

**COMMON SENSE CONSUMPTION: SUPER-SIZING  
VERSUS PERSONAL RESPONSIBILITY**

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT  
AND THE COURTS  
OF THE  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE  
ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

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## **COMMON SENSE CONSUMPTION: SUPER- SIZING VERSUS PERSONAL RESPONSIBILITY**

**THURSDAY, OCTOBER 16, 2003**

UNITED STATES SENATE,  
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE  
COURTS, COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 2:04 p.m., in Room SD-226, Dirksen Senate Office Building, Hon. Jeff Sessions, Chairman of the Subcommittee, presiding.

Present: Senator Sessions.

### **OPENING STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA**

Chairman SESSIONS. This Committee hearing will come to order.

Because of the huge impact that litigation has on our economy, it is imperative that we examine the novel and expanded legal theories that are arising in our country. For instance, we need to examine issues such as whether gun manufacturers should be liable for the illegal actions of third party individual gun users rather than for defective products they may produce.

The potential detrimental effect of runaway verdicts has been well known and well discussed, but there are huge costs that arise from the defense of unjustified lawsuits, as well. Indeed, such lawsuits, no matter how unfounded, can hurt a company by extracting huge costs from it and can also depress its stock and cause people to lose confidence in a company that is otherwise acting legally.

I emphasize, however, that our utmost duty as Congress, as a lawmaking body, is to take no step that would provide immunity for any deceptive practices or known defects that harm consumers. Our legal system serves as a great safeguard for individuals who are damaged by negligent and bad acts and we need to preserve that.

So our inquiry today examines whether legislation, such as that filed by Senator Mitch McConnell, to provide certain statutory defenses to food companies and restaurants who may be sued for obesity claims by people who ate their products, is justified.

Our legal system is based on our laws, which are, in significant part, based on the actions of Congress. Every day, lawyers take what we pass and take court interpretations of those laws and file lawsuits based on them. Congress has every right, I believe, to monitor what is going on in the legal system of our country and has a duty to fix areas of the law where abuses are occurring.

With that said, Senator McConnell's Common Sense Consumption Act would limit the liability of food retailers where the underlying premise for the litigation is not that the food was defective or prepared unlawfully. In fact, the Act deals with situations in which the food may be said to be too good; so good that the plaintiff consumed too much of it and suffers from obesity or weight gain because of that.

The allegations have been transformed from traditional types of complaints, such as that the food seller cheated the customer by providing smaller portions than promised, to complaints that the promised portions are too large. The question we examine today is whether this type of litigation is so legally unsound and detrimental to lawful commerce that it should be constrained by legislation.

First, is litigation like this legally sound? Professor Schwartz, who is, I guess, the nation's leading expert on tort law will testify later. Under classical tort law, in addition to a person having an underlying injury, a plaintiff in a lawsuit is required to prove causation. That is, but for the action of the defendant, the plaintiff would not have suffered an injury. To hold a defendant financially liable and require them to pay for damages to another, we must, at least until recent years, have clear standards.

For example, but for Wal-Mart placing a product on the shelf, the plaintiff would not be able to purchase the product. Is Wal-Mart liable for obesity? Wal-Mart has provided great benefits to the poor by providing large containers of food you can buy at low prices. Does this act by Wal-Mart give rise to an action for obesity by a customer?

But for Internet advertising, the plaintiff would be unaware of the product's availability, perhaps. Is the ad firm liable? Is AOL?

This makes me think about the case that everyone learned about in law school, *Palsgraf v. Long Island Railroad Company*. The case started innocently with two individuals running to catch the train. One of the individuals happened to be carrying a package of fireworks. When the railroad guards helped the individual as he leaped for the train, the fireworks package was dislodged. The fireworks hit the ground and exploded. It happened that Mrs. Palsgraf, who was waiting for another train at the opposite end of the platform and happened to be standing near some scales, was injured when the firework explosion caused the scales to fall.

Mrs. Palsgraf sued the railroad company, essentially under the "but for" theory. But for the railroad guard helping the passenger as he leaped on the train, the package would not have been dislodged, the fireworks would not have gone off, the scales would not have fallen, and, therefore, she would not have been injured. The great Judge Benjamin Cardozo wrote the opinion and refused to allow liability to go that far. It was a classic case of tort law.

Just as the Court decided that it was unreasonable to hold the railroad company responsible for Mrs. Palsgraf's injuries, it seems unreasonable to me and to most Americans to hold sellers of food or any other individual entity responsible for a plaintiff's obesity. To blame someone else for problems of my own causing is contrary, I believe, to the great American philosophy of individual responsibility. But we must admit that there are some olympians in our

legal system and plaintiff's lawyers who are quick to use any legal tools that are available, and they have been able to, in recent years, erode the expectation of personal responsibility.

Second, are these lawsuits economically sound? For the lawyers, there is no doubt about that. In a recent study by the Tillinghast-Towers Perrin group, it was demonstrated that in 2001, trial lawyers made \$39 billion in revenues while Microsoft made only \$26 billion and Coca-Cola \$17 billion. That has a great impact on the economy. That income to trial lawyers came from other businesses.

But the costs don't end there. The defendant company must hire expensive defense attorneys and have its employees spend countless hours responding to lawyers and pay their court costs and expert witness fees. In addition, companies are required to purchase liability insurance, which takes away funds necessary for research, expansion, and creating jobs.

No other nation must compete in the world marketplace carrying such a heavy litigation cost. Eventually, these costs are passed on to the consumer. Product prices increase and the availability of products becomes scarce.

Finally, what is good public policy? Do consumers benefit when sellers of food are on the brink? Should we shift the country's obesity crisis to restaurants? What are the factors that contribute to obesity, which is a very serious health problem in America today that I do not mean to denigrate in the slightest. Isn't it our sedentary lifestyles, our overeating, and our snacking between meals? Some argue that genetics are at play here as well.

The American people certainly do not support the idea that overweight individuals should be able to sue the companies that provided the customers what they asked for. In a recent Gallup poll, nearly nine out of ten people rejected holding the fast food industry legally responsible for the diet-related health problems of people who eat fast food on a regular basis. This, I believe, is common sense.

If the practices are deceptive or the products adulterated, and the consumer is not on due notice, then liability may and should lie, perhaps. But we need to be careful about holding sellers of food liable for products that do not break any laws or violate any regulations but, in fact, comply with laws and regulations. We need to think really hard before we hold sellers of food responsible because consumers eat too much. We need to address how far the pendulum should swing. Is a grocer liable for simply placing the Oreo cookies on the shelf? Is your mom liable for her good cooking? I hope not. Or are parents liable for not making their children exercise?

I tell you, if this litigation continues, we will find a number of people lining up to sue Krispy Kreme, no doubt. I know too many people who can't resist stopping for that "Hot Doughnuts Now" sign, as I did recently coming back after a nice supper. I just couldn't resist stopping and went in and got some in my hometown of Mobile. If the sign is on, you get a discount when you buy a dozen doughnuts. Does that add to liability?

We have some outstanding restaurants in Alabama. Dreamland BBQ is one that you have probably heard of that is associated with the University of Alabama and is part of the heritage of a football game weekend. You would be hard-pressed to find a better slab of

ribs than those. And don't forget about the Dirksen South Buffet right downstairs, providing an all-you-can-eat situation for Senators and their staff. We may see them become the target of suits, too.

Well, we laugh. People do advertise in jest, I suppose in jest. A restaurant in Seattle requires customers to sign a waiver before eating one of their desserts called "The Bulge." While this may be more of a publicity stunt than a true attempt to prevent legal action, it is no laughing matter and obesity is no laughing matter. Eroding the legal system is no laughing matter. And doing harm to the economy is no laughing matter.

So we might see some humor in this hearing. Some of these lawsuits are laughable. But in the end, our focus must be on protecting the integrity of the legal system, the right of plaintiffs to sue for legitimate harm, and the safety of the economy.

I look forward to hearing our testimony today. Senator McConnell, I know was tied up in a meeting. I expected him to be the first witness, so I think I will give him a chance to arrive before we start.

I think I will start off at this point and take this opportunity to introduce our panel. We have some superb witnesses.

First, Mr. Victor Schwartz is a partner in the Washington office of the law firm of Shook, Hardy and Bacon and chairs the firm's public policy group. Mr. Schwartz obtained his A.B. from Boston University, his Juris Doctorate degree from Columbia Law School. He was formerly a professor and dean at the University of Cincinnati's College of Law and is co-author of the most widely used tort case book in the United States. That is the Prosser, the legacy of Prosser, one I am familiar with. He also sits on many committees, including the American Law Institute, which really does important work on law in America, and the Advisory Committee to the Restatement of Torts, which is probably one of the finest forums of thoughtful people in looking at tort law in America.

Next, Russel Sutter is a consulting actuary for the Tillinghast-Towers Perrin in its St. Louis office. He is a fellow of the Casualty Actuarial Society and a member of the American Academy of Actuaries. He is also a member of the firm's Professional Standards Committee. Mr. Sutter is the primary author of Tillinghast's tort costs study. This study analyzes tort costs in the United States since 1950. The most recent study was published in February of 2002 and was cited in the National Underwriter and Business Insurance, among other publications.

Mr. Schwartz, we are delighted to have you here. We thank you for your long service both as a scholar and as a practitioner and a student of litigation in America. We would be glad to hear your remarks at this time.

**STATEMENT OF VICTOR E. SCHWARTZ, SHOOK, HARDY AND  
BACON, LLP, WASHINGTON, D.C.**

Mr. SCHWARTZ. Thank you, Mr. Chairman, and I appreciate your holding this hearing. It is an important topic. You stated my background, so I won't go into that. I will just go to the core of why we are here.



American tort law has dealt with food for 240 years, and recently, the restatement which you mentioned, Mr. Chairman, decided to restate the law once again of food, and it is very simple. If something is in food that is not supposed to be there, if there is a nail in the mashed potatoes that you have in a restaurant, the defendant is liable. There are no excuses. It is super-strict liability. And if a food seller knows that there is an allergen in the food, like peanuts, and doesn't warn about it, they are going to be liable. There is no question about that.

And if they violate a health and safety regulation—there was a case a few years ago out West where hamburgers were not cooked to 160 degrees and people got sick, and they violated a health regulation and because of that somebody becomes sick, they are liable.

In fact, when we did the restatement, the only issue that we really discussed was about natural things that occur in food and when is somebody liable. If you have a chicken sandwich, there could be a chicken bone in it. Is the defendant liable or not? And we came down with a ruling about what people might expect, and they are not going to expect a six-inch chicken bone in a sandwich and they will be liable if such a bone were present. But that was it.

So—and that is the law of torts. Law professors will take 16 weeks sometimes to say, what do you think? and well, you don't know what it is, but that is basically it.

The reason I think that this hearing is justified is because there are some folks that don't see tort law in its traditional way, which is to compensate somebody who is injured. They see tort law as an engine to do what regulators or legislators do, to change people's behavior in very broad ways, to regulate but there are judges who are willing to do it, and juries to, they literally change our lives.

Now, when judges decide cases, and you have argued so many cases before courts, you know this, basically, there are two lawyers there. But you can hold hearings with all sorts of folks, bring them back, ask them questions, and you are in a position to make broad public policy judgments. But when judges do it—a former Secretary of Labor under President Clinton, Robert Reich, called that regulation through litigation. The purpose is not to compensate a victim. The purpose is to change behavior.

Now, that has occurred with tobacco. It has occurred with guns. Some attempts are being made with lead paint. But now the focus has been on food and sellers of food.

There is a problem in this country, as you have said, Mr. Chairman, with obesity, and if people consistently eat too much and they don't exercise to burn off calories, they are going to be overweight, and obesity can lead to very serious diseases—heart disease, diabetes, other very, very serious things, premature death. But the tort system is not there to correct it.

Senator McConnell has done great work on this issue and you asked a very, very important question about the role of this body, for legislators to work in this area. This is your domain in terms of what to do about obesity. In California, there is a regulation, State, where they decided, a regulatory body decided that soft drinks shouldn't be sold in schools. Now, we may agree with that or we may disagree with it, but it was done by the right people.

It was not done by a court, it was done by a regulatory body and one that is responsive to the electorate. People in California showed something a few weeks ago. If they don't like something in the law, they know how to toss it out.

But if a judge makes a ruling, the as elected Representatives, electorate can't do anything about it, but they can with you. And the policy that we are going to have in this Nation with regard to what food is available, what choices we have is—the appropriate place to consider that is here in Congress.

One judge in one court can change everything. A court in Illinois a few years ago said, in effect, that insurance companies can't provide non-original equipment. So now throughout the whole country, with every insurance policy, if we have a fender-bender, we have to have original equipment. The cost of the fender bender accidents has gone up close to 600 percent because of that one judge making that one determination of a \$1.7 billion verdict.

The biggest argument I have heard against doing anything on food is that there is no crisis and there is no problem. I mean, that is the best argument that I have heard. There has been, and you know, a large case brought against McDonald's. The judge's opinion came in two parts. The first part was over 80 pages and he gave room to the plaintiffs to try again. The second part was 36 pages. Now, if something was utter nonsense and a Federal judge didn't think it was important, you know from your practice, and I know, too, that the judge can write a three- or four- or five-page opinion and discuss the case. We have over 100 pages written just about this problem. That says to me that some other judge, some other place, at some other time can let cases through.

And one reason that is going to help that is that symposiums are being held to teach lawyers how to bring these lawsuits. One was held up at Northeastern. I wanted to go. I was told I couldn't go because I wouldn't sign a pledge that I was interested in suing food companies. I asked if some people in the investment community could go, who analyze food for one of our large investment banking houses. He was told no because he would not sign a pledge that he would sue an industry. I am not going to say it was like al Qaeda up there, but it was certainly limited to who could participate and these people were being trained to bring obesity lawsuits and how to overcome the existing problems.

There are problems. First, you have to show normally in tort law that it was the defendant's product that injured you, and there are many causes for obesity other than food.

Second, you have to show it was this specific product, and we all eat in different places. That is a hurdle to overcome and that is serious.

And finally, you have to show that the product is defective. Now, you know sugar is not defective because it causes tooth decay. They have to overcome that hurdle in the law. But when—

Chairman SESSIONS. Well, you know that and I know that and usually the legal system seems to know that sugar is not a cause of liability, but we are drifting, aren't we, in court rulings that leave these matters hanging? Classical rules are being fudged.

Mr. SCHWARTZ. Mr. Chairman, you are absolutely right. I won't, because of time limits, give you all the rules that we thought were

in stone that then crumbled into dust. When an industry becomes unpopular rules are change. The people who supported tobacco suits, be they right or wrong, Professor Banzhaf and Professor Daynard, very, very strong advocates, have said, well. We did guns and tobacco. We are going to use the same tactics, and I am quoting, against the food industry. Ralph Nader has called the double cheeseburger a weapon of mass destruction. This is the prelude to try to get courts to change laws.

Senator McConnell has approached this issue in a very modest way. He has left the common law alone. He has left judges ample room to develop the common law. But he has said, in one core area, we are going to say as the Congress of the United States, you cannot bring a successful lawsuit, that relates to food causing obesity, or sugar causing tooth decay, natural things that occur, if people consistently overeat or fail to exercise. And his bill is sound in that regard.

The only suggestion I would make, and I mention it briefly in my written statement, is that with cases like that, it is good to have some block on discovery fishing episodes because that can cost people hundreds and sometimes millions of dollars, where they are going to win in the end, but the plaintiff knows that the defense costs are very high and that it may be cheaper to settle the case than it is to go through those costs, and so even though the law does not allow a claim, practical real life causes companies to have to settle cases that are unjustified.

I thank you for the time you have given me today. I would be very pleased to help on this issue. It is one I believe in, and I do believe this body can act. Congress has acted on ?? veteran, Congress acted to help the aviation industry in 1994 with the General Aviation Recovery Act. That has led to 25,000 jobs in an industry that was going under. This body has acted with the Biomaterials Assurance Access Act. Companies that were making medical products couldn't buy raw materials. You acted and now they can.

So there are cases where there have been success in limited areas with specific problems that have a national interest. The McConnell bill and this area has all three. Thank you, sir.

Chairman SESSIONS. Thank you very much for your comments. They are very valuable, and I think your insight into the whole concept of tort law is very valuable.

I remember the year I became a lawyer in Alabama was the year they eliminated common law pleading, which is, as you know, a complex, historical procedure. I think Alabama and Massachusetts were the last two to have it, you had to plead specifically what your theories were and what your damages were. Well, you can file your lawsuit on a napkin now. But it has led to, I think, some muddled thinking, and the clarity that the former legal system gave us on what really is an actionable case and a non-actionable case has been eroded. Maybe we can talk about that more.

[The prepared statement of Mr. Schwartz appears as a submission for the record.]

Chairman SESSIONS. Senator McConnell, we thank you for your concern about litigation in America. As I noted, we know that litigation drains our economy. If it is just, we believe in it. If it goes beyond our traditions, it can be damaging to our legal system.

Thank you for your leadership over a number of years in dealing with this. The legislation you have offered, I think is worthy of our consideration. So, I would be glad to recognize you at this time for any comments you may have.

**STATEMENT OF HON. MITCH MCCONNELL, A U.S. SENATOR  
FROM THE STATE OF KENTUCKY**

Senator MCCONNELL. Thank you very much, Mr. Chairman. Let me begin by saying I see that Victor Schwartz is providing testimony today. I first met Victor Schwartz when I was Chairman of this very Subcommittee many years ago, and it was during that period that I became interested in, and convinced, that legal reform was extremely important to the future prosperity of America.

I must say, after 18 years, that I don't have much to show for it. I have introduced bills on a variety of different types of legal reform including, Auto Choice, comprehensive legal reform, and medical liability reform. Regretfully, not much tort reform has been achieved. I think the securities litigation bill, which we passed a few years ago over the veto of President Clinton, is one of the few we could point to that addresses a very serious problem in our society.

But your hearing today, Mr. Chairman, and I want to thank you very much for holding it, focuses on a narrow portion of the growing industry of plaintiffs' lawyers going after particular businesses. We saw that in the case of the tobacco litigation and it is pretty clear that the next effort is going to be to go after the food industry.

The bill upon which you are having a hearing today is the Commonsense Consumption Act. This is another effort to get at at least some reform of our Nation's legal system. As I indicated earlier, it has been a long road with not many successes to point to. But that doesn't mean that the need is not great or that we ought not continue to try. I think this area that you are focusing on today and the sheer absurdity of these lawsuits should make this bill something that we could all support.

I recognize that obesity is a serious problem in America. No one denies that. We need only to look around to see that many, many Americans are overweight. The issue before us, however, is who is responsible for that. Who is responsible for that extra weight?

Incredibly, some plaintiffs' lawyers believe the person selling the food—the person selling the food—should be held responsible for a person's weight gain. But I and most of America believe it is the person eating the food, not the person selling the food, who bears responsibility. Obesity suits against food companies are premised on blaming the food seller for how much food the food buyer chooses to consume. This is patently absurd. But overzealous lawyers are filing these suits anyway, and they have already cost companies plenty in legal fees.

We all know who ultimately pays the tab when businesses have to defend costly suits, and, of course, that is the consumer. That is why we need to stop these abusive suits before they drain more resources from an industry that employs millions and millions of people nationwide. Every dollar a business owner spends defending

or settling a frivolous lawsuit is a dollar not invested in creating jobs and building the business.

I am not suggesting in any way that all tort claims against all defendants should be prohibited. I am merely arguing for a little sanity to the system, a little common sense, if you will.

My bill, the Commonsense Consumption Act, is short and very easy to understand. The bill simply prohibits lawsuits against food producers or sellers in State or Federal court for claims of injury resulting from a person's weight gain, obesity, or health condition related to weight gain or obesity.

I want to emphasize that the bill does not provide in any way blanket immunity to the food industry. In fact, I expressly exclude from protection traditional claims like breach of contract, breach of warranty, claims for adulterated food, and violations of Federal and State statutes.

In the simplest terms, this bill provides protection from abusive suits by people seeking to blame someone else for their poor eating habits.

Pundits love to discuss the erosion of personal responsibility in America. Many argue that we have become a nation of hapless victims. These obesity lawsuits certainly support that observation. Can there be any better indication that we have reached rock bottom than when we begin blaming others for what and how much we choose to put in our own mouths?

There has to be some measure of personal responsibility for the choices we make in life. Yet these lawsuits say, in essence, that people have no free will, that they lack the power to stop eating, and that someone else made them do it. Someone else made them do it. Do we really think that someone forces us to eat more than we want to eat? Do we really think that people do not know that cake and ice cream aren't as healthy as fruit and vegetables?

The logic of these suits is ridiculous. If we keep this up, it will not be long until we sue car dealers when we get speeding tickets. After all, it is not my fault that I exceeded the speed limit. It is the fault of the guy who sold me the car. They should know better than to sell cars that go fast.

When it comes to assigning responsibility for what we eat, the American public points its finger at itself. Shortly after I introduced my bill, the Gallup organization conducted a poll about America's views on obesity and who is to blame. That poll indicated that 89 percent of Americans oppose holding the food industry legally responsible for diet-related health problems. The same survey shows that even those people who describe themselves as overweight oppose these lawsuits by the same percentage, 89 percent. Obviously, most people think these suits are ridiculous.

Unfortunately, some activists and greedy lawyers have different ideas. There seems to always be a group of activists out there running around telling us how bad everything is in America. The food police are now sounding the alarm and saying that the rise in obesity corresponds to the increased availability of, quote, "fast food." What they want you to believe is that the food sellers are causing—  
are causing—obesity. That is ridiculous.

You know what? The rise in obesity also corresponds to the rise in household income, the rise in educational levels, and the rise in

life expectancy. Does that mean that we have the capability to earn more, learn more, and live more, yet we have no control over what we put in our mouths?

Mr. Chairman, obesity is a problem in America, but suing the people who produce and sell food is not going to solve the problem. Lining the pockets of personal injury lawyers will not help those people lose weight. Bankrupting the people who make and sell fast food or forcing them to settle ridiculous suits because it is cheaper than taking your chances with a jury, is not going to help anybody lose weight.

We must take action to stop these abusive, irresponsible and costly lawsuits, and passing the Commonsense Consumption Act is a good first step.

