the major cause of childhood obesity. I am not aware of all of the studies which have said that. Some of the studies cited in my testimony suggest—for example, a very careful one, which also is cited in somebody else's testimony here—according to the New York Times, it says that 65 percent of the cause of the obesity epidemic is fast-food restaurants.

Now, I don't know whether it is 65 percent or 35 percent or 15 percent. What I am suggesting is that if they are a significant contributor, they should be held liable for that fair share. If the parents, if the children, if the adults, whatever, are responsible for another, they should be held—then that works in, because we have what Mr. Schwartz will tell you later, or sometime, is what we call comparative responsibility or comparative liability.

We did away with the old idea that if you are at all negligent or if you know anything about the risk, you cannot recover. We now divide it.

You talked about class action. I am trying to get all of these things in. I think class actions are a good example. In class actions you do have lots of examples. You have got thousands of cases filed. I believe many of them have already been decided. You have a broad basis upon which Congress can look out and say, well, we think this is wrong with it, we think that is wrong with it. The courts have not corrected it themselves, we ultimately may have to step in.

Here you do not have that. None of these cases has gone to trial. None of the verdicts are in. We have at most a suggestion that maybe this wonderful Italian restaurant might some day be sued and you are purporting to step in. I would suggest that what you want to do is what you do with class actions: Wait until you are sure that there is a problem, get enough data so that you know what the nature of the problem is, and then deal specifically with it in terms of the details. Not throwing out the baby with the bath water.

Rather than this blunderbuss attack where in round on, or the first version of this bill, it would totally exempt all food processes from any kind of lawsuit.

Now, we have those which are, quote, "obesity related." .

Did I get everything?

Mrs. BLACKBURN. The four basic food groups. Are you aware of those? The importance of education on those. I asked—

Mr. BANZHAF. I think it is very important that people should be educated about them.

Mrs. BLACKBURN. Do you know the four basic food groups?

Mr. BANZHAF. I think so, but I am not sure I understand the relevance of your question.

Mr. CANNON. The gentlelady's time has expired. I want to thank the panelists for coming today. This has been our first hearing. It has been a remarkably clear hearing. I can't imagine four witnesses who could be more articulate from the point of view of their perspective.

I know, Mr. Banzhaf, that you had some concerns about some of the things that I said in my opening statement. If you will submit to us a little statement—you can read my statement so you can review it. We would be happy to make that available. And we are concerned that we would be accurate. We would like to respond to any concerns that you have about the particulars of that.

Let me just say, this is a difficult problem. We have people in America who are getting fat. I personally really love the new food pyramid which makes a distinction between complex carbohydrates and carbohydrates generally. It makes a distinction between good fats and bad fats. I think that Americans will tend to move in the right direction, generally speaking.

Mr. Berman talked about the difference in the physical labor of the work force at the turn of the century. A third were doing physical labor. But at the turn of the century, almost everybody walked more, rode horses more, did other things more than we do today. So we have this huge transformation in society, which, by the way,

which has been accompanied by a huge increase in the caloric intake of the American people. We have a problem in adjusting.

I suggest to you that the way to solve that problem is through the legislature, and if we don't move as fast as some lawyers hope, then let's hope that we don't have to respond by constraining the ability to sue.

On the other hand, there is in America a conflict between legislating through courts and legislating through the legislative process. And this Committee in particular, and the Judiciary Committee generally, is going to be on the forefront of that debate. We are not going—as legislators, we are not going to allow this country to be hijacked by the decisions of a chosen judge in a chosen place who is either desirous of coming to a conclusion or gullible. That is just not going to be the rule of law.

I think somebody mentioned how difficult this is on the industry. The fact is there is terror out there that the arbitrariness of a single judge will destroy our way of life. I think that we need to change and evolve our way of life.

But here let me just congratulate each of you for the way you have presented your topics. It has been remarkably enlightening, very interesting, and very clear. And with that, we are going to adjourn this hearing. Thank you very much.

Mr. WATT. Mr. Chairman, before you adjourn could I ask unanimous consent to submit for the record the statement of Dr. Neal Barnard. I ask unanimous consent to submit that.

Mr. CANNON. Without objection, so ordered.

[The information referred to follows:]

PREPARED STATEMENT OF NEAL D. BARNARD

The Personal Responsibility In Food Consumption Act is strongly anti-consumer, anti-health, and anti-safety.