I want to thank you, Mr. Chairman, for holding the hearing and for giving me and others an opportunity to testify. I have some letters in support of the bill from the National Food Processors Association, the U.S. Chamber of Commerce, and the Corn Refiners Association and the National Corn Growers Association, which I would like to have appear in the record at this point if that is possible.

Chairman SESSIONS. They will be made a part of the record. Thank you very much.

Senator MCCONNELL. And I thank you so much, Mr. Chairman, for exploring this. You are going to hear from some great witnesses here.

[The prepared statement of Senator McConnell appears as a submission for the record.]

Chairman SESSIONS. Senator McConnell, just before you go, it seems to me that it is appropriate for a legislative body to examine how our legal system is working, whether we think it is working and lawyers are doing what the law and the courts allow them to do. If we find that the legal system is developing in a way that is not good for American society, Congress is not invading the judicial province, is it, by to passing legislation?

Senator MCCONNELL. No, sir. You know, when you and I were in law school, the notion that this kind of litigation would have been brought was absurd on its face, and it is not at all inappropriate for the nation's legislative body, seeing a condition develop, to pass laws to prevent that from going forward. We do that every week around here. The legal system needs adjustments. It is embarrassing.

In my view, second only to the sorry state of elementary and secondary education in America, our next biggest problem that we could do something about are these new trends in litigation. I think the carrying cost for civil justice in America is just too high, just too high. So there is nothing at all inappropriate about us legislating in this area and I certainly hope we will.

Chairman SESSIONS. Well, I certainly agree with that. There seems to be a feeling that Congress shouldn't stick their nose in the Court's business. What a cause of action is and how it is created is determined by our legislative elected body. Judges weren't elected to set public policy. They were elected to adjudicate disputes.

Senator McCONNELL. I say to my friend from Alabama, one of the pieces of legislation that I introduced a while back that didn't go very far would have required a litigation impact statement of legislation. Congress is busily at work creating new causes of action around here all the time. So if we can create new causes of action, why can't we act to stem causes of action? There is nothing more inappropriate about reducing the number of lawsuits than there is in increasing them, which we do on almost a routine basis around here every year.

I thank you so much for your interest in this, and hopefully, we can push it forward.

Chairman SESSIONS. Thank you, Senator McConnell, for your steadfast commitment and concern for the legal system. It is a concern I share. I love the rule of law. I love the courts. I practiced in them all my life. But judges read the statutes and they rule on motions questioning whether a lawsuit or criminal case is legitimate based on the laws Congress writes, and we think they don't second-guess these laws. If we create a cause of action, courts allow it to go forward. If causes of action are going forward that are not justified, it is our burden to change the law.

I thank you for that. I know you have a lot to do on the floor, Mr. Assistant Leader—

Senator McCONNELL. Thank you.

Chairman SESSIONS. —and we appreciate your service. Thank you very much.

Senator McCONNELL. Thank you very much.

Chairman SESSIONS. Mr. Sutter, we are delighted to have you here. Thank you for coming, and we would be delighted to hear your comments at this time.

**STATEMENT OF RUSSEL L. SUTTER, PRINCIPAL, TOWERS  
PERRIN, ST. LOUIS, MISSOURI**

Mr. SUTTER. Thank you, Mr. Chairman. My testimony does not include specific comments on Senator McConnell's bill. Rather, my testimony provides background on the costs of the U.S. tort system, trends in those costs, and a comparison of costs in the U.S. to those in other countries.

Our current research on U.S. tort costs shows the following. First, the cost of the U.S. tort system was \$233 billion in 2002. This represents 2.2 percent of the U.S. gross domestic product, or GDP.

Second, in 2002, U.S. tort system costs increased by 13.3 percent over 2001. Costs in 2001 increased 14.4 percent over costs in 2000. This total 2-year change of 29.6 percent was the highest since 1986–1987. This is in contrast to the 5-year period from 1995 to 2000 during which tort costs increased by an average of 2.6 percent per year.

Three, since 1950, tort costs have increased an average of 9.8 percent per year, compared to an average GDP growth of 7.1 percent per year. Our analysis uses GDP on a nominal basis before adjusting for inflation.

Fourth, U.S. tort costs were \$809 per citizen in 2002. In 1950, tort costs were \$12 per citizen before adjusting for inflation, and \$89 per citizen after adjusting for inflation.

Chairman SESSIONS. Wait a minute. That is \$809 per citizen per year?

Mr. SUTTER. Yes.

Chairman SESSIONS. So that is close to \$60 a month?

Mr. SUTTER. Closer to \$70, actually.

Chairman SESSIONS. Seventy dollars a month?

Mr. SUTTER. Yes.

Chairman SESSIONS. That is a significant amount of money. Excuse me.

Mr. SUTTER. It also implies that real tort costs per citizen have increased by more than 800 percent since 1950.

Five, while not part of our current study, 2 years ago, we did a study comparing tort costs in the U.S. to those of 11 other countries. The 11 other countries included eight from Western Europe, along with Canada, Japan, and Australia. That comparison was based on 1998 data. At that time, the ratio of tort costs to GDP in the U.S. was 1.9 percent. The other 11 countries had ratios of tort costs to GDP ranging from 0.4 percent to 1.7 percent, with an average of 1.0 percent. In other words, tort costs in the U.S. were approximately twice as high as in the other countries.

Six, we attribute the significant increase in costs in 2001 and 2002 to several factors, including asbestos claims, other class action litigation, higher awards in medical malpractice cases, an increase in the number and size of lawsuits against directors and officers of publicly traded companies, and an increase in medical cost inflation. The charts attached to my written testimony provide details behind some of these findings.

In closing, I would like to point out three items regarding our analysis. First, this study was not paid for or commissioned by any organization. The study is self-funded by Tillinghast.

Second, the study does not attempt to quantify any of the indirect benefits of the tort system, such as acting as a deterrent to unsafe practices and products, or any of the indirect costs of the tort system, such as duplicate or unnecessary medical tests ordered mainly as a defense against possible malpractice allegations.

And third, the purpose of the study is not to support any particular viewpoint on tort costs. The study's purpose is to quantify tort costs and the trends in those costs. We do not take any position on whether the costs are too high or too low.

Mr. Chairman, thank you for the opportunity to present this testimony. I will be happy to answer any questions the Committee may have.

Chairman SESSIONS. Mr. Sutter, I thank you for that report. I suppose I would note that there have been health and other benefits that have resulted from litigation. But you also note that there have been additional costs because of defensive medical practices and other actions by companies out of fear of being sued. I don't know if they balance one another out, and you haven't expressed an opinion on that, have you?

Mr. SUTTER. That is correct. We haven't expressed an opinion.

Chairman SESSIONS. I don't think all the results of litigation are bad, but there are some costs to litigation that go beyond just the amount of money paid out in the lawyer fees. Defendants may



adopt policies that run up business or medical costs that really don't provide a net benefit to the consumer or patient.

[The prepared statement of Mr. Sutter appears as a submission for the record.]

Chairman SESSIONS. Mr. Schwartz, with regard to the testimony of Mr. Sutter and the point I raised earlier about the lack of clarity in litigation, it seems to me that what we are attempting to do, or what Senator McConnell is attempting to do in this legislation is to say, if you file this kind of a lawsuit, it is going to be dismissed. This is not a lawsuit that should be filed. We have set policy on that. We made a policy decision that companies that provide food shouldn't be liable for health problems incurred by those who voluntarily and knowingly accept that food. Is that one way to reduce health care costs in America that have been going up, as Mr. Sutter said?

Mr. SCHWARTZ. Well, it will reduce costs in many, many sectors. Certainly, money that is now going into the legal system is less likely to be going into helpful things that will assist people for example getting good information about health costs and addressing health needs.

One area that I want to say that it will help a lot is the uncertainty that this litigation creates in our marketplace. I have received reports from Merrill Lynch, J.P. Morgan, and others. They are a quarter of an inch thick about this food litigation because the threat of this litigation, the specter of it directly affects the price of common stock of very legitimate companies who are doing legitimate business. They are not engaging in any wrongdoing.

So this legislation draws a line and says to Wall Street investors, that you no longer have to worry about baseless lawsuits that are using obesity as a claim. I think that is going to be one of the most significant economic impacts of this legislation, to get rid of the uncertainty that hovers over the restaurant and food industry right now because people look to the past and they can see things where everybody thought the litigation wasn't possible actually occurred. It just takes one or two Judges somewhere to—provides a claim.

Then you go into the settlement phase, as you know from a very experienced career, the costs can be enormous. This overall industry is an industry that is perceived to have some money, and that attracts a continuing knock at the door unless legislation says, this is an area where you can't go and this case will be dismissed.

Chairman SESSIONS. Now, I think that is a very interesting point. Let us take asbestos. Do you think that the insurance companies and reinsurance companies, both of which get paid for the insuring that they do, have been impressed? Do you think the lesson of asbestos has not yet been lost on them, I assume, and the specter of food lawsuits could or perhaps has driven up insurance costs for food companies?

Mr. SCHWARTZ. Well, I can't go into the—because I don't have enough knowledge to say exactly what they would or would not do. But certainly, they have seen some areas that people thought were safe change. Asbestos had a unique profile in a way, because the companies, some of the companies that sold it, knew there was danger and that people who used it didn't know, and that is very

different from food, where anyone knows if you consistently overeat, you are going to gain weight.

So I don't think there is a real direct analogy between asbestos and obesity lawsuits. However, people in the investment community appreciate that there right now are no barriers, and while there is no successful suit today, if a moderate Federal judge takes over 80 pages to dismiss a case the first time and over 36 pages the second time, that there is going to be a third and fourth and fifth time until they break through.

And insurers in setting rates and premiums cannot here look solely to the past. If they do, they may not have adequate reserves. They have to look to possibilities that occur in the future. And unless there is something at a national level that says, you can't go there, they have to price their products based on speculation that some of this litigation could be successful in the future.

Chairman SESSIONS. Regulation by litigation—you mentioned the lawsuit filed in Illinois?

Mr. SCHWARTZ. Yes, sir.

Chairman SESSIONS. It is true under our current legal system that a judgment rendered in a single county in a single State can become binding throughout America?

Mr. SCHWARTZ. Well, there was one decision, a \$1.7 billion—I may be off a million or two when the figures get up there—and it wasn't binding anywhere else, but it created a fear that if an auto insurer continued to sell parts that were not original equipment, they might be subject to equal billion-dollar lawsuits. So they changed their behavior, even though insurance regulators, the men and women who are in charge of this very thing, in some States said you must supply the non-original equipment so that there is competition in the area and it was perfectly legal and legitimate in every State.

So you had a court through the threat of litigation, not that they could bind people by law, but that threat changed behavior, and similar things can occur in food. If there were a lawsuit that would be successful against a fast food company because they didn't have signs that were this high, six inches high, showing how much fat was in a particular piece of food they were selling, then restaurants are not bound by that, but they are saying, my God, there was a verdict here. We are going to have to change our behavior. Or there was a legal theory suggesting that you must have several alternative menus. Then somebody going into business has to decide whether he or she wants to have that or not.

So it doesn't happen by law. It happens by the threat of very, very large verdicts and people's fear that unless they behave in a certain way, they can be eclipsed by those verdicts.

Chairman SESSIONS. I think that is certainly true. You have made that very clear.

With regard to regulations, they are ultimately a province of the State legislatures and the United States legislature, the Congress, are they not? I mean, if we choose to require bigger disclosure statements and more nutrition information and other things, I suppose we could even go further in regulating the food industry. That would be a decision we should debate out in public, make our case to the American people if they are unhappy, and vote on it. They

can vote us out of office if they don't like it. But it seems to me that it is anti-democratic if people that nobody even knows, a group of lawyers and a judge, start setting public policy on a number of different issues. One of those issues could be food.

Mr. SCHWARTZ. Mr. Chairman, you are absolutely right. That is the line between your responsibilities as a legislator and courts. You can do things that courts can't do. You are one of the few who have served in this body, but also you were an Attorney General. You knew how the court system works.

A judge has a limited amount of information in front of him or her. There are basically two lawyers speaking and briefs. Courts are not in a position to set nationwide policy about what should be disclosed in food, what the size of signs are, what foods should be prohibited, what foods should be allowed. That is this body, because you can have hearings, you can call witnesses back. You are in the position to do it.

You also, when you make your rules, make them prospective. You know from the common law this fiction that they are always discovering the common law. So when courts make rules, they are retroactive. It is changing the speed sign after you have driven.

So this is the right body and State legislatures are the right body to make rules of this kind. Why I believe this particular issue is best handled by Congress is because an individual State cannot set nationwide policy. A nationwide policy should be set on obesity saying the responsibility for dealing with this issue is with the Congress and the State legislatures, not an arbitrary decision by one particular court.

Chairman SESSIONS. How would you respond to some members of this body who may say, well, I think that is good, but it should be done by the State and not the Federal Government. We don't have any business telling a restaurant in Alabama or Texas how to prepare do their food. How do you justify a Federal action as opposed to individual State actions?

Mr. SCHWARTZ. That is a very, very good question because we can't have the Congress of the United States rewriting American tort law. It is only when something is truly national in scope that this body should act.

Our food industry has become a national industry. Policies set by chains, by other restaurants, is nationwide. But one court in one State that isn't looking at our Nation's interest, is not looking at the financial interests of our Nation, can upset the apple cart with this particular industry. This particular industry is woven in interstate commerce. Our food chains and food supplies go across State lines. So having and leaving this to an individual State is a non-answer because one State or two States alone cannot set those rules.

And there is another more technical point and I will just make it for the record. In some States, the courts are so restrained on their legislatures. They want to control the tort system that they hold actions by State legislatures that attempt to make reforms to the tort system unconstitutional under State Constitutions. There is no review that is provided by the Supreme Court of the United States because it is done under a State Constitution, and some

State Courts have, in 97 decisions, thwarted attempts by States to do this.

So if you have a true national problem, and I believe that this is because our food supply, our investment in food companies is a nationwide problem, it is best addressed at this level if and when people raise the States' rights issue.

Chairman SESSIONS. And under the Commerce Clause and under the Diversity Clause in the Constitution, there is no legal problem?

Mr. SCHWARTZ. I will submit for the record, we wrote an article in the Harvard Journal of Legislation addressing when Congress can act and when there are limits. It deals with what the powers are specifically under the Commerce Clause, not pushing the Commerce Clause to the edge, because people who are conservative don't want to do that. But a mainstream Commerce Clause approach allows action in this area.

There is concern sometimes raised about the Tenth Amendment because the Tenth Amendment strongly protects States' rights and some actions by this body have been held unconstitutional under the Tenth Amendment. But the Supreme Court has been absolutely clear, and I will submit papers on this, too, that the Tenth Amendment does not affect your right in a situation precisely like this to implement the goal of having flow of interstate commerce.

This is our Nation's food industry. The data that can be given to you by the National Restaurant Association and others show it is a nationwide industry regulated by Congress and could be adversely affected by one or two States, or more, one or two courts in individual States.

Chairman SESSIONS. Mr. Sutter, can you express an opinion about what would happen if we eliminate some of these lawsuits in the fashion that is done here? Can that affect litigation costs in America?

Mr. SUTTER. Mr. Chairman, we think that the costs of litigation will continue to rise faster than GDP as it has over the last 50 years, by an average of three points a year. I guess the way I would look at it is if this type of litigation grows, we would expect that gap to increase from perhaps three points to four or five points. And so I think what this legislation does is remove that threat of a widening gap. But I don't think this legislation would take that gap down to zero. There is just too much going on out there.

Chairman SESSIONS. I see it more as a single step, but these are the kinds of litigation costs that are components of the numbers that are surging upward that you described, are they not?

Mr. SUTTER. Yes, they are.

Chairman SESSIONS. Do you have anything you would like to add, Mr. Sutter, to this discussion we have had so far?

Mr. SUTTER. Nothing further, Mr. Chairman.

Chairman SESSIONS. It is a very, very interesting study you have put forth. The size of the litigation industry at 2.2 percent of the GDP is just a stunning event. I remember when we looked at the tobacco litigation when the tobacco companies collapsed and all of that went forward. Plaintiff's lawyers went from receiving fees of hundreds of millions of dollars to billions of dollars. Maybe a plaintiff's firm of ten or 20 lawyers would be entitled to a fee of \$1 bil-

lion. In Maryland, I believe, it came in at close to \$2 billion. In Texas, around \$4 billion.

So these are huge, huge costs, even by U.S. Government terms, and I think Congress has a right to look at that. We ask ourselves, is the legal system furthering our public policy in a healthy way; if not we study and make sure we are acting legally and constitutionally, and, if necessary, take steps to reform it.

Mr. Schwartz, do you have any further insight into this subject you would like to add?

Mr. SCHWARTZ. No. I feel you have really gotten in the record very, very important things. The fact that the legislation is needed, that it is constitutional, that it represents sound public policy, and it is an area where, I think if Congress acts in this area, it puts a marker down to say there are certain places where courts should not make law.

Senator McConnell mentioned automobiles. Well, lawsuits have not been successful yet, but an automobile can go 90 miles an hour. The same type of thesis would hold the car company liable for a car that went 90 miles an hour, not the driver's choice to drive that fast, would also hold a food company responsible for somebody who consistently overeats.

I think it is a good message. There was other testimony that I read and that you will hear that is brilliant because it says these lawsuits really give the wrong signal, my final point, to people, that the blame is external. It is not on themselves, it is because of the seller of food. It is not my responsibility for my own choice. This legislation puts the right signal out saying individuals do have a responsibility to exercise and have control over their diet. I appreciate your time on this issue.

Chairman SESSIONS. Thank you. I am glad that you are participating and writing textbooks for America's law schools. I remember when I was in law school, a professor said when someone is wrong, there is a lawsuit. There is a cause of action. You just have to find it. And I think that is the mentality, that if somebody has in some way been damaged or has damaged themselves or whatever, the mentality is to look for a way to get them compensation.

But that begins to muddle the principles of liability and fault in America. I just think that we need to recapture that sense, and I believe the Congress is going to have to play a larger role than we have in the past.

I thank you for your leadership, Mr. Sutter. Thank you very much for your valuable information.

Mr. SUTTER. Thank you, Mr. Chairman.

Chairman SESSIONS. Our next witness is Mr. Wayne Reaves. He is the President of Manna Enterprises, located in Anniston, Alabama. Mr. Reaves owns seven quick-service restaurant establishments known as Jack's Family Restaurants. His businesses employ 180 individuals. He is a member of the Board of Directors of the Spirit of Anniston, a commercial development board in Anniston, Alabama. Mr. Reaves is a current board member of the National Restaurant Association. He is also a past president of the Alabama Restaurant Association. In 1996, he was named Alabama Restaurateur of the Year.

Dr. Gerard Musante is the founder of Structure House, a residential weight loss center in Durham, North Carolina. He is a clinical psychologist who specializes in adapting the principles of behavior modification to the eating habits of significantly overweight people and food abusers. He received his professional training from New York University, the University of Tennessee, Duke University Medical Center, and Temple University Medical School. He is a member of the American Psychological Association and the Association for the Advancement of Behavior Therapy. He has served on the editorial board of Addicted Behavior and as a consultant to the National Board of Medical Examiners. He continues to serve Duke University as an adjunct professor.

Mr. Reaves, it is a delight to have you here. I know you are in the real world every day, working hard to provide a product and make a living and pay the salary of your workers. We would be delighted to hear your perspective on the issue before us today.

**STATEMENT OF WAYNE REAVES, PRESIDENT, MANNA ENTERPRISES, INC., ANNISTON, ALABAMA, ON BEHALF OF THE NATIONAL RESTAURANT ASSOCIATION**

Mr. REAVES. Thank you, Mr. Chairman. Chairman Sessions, my name is Wayne Reaves. I am the owner of Manna Enterprises, Incorporated, in Anniston, Alabama. I own and operate seven quick-service restaurants operating in the region as Jack's Family Restaurants.

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 S. 1428, the Common Sense Consumption Act of 2003. I am a current member of the Board of Directors of the Association and I have submitted my written copies of my full remarks for the record.

Mr. Chairman, I would like to start by giving you a very brief background on my business. I proudly have spent my entire professional career working in the restaurant industry with Jack's Family Restaurants. Jack's is a quick-service concept that serves breakfast, lunch, and dinner, with a wide variety of options on the menu.

I started out working in Jack's as a cook back in high school and became general manager of the store shortly after I graduated. While out of high school, I was drafted and served in the Army before returning to Jack's, where I worked my way up the management ladder. Today, as the only Jack's franchisee, I own and operate seven restaurants, and while I am certainly not the only one to work their way up in our industry, it is gratifying to have done so within the same concept for over three decades.

The restaurant industry has been very good to me and I hope 1 day to pass my business on to my son so that he can hopefully share the same experiences, rewards, and challenges that I have.

However, one of the challenges that the restaurant and food service industry has been confronted with recently is the string of frivolous lawsuits being filed against our industry, claiming that they are the cause of some individuals' overweight and obesity-related health conditions. These senseless and baseless attempts by representatives of the trial bar are nothing more than a distraction

from finding sensible solutions to this very complex issue and are a clear abuse of the judicial system.

The American public also sees through the trial bar's misguided approach and understands the frivolousness of these irresponsible lawsuits. And I am pleased to share the good news that personal responsibility remains a strong American value. It has already been mentioned that in a Gallup poll conducted in July, 89 percent of Americans indicated that the food industry should not be blamed for issues of obesity and overweight. We are also fortunate that common sense has prevailed in the ruling in September by Judge Robert Sweet in New York, dismissing the most recent lawsuit against a restaurant chain claiming it caused obesity among some Americans.

There is no doubt in my mind that trial attorneys will persist in trying to file other similar lawsuits, as they made no secret of their intentions to continue their efforts. As you already know, this past June, members of the trial bar community convened a three-day workshop in Boston entitled, "Legal Approaches to the Obesity Epidemic." Some of the same individuals who were associated with the tobacco litigation played significant roles in the workshop.

Mr. Chairman, in the simplest terms, this type of legal action, if permitted to go forward, could be very costly to my business. It would only take one lawsuit of this nature to potentially put me out of business and take away all that I have worked for. As a businessman who employs now 196 individuals, that is a grave concern of mine. For more than half of my employees, the job I provide them serves as their primary source of income for their family.

Beyond the risk to my business, you asked Mr. Schwartz earlier about the effect of the obesity litigation and what it could have on the insurance costs. Beyond the risk to my business, the mere threat of such a suit can have an impact on the cost of insuring my business. Insurance companies have acknowledged that they are watching these lawsuits very closely and they recognize that this litigation may impact how they price future liability products for food companies. One very respected insurance industry publication has even coined the phrase "food fright" in discussing this recent legal phenomenon and its potential repercussions in the insurance markets.

The food service industry accounts for four percent of the nation's GDP. If this type of litigation is not kept in check, there could not only be a negative consequence for the food service industry, but for our Nation's economy.

In the restaurant industry, clearly, the customer comes first. However, the thought that an individual can file a lawsuit based in part on the voluntary choice he or she made regarding where and what to eat is disturbing. Perhaps no other industry offers a greater variety of choices to consumers than restaurants. In any one of our Nation's 870,000 restaurants, consumers have the opportunity, the flexibility, and the freedom to choose among a variety of high-quality, safe, healthy, and enjoyable types of cuisine.

The lawsuits we are discussing this afternoon not only 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 respon-

sibility, moderation, and physical activity are all key ingredients to a healthy lifestyle.

If these lawsuits are permitted to go forward, they could 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.

Mr. Chairman, thank you again for this opportunity to appear before you.

Chairman SESSIONS. Thank you very much, Mr. Reaves. It is great to have you here.

[The prepared statement of Mr. Reaves appears as a submission for the record.]

Chairman SESSIONS. Do we have much time on that vote? Five minutes? We have got two votes back to back. I will get down at the end of the first one and cast a vote and try to be one of the first votes in the second and will be able to come back in probably ten to 15 minutes. Sorry to interrupt this at this point, but I will be right back. Thank you so much.

[Recess.]

Chairman SESSIONS. We will return to session. I apologize for the interruption, the votes that we had. We are in the Defense Supplemental War Act and some important matters and we just have to be here. We have troops in the field at risk and if we have to stay here until midnight and all weekend to get it done, we need to do that, as far as I am concerned, and I intend to work toward that end.

Dr. Gerard Musante, we are delighted you are here. Obesity is a real problem in America. I would like to hear your take on it as a person professionally engaged in those issues and we are delighted that you could come. We will hear your statement at this time.

**STATEMENT OF GERARD J. MUSANTE, FOUNDER AND CHIEF EXECUTIVE OFFICER, STRUCTURE HOUSE, DURHAM, NORTH CAROLINA**

Mr. MUSANTE. Good afternoon, Mr. Chairman. I am Dr. Gerard J. Musante. I appreciate the opportunity to appear before you today. I have been called here to share my expertise and educated opinion on the importance of personal responsibility in food consumption in the United States. This lesson is one I have been learning about and teaching for more than 30 years to those who battle moderate to morbid obesity, a lesson that emphasizes the criticality of taking responsibility for one's own food choices.

I am testifying before you today because I am concerned about the direction in which today's obesity discourse is headed. We cannot continue to blame any one industry or any one restaurant for the nation's obesity epidemic. Instead, we must work together as a nation to address this complex issue, and the first step is to put the responsibility back into the hands of the individuals.

As a clinical psychologist with training at Duke University Medical Center and the University of Tennessee, I have worked for more than 30 years with thousands of obese patients. I have dedicated my career to helping Americans fight obesity. My personal road, which included the loss and maintenance of 50 of my own



pounds, began when I undertook the study of obesity as a faculty member in the Department of Psychiatry at Duke University Medical Center. There, I began to develop an evidence-based, cognitive behavioral approach to weight loss and lifestyle change. I continue to serve Duke University Medical Center as a consulting professor in the Department of Psychiatry. Since the early 1970's, I have published research studies on obesity and have made presentations at conferences regarding obesity and the psychological aspects of weight management.

Today, I continue my work at Structure House, a residential weight loss facility in Durham, North Carolina, where participants come from around the world and the country to learn about managing their relationship with food. Participants lose significant amounts of weight while both improving various medical parameters and learning how to control and take responsibility for their food choices. Our significant experience at Structure House has provided us with a unique understanding of the national obesity epidemic.

Some of the lessons I teach my patients are examples of how we can encourage Americans to take personal responsibility for health and weight maintenance. As I tell my participants, managing a healthy lifestyle and a healthy weight certainly are not easy to do. Controlling an obesity or weight problem takes steadfast dedication, training, and self-awareness. Therefore, I give my patients the tools they need to eventually make healthy food choices as we best know it. Nutrition classes, psychological understanding of their relationship with food, physical fitness training, and education are tools that Structure House participants learn, enabling them to make sensible food choices.

As you know, the obesity rates in this country are alarming. The Centers for Disease Control and Prevention have recognized obesity and general lack of physical fitness as the nation's fastest growing health threat. Approximately 127 million adults in the United States are overweight, 60 million are obese, and nine million are severely obese. The country's childhood obesity rates are on a similar course to its adult rates, as well as increases in type II diabetes. Fortunately, Americans are finally recognizing the problem. Unfortunately, many are taking the wrong approaches to combating this issue.

Lawsuits are pointing fingers at the food industry in an attempt to curve the nation's obesity epidemic. These lawsuits do nothing but enable consumers to feel powerless in a battle for maintaining one's own personal health. The truth is, we as consumers have control over the food choices we make and we must issue our better judgment when making these decisions. Negative lifestyle choices cause obesity, not a trip to a fast food restaurant or a cookie high in trans fat.

Certainly, we live in a litigious society. Our understanding of psychological issues tells us that when people feel frustrated and powerless, they lash out and seek reasons for their perceived failure. They feel the victim and look for the deep pockets to pay. Unfortunately, this has become part of our culture. The issue is far too comprehensive to lay blame on any single food market or manu-

facturer. These industries should not be demonized for providing goods and services demanded by our society.

Rather than assigning blame, we need to work together towards dealing effectively with obesity on a national level. Furthermore, if we were to start with one industry, where would we stop?

For example, a recent article in the Harvard Law Review suggests that there is a link between obesity and preference manipulation, which means advertising. Should we consider suing the field of advertising next? Should we do away with all advertising and all food commercials at halftime? We need to understand that this is a multi-faceted problem and there are many influences that play a part.

While our parents, our environment, social and psychological factors all impact our food choices, can we blame them for our own poor decisions as it relates to our personal health and weight? For example, a recent study presented at the American Psychological Association Conference showed that when parents change how the family eats and offer children wholesome rewards for not being couch potatoes, obese children shed pounds quickly. Should we bring lawsuits against parents that don't provide the proper direction? Similarly, Brigham and Women's Hospital in Boston recently reported in Pediatrics Magazine that children who diet may actually gain weight in the long run, perhaps because of metabolic changes, but also likely because they resort to binge eating as a result of the dieting. Do we sue the parent for permitting their children to diet?

From an environmental standpoint, there are still more outside influences that could erroneously be blamed for the nation's obesity epidemic. The Centers for Disease Control has found that there is a direct correlation between television watching and obesity among children. The more TV watched, the more likely the children will be obese. Should we sue the television industry, the networks, the cable, the television manufacturers, or the parents that permit this? Now we have Internet surfing and computer games. Where does it stop? School systems are eliminating required physical education. Are we also to sue the school systems that do not require these courses?

Throw social influences into the mix and we have a whole new set of causes for obesity. Another recent study in Appetite Journal indicated that social norms can affect quantitative ratings of internal states such as hunger. This means that other people's hunger levels around us can affect our own eating habits. Are we to blame the individuals who are eating in our presence for our own weight problems?

As evidenced in these studies, we cannot blame any one influencing factor for the obesity epidemic that plagues our Nation. Through working with obese patients, I have learned that the worst thing one can do is to blame an outside force to get themselves off the hook, to say it is not their fault, that they are a victim. To do this can bring about feelings of helplessness and then resignation. Directing blame or causality outside of oneself allows the individual not to accept responsibility and perhaps even to feel helpless and hopeless. "The dog ate my homework," and "The devil made me do it" are statements that allow the individual not to take

serious steps towards correction when they believe that these steps are not within their power. We must take personal responsibility for our choices.

What does it mean to take personal responsibility for food consumption? It means making food choices that are not detrimental to your health and not blaming others for the choices we make.

Ultimately, Americans generally become obese by taking in more calories than they expend, but certainly there are an increasing number of reasons why Americans are doing so, producing rising obesity rates. Some individuals lack self-awareness and over-indulge in food ever more so because of psychological reasons. Others do not devote enough time to physical activity, which becomes increasingly difficult to do in our society. Others lack education or awareness as it relates to nutrition and physical activity, particularly in view of lessened exposure to this information. And still others may have a more efficient metabolism or hormonal deficiencies. In short, there is yet much to learn about this problem.

Congress has rightly recognized the danger of allowing Americans to continue blaming others for the obesity epidemic. It is imperative that we prevent lawsuits from being filed against any industry for answering consumer demands. The fact that we are addressing the issue here today is a step in the right direction. No industry is to blame and none should be charged with solving America's obesity problem.

Rather than pointing fingers, we should be working together on a national level to address the importance of personal responsibility in food consumption. The people who come to Structure House have the unique opportunity to learn these lessons, but they are only a select few. These lessons need to be encouraged on a national level from an early age in schools, homes, and through national legislation that prevents passing this responsibility on to the food or related industries.

In closing, I would like to highlight the fact that personal responsibility is one of the key components that I teach my patients in their battle against obesity. This approach has allowed me to empower more than 10,000 Americans to embrace improved health. I urge you to consider how this type of approach could affect the obesity epidemic on a national level by encouraging Americans to take personal responsibility for their health. By eliminating frivolous lawsuits against the food industry, we can put the power back into the hands of the consumers. This is a critical first step on the road towards addressing our Nation's complex obesity epidemic.

For years, I have seen Presidents call for economic summits. I urge that we consider an obesity summit. Let me suggest, instead of demonizing industries, that we bring everyone to the table, representatives in the health care, industry, advertising, restaurants, Hollywood, school systems, parent groups, the soft drink industry, the bottling industry. Instead of squandering resources and defending needless lawsuits by pointing fingers, let us make everyone part of the solution. Let us encourage a national obesity summit where all the players are asked to come to the table and pledge their considerable resources towards creating a national mindset aimed at solving this problem. That would be in the interest of the American people.

I feel privileged to be part of the Subcommittee's efforts. I want to thank you for allowing me to testify here before you today and I will be glad to answer any questions.

Chairman SESSIONS. Thank you very much, Dr. Musante. Your personal experience with thousands of people who are overweight gives real authority, I think, to your testimony and we appreciate that.

[The prepared statement of Mr. Musante appears as a submission for the record.]

Chairman SESSIONS. Mr. Reaves, as I understand it, the restaurants do have health care requirements placed on them. They are required to have available for view the nutrition contents of a product and are required to meet other Federal and State standards in order to maintain an operational license. Would you agree that these standards are real and required by law? They are not haphazardly complied with, but fully complied with by most of the businesses in the fast food industry.

Mr. REAVES. You are talking about the health regulations?

Chairman SESSIONS. Yes.

Mr. REAVES. Yes, sir. They are not only complied with, but they are strictly enforced by the State health departments and the local county health departments, more so the county, very strictly.

Chairman SESSIONS. And you do have to provide calorie content and fat content information on foods you serve in your restaurants?

Mr. REAVES. No, sir.

Chairman SESSIONS. That is—

Mr. REAVES. That is not required.

Chairman SESSIONS. What restaurants is that required for, none?

Mr. REAVES. Mandatory, none that I am aware of.

Chairman SESSIONS. Would you accept that as something that would be beneficial to the process of weight gain evaluation by customers?

Mr. REAVES. Well, the restaurant industry is an industry of accommodation and choices. If customers have a question about our menu, we are more than happy to answer any questions that they have. A lot of companies now are providing information in the form of brochures and on the websites they have that information available, so—

Chairman SESSIONS. When a lawsuit is filed, that lawsuit results in your having to hire an attorney. If you have insurance, and I suspect you do—

Mr. REAVES. Yes.

Chairman SESSIONS. —does the insurance company provide that attorney or do you have to have one of your own to watch the insurance company?

Mr. REAVES. Well, I have liability, obviously, insurance, and I do have to pay a deductible. But they do supply the attorney. But I do have limits.

Chairman SESSIONS. And you do have limits.

Mr. REAVES. And once those limits are exceeded, then I am on my own.

Chairman SESSIONS. Have you noticed any changes in your insurance premiums over the last decade or so?

Mr. REAVES. Oh, yes sir. I mean—

Chairman SESSIONS. What can you tell us in your personal experience, if you recall?

Mr. REAVES. I don't have the percentage, but it is basically a steady increase. Now, you remember a time in Alabama when we went through an insurance crisis, and that abated a little bit. But basically, it is you just anticipate an annual increase in the insurance rates. This past year, I believe my number was 23 percent, which was a high year for us, if I am not mistaken.

Chairman SESSIONS. A 23 percent increase?

Mr. REAVES. Yes if I am not mistaken. The year before, I had a good insurance policy. This year, it was time to pay the piper, but I did have an increase, yes.

Chairman SESSIONS. Of course, insurance costs are pulled from your business' resources, making them unavailable for salaries, or bonuses, or expansion of stores and restaurants, is that correct?

Mr. REAVES. That is correct. That is exactly correct. And one of the problems and the concerns that I have with this obesity issue is the insurance industry that I mentioned earlier and the article, "Food Fright," one of the things that they say in this article, they comment that "when you have an emerging issue, you look at what could be the potential financial impact and what are the things you could do to mitigate that impact. We could introduce a special endorsement that may limit the impact of these types of lawsuits, or there may be particular risks" we wouldn't want to take.

"Nothing happens to change coverage until there is a precedent-setting lawsuit—I mean, judgment or settlement", and this is out of their own, the insurance industry's magazine, and they have gone on to say, "insurers haven't backed away from writing liability policies for restaurants yet. . . . They aren't likely to do so until an obesity case is successful in winning a judgment or settlement against a restaurant", and if that was to happen, I can't imagine what would happen to the rates. Would there be any restaurants or groups of restaurants or segments of the restaurant industry that the insurance industry would just say, we are not interested in insuring. The risk is too high.

Chairman SESSIONS. Well, the theory is there. I have represented a plaintiff in an asbestos case and the legal theories are such that should cause stores to be concerned and restaurants to be concerned. For example, if you have asbestos damage and you have been made ill as a result and 100 different companies had asbestos at the plant where you were working, you can sue all 100 without any regard for how much one company contributed, or whether that company's fibers actually got into your lungs or not. Would it cause you concern as a small business person that to the extent of your deep pocket, however deep it is, you could be liable for the full amount of damage to any one plaintiff?

Mr. REAVES. Yes, it very definitely bothers me. And think about the restaurant industry. Seventy percent of our 870,000 restaurants nationwide are individually owned. They wouldn't have the deep pockets. Many of those are local delis or a family that has put together a Chicken Finger restaurant. They wouldn't have the deep pockets to start with. I shudder to think what would happen again if it got to that point.

Chairman SESSIONS. Mr. Reaves, to what extent do you worry about lawsuits, some of which might be legitimate or some of which might be fraudulent? In other words, someone comes in the store and slips and falls, or maybe somehow in the food system an error was made and an unhealthy product was delivered to the customer. Is that something that a business person in your line of work actually worries about on a daily basis, or is it something you just worry about when you hear about it?

Mr. REAVES. No, it is absolutely something that I worry about. I keep an eye on my coverages to, make sure that I have got proper coverages, because I see and I get the industry publications. I see where people are sued, and I have been sued a number of times, never, as far as I am concerned, never legitimately, for legitimate reasons, rather. But yes, it is very definitely a concern.

Chairman SESSIONS. But you—

Mr. REAVES. And if for any individual that is not a concern, it should be.

Chairman SESSIONS. Dr. Musante, as I understand your testimony, you are saying that we are creating harmful conditions for people who are overweight by telling them it is somebody else's fault. It hurts them rather than helps them.

Mr. MUSANTE. Senator, that really is at the heart of my testimony. It is misleading. It really talks to causality and all this. Once people begin to feel powerless, they begin to feel that there is nothing they can do and then they are going to look around for someone to blame, and that is at the heart of all this.

One of the things that we always have found out clinically with working with our patients, that in reality, when people have become obese, they will tell us that the majority of their calories are consumed privately. You do not see people publicly eating large amounts of food on a regular basis to be able to gain the kind of weight that required to acquire such high BMI (Body Mass Index,) figures.

So this kind of private use of food is very much, from our experience, is at the heart of their obesity. And to begin to say that you can have no control over this overeating because of some industry would, I think, create an even worse situation in this country. It would lead obesity rates to increase more quickly. And again, it would sap the resources that could potentially be applied to a reasonable solution to this problem.

Chairman SESSIONS. We recently had in the Joint Economic Committee, of which I am a member, a hearing chaired by Senator Bennett on obesity and the economic impact on the economy. We discussed a number of things. Do you have any thoughts about what we could do for young people, particularly to educate them in a realistic and effective way to assume responsibility for their diet and to avoid obesity—

Mr. MUSANTE. Oh, yes, there is no question about it. Children really begin to develop their eating patterns from their parents, early on in life, and in fact, there is some data that indicates that at approximately, two to 5 years of age, many of the eating patterns can be laid down. Of course, that is about the same time that children learn to walk, and I know they are not walking to fast food restaurants at that age. So they have learned patterns from

their parents at home that have might set them out on the wrong course.

Certainly, this is something we should be concerned about because of the increases of obesity among children, increasing instances of type II diabetes among children. For example, type II diabetes traditionally has been called adult-onset diabetes. That term really needs to be changed, and it is being changed now. For example, in the State of Texas, there are more adolescents who are type II diabetics than there are adults. That is a serious, serious situation.

From what we have seen, these early experiences come on early in life. They go into the school system where now any education about nutrition or physical fitness has really been taken out of the situation, and they are given a food program very often that is determined by the Federal Government until they get to their middle school years.

I can tell you that in my hometown of Durham, the superintendent of the schools has said that the minute those children have an opportunity to eat on their own, the foods they tend to go for are french fries and pizza. This is very indicative of the fact that even though these children might have been given a proper experience by the kinds of foods that the Federal Government has indicated they should be eating over grade school, they have learned these negative food patterns elsewhere, and the patterns are really learned again, from the parents in the household.

There are programs, an experimental research program for study that was done in Minnesota. The researchers there went into the school system to alter the choices that children made in the cafeteria. It was a junior high school where this joint project got the vendors together, the soft drink people together, the schools together, the parents together, and as a group, they worked on this, and they really did affect the amount of food or the quality of the foods that children were eating as a result of a broader-based educational program.

So I would really urge something that is done early on in life that includes the parents and really allows these children to learn while they are going through school, the proper way in which they can balance their food intake and their energy expenditure and not to be saddled with this problem for the rest of their life and endanger their health.

Chairman SESSIONS. Now, do I get an optimistic or pessimistic note here; that if a school takes strong steps to provide good advice on nutrition, that that will impact the child?

Mr. MUSANTE. The early results are showing, yes, it would. And in fact—

Chairman SESSIONS. Though some children would go home and eat unhealthy products.

Mr. MUSANTE. Well, they might because of what is going on at home, and the extension of that study now, the same researchers in Minnesota are doing a pilot program with parents to try to get them to change things. Interestingly enough, and the group that they selected, the volunteer group of parents, didn't particularly have a high level of education or a high level of income, but they

were all very concerned about this. Everybody knows about this problem now.

In our own city of Durham, North Carolina, I am very pleased that we are going to be working with the public instruction, the county, the school system, and Duke Medical Center to really develop a program that is going to be aimed at helping the parents and the children in the schools to begin to alter their selections. This is the kind of a program that is needed, where we get groups of people together, all concerned about this problem, so that we are working together, not fighting in a courtroom.

This serves no purpose. It is adversarial. I have never believed in that. I believe in bringing people together and recognizing the problem, then going out together to do something about it, and I think people are willing to do that. You just have to give them a chance, rather than fighting with them first.

Chairman SESSIONS. And the people you have counseled, do you have success in having people take off weight?

Mr. MUSANTE. Oh, yes. We have folks that lose significant amounts of weight. Now, you have to understand, the people we work with can be anywhere from 20 pounds overweight to 200 pounds overweight, so we really run the gamut in terms of obesity and the like. But we have done follow-up studies a number of times in various ways. When you are working with a clinical population and you are working with people all over the country, that is always a complex problem in terms of tracking each participant.

We are also now tracking our success—but we have done that in various ways three times before. We are also doing it now with a cohort of people that left about five or 6 years ago and we are going to track them and we have a great deal of data on these individuals and the results are very encouraging. Generally, approximately half of our patients will go home, continue to lose weight or keep weight off over a considerable period of time, and that can be anywhere from six—when we have looked at it, anywhere from 6 months to 5 years.

So the impacts can be made. You see people's lives that turn around. You see people whose lives have been saved, and they always come in, of course, and thank us for that, and I always say, "Well, it is not us, it is you. You have done this. You have taken responsibility for this and look where you are now." So it really is an issue that has to be directed back to them.

Having said that, there still are many issues to learn about this problem. We really are just scratching the surface. I just came back this week from our National conference. The North American Association for the Study of Obesity took place in Fort Lauderdale. We presented some of our research there. And this is a composition of folks from every discipline—epidemiology, nutrition, surgeons, physicians, psychologists, basic medical sciences. And certainly, everybody is looking at every aspect of this problem.

The feeling was, well, there is so much to be learned. No one could pinpoint any one thing. I have to say no one was really pointing any fingers at the food industry. As a matter of fact, the one finger that was pointed, I might add, was at the Federal Government for not providing enough research money. But other than that, there is an understanding that this is a multi-faceted problem



and we have to approach it in that way. There are some things, however, we know as to what needs to be done now, and that is moving into the schools early on, working with the parents and getting them to set a course of action that is going to lead to good health and not obesity.

Chairman SESSIONS. Thank you. I appreciate those comments.