First, the bill is needless. While its stated purpose is to "to prevent frivolous lawsuits against the manufacturers, distributors, or sellers of food or non-alcoholic beverage products," this goal is readily achieved without legislation. Using currently available legal remedies, frivolous lawsuits can be and generally are dismissed before significant costs are incurred.

Second, because the bill not only prevents frivolous lawsuits, but also meritorious ones, the bill runs strongly contrary to consumers' interests and effectively robs them of their day in court.

It would have shielded the Jack in the Box chain, where E. coli food poisoning killed four people and sickened hundreds more in the Pacific Northwest in 1992, from any legal responsibility. As it is currently written, the bill requires plaintiffs to prove the production of tainted or otherwise unsafe food violated federal regulations. But federal regulations

are extremely weak and actually permit the sale of the foods containing microbial contamination. Had this proposed legislation been in force at the time of the Jack in the Box tragedy, parents who had lost their children in that episode would have had no legal recourse.

Manufacturers who introduce new additives, such as sweeteners, coloring agents, or preservatives that later prove to be toxic will be totally shielded from all responsibility for their actions. While manufacturers must have their additives approved initially, it is clear that significant toxic effects are sometimes seen only after approval. To suggest that lawsuits in relation to the damage they may have caused are necessarily frivolous is an insult to consumers. The merit of these issues deserves to be weighed by the courts.

Aspartame, which is marketed as NutraSweet, is the subject of an ongoing debate as to its safety. While this debate continues, consumers have a right to have legitimate grievances weighed in a court of law at the appropriate time. To give manufacturers immunity from litigation is to remove much of their responsibility for marketing safe products.

Some manufacturers are now spiking beverages with ever-larger amounts of caffeine and other chemicals and marketing them to children. It is unclear where the food-additive industry is headed, and it is inappropriate to shield manufacturers from all consumer actions, should they overstep the bounds of safety.

Some industries deliberately target consumers who are vulnerable to food addictions. At a dairy industry conference on December 5, 2000, Dick Cooper, the Vice President of Cheese Marketing for Dairy Management, Inc., described the demographics that allowed them to spot a group he referred to as “cheese cravers,” and laid out plans to go after them. “What do we want our marketing program to do?” he asked, in a set of slides released under the Freedom of Information Act. “Trigger the cheese craving,” was his reply. And industry has done exactly that, deliberately attempting to trigger addictive patterns of food consumption with marketing programs through fast-food chains. Cooper’s presentation concluded with a cartoon of a playground slide with a large spider web woven to trap children as they reached the bottom. The caption had one spider saying to another, “If we pull this off, we’ll eat like kings.”

The dairy industry is well aware of biochemical characteristics of food products that may contribute to their addictive qualities—characteristics that are essentially unknown to the lay public. Over the past 20 years, dairy industry journals have carried scientific analyses showing that opiate compounds are released from casein, the dairy protein that is particularly concentrated in cheese products. One of these casomorphins, as they are called, has about one-tenth the opiate power of morphine. Simultaneously, research studies using opiate-blocking drugs have shown that opiate effects do indeed influence consumption of certain foods—not only cheese, but also chocolate, sugar, and meat—the very foods that doctors would like us to trim from our diets but that we end up quite literally hooked on.

At best, the bill is dangerously premature. Questions regarding the role of the food industry in our nation’s obesity epidemic are just now being brought to light. Rather than immediately absolve the entire industry of all potential liability, we should learn more about what has happened to contribute to this crisis.

In summary, the food industry is right to object to frivolous lawsuits. But legal remedies already exist to eliminate such suits at early stages. To seek to avoid frivolous lawsuits by banning all litigation regardless of its merit is to deprive consumers of fundamental rights.

Mr. CANNON. I think, Mr. Berman, this is the doctor that you referred to in your testimony. We would like to make a copy of that available to you so that you may in particular want to respond to what is in this document.

Mr. WATT. Can I just make it clear that by offering his testimony for the record—I haven’t read it, I don’t know what it consists of—so I am not adopting it as my position in any way but just in the interests of getting the record complete.

Mr. CANNON. Let me ask unanimous consent that any Member of the panel here, or not here, have 5 days within which to submit questions to the panel. If you could respond to those as quickly as possible.

Hearing no objection so ordered.

Thank you again for coming. This hearing is adjourned.

[Whereupon, at 11:55 a.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE ROBERT W. NEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. Chairman, Members of the Committee, I want to thank you for holding this important hearing today to focus the attention of the Congress of the United States on an issue that has unfortunately become very prevalent in our society, and becomes more prevalent by the day: the issue of the harmful effects of abusive, and frivolous lawsuits.