Mr. Reaves, I know that the groups are plotting how to file these lawsuits and they won't let Professor Schwartz participate in their discussions. We can expect that if we allow lawsuits to be filed on theories that are unjust and certainly contrary to our basic history of what liability should be for, then it is the Congress's fault. I find it hard to say lawyers shouldn't get together and see if they can figure out a way to file a lawsuit and be successful if the lawsuit is consistent with the law.

I think a lot of this is Congress's responsibility. We are going to have to step up to the plate and deal with the litigation issue. Maybe we need to be spending more research money on obesity and what we can do and what we can tell schools and parents precisely to do to help themselves and their children contain weight gain. That is important.

Do either of you have any further comments for the record or for the hearing today?

Dr. MUSANTE. Only to say that I applaud your efforts. I applaud your efforts for bringing this to people's attention and I do trust that our public discourse can be properly directed.

Chairman SESSIONS. I thank you for that. I thank you for your excellent testimony. Mr. Reaves, you bring us the perspective of the person out trying to run a business and run a restaurant. Dr. Musante, we appreciate your testimony from the perspective of how people gain weight and what we can do to help them take that off.

We will leave the record open for one week for follow-up questions, statements, or any other items that Senators would like to submit. This record, I think, is a pretty good record dealing with the issues raised by Senator McConnell's legislation. Using this, I think we can make a decision and possibly move forward toward reform in this area.

We thank you very much. We are dismissed.

[Whereupon, at 4:22 p.m., the Subcommittee was adjourned.]

[Submissions for the record follow.]

[Additional material is being retained in the Committee files.]



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**October 24, 2003**

The Honorable Jeff Sessions  
Chairman  
Subcommittee on Administrative Oversight and the Courts  
Committee on the Judiciary  
G-66 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Senator Sessions:

Thank you for the opportunity to comment on the merits of litigation against sellers of food for obesity-related problems.

For twenty-five years, the American Council on Science and Health has sought, with the guidance and assistance of a 350+ member Board of Scientific Advisors, to bring sound, commonsense information about health-related topics to the American consumer. An important part of that effort has involved the description of the overwhelmingly harmful effects of smoking tobacco products, especially cigarettes, on human health. Further, we have on numerous occasions indicted the tobacco industry for its attempts to obfuscate and cover up scientific research on the deleterious health effects of cigarette smoking. Only recently (i.e. in the past five years) has the tobacco industry been called to account for its destructive and deceitful behavior.

In an effort to mimic the successful litigation against 'Big Tobacco,' as the Committee well knows, lawyers are bringing suits against purveyors of foods, particularly "fast food" companies which also have deep pockets. These suits are based on the premise that these foods are uniquely and disproportionately responsible for the increasingly high prevalence of overweight and obesity among Americans.

While it is true that so-called "fast foods" are often calorically dense and high in fat and sugar, there is no scientifically reliable evidence that singles them out as a major cause of America's obesity crisis. Foods that are equally "fattening" are widely available in restaurants, supermarkets, and consumers' homes. Indeed, data from national surveys indicate that calorie intake at home (often due to increased frequency of snacking) has certainly increased since the 1970s.<sup>1</sup>

These data indicate that Americans are consuming more calories per day than they did in the 70s. National surveys indicate that in the late '70s, adult men consumed 2,080 calories

<sup>1</sup> Cutler, DM and EL Glaser, "Why Have Americans Become More Obese?" NBER Monograph, January, 2003.

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per day; in the '94-'86 Continuing Survey of Food Intake by Individuals, that figure had increased to 2,347 calories per day. Similar figures for adult women were 1,515 and 1,658 calories, respectively. These data are clearly summarized in a monograph available on the Internet at: <http://www.stanford.edu/group/SITE/Shapiro.pdf> (see Table 1). A large proportion of the increase was due to an increased number of calories consumed in snacks.

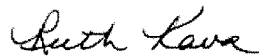
In addition, these lawsuits ignore the fact that obesity is due to a calorie imbalance: more calories consumed than are expended in physical activity. Americans are more sedentary than in the past, and thus even if they did not increase calorie intake, one would expect an increased body weight simply from the decreased energy expenditure. According to the Surgeon General's report *Physical Activity and Health* (US HHS, CDC, National Center for Chronic Disease Prevention and Health Promotion, 1996, Atlanta, GA), 25% of American adults report no leisure time physical activity; only 15% report engaging in vigorous physical activity at least three times per week during leisure hours. Similarly, 25% of young Americans aged twelve to twenty report no vigorous physical activity. During the decade of the '90s, the portion of high school students who reported being active for at least twenty minutes in gym classes decreased from 81 to 70%. These are not statistics describing an increasingly active population.

The scientific data thus indicate that the origin of the American obesity epidemic is multifactorial, and that ascribing primary blame to one aspect of the food industry is misguided at best.

Further, we certainly take exception to attempts to draw any analogy between cigarettes and fast food. Claims that any foods are addictive in the same sense that nicotine is addictive are ludicrous. Food is necessary for life; education is necessary for making healthful food choices. There are no healthful ways one can smoke cigarettes, and the main education one needs about them is to avoid them.

Our opinion of litigation ascribing primary causality to food purveyors is that such suits have no scientific basis. If they were successfully pursued, and particular foods were to disappear from the American market, we think the impact on national obesity rates would be minimal at best. Consumers would face a diminished range of food choices, without garnering any useful information that would assist them in making healthful food choices.

Submitted on behalf of the American Council on Science and Health.



—Ruth Kava, Ph.D., R.D.  
*Director of Nutrition*



**Testimony Regarding "Common Sense Consumption: Super-Sizing Versus Personal Responsibility."**

**Senate Judiciary Committee  
Subcommittee on Administrative Oversight and the Courts  
October 16, 2003**

**Neal D. Barnard, M.D.  
President, Physicians Committee for Responsible Medicine  
Submitted October 23, 2003**

Thank you for the opportunity to submit this testimony concerning Congressional efforts to immunize food manufacturers, distributors and sellers from their contributing role in this nation's obesity epidemic. I am a nutrition researcher, author of seven books on diet and health, and president of the Physicians Committee for Responsible Medicine, a nonprofit organization founded in 1985, which conducts clinical trials and advocates for preventive medicine and higher standards in research.

As has been acknowledged by virtually everyone involved in health care, and even by Senator McConnell, the sponsor of the Commonsense Consumption Act, obesity and its attendant health-related consequences such as cardiovascular disease and diabetes are serious problems in this country. This crisis was not caused by any one factor, nor will it be remedied by any one action. Rather, common sense tells us that there are many reasons—some obvious and some which have not yet been uncovered—why Americans are experiencing epidemic levels of obesity, just as common sense tells us that the solution will involve collective efforts by the government, the food industry, health care professionals, and consumers, among others.

As such, Congress should not be seeking to absolve the food industry of its responsibility. To push through the Commonsense Consumption Act or bills like it at this time is premature, needless, anti-consumer, anti-states rights, and anti-health.

At best, these efforts are 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. For instance, some industries hawking unhealthy foods 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. These studies indicate that there may indeed be an addictive quality of certain foods, and food producers are well aware of this fact.

The goal of preventing frivolous lawsuits against food manufacturers, distributors, or sellers of food related to overweight and obesity is readily achieved without legislation, as evidenced by the dismissal of the McDonald's lawsuit. Using currently available legal remedies, frivolous lawsuits will be dismissed before significant costs are incurred. Moreover, legislation will likely have the unwelcome result of blocking not only frivolous lawsuits, but also meritorious ones, running strongly contrary to consumers' interests and effectively robbing them of their day in court.

Efforts to ban food-related lawsuits are anti-consumer. Undoubtedly, personal responsibility is an important factor in this puzzle. But personal responsibility is only one factor, as food choices are not made in a vacuum. Industry actions are also a factor, and the fear of lawsuits has prompted industry to begin making important, though still largely insignificant, changes in the way they produce and market their products. For example, many fast food restaurants have added or are considering adding healthier menu alternatives, such as salads, fruit, and vegetable or soy burgers. Kraft Foods Inc. announced it will reduce the fat, salt, and sugar content of some of its products and that it will eliminate in-school marketing. Eliminating the threat of lawsuits will only hurt the consumer.

These efforts are also anti-states' rights. Prohibiting all civil actions from being brought against any member of the food industry for any claim related to overweight and obesity, which the Commonsense Consumption Act is trying to do, may be so broad as to violate the commerce clause. As the Supreme Court has said, Congressional Acts violate the commerce clause if they "embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." Consequently, these efforts unreasonably and unnecessarily interfere with the rights of states to have their courts decide these issues and to otherwise address the obesity epidemic in their state as they see fit. According to a July 23, 2003, article in the Philadelphia Inquirer, "From Augusta, Maine, to Sacramento, Calif., the number of bills and resolutions targeting the nation's fat epidemic has more than doubled in a year." Federal legislative efforts will trample on the states' interests in resolving, through all appropriate means including litigation, this important public health matter.

These efforts are anti-health. More than 65 percent of American adults are now overweight, Type 2 diabetes is being diagnosed in younger and younger age groups, and artery damage that eventually leads to heart disease is now routinely found in high school children. Rather than eliminate corporate liability, Congress should focus on passing comprehensive legislation aimed at solving America's epidemic of obesity. Some of this should include statutes targeting the food industry's irresponsible, obesity-causing actions.

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 all citizens of this country a healthier environment.



# CASE FILE

BURGER, FRIES AND LAWYERS:  
*THE BEEF BEHIND OBESITY LAWSUITS*  
BY TODD G. BUCHHOLZ

*Conducted for the U.S. Chamber of Commerce and  
the U.S. Chamber Institute for Legal Reform*

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Dr. Ruth Kava is a graduate of the University of Kansas (B.A., zoology, 1969). She earned a Masters of Science in Human Nutrition (1978) and a Doctorate in Human Nutrition (1984) from Columbia University in New York City. In 1994 she completed a dietetic internship at the New York Hospital, and became a registered dietitian in 1995.

Dr. Kava's research interests focused on nutrition during pregnancy and on animal models of genetic obesity and type 2 diabetes mellitus. She has authored and co-authored research papers in several scientific journals such as *Diabetes*, the *Journal of Nutrition*, and the *American Journal of Physiology*. Her professional memberships include the American Society for Nutritional Sciences, the American Dietetic Association and the North American Association for the Study of Obesity.

Since 1995, Dr. Kava has served as Director of Nutrition for the American Council on Science and Health. The ACSH's goal is to provide consumers with up-to-date, scientifically sound information on the relationship between human health and environmental factors, food, nutrition, lifestyle, and chemicals. As nutrition director, Dr. Kava has authored or directed production of educational materials on a variety of nutrition-related topics, including vitamin and mineral supplementation, biotechnology and food, functional foods, vegetarianism, dietary supplements, food irradiation, and coverage of nutrition topics by popular media. She has participated in radio and television interviews exploring issues around nutrition and food safety.



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***Foreword***

Litigators, eager to replicate the swath of remunerative tobacco lawsuits, have focused on the rapidly increasing girth of American consumers as a problem to be addressed in the nation's courts. Purveyors of fast foods like burgers, tacos, soft drinks and the like, typically companies whose pockets compare favorably to those of Big Tobacco, are the targets of trial lawyers eager to find a lucrative villain to sue.

Some in the public health arena have climbed aboard this bandwagon, blaming the obesity epidemic on McDonald's and Burger King for daring to "Super Size" their offerings. Because the increase in obesity and the proliferation of fast food venues coincided temporally, the assumption is widespread that such foods and companies played a major role in the supersizing of Americans. But as Todd Buchholz points out in his cogent essay, mere coincidence does not prove a causal relationship.

The relatively recent upswing in the percentage of overweight and obese Americans has a number of complex roots. Many facets of Americans' lives have changed since the 1970s, only one of which is the increased availability of fast foods. As Mr. Buchholz points out, only in the last few decades is it likely that an increase in Body Mass Index (BMI) signalled an unhealthy increase in body fat. Throughout much of human history a greater BMI probably contributed to increased health, and likely to greater longevity.

But of course, things have changed. The typical worker spends much less of his or her working life in motion, and when the working day is over, much less time in active pursuits – for amusement, for family activities, or for home and self maintenance.



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Food, all type of food, is much more readily available to the average American than ever before, and cheaper too. Not only are fast foods cheaper and more accessible, so are foods in other types of restaurants and in supermarkets. And Americans have been taking advantage of these benefits, perhaps to our own detriment. We've been snacking more, and consuming larger portions wherever we eat.

Far from fast food venues being villains in this scenario, Todd Buchholz makes a reasonable case for their actually providing nutritional benefits more cheaply than do other food purveyors. Using the price of a gram of protein as an index, Mr. Buchholz points out that many items available from places like Subway or Burger King provide protein even more cheaply than do supermarkets.

Relying on a wide variety of evidence, Buchholz vitiates the contention that fast food is the primary (or even an important) factor in the recent oversizing of Americans. If we give credence to the idea that any one type of food venue is the culprit in the obesity epidemic, we will ignore the true complexity of the factors behind it, many of which Todd Buchholz has illuminated in this essay. Anyone interested in gaining insight into this increasingly important health issue would do well to start by reading this essay – it contains much food for thought, none of which is fattening!

Ruth Kava, Ph.D., R.D.

Director of Nutrition, American Council on Science and Health

**ABSTRACT**

Americans have gained weight over the course of the last century. This increase stems from a variety of factors, primarily more consumption of calories and less vigorous activity. From a historical perspective, a rising caloric intake was a positive event for the first half of the twentieth century. Though the fast food industry has proliferated since the 1960s, there is little conclusive evidence that it is a primary cause of obesity. Further, this study finds that fast food has worked as a force to lower the cost of protein for consumers at all income levels. Lawsuits against fast food companies miss the mark from a nutritional, economic and legal perspective; they ignore the fundamental issue of personal choice and responsibility.



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### **A Scene:**

*The overweight baseball fan jumps to his feet in the bleachers of Wrigley Field, screaming for the Chicago Cubs to hold onto their 3-2 lead in the bottom of the ninth inning. He squeezes a Cubs pennant in his left hand while shoving a mustard-smeared hot dog into his mouth with the right. The Dodgers have a runner on first who is sneaking a big lead off the base. The Cubs' pitcher has thrown three balls and two strikes to the batter, a notorious power hitter. The obese fan holds his breath, while the pitcher winds up and fires a blazing fastball. "Crack!" The ball flies over the fan's head into the bleachers for a game-winning home run. The fan slumps to his bleacher seat and has a heart attack.*

*Who should the fan sue? (a) The Cubs for breaking his heart? (b) The hot dog company for making a fatty food? (c) The hot dog vendor for selling him a fatty food? (d) All of the above*

A few years ago these questions might have seemed preposterous. But now scenes better suited for the absurd stories of Kafka snake their way into serious courtroom encounters. While no federal court has yet heard a case on behalf of sulking baseball fans, just a few months ago, the U.S. District Court for the Southern District of New York responded to a complaint filed against McDonald's by a class of obese customers, alleging among other things that the company acted negligently in selling foods that were high in cholesterol, fat, salt and sugar.<sup>1</sup> In the past ten years we have seen an outburst of class action lawsuits that alleged harm to buyers. With classes numbering in the thousands, these suits may bring great riches to tort lawyers, even if they provide little relief to the plaintiffs. The sheer size of the claims and the number of claimants often intimidate defending firms, which fear that their reputations will be tarnished in the media and their stock prices will be punished – not because of the merits but from the ensuing publicity. In his opinion in the McDonald's case, Judge Robert W. Sweet suggested that the McDonald's suit could "spawn thousands of similar 'McLawsuits' against restaurants." Sure enough, a few days ago, hungry lawyers

gathered in Boston to plot their strategy for future obesity litigation, convening panels with titles such as "Food Marketing and Supersized Americans."<sup>2</sup> Recent books with titles such as *Fat Land* and *Fast Food Nation* promote the view that fast food firms are harming our health and turning us into a people who are forced to shop in the "big and tall" section of the clothing stores.<sup>3</sup> The *Wall Street Journal* recently reported that "big and tall" has become a \$6 billion business in menswear, "representing more than a 10 percent share of the total men's market."<sup>4</sup>

While it may be easy for critics to accuse fast food restaurants of serving fattening foods, this study analyzes the issues on several levels. First, this paper examines why fast food companies suddenly find themselves under legal attack. Second, this paper finds that fast food restaurants are not a chief explanation for rising obesity levels in the U.S. Third, this paper suggests that the spread of fast food restaurants has actually helped to push down the cost of protein, a key building block to good physical health. Fast food restaurants provide a very economical source of protein and calories (even though they may also be providing cheap sources of fat as well.) Fourth, this paper explains how changing and contradictory nutritional recommendations make the courtroom a particularly poor place to determine what and where people should eat.

The study does not conclude that you should stuff yourself with french fries or that you should get your children hooked on a daily "Happy Meal." But it does argue for more facts, more careful consideration – and less litigation.

#### **WHY HAVE FAST FOOD FIRMS BEEN UNDER ATTACK?**

Fast food restaurants ("FF")<sup>5</sup> have exploded in popularity since World War II. More cars, more suburbs and more roads have made roadside eating more convenient. During the 1950s, drive-through and drive-in burger, ice cream and pizza joints catered to a mobile population. McDonald's, which specialized in roadside restaurants, eclipsed



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White Castle hamburger stands in the 1960s because the latter had focused more on urban, walk-up customers.<sup>6</sup> The McDonald's road signs in the early 1960s boasted of serving a million hamburgers; now McDonald's claims to have sold over 99 billion burgers. The "zeros" in 100 billion will not fit on the firm's tote-board signs when the 100 billionth burger is sold.

And yet despite the popularity of such FF firms as McDonald's, Wendy's, Burger King, Pizza Hut, Taco Bell, Subway, etc – at which American consumers voluntarily spend over \$100 billion annually – it has become quite fashionable to denounce these restaurants for a variety of reasons. "They make people fat." "They hypnotize the kids." "They bribe the kids with toys." "They destroy our taste for more sophisticated foods." These condemnations often come from high-brow sources who claim that customers of FF are too ignorant or too blinded to understand what they are putting in their own mouths. But the onslaught of criticism is not even limited to the food. Animal rights activists condemn FF for animal cruelty. Environmentalists allege that FF produces too much "McLitter." Orthodox organic food fans accuse FF firms of using genetically modified ingredients, which they call "frankenfoods." In Europe, anti-globalization protestors allege that FF homogenizes culture and spreads capitalism far and wide. French kids are eating fries instead of foie gras. *Sacre bleu!*

With the fury directed at FF firms, it is no surprise that tort lawyers have jumped into the fray. Tort lawyers around the country settled the \$246 billion tobacco case in 1998. Those who have not retired on their stake from that settlement are wondering whether fast food could be the "next tobacco," along with HMOs and lead paint. After all, the Surgeon General estimates that obesity creates about \$117 billion in annual healthcare costs.<sup>7</sup> There are differences, of course. No one, so far, has shown that cheeseburgers are chemically addictive. Furthermore, most FF restaurants freely distribute their nutritional content and offer a variety of meals, some high in fat,

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some not. Nor is it clear that the average FF meal is significantly less nutritious than the average restaurant meal, or even the average home meal. The iconic 1943 Norman Rockwell Thanksgiving painting ("Freedom from Want") highlights a plump turkey, which is high in protein. But surely the proud hostess has also prepared gravy, stuffing and a rich pie for dessert, which though undoubtedly tasty, would not win a round of applause from nutritionists.

The key similarity, though, between the tobacco lawsuits and claims against the FF industry is this: both industries have deep pockets and millions of customers who could join as potential plaintiffs. Therefore, lawyers have enormous incentives to squeeze food complaints into the nation's courtrooms. They will not disappoint in their eagerness to pursue this.

#### ***HOW HAVE DIETS AND FOOD SOURCES CHANGED?***

If you believe the old saying, "you are what you eat," human beings are not what they used to be. Before jumping into today's fashionable condemnation of calories, let us spend a moment on a historical perspective and at least admit that for mankind's first couple hundred thousand years of existence, the basic human problem was how to get enough calories and micronutrients. Forget the caveman era, just one hundred years ago, most people were not receiving adequate nutrition. Malnutrition was rampant, stunting growth, hindering central nervous systems, and making people more susceptible to diseases. Often poor people begged on the streets because they did not have the sheer physical energy to work at a job, even if work was available to them. By modern standards even affluent people a century ago were too small, too thin and too feeble.<sup>8</sup> A century ago, an American with some spare time and spare change was more likely to sign up for a weight-gaining class than a weight-loss program.





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Just as life expectancy in the United States rose almost steadily from about 47 years in 1900 to 80 years today, so too has the "Body Mass Index" or BMI, a ratio of height to weight. (The BMI is calculated by dividing weight in kilograms by height in meters squared. A person five feet five, weighing 150 pounds, would have a BMI of 25. A taller person, say, six feet tall could weigh 184 and have a BMI of 25, too.) In the late nineteenth century most people died too soon and were, simply put, too skinny. The two are related, of course. For most of human history only the wealthy were plump; paintings of patrons by Peter Paul Rubens illustrated that relationship. In ancient times figurines of Venus (carved thousands of years ago) display chunky thighs, fulsome bellies and BMIs far above today's obesity levels. Likewise, skinny people looked suspicious to the ancients. Remember, that the back-stabbing Cassius had a "lean and hungry look." *The rise in the BMI from the nineteenth century to about 1960 should be counted as one of the great social and medical victories of modern times.* In a sense, it created a more equal social status, as well as a more equal physical stature.

### **WHAT WENT WRONG? SHOULD WE BLAME FF FOR BIGGER BMIS?**

So what went wrong more recently? It is *not* the case that the average BMI has suddenly accelerated. In fact, BMI has been rising fairly steadily for the last hundred and twenty years. Nonetheless, since the 1960s the higher BMI scores have surpassed the optimal zone of about 20-25.<sup>9</sup> No doubt, a more sedentary lifestyle adds to this concern. (In contrast, the healthy rise in BMIs during the early 1900s might be attributed to gaining more muscle, which weighs more than fat.) The post-1960s rise in BMI scores is similar to a tree that grows 12 inches per year, but in its 10<sup>th</sup> year starts casting an unwanted shadow on your patio. In the case of people, more mass from fat has diminishing returns, cutting down their life spans and raising the risk for diabetes, heart disease, gallbladder disease, and even cancer. Over half of American adults are overweight, and nearly one-quarter actually qualify as obese, according to the National Institutes of Health.

Should we chiefly blame FF firms for BMI s over 25? According to the caricature described by lawyers suing FF companies, poor, ill-educated people are duped by duplicitous FF franchises into biting into greasy hamburgers and french fries. The data tell us that this theory is wrong. If the "blame fast food" hypothesis were right, we would see a faster pace of BMI growth among poorly educated people, who might not be able to read or understand nutritional labels. *In fact, college educated, not poorly educated people accounted for the most rapid growth in BMI scores between the 1970s and the 1990s* – though poorly educated people still have a higher overall incidence of obesity. The percentage of obese college-educated women nearly *tripled* between the early 1970s and the early 1990s. In comparison, the proportion of obese women without high school degrees rose by 58 percent. Among men, the results were similar. Obesity among those without high school degrees climbed by about 53 percent. But obesity among college graduates jumped by 163 percent.<sup>10</sup> *If the "blame FF" hypothesis made sense, these data would be flipped upside down.*

	Percent Obese		Percentage Change
	1971-75	1988-94	
<u>Women Aged 20+</u>			
<High School	24	38	58%
College or More	7	20	186%
<u>Men Aged 20+</u>			
<High School	15	23	53%
College or More	8	21	163%

*Data derived from the National Health and Nutrition Examination Survey, US Dept. of Health and Human Services.*

Of course, we cannot deny that people are eating more and getting bigger. But that does not prove that FF franchises are the culprit. On average Americans are eating about 200 calories more each day than they did in the 1970s. An additional



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200 calories can be guzzled in a glass of milk, a soda, or gobbled in a bowl of cereal, for example. FF critics eagerly pounce and allege that the additional calories come from super-sized meals of pizza, burgers, or burritos. It is true that between the 1970s-1990s, daily fast food intake grew from an average of 60 calories to 200 calories. But simply quoting that data misleads. Though Americans have been consuming somewhat more fast food at mealtime, they have reduced their home consumption at mealtime. Americans have cut back their home meals by about 228 calories for men and 177 for women, offsetting the rise in fast food calories.<sup>11</sup> *In total, mealtime calories have not budged much, and mealtimes are when consumers generally visit FF restaurants.* So where are the 200 additional calories coming from? The U.S. Department of Agriculture has compiled the "Continuing Survey of Food Intakes by Individuals," which collects information on where a food was purchased, how it was prepared, and where it was eaten, in addition to demographic information, such as race, income, age and sex. The Survey shows us that Americans are not eating bigger breakfasts, lunches or dinners. But they are noshing and nibbling like never before. Between the 1970s and the 1990s, men and women essentially doubled the calories consumed between meals (by between 160 and 240 calories). In 1987-88 Americans typically snacked less than once a day; by 1994 they were snacking 1.6 times per day. But surely, the FF critics would argue, those FF cookies and pre-wrapped FF apple pies must account for calories. Again the data fails to make their case. *Women ate only about six more snack calories at fast food restaurants, while men ate eight more snack calories over the past two decades.* That is roughly equal to one cracker or a few raisins. Where do Americans eat their between-meal calories? Mostly at home. Kitchen cabinets can be deadly to diets. And in a fairly recent development, supermarket shoppers are pulling goodies off of store shelves and ripping into them at the stores before they can even drive home. Consumers eat two to three times more goodies inside stores than at fast food restaurants.<sup>12</sup>

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Why are people eating more and growing larger? For one thing, food is cheaper. From a historical point of view that is a very good thing. A smaller portion of today's family budget goes to food than at anytime during the twentieth century. In 1929, families spent 23.5 percent of their incomes on food. In 1961, they spent 17 percent. By 2001, American families spent just 10 percent of their incomes on food.<sup>13</sup> The lower relative cost of food made it easier, of course, for people to consume more.

Since the mid-1980s we have seen an interesting change in restaurant pricing, which has made restaurants more attractive to consumers. Compared to supermarket prices, restaurant prices have actually fallen since 1986. Whereas a restaurant meal was 1.82 times the cost of a store-bought meal in 1986, by 2001 a restaurant meal cost just 1.73 times as much.<sup>14</sup> Higher incomes and lower relative restaurant prices have induced people to eat more and to eat more away from home.

Despite the attraction of restaurant eating and the proliferation of sit-down chain restaurants such as the Olive Garden, TGI Friday's, P.F. Chang's, etc, Americans still consume about two-thirds of their calories at home. Critics of FF spend little time comparing FF meals to meals eaten at home, at schools or at sit-down restaurants.

The nature of the American workplace may also be contributing to higher caloric intake. Whether people dine while sitting down at a table or while standing at a FF counter, at the workplace they are literally sitting down on the job more than they did during prior eras. More sedentary desk jobs probably contribute to wider bottoms. Consider two middle-income jobs, one in 1953 and one in 2003. In 1953, a dockworker lifts 50 boxes off of a mini-crane and places it on a handtruck, which he pulls to a warehouse. In 2003, a person earning a similar income would be sitting in front of a computer, inputting data and matching orders with deliveries. What's the key difference? *Until recently, employers paid employees to exert energy and burn calories. In*



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*contrast, employers pay workers to stay in their seats. For many, the most vigorous exercise comes from tearing off a sheet of paper from a printer or walking to the refrigerator. Furthermore, I would suggest that the decline in factory work – with its fixed lunch and coffee break schedule – enables people to eat more often. Less factory work means less foremen supervision. According to Bureau of Labor Statistics data, manufacturing employment fell from about 24.4 percent of civilian employment in 1970 to merely 13 percent in 2000. A woman who spends her career sitting at a desk may “end up with as much as 3.3 units of BMI more than someone with a highly active job.”<sup>15</sup> A person telecommuting from home may be sitting even closer to the refrigerator or cupboard. In 1970 the term “telecommuting” did not even exist. By 2000, however, with advances in computers and remote access technology, approximately 12 percent of the workforce worked from home at least part of the week. This figure does not include over 25 million home-based businesses.<sup>16</sup> Casual observation implies that many telecommuters take breaks from their home-work at coffee shops and other sellers of baked goods.*

Finally, some analysts argue that over the past three decades the national anti-smoking campaign has driven up cigarette prices and led smokers to switch from nicotine to calories.<sup>17</sup>

### **FAST FOOD EATING VS. ALTERNATIVES**

Very few defenders of FF would tell moms and dads to throw out the home-cooked meal and instead eat 21 meals a week at a FF restaurant. But it is a mistake to stereotype FF as simply a cheeseburger and a large fries. FF restaurants have vastly expanded their menus for a variety of reasons, including health concerns and demographic shifts. The increasing role of Hispanic-Americans in determining national food tastes has inspired many FF franchises to offer tacos, burritos and salsa salads. Wendy's, traditionally known for its square-shaped hamburgers, offers a low-fat chili

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dish that the Minnesota Attorney General's office recommended as a "healthier choice" in its fast food guide.<sup>18</sup> McDonald's has continuously revamped its menu in recent years. On March 10, 2003, the company unveiled a new line of Premium Salads that feature Paul Newman's Own All-Natural dressings. In its publicity blitz, McDonald's facetiously asked, "What's Next? Wine Tasting?" Meanwhile, Burger King features a Broiled Chicken Teriyaki in addition to its traditional fare. Judge Sweet notes that the Subway sandwich chain, which boasts of healthy choices, hired a spokesman who apparently lost 230 pounds of weight while eating the "Subway Diet."<sup>19</sup> In fact, FF meals today derive fewer calories from fat than they did in the 1970s. Consumers can customize their FF meals, too. Simply by asking for "no mayo," they may cut down fat calories by an enormous proportion. It is worth pointing out that FF firms introduced these alternative meals in response to changing consumer tastes, not in reply to dubious lawsuits. During the 1990s, McDonald's and Taco Bell invested millions of dollars trying to develop low-fat, commercially viable selections such as the McLean Deluxe hamburger and Taco Bell's Border Lights. Burger King adopted its "Have It Your Way" slogan several decades ago.

While plaintiffs' lawyers vigorously denounce the nutritional content of FF, they tend to ignore the nutritional content of alternatives. Home cooking, of course, has a nice ring to it, and it is hard to criticize the idea of a traditional meal cooked by mom or dad. But if we put nostalgia aside for a moment, we can see that the typical American meal of 25 years ago might win taste contests but few prizes from today's nutritionists. Meat loaf, fried chicken, butter-whipped potatoes and a tall glass of full-fat milk may have kept us warm on a cold winter evening. But such a diet would surely fail a modern test for healthy living. And let's not even discuss a crusty apple pie or bread pudding for dessert. Yesterday's "comfort" food gives today's dieticians indigestion. *No surprise then that today's FF derives a smaller percentage of calories from fat than a typical home meal from 1977-78.* In fact, even in the 1970s, FF meals had almost the



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same fat/calorie ratio as home cooking at that time. By this measure of fat/calories, FF in the 1970s looked healthier than restaurant cooking.<sup>20</sup> Therefore, the caricature of FF as a devilish place for nutrition makes little historical sense.

Now it is true that home cooking has changed since the 1970s and that it has made even more progress than FF at reducing fat calories. Very few families these days feast on pork rinds and pecan pie, a development that flatters our current nutritional tables. How do FF meals compare to schools? Despite the legions of concerned dieticians and PTA leaders, school meals do not look considerably better on the test of fat. While schools provide slightly fewer fat calories, they deliver more saturated fat than FF, the more dangerous subset of fats. The comparison to sit-down restaurants is similar, with no clear advantage to either FF or sit-down restaurants. Of course, FF firms have made it easier for patrons to learn about nutritional content than fancier kinds of food outlets. Few patrons of the fabled 21 Club in New York would know that its \$26 hamburger is made with rendered duck fat. Should super-chef Daniel Boulud worry about lawsuits for daring to sell a \$50 hamburger at db Bistro Moderne that is crafted from ground sirloin and braised short ribs, stuffed with foie gras, and topped with shaved black truffles?

In sum, the facts show that obese plaintiffs might just as well walk up to a FF counter rather than tuck a napkin under their chins and dine at a chic restaurant or at a school.

FF critics also like to criticize portion sizes. True, FF restaurants have been offering super-sized sandwiches, drinks, and french fries. But have these critics been to a movie theater lately, where popcorn containers look like bushel baskets? Or to fancy restaurants featuring all-you-can-eat Sunday buffets? A study in the *Journal of the American Medical Association* cited the "most surprising result [as] the large portion-size

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increases for food consumed at home—a shift that indicates marked changes in eating behavior in general.”<sup>21</sup> People eat bigger portions of hamburgers, fries, and Mexican food on their own kitchen tables than when they are sitting on a FF stool. The study found that “the average home-cooked hamburger now weighs in at about eight ounces, versus perhaps 5.5 ounces in full-service restaurants and a little over seven ounces at fast-food outlets.” When the USDA surveyed portion sizes and compared them to official U.S. government portions, it did find that FF hamburgers exceeded official estimates by 112 percent. But it also found that Americans were eating pasta portions that surpass official measures by 333 percent and muffins that rise to 480 percent of the official sizes.<sup>22</sup> If we are turning into a jumbo people, we are a jumbo people everywhere we eat, not just where the tort lawyers target defendants.

#### **FAST FOOD AND PROTEIN PER DOLLAR**

As discussed earlier in this paper, obtaining enough protein and calories to fuel the human body has been a constant struggle throughout history. A time traveler from almost any other era would be befuddled by our current obsession with losing weight, which has spurred America’s \$50 billion diet industry, \$12 billion in annual health club revenues, and the 100,000 radical gastric bypass surgeries last year.<sup>23</sup> Nowadays in the United States food comes pretty cheap, and FF has played a role in giving people access to inexpensive foods.

There are many measures of nutritional value. In an earlier time, we might simply measure calories per dollar. Because, however, critics accuse FF of selling “empty” calories (that is, calories comprised of fats and sugars), I have developed a more specific benchmark, namely “cost per gram of protein.” Protein is the building block for muscles, and animal protein foods, including meat, poultry, fish, dairy products and eggs, contain the [nine] essential amino acids that cannot be synthesized in the body. Using the ratio of dollar/protein gram seems reasonable and, because it does not include fats and





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sugars, creates a tougher test for FF than, for example, dollar/calorie.

This section compares the cost of protein obtained at FF restaurants to protein obtained at supermarkets. It finds that FF restaurants provide reasonable value to the consumer, considering the cost of raw materials and the cost of time in preparing meals. In a survey of fast food chains and supermarkets in five southern California communities (where the FF chains and the supermarkets were located within the same towns), I compared the cost of purchasing a "marquee" hamburger, a grilled chicken sandwich, a fish sandwich, a sliced turkey sandwich, and a green salad. The results suggest that in some cases consumers can actually purchase a high protein meal at a fast food chain for less than the cost of buying the separate groceries at a supermarket and preparing the sandwich themselves. The comparisons understate the cost of supermarket purchases for two principal reasons:

- First, supermarket prices generally reflect a cost savings for purchasing a larger quantity. You can order one fish fillet from Burger King; it is nearly impossible to buy a single frozen fish fillet in your supermarket.
- Second, supermarket prices do not reflect the time and cost to the shopper of preparing the meal at home. Nor have I included the extra ingredients such as pickles, relish, onion, mustard, etc. There is little doubt that for a worker earning the average hourly rate (which is \$15, according to the Bureau of Labor Statistics) preparing a cooked sandwich would cost far more in materials and time than simply purchasing it from a FF restaurant. Even for a minimum wage worker earning \$5.15 per hour an FF sandwich is probably much cheaper than spending 30 minutes preparing and grilling a hamburger, fish fillet, or chicken breast.

On average, a gram of hamburger protein found in a Burger King Whopper or McDonald's Big N' Tasty costs about seven cents. Each sandwich provides 25 grams of protein. During a recent national campaign, both of these restaurant chains slashed

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their prices, bringing the dollar/protein ratio down to just 3.8 cents. The supermarket survey shows that a gram of protein from a ground beef patty and bun costs about eight cents (leaner beef would cost somewhat more, standard ground beef somewhat less). The cost of supermarket beef does not include the cost of a tomato, lettuce, pickle, and other accompaniments, nor does it include any time or labor costs for preparing a sandwich yourself.

For fish fillets, the results were similar. A Burger King fish fillet provides protein at 7.8 cents per gram. Van de Kamp's and Gorton's frozen fish fillets cost 15 cents per gram.

The results for grilled chicken sandwiches display an advantage for supermarket buyers. A Burger King grilled chicken sandwich provides 35 grams of protein at 10.5 cents per gram. McDonald's grilled chicken costs 13.9 cents per gram. Purchasing chicken breast fillets at a supermarket averages just 4.6 cents per gram of protein. Again, the comparison does not include the extra costs or time involved in creating a grilled chicken sandwich served with lettuce, tomato, and seasoning.

Sliced turkey also shows an advantage for supermarket shoppers. While a Subway turkey sandwich costs almost 24 cents per gram of protein, sliced Sara Lee turkey averages just over 10 cents per gram of protein. Once again, the Subway sandwich also includes lettuce, tomatoes, green peppers, onion, olives, pickles and a choice of breads, as well as the convenience of someone else putting together the meal.

Salad greens are roughly similar in price at FF restaurants and supermarkets. Because greens are not notable for their protein content, I have instead calculated the cost per ounce. A Burger King side salad costs just under 20 cents per ounce, compared with over 27 cents for a Fresh Express bag of prewashed "American Salad."




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**BURGER, FRIES AND LAWYERS: THE BEEF BEHIND OBESITY LAWSUITS**

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In sum, FF provides in a number of cases competitively priced foods per gram of protein. For people who lack the time, kitchen space, or ability to purchase from grocery stores and cook at home, FF can provide significant benefits. Furthermore, if consumers choose with some level of prudence from the FF menus, they can eat fairly nutritious meals.

***IS NUTRITION A MOVING TARGET?***

I remember my mother forcing us to eat beef liver every two months because it was iron-rich. I hated it and often snuck bite-sized pieces under the table to our appreciative sheepdog. Nowadays, few people press cholesterol-laden liver on their family. For liver-hating kids everywhere, that represents a big step forward, almost as important as the Salk vaccine.

What has been more fickle than diet recommendations over the years, which continuously spark new fads? In the 1980s and early 1990s, "carbo-loading" was hot, and steaming bowls of pasta shoved roast beef off the dinner table. Today a plate of pasta scares those on the popular, low-carb Atkins diet, who are instructed to load up their breakfast plates with fried eggs, ham and bacon while leaving toast off to the side. According to the Atkins' approach, it is fine to bite into a greasy hamburger, but don't dare chew on the bun. Desserts, too, have changed. During the 1960s and 1970s, parents maneuvered to keep chocolate away from children, fearing the high fat and sugar content, as well as a connection to acne. More recently we read that cocoa powder and dark chocolate may help delay the progression of cardiovascular disease.<sup>24</sup> Chocolate contains a healthful nutrient known as a flavonoid that may slow the oxidation of "bad cholesterol" (LDL). So maybe we should not worry so much about a few pimples.

Surely, you might say, there are obvious national standards such as the official U.S. Department of Agriculture's food pyramid. Why not force FF firms to serve meals that

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fit into the pyramid's architecture? The pyramid tells us to eat at least six servings of grain (breads, pasta, etc) each day, two servings of fruit, and only a little bit of fat or sweets. Sounds reasonable, no? Here is what the controversial head of the Harvard School of Public Health says about the pyramid: "some people are likely to die from following the USDA pyramid because they will be eliminating healthy fats, such as liquid vegetable oils, that actually reduce the risk of heart disease."<sup>25</sup> Who should Wendy's listen to? The U.S. government or Harvard? Is this a fair choice for a restaurant?

During the 1980s, nutrition advocates lobbied McDonald's to switch its french frying oil from partially beef-derived to vegetable-based. Then after McDonald's switched, many of the same advocates assailed McDonald's for using trans-fatty acids – a result of using the vegetable oils! Now McDonald's is introducing new vegetable oils that reduce the trans-fatty acids.

Here again, FF presents a very different case than tobacco, even though plaintiffs' counsels are eager to deploy the same lucrative, cookie-cutter approach to litigation. FF meals, though tasty to many patrons, are not chemically addictive. One seldom hears of Subway or Wendy's customers shaking with withdrawal symptoms when they give up a turkey sandwich or a frozen fish fillet. Second, no one has claimed yet that he or she became sick, cancerous, or even choked or coughed from "second-hand" eating. Swallowing food is very much an individual act.

Third, cigarette research has been rather consistent for decades in pointing to the physical effects of smoking. In contrast, diet advice and research has been inconsistent and often contradictory. As a result, FF firms have been reacting to the changing tastes and nutritional expectations of customers. As stated above, in the 1970s there was very little difference between the fat content of home-cooked meals or FF meals. FF chains did not start out by conspiring to sell diabolical menus. Over the past twenty




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years, homes and FF restaurants have pursued lower fat menus (though homes have admittedly moved more quickly). This would be expected since commercial restaurants would tend to follow the tastes of patrons. Today, nearly every FF restaurant offers non-fried poultry and low-fat salads. Further, within twenty seconds of inquiring, each of the FF chains mentioned in this paper produced nutritional content charts. Should we expect or demand that FF lead the march to better menus? How could they? What would they base it on? The U.S. government's nutrition pyramid? The Harvard pyramid? The Atkins diet? Weight Watchers? Oprah's personal plan? Clearly the best avenue is for FF firms to provide choices and provide information so that customers can be informed, prudent and as up-to-date as they like.

In April 2003, the *Wall Street Journal* carried the following headline: "Wendy's Sees Green in Salad Offering: More Sophistication, Ethnic Flavors Appeal to Women ...". Salads had leapt to more than 10 percent of Wendy's total sales, from 3 percent a year earlier. In October 2002, Bloomberg News announced that "Wendy's 3<sup>rd</sup> Qtr Net Rises 16 percent as Salads Boost Sales." The story explained how Wendy's new "Garden Sensations" salad strategy was drawing customers from sit-down restaurants, while also posing new challenges to McDonald's and Burger King, "as consumers seek healthier choices." The story then described how Wendy's more healthful strategy spurred on "rival Burger King [which] is trying to gain market share by introducing new items that compete directly with Wendy's, including a baked potato and chili ..."<sup>26</sup> Is this a broken system that desperately cries for judicial action? No, it is a super-competitive market where stores jockey for position, trying to please customers and their changing tastes for a more healthful lunch.

Faced with the conundrum of changing tastes and nutritional recommendations, Judge Sweet shrewdly took up the distinction between an inherently dangerous meal and a meal that may pose some legitimate risk, if only from over-consumption. The

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Restatement (Second) of Torts states that "[o]rdinary sugar is a deadly poison to some diabetics" and that "Good whiskey is not reasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fuel oil, is unreasonably dangerous."<sup>27</sup> These risks are not good reasons to outlaw good sugar or good whiskey. Fried fish may be oily but that does not mean it is contaminated. Absent a truly compelling and sweeping health reason, we should not let lawsuits rob consumers of choices.

Judge Sweet recognized "that the dangers of over-consumption of ... high-in-fat foods, such as butter, are well-known. Thus any liability based on over-consumption is doomed if the consequences of such over-consumption are common knowledge. ... Thus, in order to state a claim, the Complaint must allege either that the attributes of McDonald's products are so extraordinarily unhealthy that they are outside the reasonable contemplation of the consuming public or that the products are so extraordinarily unhealthy as to be dangerous in their intended use. The Complaint – which merely alleges that the foods contain high levels of cholesterol, fat, salt and sugar, and that the foods are therefore unhealthy – fails to reach this bar."<sup>28</sup> Judge Sweet also found, as I did in my survey, that McDonald's willingly provides information on the nutritional content of its products.