The goal of the American civil court system is to make whole again people who were harmed in some way. There is no doubt that there are legitimate lawsuits filed everyday by people who have been wronged and that deserve their day in court. However, there are also thousands upon thousands of lawsuits filed, which have the sole purpose of enriching the plaintiff attorneys' bar. Such was the case earlier this year when suits were filed against the restaurant industry seeking monetary damages claiming that it was the fault of the restaurateurs that caused obesity in the plaintiffs of those suits.

Mr. Chairman, the reaction to these suits was nearly universal: hysterical laughter. The plaintiffs' bar was not deterred. They weren't deterred either, after the primary suit was dismissed in a New York Federal District Court. That suit was amended and re-filed.

It is because of this sort of persistence that the Congress must act. That is why I am an original cosponsor of H.R. 339, the Personal Responsibility in Food Consumption Act. Mr. Chairman, as you know, it is not the duty of the Courts to legislate, but the duty of the Congress. I urge the Committee to continue to look into this issue and this bill, and to report it favorably so that the full House may consider it in the 108th Congress. If we do not act, the Court system will, and another innocent defendant may be left footing a bill lining the pockets of already wealthy trial attorneys.

Mr. Chairman, today you will hear testimony from both sides of this issue. Some will speak of how detrimental these suits are, while some will argue that they are needed to protect Americans. I hope that you and Members of the Committee will analyze these arguments carefully. I am certain that should you do so, you will discover what the true motivation is: money. There is no legitimacy to these actions. It is widely known that the most productive way to fight obesity is through a balanced diet and exercise. To claim that suing the restaurateurs is a worthy alternative is absurd, and must be fought with the utmost vehemence.

Mr. Chairman, Members of the Committee, I thank you for your continued leadership on this issue.

PREPARED STATEMENT OF RICHARD BERMAN

The written testimony submitted by Neal D. Barnard on June 19, 2003 is hopelessly biased and should be wholly disregarded by Congress.

Barnard is an acknowledged career animal-rights movement leader, not a nutritionist. He is a psychiatrist by training, and he does not currently practice medicine.

His organization, the misnamed "Physicians Committee for Responsible Medicine" (PCRM) has long-standing ties to the well-known animal rights group PETA (People for the Ethical Treatment of Animals). Barnard is PETA's "medical advisor," and he holds one of only three seats on the board of PETA's foundation.

In addition, PETA has used this foundation (originally called the Foundation to Support Animal Protection, recently d/b/a/ "The PETA Foundation") to funnel nearly \$1 million to PCRM. The foundation also maintains PCRM's financial accounting.

The noted animal-rights watchdog publication *Animal People News* calls PETA and PCRM "a single fundraising unit," and has accused them of attempting to "evade public recognition of their relationship."

Barnard is scheduled to deliver a speech on June 29, titled "Reaching the Mainstream," to the "Animal Rights 2003" convention in Northern Virginia. The arguments in his June 19 written testimony regarding the supposedly "addictive" qualities of dairy foods are typical of Barnard's methods of bringing destructive animal rights messages to the mainstream public.

Barnard has also collaborated with some of the animal rights movement's most violent criminals. In 2001 he co-signed a series of letters (example attached) with one Kevin Kjonaas, a former "spokesperson" for the FBI-designated "domestic terrorist" Animal Liberation Front.

Kjonaas now manages the U.S. campaign of an animal rights group known as SHAC ("Stop Huntingdon Animal Cruelty"). SHAC's criminal activists have made countless death threats against employees of companies they don't like. They have beaten people with baseball bats, detonated car bombs, and relentlessly stalked Americans and their families for the "sin" of rejecting the animal rights philosophy.

Setting the animal-rights issue aside, Neal Barnard's organization (PCRM) has been censured by the American Medical Association. In the past, the AMA has called PCRM's recommendations "irresponsible" and "dangerous to the health and welfare of Americans." At present, the AMA has two policy statements in force specifically condemning PCRM for its willful misrepresentation of medical science.

Barnard is currently on a book tour, encouraging unsuspecting Americans to buy his latest title (called *Breaking the Food Seduction*), in which he claims that meat and dairy foods are as addictive as heroin. He (literally) calls cheese "morphine on a cracker."

He is adding to his notoriety through a direct connection to the latest frivolous lawsuit filed against a restaurant chain (*Pelman et al v. McDonald's*). Barnard is cited four times in *Pelman's* latest pleading as an "expert"; he has also filed two separate affidavits in that case. I fear that Barnard is using the recent flurry of fast-food litigation (and last week's timely hearing on H.R. 399) as a vehicle to draw even more attention to himself and to his skillfully hidden animal-rights agenda.

Purveyors of such irresponsible and baseless claims should be identified as hucksters and dismissed from the public arena. When social activists put on the sheep's clothing of the medical profession, it can become difficult to know who's credible. I am hopeful that Congress will recognize Neal D. Barnard as a publicity-seeking animal rights zealot—not an honest broker on the issue of restaurant litigation—and wholly dismiss his testimony.

ATTACHMENT

PCRM

PHYSICIANS
COMMITTEE
FOR
RESPONSIBLE
MEDICINE

5140 WISCONSIN AVENUE, NW - SUITE 400
WASHINGTON, DC 20016
(202) 466-2210 • FAX (202) 466-2216
WWW.PCRM.ORG

September 20, 2001

Executive Director
Tokyo Fuji Bldg
11-2 Fujimi 1 Chome
Chiyoda-ku
Tokyo 102-8172, Japan

Dear Executive Director:

This letter is written on behalf of the Physicians Committee for Responsible Medicine (PCRM) and Stop Huntingdon Animal Cruelty (SHAC). PCRM is a health advocacy non-profit organization that promotes preventive medicine and higher standards for ethics and effectiveness in research. It is comprised of 5,000 physicians and more than 100,000 laypersons. SHAC is an animal protection non-profit organization campaigning to close the Huntingdon Life Sciences (HLS) facility because of its documented abuses to animals and inappropriate animal experimentation. These two organizations would like to share with you two scientific critiques of animal experiments conducted at HLS. These scientific reviews, written by PCRM physicians, show what we believe to be the irrelevance and inappropriateness of some of the studies done at HLS.

May I ask you to please read the enclosed studies? As a company that is striving to bring products to the market that may improve or enhance people's lives, we ask you to make an honest assessment as to the extent that HLS has served you, their customer, and the public fairly and safely when given a contract to test various products, chemicals, and life altering drugs.

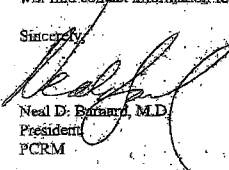
Although animal tests are routinely used to test compounds for toxicity or carcinogenicity, or alternatively, for their possible therapeutic effect, these tests are poor indicators for safety and effectiveness in humans. Animal studies cannot be reliably used to understand human pharmacokinetics because of the myriad anatomical, physiological, and pathological differences between humans and other animals. For instance, the significantly shorter gestational periods of rodents, compared to humans, contribute to the marked differences in developmental toxicity of drugs that often occur between test animals and humans. On the other hand, epidemiological data provide much more reliable risk assessments and can be applied directly to human populations.

Extrapolating carcinogenicity data generated by animal studies to humans is especially problematic. Not only are humans and other species prone to developing different cancers, most human cancers behave differently from artificially produced animal models. Moreover, rodents in carcinogenicity tests sometimes develop cancer from chemicals given in extremely high doses that are harmless to humans at normal exposure levels because these doses cause artificial tissue irritation and cell

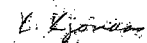
proliferation, which result in cancer. In other instances, potentially useful drugs may be overlooked because of ineffectiveness or harmful effects in animals used in testing. For these and other reasons outlined in the enclosed critiques, reliance on nonhuman animals to provide toxicity and carcinogenicity data for human risk assessment constitutes a faulty scientific method.

Because we realize your company is committed to public safety and sound science, we hope you will take the time to contact PCRM or SHAC with any questions or concerns you may have. Below you will find contact information for SHAC. We extend a sincere hope to hear from your company soon.

Sincerely,



Neal D. Baran, M.D.
President
PCRM



Kevin Kjonas
SHAC
P.O. Box 22398
Philadelphia, PA 19110
(T) 215-981-9593

LETTER FROM THE NATIONAL ASSOCIATION OF MANUFACTURERS

The Honorable Chris Cannon
Chairman
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

On behalf of the 14,000 member companies of the National Association of Manufacturers, representing nearly every business sector, thank you for holding the June 19 hearing on H.R. 339, the Personal Responsibility in Food Consumption Act. I respectfully request that this letter of support for H.R. 339 be included in the hearing record. The NAM also hopes that this legislation can be scheduled for consideration by the Subcommittee on Commercial and Administrative Law and the full Committee on the Judiciary so that it can go before the full House for approval.