What would the plaintiffs' counsel want McDonald's to do – other than pay out settlement sums? Should Judge Sweet have stopped McDonald's from flipping burgers? What about diners at the 21 Club? Should they too be protected, or are the FF lawsuits a patronizing tool to protect the poor and the allegedly illeducated from their own mouths? If the fear is over-consumption, should McDonald's discriminate against plump people? Should a cheeseburger require a doctor's prescription? Should FF firms be required to punch holes in a meal ticket and refuse to serve those who have already filled their card? Surely some intermeddlers could devise a national BMI card,



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certified by a government nutritionist, that determines how many fat grams Burger King may sell to you. Of course, that number would have to be revised with each new issue of the *Journal of the American Medical Association* and after every meeting of the American Society for Clinical Nutrition.

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**CONCLUSION**

The Food and Drug Administration, with its battalion of researchers, aided by thousands of university and private-sector scientists throughout the world, are constantly exploring, testing and digging for scientific insight. A class action lawsuit would not be digging for scientific inferences. Instead, plaintiffs' lawyers would be digging into the pockets of franchise owners, employees and shareholders in order to pull out gold. Moreover, the threat of such lawsuits can do no good to the employees, shareholders or customers of FF firms. When tort lawyers strut in front of cameras waiving weighty complaints that are flimsy in facts, the media quickly follow the story. Nearly every major publication in the country carried stories about the McDonald's obesity suit. If "McLawsuits" spread, we will see at least one, if not all, of the following three results: (1) lower wages for FF employees; (2) lower stock prices for shareholders; and/or (3) higher prices for consumers. FF restaurants hire and train hundreds of thousands of workers; attract investments from millions of middle class citizens; and quench the hunger and thirst of millions of satisfied patrons.

This study finds that fast food restaurants are not a chief culprit in the fattening of America. But let us be frank here. Depending on what you pile on it, a fast food burger may not enhance your health and it may even hinder your ability to run a marathon – but it is very easy to find out how fatty that burger is. You do not need a tort lawyer by your side to pry open a brochure or to check the thousands of Web sites that will provide nutrition data. Lawsuits against fast food firms fail to recognize the fact that people choose what and how they want to eat. While it is unlikely that nutritionists will soon announce that super-sized double-cheeseburgers will make you thin, society should not allow the latest fads or the most lucrative lawsuits to govern what we eat for lunch.



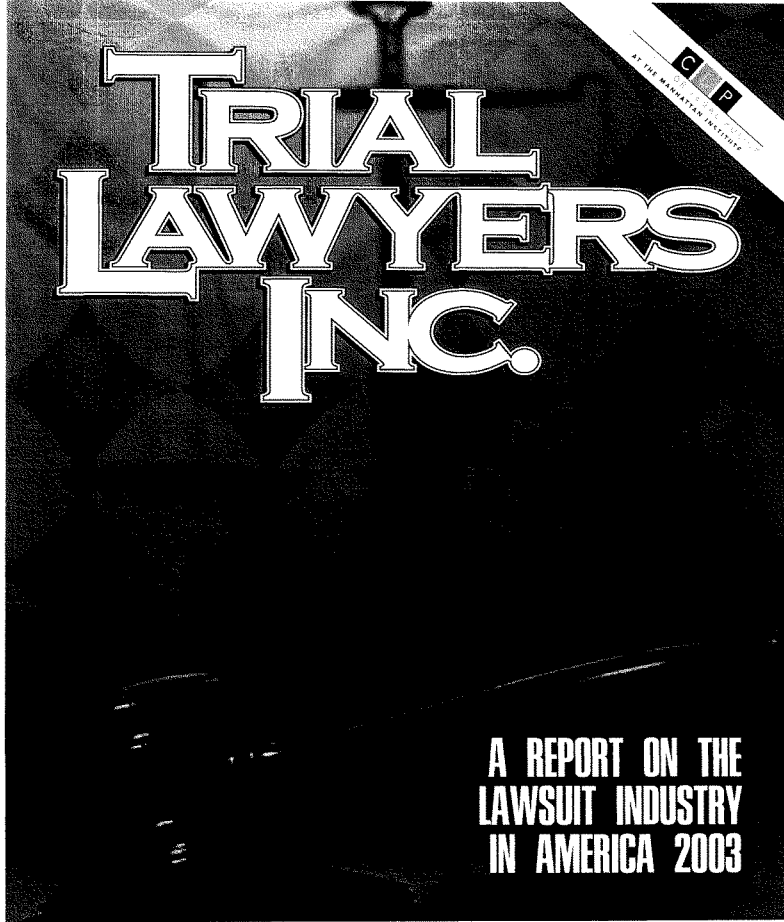


## BURGER, FRIES AND LAWYERS: THE BEEF BEHIND OBESITY LAWSUITS

By Todd G. BUCHHOLZ

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## A Message from the Director



As director of the Center for Legal Policy at the Manhattan Institute, it is my pleasure to present *Trial Lawyers, Inc.: A Report on the Lawsuit Industry in America 2003*. This report attempts to shed light on the size, scope, and inner workings of an industry poorly understood by the media and the general public. As we shall see, the lawsuit industry today is truly a behemoth, but—unlike the major corporations in our regular market economy—it remains financially

opaque. Whereas public corporations must disclose their financials in 10-Ks according to SEC regulations, trial lawyers practice in private partnerships that, under the guise of attorney-client privilege, have shielded their financials from public scrutiny.

*Trial Lawyers, Inc.*, while not an annual report per se, presents a snapshot of the lawsuit industry as it exists today. The picture is not pretty. Total tort costs today exceed \$200 billion annually, or more than 2% of America's gross domestic product—a significantly higher percentage than in any other developed nation.<sup>1</sup> Moreover, even as the economy has stagnated and the stock market has plunged, the lawsuit industry's revenues have continued to skyrocket: in 2001, the last year for which data are available, U.S. tort costs grew by 14.3%.<sup>2</sup> Over the last 30 years, tort costs grew at a compound annual rate of 9.1%; by comparison, the U.S. population grew 1.1% annually, the consumer price index grew 5.0% annually, and the gross domestic product grew 7.6% annually during the same period.<sup>3</sup>

I hasten to emphasize that while our figures on the size of the lawsuit industry are estimates—due to the industry's lack of transparency—those estimates are sparingly conservative. The above statistics were derived in studies conducted by Tillinghast-Towers Perrin that aggregated insured tort costs going to legal defense, plaintiffs, plaintiffs' attorneys, and administrative overhead. Significantly, these estimates *exclude* the tobacco settlements, most contract and securities litigations, and most punitive damages, as well as the substantial fees generated by the legal profession outside the field of tort law (in such areas as corporate and real-estate transactional work, bankruptcy litigation, or trust and estate planning). And our analysis fails to account for many of the perverse side effects of over-litigation, such as reduced investment and innovation and costly protective practices like "defensive medicine."

While many Americans may understand that the lawsuit industry in America has run amok—most people could quote anecdotal examples of silly cases generated by our "lawsuit culture"—the public tends not to appreciate that the litigation industry is nothing but Big Business. Given that 19% of all tort costs go to plaintiffs' attorneys, we can imagine a corporation called Trial Lawyers, Inc. which rakes in *almost \$40 billion per year* in revenues—50% more than Microsoft or Intel and twice those of Coca-Cola.<sup>4</sup> The lawsuit industry's lack of transparency prevents us from making an accurate profit estimate, but if its margins are as high as we suspect, Trial Lawyers, Inc. might well be the most profitable business in the world.

But is it really accurate to think of Trial Lawyers, Inc. as a "corporation"? While there are thousands of lawyers who don't fit the mold, for the big class action and mass tort attorneys who receive the lion's share of big awards, the answer, increasingly, is yes:

- Although not centrally organized, the plaintiffs' bar tends to be dominated by tort kingpins who carve up their markets—a practice that in a non-litigation context would be called *collusion*, a violation of antitrust law.

- Just as corporations are organized around different "lines of business," plaintiffs' lawyers target different industrial sectors. These include:

- Traditional profit centers like asbestos, tobacco, pharmaceuticals, and insurance;
- Potential growth markets like lead paint and mold; and
- Suits that today seem outrageous, like those against the fast-food industry, but might well be called *new product development*.

- Plaintiffs' lawyers are increasingly sophisticated in targeting their *customer base*; they aggressively and cooperatively solicit potential claimants through the Internet and traditional print, radio, and television media outlets.

- Although the trial bar likes to accuse corporations of having undue influence, the *government relations* and *public relations* arms of Trial Lawyers, Inc. are more powerful and focused than those of any other industry.

Indeed, the biggest difference between the lawsuit industry and most other industries is that Trial Lawyers, Inc. is in a noncompetitive market and that its takings are necessarily zero-sum, since the industry involves redistribution rather than free exchange.

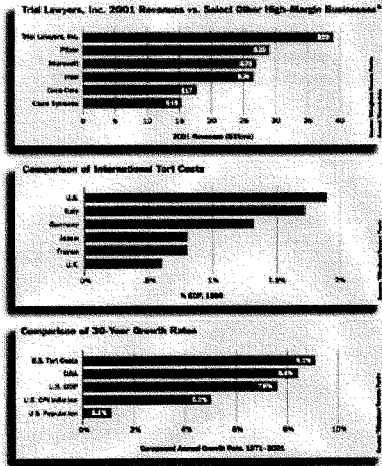
*Trial Lawyers, Inc.* does not claim to be comprehensive. As a brief survey of the "litigation groups" listed by the American Trial Lawyers Association on page 23 makes painfully obvious, the lawsuit industry is slowly creeping into almost every aspect of American life. We have only focused on the industry's highlights—or lowlights.

Since its founding in 1986, the Manhattan Institute's Center for

Legal Policy has been a leader in civil justice reform. Historically, our work has tended to be scholarly in nature. Senior Fellows Peter W. Huber and Walter K. Olson have been called the "intellectual gurus of tort reform" and have each written several influential books on malfunction in our legal system. We have published numerous policy papers by leading academics, judges, and practitioners. So *Trial Lawyers, Inc.* represents something of a departure for us. We are publishing this survey because the litigation industry remains woefully misunderstood by the public, and because we felt it useful to provide a single, readable source of information on the current practices and state of affairs in the litigation industry. We hope that you find *Trial Lawyers, Inc.* useful and informative, if alarming to read.



James R. Copland  
 Director, Center for Legal Policy  
 Manhattan Institute for Policy Research



MANHATTAN INSTITUTE FOR POLICY RESEARCH

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Visit [TrialLawyersInc.com](http://TrialLawyersInc.com) for updated information, pending legislation, and additional resources.

Introduction

# A RECESSION-RESISTANT INDUSTRY

As U.S. economy sputters, Trial Lawyers, Inc. continues to rake it in.

The national economy struggled again in 2002, as the stock market declined more than 20%, retail sales weakened, and businesses put off new investments. But the lawsuit industry proved resilient, and Trial Lawyers, Inc. recorded a banner year.

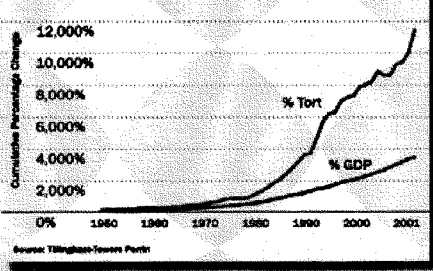
Led by novel lawsuits making big scores in diverse sectors—reeling in ever-larger class action verdicts, expanding the scope of asbestos litigation, barraging doctors with unprecedented new levels of claims—the lawsuit industry once again proved among the most lucrative business sectors in America. Trial Lawyers, Inc. earned around \$40 billion in revenues last year as settlements and claims reached record proportions.<sup>1</sup>

## The Lawsuit Industry

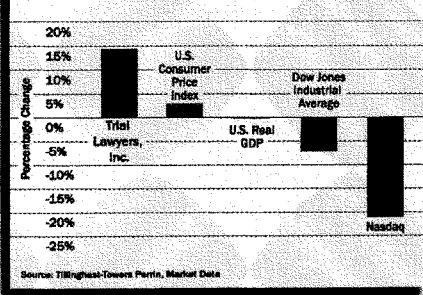
Despite the enormity of that sum, some people may find it strange to describe our civil justice system as an *industry*. After all, the classic conception of a plaintiff's lawyer is an advocate who waits until he is approached by a client with a grievance to be resolved—by negotiation, if possible, and by court action only as a last resort. But that conception is far from the current reality, at least for the big plaintiffs' attorneys running Trial Lawyers, Inc.

These leading plaintiffs' lawyers run complex, multi-million-dollar organizations that use sophisticated and expensive marketing to pursue clients through every commercial avenue, including the Internet. Like any business expanding its market presence, Trial Lawyers, Inc. uses sales tactics such as no-cost, no-risk offers. As one lawsuit industry-sponsored website declares, "Seek justice NOW by

Changes in Tort Costs and GDP, 1950-2001



2001 Overall Returns

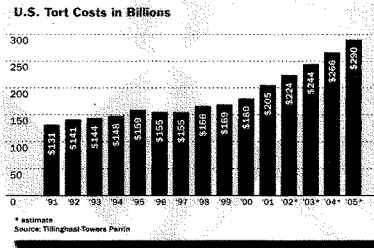


submitting your class action information online to be considered for a FREE case evaluation!"<sup>2</sup> These tactics are often designed to launch mass tort cases of the sort that have all but replaced the principle of fair and impartial justice with a new governing principle: winning through intimidation.

Free from the threat of antitrust actions, which have never been brought against the lawsuit industry, the industry is frequently organized into cartels: alliances of firms specialize in particular kinds of lawsuits (e.g., asbestos or medical malpractice), trade information, share briefs, combine clients, and jointly finance actions.<sup>3</sup> Law professors acting as "new product" consultants and legal magazines acting as a trade press publish articles describing the latest practice areas that are likely to produce "gold" for advocates.<sup>3</sup> The lawsuit industry even has its own venture capitalists—investors who back firms filing enormous, speculative class action suits with the hope that there will be rich rewards somewhere down the



**The overall cost of the tort tax over the next ten years may be almost triple the size of the 2001 and 2003 Bush tax cuts combined.**



road<sup>10</sup>—and its own secondary financial market, where shares in future legal fees are bought and sold.<sup>11</sup>

**The Cost of the Tort Tax**

While this new and predatory style of law has been a bonanza for Trial Lawyers, Inc., it has been a drain on the American economy and a serious threat to the livelihood and lifestyle of many Americans. America's tort system costs over \$200 billion annually;<sup>12</sup> even assuming that the underlying lawsuits have merit, much of this cost is wasteful and excessive—at least \$87 billion, according to the president's Council of Economic Advisors.<sup>13</sup>

The overall cost of this "tort tax" on our economy over the next ten years will be more than \$3.6 trillion, assuming tort costs increase at their 30-year trend. If tort costs increase at their 2001 pace, the ten-year cost of the tort tax will be over \$4.8 trillion—almost triple the size of the 2001 and 2003 Bush tax cuts combined.<sup>14</sup>

**A Dangerous Racket**

The impact of predatory litigation is staggering. Asbestos litigation alone has driven 67 companies bankrupt, including many that never made or installed asbestos, costing tens of thousands of jobs and soaking up billions of dollars in potential investment capital.<sup>15</sup> Moreover, the negative social costs of Trial Lawyers, Inc. can be measured in more than just dollars and cents. In 2002, a dozen states experienced medical emergencies because doctors and hospitals could no longer afford malpractice insurance.<sup>16</sup> Women scrambled for doctors to deliver their babies,<sup>17</sup> seriously injured patients had to be airlifted out of some locations because there were no practicing emergency-room physicians available,<sup>18</sup> and hospitals closed maternity wards to protect themselves.<sup>19</sup>

And thanks to Trial Lawyers, Inc., the babies that do get delivered are vulnerable to deadly and thoroughly preventable diseases. Why? The litigation industry has used specious theories lacking scientific support to sue vaccine manufacturers for alleged harmful effects caused by vaccines and vaccine preservatives.<sup>20</sup> Recognizing that vaccines provide enormous public benefit but inevitably cause side effects in some recipients, Congress in 1986 saved the few remaining vaccine manufacturers from near bankruptcy by shielding them from lawsuits and setting up an alternative no-fault compensation system for those harmed by vaccinations.<sup>21</sup> The lawsuit industry's recent end run around this legislation, in an age of potential bioterrorism, threatens not only public health but also homeland security.

Trial Lawyers, Inc. and its defenders argue that they are providing a necessary service. They portray themselves as the friend of the "little guy" against incompetent doctors and uncaring corporations. Though this portrayal may have been accurate 30 years ago—and may be today for some attorneys—the kingpins of the lawsuit industry have pursued mass tort and class action suits and turned litigation into a multi-billion-dollar business.

More and more, the industry resembles a racket designed to do little more than advance the incomes and interests of its members—everyone else be damned. In most class action cases, Trial Lawyers, Inc. rakes in huge fees while individual plaintiffs walk away with pennies.<sup>22</sup> In medical malpractice cases these days, Trial Lawyers, Inc. often takes between 40% and 70% of the award for its fees and costs.<sup>23</sup> In tobacco litigation, lawyers who never went to trial and never filed an original brief have claimed hundreds of millions of dollars in fees.<sup>24</sup> Trial Lawyers, Inc. is truly a lucrative—and dangerous—racket.



Attorneys' Fees

## THE NEW BILLIONAIRES

Top officers of Trial Lawyers, Inc. haul in sky-high fees for little work.

Once upon a time, the average person blanched at lawyer fees that reached upward of \$500 an hour at many of the best firms. But those high hourly fees are chump change compared with what Trial Lawyers, Inc. is raking in these days. From tobacco settlements to asbestos litigation to class action suits, the industry now boasts fees that can range as high as an astounding \$30,000 an hour, turning some members of Trial Lawyers, Inc. into overnight billionaires and providing the capital to bankroll new lawsuit ventures in new markets.<sup>25</sup>

### The Tobacco Settlements

Regardless of one's view about the merits of the suits, the mega-fees from the 1998 tobacco settlement were nothing but egregious. Some 300 lawyers from 86 firms will pocket as much as \$30 billion over the next 25 years even though, for many of them, the suits posed minimal risk and demanded little effort.<sup>26</sup> That staggering sum comes right out of taxpayers' pockets—enough money to hire 750,000 teachers. When it comes to big corporations ripping off the public, no one holds a candle to Trial Lawyers, Inc.

More than \$8 billion will go to a handful of firms that pioneered the first tobacco lawsuits in Mississippi, Florida, and Texas.<sup>27</sup> The Florida teams will take home \$3.4 billion, or \$233 million per lawyer.<sup>28</sup> That's \$7,716 an hour—assuming they each worked 24 hours a day, seven days a week for three and a half years.<sup>29</sup>

The branch of Trial Lawyers, Inc. hired by the state of Illinois to handle the tobacco settlement took no depositions and never submitted a reckoning of their hours, but pocketed \$121 million—and complained it should have gotten \$400 million.<sup>30</sup> Ohio and Michigan also signed on late in the game—after the heavy lifting had already been done—but their lawsuit industry sections still got \$265 million and \$450 million, respectively.<sup>31</sup>

The Michigan award alone amounted to \$22,500 an hour for the Pascagoula, Mississippi, firm of Richard "Dickie" Scruggs and for Ness Motley, the Charleston, South Carolina, firm that was headed by prominent trial attorney Ron Motley.<sup>32</sup> Motley, in many ways the "founder" of Trial Lawyers, Inc., helped get the asbestos litigation industry rolling in the 70s. Motley has now moved on to other prey, including lead-paint manufacturers, from whom he hopes to extract more huge sums, along with contingency fees for Trial Lawyers, Inc.<sup>33</sup>

The Scruggs firm will collect \$1.4 billion in the tobacco settlement.<sup>34</sup> Scruggs, who might be called the president of the tobacco branch of the lawsuit industry, is now gunning for HMOs.<sup>35</sup>

Baltimore trial lawyer Peter Angelos, who along with Motley and Fred Baron was an asbestos-suit pioneer, claimed a disputed \$1.1 billion in tobacco fees, or one quarter of Maryland's entire award.<sup>36</sup> Angelos is now suing cell-phone makers

**Trial lawyers are now hauling in fees that can range as high as an astounding \$30,000 an hour, turning some plaintiffs' attorneys into overnight billionaires.**

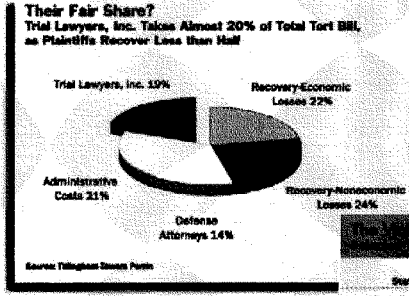


Ron Motley

TRIAL LAWYERS, INC.

**A TEXAS-SIZE FRAUD**

In July, former Texas attorney general Dan Morales pled guilty to two of 12 counts for which he had been indicted in connection with the Texas suits he filed against the tobacco industry.<sup>43</sup> Morales was accused of trying to funnel hundreds of millions of dollars from the Texas tobacco settlement to a friend and converting campaign contributions to personal use.<sup>43</sup> Morales's case demonstrates the grave danger when government officials subcontract out the state's judicial authority to private litigators in Trial Lawyers, Inc.<sup>44</sup>



(so far unsuccessfully)<sup>37</sup> in addition to passing his time as owner of the Baltimore Orioles.

**Who Benefits?**

While Trial Lawyers, Inc. makes a fortune from its suits—Scruggs and other top officers are known to fly around in their private jets<sup>38</sup>—its customers are often left with crumbs. For example, in one Florida class action, lawyers for flight attendants suing the airlines for health problems resulting from secondhand smoke pocketed \$49 million of the \$349 million settlement.<sup>39</sup> The flight attendants who brought the suit got nothing unless they filed individual suits and demonstrated that secondhand smoke actually made them sick.

Class members in a lawsuit against Toshiba for defective laptop computers did little better, collecting between \$100 and \$443 in cash and coupons. The take for Trial Lawyers, Inc.: \$148 million.<sup>40</sup>

For the lawsuit industry as a whole, less than half of all dollars actually go to plaintiffs, and less than a quarter of all dollars actually go to compensate plaintiffs' economic damages. As the above examples indicate, in mass tort and class action claims, plaintiffs' awards are typically divided among so many individuals that the only people who meaningfully profit are the plaintiffs' lawyers themselves. And in capturing 19% of a \$200 billion pie, Trial Lawyers, Inc. does handsomely indeed.<sup>41</sup>

State	Payments to State	Amount to Lawyers	Law Firms
Mississippi	\$4.1 billion	\$1.4 billion	Richard Scruggs, Hans Mealey
Florida	\$12.2 billion	\$3.4 billion	Scruggs, Hans Mealey, nine Florida firms
Texas	\$17,900 million	\$3,299 million	Scruggs, Hans Mealey, five Texas firms
Massachusetts	\$8.3 billion	\$770 million*	Hans Mealey, Jeff Calmeser, four Boston firms
Hawaii	\$1.38 billion	\$80 million**	Hans Mealey, Scruggs, four Hawaii firms
Illinois	\$6.3 billion	\$131 million*	Hughes Bosman, Jeff Calmeser, two other firms
Iowa	\$1.8 billion	\$85 million	Hans Mealey, six other firms
Louisiana	\$4.8 billion	\$675 million**	Scruggs/Hans
Kansas	\$1,787 million	\$54 million*	Hans Mealey, Scruggs, two Kansas firms
Ohio	\$10.1 billion	\$285 million**	Hans Mealey, Scruggs, five other firms
Oklahoma	\$2 billion	\$280 million*	Hans Mealey, Scruggs, four Oklahoma firms
Puerto Rico	\$3.2 billion	\$78 million*	Hans Mealey, Scruggs, two local firms
New Mexico	\$1.25 billion	\$24.5 million**	Two local firms
South Carolina	\$2.3 billion	\$62.8 million**	Hans Mealey
Utah	\$1 billion	\$41.85 million**	Clayton Crockett, Sandberg & Peterson, Hans Mealey
California	\$20 billion	\$837.8 million**	William Wells, Jeff Calmeser, five California firms
Michigan	\$8.7 billion	\$480 million**	Hans Mealey, Scruggs
New York	\$75 billion	\$325 million**	Hans Mealey, Scruggs, Hughes Bosman, three local firms

CIRP  
 AT THE DIRECTOR, ALL 1974



—Mature Product Line: Class Actions

## THE REAL CLASS WARFARE

Predatory class action lawsuits drive up consumer costs and reduce innovation.

Class actions were conceived as an expeditious way for people with similar grievances to join in a common suit and get compensated for injuries. But class actions have evolved into a favored means for Trial Lawyers, Inc. to launch predatory assaults on businesses and large institutions, often in the name of clients who don't even know they are being represented.

Despite the absurdity of many of these suits, legitimate companies are hard-pressed to defend themselves because they face thousands or even millions of plaintiffs. As they watch their share prices sink with bad publicity, companies almost always have to settle rather than risk billions of dollars in punitive damages.<sup>45</sup>

Increasingly, the end result is huge fees for the lawsuit industry—an average of over \$1,000 per hour according to *Class Action Reports*<sup>46</sup>—but relatively tiny awards for individual plaintiffs.<sup>47</sup> For example, in one Texas case, lawyers sued two auto insurers for overbilling because the insurers rounded up premium bills to the next dollar (a practice that was sanctioned by the state insurance department) and pocketed almost \$11 million; policyholders got a paltry \$5.50 each.<sup>48</sup>

### Sophisticated Customer Targeting

Predatory class action lawsuits are getting significant traction from Trial Lawyers, Inc.'s sophisticated marketing tactics. Websites help trial lawyers troll for class members online: "Justice is now a click away" announces a headline on ClassActionAmerica.com, where for \$8.95 a month consumers can get information on hundreds of class action "opportunities" and sign up to get "the money that you may be due."<sup>49</sup>

Moreover, innovative new financing mechanisms are enabling the lawsuit industry to initiate many more costly suits. Outfits such as ExpertFunding.com and American Asset Finance are the industry's venture capitalists, assembling portfolios and expecting to hit on two or three out of every dozen investments.<sup>50</sup>

### A Race to the Bottom

Unlike traditional lawsuits, class actions tend to involve plaintiffs from multiple jurisdictions, if not from all over the nation. Thus, instead of filing suit at the place of residence or injury—as is normally required in the typical single plaintiff lawsuit—Trial Lawyers, Inc. is able to "shop" class action suits in search of the most favorable forum. Quite predictably, the best forum winds up being a state "magnet court" well known for its hospitable treatment of class action lawsuits.

For instance, Madison County, Illinois—recently made famous by handing out a \$10.1 billion verdict against Philip Morris for allegedly insinuating that its "light" cigarettes were "safer"<sup>51</sup>—has seen a tremendous upsurge in class action filings in recent years. From 1998 to 2000, class action filings in Madison County increased over 1,800%; over 80% of these suits were brought on behalf of proposed nationwide classes.<sup>52</sup>

The costs associated with the proliferation of magnet courts go beyond the increased settlement values they generate for often tenuous claims. The fact that major national policy decisions are increasingly being made by county court judges, who are elected by and accountable to only the several thousand residents of their home communities, presents a serious threat to the democratic and federalist principles underlying our constitutional design.

For example, in November 1999, an Illinois judge in a county adjacent to Madison County awarded a national class of plaintiffs \$1.2 billion in a lawsuit against State Farm Insurance.<sup>53</sup> State Farm had allegedly been "fraudulent" in authorizing the use of generic parts in

### MAGNET COURTS—IN THEIR OWN WORDS

Don't believe us about the "magnet court" phenomenon? Take it from king tobacco lawyer Dickie Scruggs, who had this to say about "magic jurisdictions":

[W]hat I call the "magic jurisdiction" . . . [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected; they're State Court judges; they're populists]. They've got large populations of voters who are in on the deal, they're getting their [piece] in many cases. And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places. The plaintiff lawyer walks in there and writes the number on the blackboard, and the first juror meets the last one coming out the door with that amount of money. . . . The cases are not won in the courtroom. They're won on the back roads long before the case goes to trial. Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or the law is.<sup>54</sup>



Dickie Scruggs

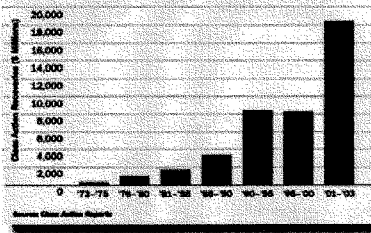
**Between 1997 and 2000, U.S. firms saw a 300% jump in federal class actions and a 1,000% spike in state class actions filed against them.**

automobile repairs, even though using generic parts was not only allowed but actually required by some states to reduce insurance costs. The local Illinois judge thus unilaterally overrode the considered policy decisions of many other states' democratically elected officials.<sup>34</sup>

**The Costs of Class Action Abuse**

Between 1997 and 2000, American corporations reported a 300% increase in federal class actions and a 1,000% spike in state class actions filed against them.<sup>35</sup> This explosion in class action suits is driving up costs for all consumers. Moreover, the fear of litigation—especially in health care—has kept new products off the market. Lawsuits against IUDs and Norplant rods, for example, are the main reason that only three new contraceptive products have come to market in the U.S. in the last decade, all of them variations on existing technology; not surprisingly, American companies today spend 20 times more on developing new cosmetics than on research into contraceptives.<sup>36</sup>

**Class Action Recoveries Have Skyrocketed**



**MARKET IN-SECURITIES**

Perhaps nowhere are class action suits more pervasive—or more pernicious—than in the securities industry. Within days of a drop in a company's stock price (usually a high-growth technology stock with a naturally high share-price volatility), Trial Lawyers, Inc. swoops in to file a claim—often lacking any real proof of corporate wrongdoing. Corporations faced with the inevitable, extremely onerous discovery process must defend themselves at great expense; little wonder that such cases typically settle, with one-third of the proceeds going to Trial Lawyers, Inc.<sup>37</sup>

These actions merely redistribute wealth from one class of shareholders to another—with a sizable cut for Trial Lawyers, Inc.—and thus do nothing to curb management abuse.<sup>38</sup> Some critics have called this system nothing less than "legal extortion";<sup>39</sup> a Florida judge rejecting a recent securities class action settlement compared the lawyers in that case to "squeegee boys" who . . . run up to a stopped car, splash soapy water on its perfectly clean windshield and expect payment for the uninvited service of wiping it off.<sup>40</sup>

The plaintiffs' firm in that Florida case was none other than Milberg Weiss Bershad Hynes & Lerach, Trial Lawyers, Inc.'s 800-pound gorilla for securities class actions. Headed by New York's Mel Weiss and San Diego's Bill Lerach, the firm handles the majority of all securities class actions nationally (though a reported rift between Weiss and Lerach has recently led the firm to announce a decision to split its East and West Coast offices).<sup>41</sup>

Incredibly—though hardly unpredictably—Lerach and his lawsuit industry colleagues have tried to place the blame for the Enron debacle and other corporate implosions on the 1995 Private Securities Litigation Reform Act (PSLRA), which was intended to curb some of the worst abuses of the Trial Lawyers, Inc. squeegee boys.<sup>42</sup> But since the empirical evidence shows that securities class actions' settlement values are unrelated to the merits of the underlying cases,<sup>43</sup> the argument that the securities class action system offers any meaningful deterrent to corporate misconduct is wholly unpersuasive.

Indeed, Lerach's public posturing on the PSLRA notwithstanding, the law actually created barriers to entry for Milberg Weiss's potential competitors.<sup>44</sup> And despite the PSLRA, the securities gravy train for Trial Lawyers, Inc. rolls on: securities class action filings rose 31 percent in 2002, and Milberg Weiss negotiated three recent settlements of \$300 million or more.<sup>45</sup>



Mature Product Line: Asbestos

# ASBESTOS LITIGATION: FIRE IN THE COURTS

Bankruptcies explode as the asbestos inferno rages on.

Last year, Trial Lawyers, Inc.'s asbestos juggernaut rolled on, racking up multi-million-dollar judgments for claimants with little or no injury and funneling billions of dollars into the pockets of the lawsuit industry. The longest-running mass tort in U.S. history and arguably the most unjust, asbestos litigation has so far bankrupted 67 companies and wrung \$54 billion from helpless corporations.<sup>67</sup> That's more than the total bill for all Superfund sites, Hurricane Andrew, or the World Trade Center attacks.<sup>68</sup>

## Asbestos-Related Bankruptcies, 2000-2002

A-Beet  
AC&S  
A. P. Green Industries  
Armstrong World Industries  
ANTRA (Synkoloid)  
Babcock & Wilcox  
Bethlehem Steel  
Burns & Roe Enterprises  
Eastco Industrial Safety Corp.  
E. J. Bartells  
Federal Mogul Corp.  
G-1 Holdings  
Harsco-Walker  
J. T. Thorpe  
Kaiser Aluminum and Chemical  
MacArthur Companies  
North American Refractory Co.  
Owens Corning Fiberglas  
Pittsburgh Corning  
Pittco  
Porter Hayden  
Shook & Fletcher  
Sinker Engine Company  
Swan Transportation Corp.  
USG Corporation  
Washington Group International  
W. R. Grace

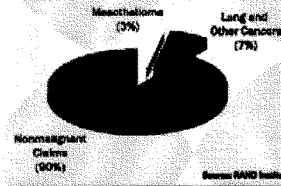
Source:  
American Academy of Actuaries

## An Avalanche of New Claims

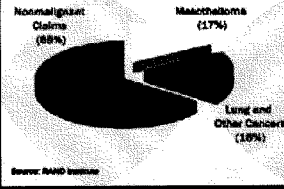
The asbestos litigation nightmare is far from over. By current estimates, some 600,000 claimants, or fewer than a quarter of the potential plaintiffs, have filed suit. Experts are forecasting that total claims could reach 1.3 million to 3.1 million<sup>69</sup> and that the final price tag could be \$200 billion to \$275 billion.<sup>70</sup>

Driving up the cost are the skyrocketing number of claims—60,000 a year<sup>71</sup>—often by people with little or no evidence of injury. Since cases of serious illness—mesothelioma

## Nonmalignant Claims Constitute Almost 90% of Asbestos Claims . . .



## . . . and Almost Two-thirds of Asbestos Compensation Awards



and other cancers—have remained level at about 4,000 a year, Trial Lawyers, Inc.'s creative marketers have stepped up recruitment of ever more marginally impaired claimants.<sup>72</sup> Such was the case with six former railroad workers in a Lexington, Mississippi, case decided in October 2001. The jury awarded them \$25 million each, even though not one of them exhibited any form of asbestos-related disease.<sup>73</sup>

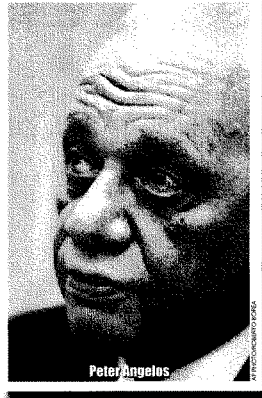
## The Search for New Defendants

Even as it files suits for claimants who are not injured, Trial Lawyers, Inc. is supporting its asbestos product line by targeting any solvent company that ever used a product containing asbestos, no matter how minute the amount. To date, 6,000 companies representing 91% of the industries in the United States have been named as defendants.<sup>74</sup>

The industry has targeted companies like AC&S, Inc., a tiny Lancaster, Pennsylvania, insulation contractor being sued in a rural, plaintiff-friendly county in Mississippi.<sup>75</sup> Not only did AC&S never perform work at any of the sites where the six plaintiffs in the case worked, but it sold few



**Predatory lawsuits in cases where there are no observable health problems are surging even as cases of serious disease remain essentially flat.**



products that contained asbestos. Those facts did not deter a jury from returning a judgment against the company for nearly \$84 million.<sup>76</sup> AC&S last year filed for bankruptcy.

Other defendants' connection with asbestos is even more tenuous. Under siege are companies like Chiquita Brands, Sears Roebuck, and 3M, the last of which never made or sold asbestos but is accused of failing to warn users that its masks would not filter out asbestos dust if they were not used properly.<sup>77</sup> Little more than bystanders, such companies are now bearing the brunt of asbestos litigation, paying out 60% of all claims.

**Cases That Never Go to Trial**

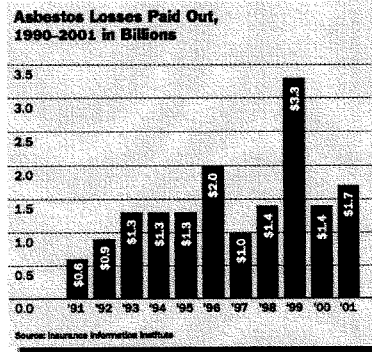
Faced with a seemingly bottomless pool of claimants, defendants are increasingly electing to settle, abandoning any attempt to verify the claims pouring in or to defend themselves at the risky mass trials in which evidence of illness or fault plays no discernible role. Between 1993 and 2001, only 1,598 out of hundreds of thousands of asbestos claimants have received jury verdicts.<sup>78</sup>

One reason? The horde of asbestos claimants seems to be well coached by Trial Lawyers, Inc. In one noted case, defense attorneys discovered a memo from one of the lawsuit industry's biggest asbestos litigation firms, Baron and Budd, coaching plaintiffs on their testimony. Among other things, the memo urged plaintiffs "to maintain that you NEVER saw any labels on asbestos products that said WARNING OF DANGER."<sup>79</sup>

**The Asbestos Litigation Victims**

The avalanche of new claims has experts questioning whether there will be any money left to pay future claims. Often, nonmalignant claims have so drained the pot of money that seriously ill, more deserving claimants have been left to squabble over the crumbs. The widow of Dale Dahlke, a 53-year-old electrician and cost estimator at the Puget Sound Naval Shipyard who died last year of asbestos-induced mesothelioma, can expect to get about \$150,000 for her husband's affliction, a meager 1% of the \$25 million that each of the Mississippi railroad workers was awarded.<sup>80</sup> Claimants suffering from deadly mesotheliomas get a scant \$10,000 from the trust set up by Johns-Manville to settle its asbestos claims.<sup>81</sup>

Also left holding the bag are workers and shareholders of bankrupt and besieged companies, who have seen jobs and equity evaporate. Companies bankrupted by asbestos have slashed an estimated 60,000 jobs,<sup>82</sup> failed to create 128,000 new jobs,<sup>83</sup> and forgone an estimated \$10 billion in investment,<sup>84</sup> according to new studies by RAND and Sebago Associates. Workers' retirement funds, many of which held substantial portions of company stock, have shrunk 25%.<sup>85</sup> The damage will escalate—if current estimates of the eventual payout prove accurate—to \$33 billion in forgone investment<sup>86</sup> and 423,000 jobs not created.<sup>87</sup>



— Mature Product Line: Medical Malpractice

## AN UNHEALTHY SYSTEM

Doctors flee as skyrocketing malpractice claims drive up insurance costs.

Among Trial Lawyers, Inc.'s most mature markets is that for medical malpractice. Today, soaring jury verdicts are producing outstanding returns for the lawsuit industry even as they drive up insurance costs and make it difficult for patients in some areas to find doctors or hospital care.<sup>88</sup> Hard-pressed to pay skyrocketing premiums or even to find coverage, doctors are abandoning risky procedures, retiring early, and moving out of tort-friendly states.<sup>89</sup> A major challenge facing Trial Lawyers, Inc. in the future will be how to maintain this lucrative market as these avoidance tactics spread. But for the moment, business couldn't be better.

### Exploding Malpractice Costs

In 2000, the median jury award for malpractice rose 43%, to \$1 million.<sup>90</sup> By 2001, 52% of all awards exceeded \$1 million.<sup>91</sup> Urban juries in particular are prone to grant mega-awards, and judges, increasingly hard to shock, are less inclined these days to reduce them. In 2002, three of the top ten verdicts in the nation—\$94.5 million, \$91 million, and \$80 million—were returned in malpractice lawsuits. All involved lawsuits in plaintiff-friendly New York City or the suburbs of nearby Long Island.<sup>92</sup>

No doctor is safe from Trial Lawyers, Inc. A 2002 *Medical Economics* survey of 1,800 physicians found that 58% had been the target of a lawsuit. In some areas of the country, such as the border counties of south Texas, predatory attorneys have swarmed in and recruited impoverished immigrants as claimants.<sup>93</sup> Doctors and hospitals in Hidalgo County got hit with 750 claims between 2000 and 2001, compared with 131 in 1999.<sup>94</sup>

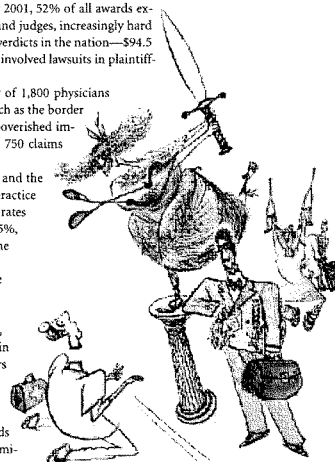
The majority of all malpractice suits are weak or bogus, but the huge awards and the millions of dollars required to defend even spurious actions have driven up malpractice insurance rates beyond what many doctors can afford. Between 2000 and 2002, rates typically rose between 30% and 75%, with even larger increases in some crisis states.<sup>95</sup>

Trial Lawyers, Inc. tries to blame these rising rates on the insurance companies.<sup>96</sup> But a January 2003 study by Brown Brothers Harriman, which tracked investment returns in malpractice insurance over 25 years based on the lawsuit industry allies' own data, refutes that assertion, finding that what has precipitated the crisis is the huge growth in awards and settlements and inadequate premiums to cover them (see graphs).<sup>97</sup>

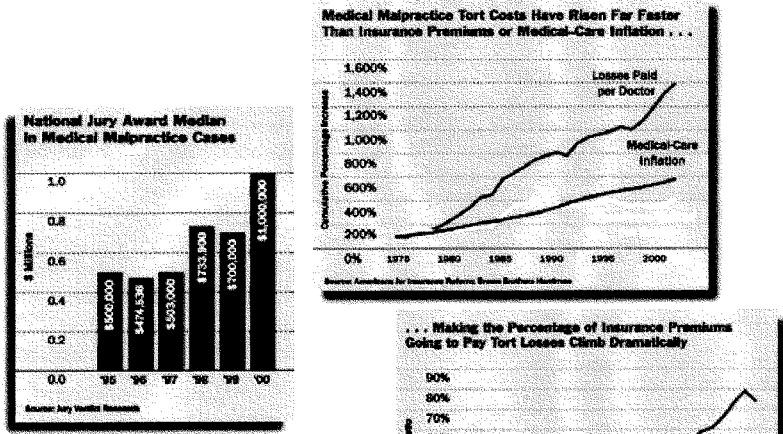
### Malpractice States in Crisis

Arkansas  
Connecticut  
Florida  
Georgia  
Illinois  
Kentucky  
Mississippi  
Missouri  
Nevada  
New Jersey  
New York  
North Carolina  
Ohio  
Oregon  
Pennsylvania  
Texas  
Washington  
West Virginia

Source: American Medical Association



**Nearly 80% of doctors say they order unnecessary tests and 74% say they make unnecessary referrals to specialists due to fear of being sued.**



**A Health-Care Crisis**

As a result of Trial Lawyers, Inc.'s relentless assault on the medical industry, insurers are abandoning plaintiff havens, leaving thousands of doctors and hospitals scrambling to find coverage.<sup>158</sup> The country's biggest malpractice insurer, the St. Paul Companies, last year exited the business entirely after incurring nearly \$1 billion in losses.<sup>159</sup> In Pennsylvania, one of 18 states with out-of-control rates, only two malpractice insurers remain, down from ten only five years ago. In Mississippi, at least 15 insurers have left the market since 1997.<sup>160</sup>

Obstetricians and neurosurgeons—high-risk specialties—bear the brunt of Trial Lawyers, Inc.'s skyrocketing verdicts. A child born with cerebral palsy after a difficult birth can command tens of millions of dollars for care over a lifetime; and juries tend to grant such awards even though medical science shows that delivering doctors are almost never to blame. The upshot is that many obstetricians are limiting their practices to gynecology, forcing women in some areas to travel hours for prenatal care and delivery.<sup>161</sup> In West Virginia, some community hospitals have shuttered maternity units because local obstetricians can't afford or find coverage.<sup>162</sup> Neurosurgeons are also abandoning malpractice war zones like West Virginia;<sup>163</sup> stroke patients and head- and spinal-trauma victims who need urgent treatment are helicoptered to Pittsburgh, 70 miles away.