While H.R. 339 is of most interest to food-related companies and associations, the Personal Responsibility in Food Consumption Act addresses a problem of increasing concern to every industry. Specifically, the trial bar, sometimes acting in concert with or at the behest of governmental entities, has begun to sue various industries in order to achieve changes in industry behavior or practices that would be hard to win through the normal legislative process.

Dubbed "regulation through litigation," this course of action is detrimental to the American system of government. While the NAM believes that Congress should exercise its power of checks and balances over the judicial branch in a more comprehensive manner, H.R. 339 would at least minimize judicial excess for the food industry.

The Personal Responsibility in Food Consumption Act would not limit lawsuits against companies that have violated statutory or regulatory requirements. It would, however, prohibit unproductive lawsuits that are, in effect, an end-run around the legislative process.

Sincerely,

cc: Members of the Committee on the Judiciary

PREPARED STATEMENT OF THE AMERICAN INSURANCE ASSOCIATION

The American Insurance Association, a national property and casualty insurance trade association based in Washington, D.C. is pleased to support H.R. 339, the "Personal Responsibility in Food Consumption Act," as an example of common-sense litigation management that will hold the skyrocketing costs of the U.S. tort system in check by reinforcing the doctrine that adherence to statutory and regulatory requirements should act as a bar to frivolous lawsuits.

AIA's 424 member companies offer all types of property and casualty insurance, including personal and commercial automobile insurance, commercial property and liability coverage, workers' compensation, homeowners' insurance, medical malpractice coverage, and product liability insurance. The U.S. premiums for AIA's member companies exceeded \$103 billion in 2001. Our member companies provide commercial property and casualty insurance to businesses and individuals that are the targets of the lawsuits that H.R. 339 seeks to contain—lawsuits that are a misguided attempt to replace regulation with litigation. The vast majority of liability insurance policies written by AIA's member companies couple the promise to indemnify against liability with a contractual right and duty to defend. Because of this contractual promise and our commitment to insuring businesses and supporting a healthy and vibrant U.S. economy, AIA and its members have an important and continuing stake in ensuring that the U.S. tort system functions efficiently and effectively.

Rising Legal Costs and the U.S. Economy

Over the last 30 years, American businesses, including insurers, have experienced an unprecedented increase in litigation. The main reasons behind this steady, at times explosive, growth have been the expansion of causes of action and the liberalization of tort rights. A sampling of the more significant legal developments include adoption of strict liability for products, comparative negligence in place of contributory negligence, environmental exposures, employment practices liabilities, expanded duties of directors and officers to stockholders and customers, and increased availability of class actions. Clearly, these expanded exposures have vastly increased the cost to American businesses of defending lawsuits.

In turn, the growing tort system has had a marked effect on the U.S. economy. Tillinghast-Towers Perrin, which periodically reviews trends and costs of the U.S. tort system, recently issued an update with the following conclusions¹:

- *Tort costs have outpaced short-term and long-term economic growth.* Over the last 50 years, U.S. tort costs have increased 100-fold while overall economic growth has increased only 34-fold and the population has grown by a factor of less than 2. The 14.3% rate of growth in tort costs in 2001—the highest annual percentage increase since 1986—far exceeded the 2.6% increase in overall economic growth (as measured by gross domestic product).
- *Tort costs are hurting U.S. consumers.* U.S. tort costs are equivalent to a 5% tax on wages and average \$721 per U.S. citizen. By comparison, U.S. citizens paid an inflation-adjusted average of \$87 in tort costs in 1950.
- *The U.S. tort system is an inefficient method of compensating injured parties.* The tort system returns less than 50 cents on the dollar to those it is designed to help and returns only 22 cents on the dollar to compensate for actual economic loss.
- *This trend is likely to continue into the foreseeable future.* Tillinghast noted that the trend in higher tort costs continued in 2002 and that we can assume annual increases in the 7-11% range for the next several years if no significant efforts to contain these costs are implemented.

These conclusions are alarming. Tort costs are slowly eroding our economy, and we should do everything possible to identify and eliminate systemic inefficiencies that litigation breeds.

The Important Role of Definitive Statutory and Regulatory Guidance in Preserving Fairness and Containing Costs

The equitable and responsible regulation of the food industry is vital to the interests of everyone—consumers, regulators, legislators, and businesses including insurers. As with other important commercial products, there are many thoughtfully crafted laws and regulations governing the manufacture, distribution and sale of

¹ Tillinghast-Towers Perrin, "U.S. Tort Costs: 2002 Update, Trends and Findings on the Costs of the U.S. Tort System." All tort cost data and conclusions based on the data cited in this Statement have been taken from this Tillinghast-Towers Perrin Update. Page references have been omitted, but can be provided.

food products, as well as duly constituted agencies to provide enforcement. Despite their adherence to this comprehensive network of oversight, participants in many regulated industries are frequently forced to defend against lawsuits brought by claimants seeking to circumvent the applicable regulatory authority. These arbitrary and costly lawsuits undermine the authority of settled law and qualified regulators, and they harm consumers by depriving businesses of the level of certainty required to efficiently respond to market conditions. Equally important, those lawsuits contribute to the staggering costs of our legal system that weigh heavily on the U.S. economy.

The property and casualty insurance industry is well aware of the “regulation through litigation” phenomenon, as we continue to face a barrage of civil actions filed in courts around the Nation despite our adherence to a complex system of state statutory and regulatory requirements that makes the existence of such actions puzzling. In our experience, the regulatory system is complicated enough without superimposing the courts onto the existing enforcement structure.

In view of the highly specialized nature and broad public policy ramifications of issues that arise in the food industry and other vital areas of commerce, regulatory agencies such as the Food and Drug Administration (“FDA”) are equipped with a variety of tools that make them uniquely qualified to render decisions that impact entire marketplaces. Unlike courts and juries, which are best suited to resolving narrowly-defined individual disputes between specific parties, regulators must apply their expertise and ensure the stability of markets by balancing the interests of numerous stakeholders. Their intimate knowledge of the complicated array of factors bearing upon appropriate resolution of sensitive commercial issues is crucial to ensuring that frivolous lawsuits do not undermine the financial health of vital sectors of the economy such as the food industry and result in massive increased costs to consumers.

AIA strongly urges the passage of H.R. 339 as a streamlined, effective, and consumer-friendly tool to preserve tort rights and existing regulatory authority without causing the U.S. economy to buckle under the weight of an inefficient, out-dated litigation system.

LETTER FROM THE MICHAEL F. JACOBSON



June 18, 2003

The Honorable Chris Cannon
Chairman
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
Room B353
Rayburn House Office Building
Washington, D.C. 20515

Re: hearing on H.R. 339

Dear Chairman Cannon:

On behalf of our 700,000 members in the United States, I request that you make this letter part of the record of the June 19, 2003 hearing on H.R. 339, The Personal Responsibility in Food Consumption Act.

The Center for Science in the Public Interest ("CSPI")¹ strongly opposes H.R. 339. Despite its stated purpose of banning frivolous lawsuits, H.R. 339 bans *any* lawsuit against a manufacturer, distributor, or seller of a food or a non-alcoholic beverage "unless the plaintiff proves that, at the time of sale, the product was not in compliance with applicable statutory and regulatory requirements."

H.R. 339 ignores the fact that both legislatures and administrative agencies frequently are too busy to enact specific standards dealing with a particular food safety or nutrition problem, and so the victims must turn to the courts for help. Meritorious lawsuits can, of course, spur the food industry to improve its practices.

Both Congress and state legislatures, recognizing their inability to deal with the myriad of food safety and nutrition problems, have delegated regulatory responsibilities to specific agencies.

¹ CSPI, a nonprofit organization based in Washington, D.C., is supported by its members and subscribers to its *Nutrition Action Healthletter*. CSPI has been working to improve the nation's health through better nutrition and safer food since 1971.

- Page 2 -

Congress, for example, has delegated regulatory responsibility over food to the Food and Drug Administration ("FDA"), the Department of Agriculture, and the Environmental Protection Agency.

However, these agencies, like their state counterparts, do not have enough resources to promptly address all the new concerns about food safety and nutrition. For example, in February 1994 CSPI petitioned the FDA to require the disclosure of *trans* fatty acids on packaged foods. More than five years later, in November 1999, the FDA published a proposed regulation in response to our petition. The FDA still has not issued a final rule, although FDA Commissioner Mark McClellan has said that a final rule, requiring the disclosure of the amount of *trans* in packaged foods, will be announced in the near future.

In conclusion, H.R. 339 should be rejected because lawsuits can play a valuable role in protecting consumers by filling the interstices in legislative and regulatory requirements.

Sincerely,

Michael F. Jacobson, Ph.D.
Executive Director

cc: The Honorable Melvin L. Watt
Ranking Member
Subcommittee on Commercial and Administrative Law