Other high-risk specialists also are finding themselves in the crosshairs of the lawsuit industry. In October 2001, a group of 18 physicians, who performed about 80% of the orthopedic surgeries in Delaware County outside Philadelphia, announced that they would stop doing surgery and answering trauma calls.<sup>164</sup> To protest rising insurance costs driven by predatory lawsuits, surgeons at the University of Nevada Medical Center in Las Vegas quit for ten days last summer, forcing a temporary closing of the medical center's trauma center.<sup>165</sup>

Physicians who continue practicing have adjusted their behavior to minimize risk. Nearly 80% of doctors say they order unnecessary tests and 74% say they make unnecessary referrals to specialists.<sup>166</sup> The price tag: an estimated \$60 billion to \$108 billion a year in unnecessary health-care costs.<sup>167</sup> In the meantime, millions go uninsured for lack of affordable health care.

High-Growth Product: Mold

# A PARASITIC PLAGUE SPREADS

Trial Lawyers, Inc. makes more and more money off mold despite the lack of scientific evidence.

Like any business, Trial Lawyers, Inc. continues to explore new opportunities with perceived growth potential. Unfortunately, the out-of-control state of our civil justice system means that the number and size of new ventures in litigation is vast indeed. Current expansion opportunities include lawsuits targeting manufacturers of lead paint—even though the industry supported a voluntary standard to eliminate lead pigments in paint in 1955<sup>108</sup>—and HMOs, the industry everyone loves to hate.<sup>109</sup> But one of the most curious, and largest, new markets for Trial Lawyers, Inc. involves a ubiquitous little fungus we all know well: mold.<sup>110</sup>

Mold has of course grown for millions of years, hardly noticed, thriving in water-soaked niches and colonizing dark and wet places. Until recently, insurance adjusters generally handled mold claims only as a result of a covered incident, such as a burst water pipe.<sup>111</sup> The average mold claim cost several thousand dollars.<sup>112</sup> But now under the aggressive actions of the litigation industry, mold has emerged from its dank corners and become a topic for the front pages and the courts. Mold made the big time when trial lawyers started claiming that some forms of mold caused a variety of health problems, creating a much broader scope of liability for insurers and landlords.<sup>113</sup> Common mold has become an uncommon liability problem, driving up the cost of homeowners' insurance and threatening to slow construction in some areas of the country.<sup>114</sup> The *American Bar Association Journal* is now predicting that mold could surpass asbestos in case volume and value of awards.<sup>115</sup>

### Creating a "Black Gold" Rush

Though it's been pervasive for centuries, mold only recently has been accused of a huge variety of health ailments. Did mold itself become more toxic than before? Scientific evidence suggests not<sup>116</sup> (see box on next page), since the flood of new claims encompasses both new and old homes and materials in broad geographic areas.

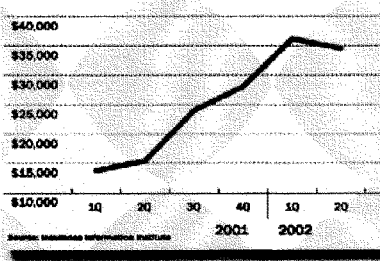
Despite the lack of scientific evidence, successful mold suits are the newest growth sector for Trial Lawyers, Inc. and for a whole industry of consultants who now work around the issue. The *American Bar Association Journal* made the case blatantly when it headlined a recent article on the growth of mold litigation **MOLD IS GOLD**.<sup>117</sup> Law professors use the term in academic papers,<sup>118</sup> while consultants advertise their services claiming mold is "black gold." The underside of this aggressive approach to common mold is already evident: in Texas, homeowners working with so-called mold remediation firms were reported to have conspired to "cook" houses, that is, to heat them and flood them with water to produce big insurance claims.<sup>119</sup> No doubt they were spurred by increasing reports of big awards.

### The Mold Litigation Explosion

The vanguard big-money mold award came from a landmark 1999 Texas lawsuit in which homeowner Melinda Ballard sued her insurer for \$100 million after her family allegedly got sick from mold

**The American Bar Association Journal is now predicting that mold could surpass asbestos in case volume and value of awards.**

**The Best Little Tort Tax in Texas: Increased Cost of Mold Claims**





contamination.<sup>120</sup> *The New York Times Magazine* ran photos of workers in hazard suits combing through her mold-infested Texas mansion. In June 2001, a jury awarded Ballard \$32 million, including \$12 million in punitive damages, \$5 million for mental anguish, and nearly \$9 million for attorney fees.<sup>121</sup>

Within months, mold lawsuits proliferated, fed by an uncritical media. Television personality Ed McMahon sued for \$20 million, claiming fungus in his home killed his dog;<sup>122</sup> his case ultimately settled for \$7 million.<sup>123</sup> Activist Erin Brockovich went to court over mold in the \$6 million home she bought with proceeds from her hit movie.<sup>124</sup>

Starting in 1999, mold filings in Texas increased sharply—up by 1,300% from the beginning of 2000 to the end of 2001, according to the Insurance Information Institute.<sup>125</sup> Average mold claims today cost about \$35,000, and many exceed \$100,000.<sup>126</sup> Through 2001, mold claims had added over \$1 billion in costs to the homeowners-insurance system in Texas alone; that's an annual increase of about \$440 for every insured household in Texas.<sup>127</sup>

Although mold litigation caught fire in warm-weather climates like Texas, California, and Arizona, the litigation frenzy has now gone national. One of the biggest cases of 2002 involved an apartment complex in New York City. At Henry Phipps Plaza South, 400 residents sought class action status for an \$8 billion lawsuit—the largest mold lawsuit to date. The group settled for \$1.2 million.<sup>128</sup>

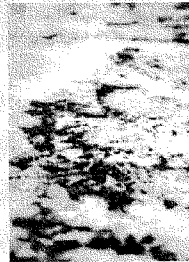
#### MOLDY CLAIMS

Exposure to mold causes runny noses, itchy eyes, scratchy throats, and other allergic symptoms in susceptible people. Beyond that, assertions of serious health effects from mold are unproven.<sup>129</sup>

What the litigation industry calls "toxic molds" are uncommon mold strains releasing substances called mycotoxins, which have been asserted to be a cause of significant health ailments such as asthma, pulmonary damage, and memory loss.<sup>130</sup> Chief among the suspected mold species is *stachybotrys chartarum*, a black mold variety that requires nearly constant moisture to grow.

Despite the assertions by Trial Lawyers, Inc., medical science has yet to show a significant link between toxic mold and the serious health risks it allegedly causes. Acknowledging that individuals with chronic respiratory disease may be prone to more serious negative effects from mold, the U.S. Centers for Disease Control states the following as the current state of science on "toxic" mold: "There are very few case reports that toxic molds (those containing certain mycotoxins) inside homes can cause unique or rare health conditions such as pulmonary hemorrhage or memory loss. These case reports are rare, and a causal link between the presence of the toxic mold and these conditions has not been proven."<sup>131</sup>

Much of the mold panic was fueled by earlier U.S. Centers for Disease Control studies in 1994 and 1997 that initially found an association between exposure to *stachybotrys chartarum* mold and lung damage in a group of infants in Cleveland. In 2000, however, the CDC took the very unusual step of retracting its endorsement of the earlier reports, citing faulty methodology.<sup>132</sup>





High-Growth Product: Regulated Industries

# REGULATION THROUGH LITIGATION

Trial Lawyers, Inc. supplants elected officials and regulators as a fourth branch of government.

Once upon a time, law school graduates could look forward to one of two career paths. Those who hoped to make it rich—or pay down their law school loans—headed off to big law firms, representing deep-pocket clients in typically mundane if complex business cases. Those who retained a sense of idealism and wanted to “help people” or “better the world” left for low-paying but personally fulfilling “public interest” jobs, on behalf of indigent defendants, civil rights causes, and the like.

As Manhattan Institute senior fellow Walter Olson chronicles in *The Rule of Lawyers*, however, the deep pockets of Trial Lawyers, Inc.—especially since the tobacco settlements—have completely changed this equation.<sup>133</sup> Today, the fastest way to riches in the legal profession is undoubtedly to become a plaintiffs’ attorney for Trial Lawyers, Inc. And those members of Trial Lawyers, Inc. who want to “change the world” can do just that, as well, since they have amassed so much power that they can drive major policy changes on their own.<sup>134</sup>

As Olson notes, the litigators of Trial Lawyers, Inc. have emerged as a “fourth branch” of government; and the grave danger of this branch is that, unlike the three carefully designed by our constitutional framers, there are essentially no checks and balances on its power.<sup>135</sup> Whether or not one agrees with the political objectives pursued by Trial Lawyers, Inc., one has to be fearful of the democratic implications of ceding national decision making to an unelected, unaccountable, self-interested industry. As former secretary of labor Robert Reich has noted, “The era of big government may be over, but the era of regulation through litigation has just begun.”<sup>136</sup>

## Justice for Hire: The Co-option of Attorneys General

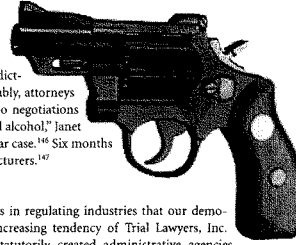
A key to Trial Lawyers, Inc.’s ability to regulate has been its ability to cooperate with, and receive the blessings of, state attorneys general.<sup>137</sup> State attorneys general typically have broad power to sue on behalf of the state for alleged wrongdoings.<sup>138</sup> The breakthrough in Trial Lawyers, Inc.’s relentless pursuit of Big Tobacco’s deep pockets came when Dickie Scruggs got the cooperation of Mississippi’s attorney general Mike Moore to go after the tobacco companies in suits to “recoup” state medical expenses due to smoking-related illnesses.<sup>139</sup> Scruggs had given substantial sums to Moore’s campaign as well as flying him around the state to campaign stops.<sup>140</sup>

When the case went national, more states came after tobacco dollars, and Moore and Scruggs conceived the almost unprecedented step of having state attorneys general contract out the cases to Trial Lawyers, Inc. on a contingency-fee basis.<sup>141</sup> It mattered little that the theory underlying the states’ cases was rather shaky (both the RAND Corporation and the Congressional Research Service estimated that the external costs of smoking were exceeded by excise taxes on cigarettes).<sup>142</sup> Typically, each state’s case went both to “national” counsel—the originators of the tobacco gambit, such as Scruggs, Motley, and their friends—as well as to “local counsel” from the state in question.<sup>143</sup>

The potential for corruption in such a scenario is vast. For example, Kansas attorney general Carla Stovall hired her former firm, Entz & Chanay, to be the state’s local counsel; not surprisingly, the firm offered her an office and generous contributions for her reelection campaign.<sup>144</sup> Though there has been no evidence of any *quid pro quo* in this or most other cases, the indictment and guilty plea of former Texas attorney general Dan Morales (see box on page 7) shows just how dangerous these arrangements can be.<sup>145</sup>

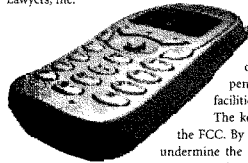
**As former secretary of labor Robert Reich has noted, “The era of big government may be over, but the era of regulation through litigation has just begun.”**

Emboldened by its success against the tobacco companies, Trial Lawyers, Inc. predictably branched out to tackle new industries it wished to regulate. And, again predictably, attorneys general continued to help them in their cause. When questioned during the tobacco negotiations "whether she intended to go after other industries, such as firearms, high-fat food, and alcohol," Janet Reno replied that she was "not aware of any other industry" that might present a similar case.<sup>146</sup> Six months later, the Justice Department decided to assist Trial Lawyers, Inc. in suing gun manufacturers.<sup>147</sup>



#### Sorry, Wrong Number: Trial Lawyers, Inc. Takes on Regulated Industries

In cases like tobacco and guns, Trial Lawyers, Inc. has supplanted the legislatures in regulating industries that our democratically elected officials had left alone. Even more dangerous, perhaps, is the increasing tendency of Trial Lawyers, Inc. to regulate through litigation industries that are already heavily regulated by statutorily created administrative agencies. Industries like pharmaceuticals (see box, below) and telecommunications are closely regulated by the Food and Drug Administration and Federal Communications Commission, respectively, but have nevertheless been on the receiving end of a litigious regulatory assault by Trial Lawyers, Inc.



Indicative of the assault on regulated industries is the antitrust suit against Verizon launched by Curtis V. Trinko, LLP, a securities class action firm, on behalf of East Coast customers.<sup>148</sup> Under an FCC consent decree, Verizon paid competitive local exchange carriers \$10 million over a billing glitch.<sup>149</sup> Trinko's lawsuit alleges that all Verizon customers are also entitled to compensation under the antitrust laws, under a novel interpretation of what is known as the "essential facilities" doctrine.<sup>150</sup>

The key point here is that such a lawsuit runs squarely against the regulatory authorities vested in the FCC. By forcing Verizon and other local carriers to subsidize their competition, the lawsuits threaten to undermine the balance struck by Congress in the Federal Communications Act of 1996.<sup>151</sup> And as noted by John Rogovin, the FCC's acting general counsel, "It's difficult to imagine how a private case getting into this 'essential facilities' issue . . . is not going to bump up quite seriously into what the commission is doing."<sup>152</sup> *Trinko* is now pending before the U.S. Supreme Court; only time will tell how far Trial Lawyers, Inc.'s power to regulate by litigation will extend.

#### A DANGEROUS PRESCRIPTION

Pharmaceuticals are heavily regulated by the Food and Drug Administration under Congress's grant of authority.<sup>153</sup> For better or worse, all drugs must go through lengthy and onerous approval processes before being introduced into the market.<sup>154</sup> Yet such strict regulatory oversight has not stopped Trial Lawyers, Inc. from suing drug manufacturers over alleged side effects and "defects." From Bendectin to Fen-Phen, from Norplant to IUDs, Trial Lawyers, Inc.'s pursuit of deep-pocket pharmaceutical manufacturers has been relentless; and often the "science" underlying such claims has been junk.<sup>155</sup>

Some of the costs of such litigation are obvious: raising consumer prices, reducing research into new drugs, and forcing manufacturers to withdraw existing effective drugs from the market. The onslaught of cases against birth control devices such as Norplant and IUDs has led to a virtual cessation of research into new contraceptives and drugs or devices to facilitate women's reproductive health.<sup>156</sup> But particularly insidious is the pharmaceutical suits' usurping of FDA authority. Every jury award that a drug was too "unsafe" to be introduced into the market directly undermines the FDA's congressional mandate to approve which drugs are safe and effective enough to be sold. The FDA has intervened in recent court actions to explain how judicial review of FDA-approved labeling undermines FDA oversight of drugs and patient health.<sup>157</sup>



\_\_\_\_\_New Product Development: Fast Food

## BURGERS: THE NEXT CASH COW?

Trial Lawyers, Inc. continues product development by making litigation against the fast-food industry its *suit du jour*.

Many people scoffed when 270-pound Caesar Barber filed a lawsuit against McDonald's and three other fast-food companies in July 2002 accusing them of selling high-fat meals that made him obese.<sup>158</sup> Blaming restaurants for making one fat seems, well, fatuous. And when a judge dismissed Barber's lawsuit, it seemed to be proof that such cases aren't based on weighty evidence.<sup>159</sup>

But it would be a mistake to think the obesity lawsuits are no longer on the menu. Barber's was just the first course in what is emerging as the latest strategic initiative by Trial Lawyers, Inc., which aims to feast on the fast-food industry. The strategy is clear: attempt to hold food firms responsible for a portion of the public health costs related to obesity<sup>160</sup>—just as the tobacco industry was eventually forced to fork over the expense of tobacco-related illnesses—and collect big fees for cooking up whopper suits.

### A Research and Development Strategy

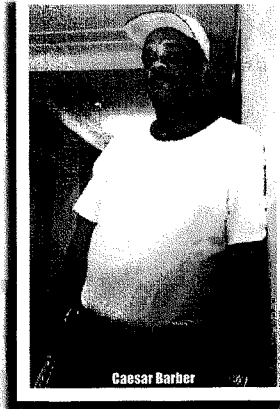
For Trial Lawyers, Inc., a few early unsuccessful cases represent nothing more than new product development costs: in tobacco litigation, lawyers fought unsuccessfully in court for years before finally working out the kinks that stood in the way of big-fee verdicts. Such early defeats are merely up-front investments, much like research-and-development expenses for other industries.<sup>161</sup> When potential revenues are massive—consider the

\$30-billion-plus contingency fees extracted from Big Tobacco—Trial Lawyers, Inc. has every incentive to invest heavily in such speculation.

Trial Lawyers, Inc.'s initial line of attack is to go after food companies that make allegedly deceptive claims about fat, calories, and nutrition.

That strategy was used in a 2002 class action filing against the makers of Pirate's Booty cheese snacks, which accused them of presenting inaccurate figures on fat content.<sup>162</sup>

A second line of attack is accusing companies like McDonald's of misleading people to believe their food is healthy. In his January dismissal of fast-food claims brought in the Southern District of New York, Judge Robert Sweet rejected claims of deception but seemed to leave on the plate the possibility of revisiting whether McDonald's was negligent, if by processing its food McDonald's created a more dangerous product.<sup>163</sup> In early September, Judge Sweet again dismissed the plaintiffs' restated claim, but it is reasonable to expect Trial Lawyers, Inc. to keep trying to Super Size its claim.<sup>164</sup>



**By forcing food suppliers to foot the bill for a portion of the social cost of diseases related to severe obesity, the lawsuit industry could again pocket tens of billions.**

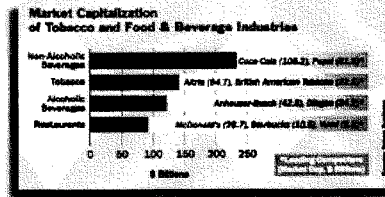
**A Public Opinion Crusade**

As in the tobacco cases, Trial Lawyers, Inc. is banking on a growing din from public health advocacy groups gradually to swing public opinion against the food companies. Longtime trial-lawyer ally Ralph Nader, for instance, has already called a McDonald's hamburger "a weapon of mass destruction."<sup>165</sup> The Center for Science in the Public Interest, an advocacy group started by former lawyers associated with Nader, has been promoting ideas such as imposing a "fat tax" on sodas and greasy snacks to help cover the cost of epidemic levels of obesity and mandating that McDonald's post calorie counts for each item on its menu boards.<sup>166</sup> Perhaps unsurprisingly, such "public health" advocates make little effort to encourage individuals to take personal responsibility through improved exercise and eating habits.

**Golden Arches: A Pot of Gold?**

The eventual goal for Trial Lawyers, Inc., however, is to force food suppliers to foot the bill for a portion of the social cost of diseases related to severe obesity—including type-two diabetes, sclerotic arteries, heart attacks, and strokes—while taking the lion's share of the payout themselves.<sup>167</sup> Under its typical contingency-fee arrangements, the lawsuit industry could again pocket tens of billions.

The success of the fast-food suits may hinge on the ability of trial lawyers to persuade state attorneys general to begin filing suit to recover obesity-related medical costs from food companies. Similar actions proved to be a breakthrough in the tobacco lawsuits. And if the tobacco settlements are any guide, state lawmakers faced with budget crunches may be all too willing to go after the Golden Arches' pot of gold—and expand Trial Lawyers, Inc.'s bottom line in the process.



**WHAT'S NEXT IN NEW PRODUCT DEVELOPMENT?**

**•Hookers v. Hollywood.** A group claiming to represent prostitutes, drug abusers, and panhandlers wrote to several Hollywood film companies in August 2002 seeking cash compensation for depriving them of business opportunities and displacing them from neighborhoods during the filming of various movies.<sup>168</sup>

**•Like a Cigarette Shouldn't.** A former Winston cigarette model filed a \$65 million lawsuit against the cigarette maker for allegedly damaging his reputation. The model, who appeared in print and TV ads in the 1970s, claims he has suffered emotional pain as a result of the use of his image to influence others to smoke.<sup>169</sup>

**•Better Off Dead.** A spate of "wrongful birth" lawsuits is being filed and, in several cases, won. Parents testify in court that they would have aborted their child had they been properly informed of genetic risks, accuse the doctors of malpractice, and demand expenses for the care of the child. A law firm in New Jersey claims it has won awards of \$950,000 to \$2 million for the plaintiffs in each of four such cases over the last two years.<sup>170</sup>

**•Most Valuable Lawsuit.** Proving that litigation madness isn't limited to the U.S. alone, a father in New Brunswick, Canada, is suing an amateur hockey league for \$300,000 after his son failed to win the league's Most Valuable Player award. The lawsuit seeks psychological and punitive damages, and it demands that the trophy be taken away from the player to whom it was awarded and given to his son.<sup>171</sup>

**•A Matter of Fax.** Two class action lawsuits filed in California in August of 2002 are seeking \$2.2 trillion in damages against alleged junk-fax distributor Fax.com and its business partners. The claim amounts to \$1,500 for each unwanted piece of paper sent by Fax.com over a period of four years. Under general fee guidelines, if the plaintiffs are successful in winning the full amount, the lawsuit industry might collect as much as \$700 billion—the value of the entire GDP of China.<sup>172</sup>

**•Monkey Business.** A group of legal activists, including Harvard Law professor Laurence Tribe,<sup>173</sup> is pressing to grant chimpanzees legal standing in court, similar to that of children.<sup>174</sup> If the group has its way, a chimpanzee theoretically could win an injunction against a medical researcher or a roadside zoo.

Government Relations/Public Relations

# THE BEST FRIENDS MONEY CAN BUY

Trial Lawyers, Inc. floods the political process with cash.



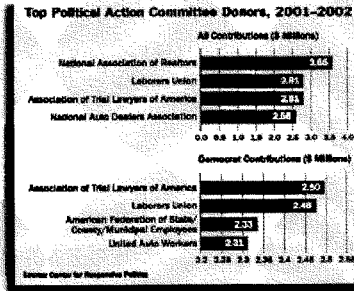
Trial Lawyers, Inc. has poured funds into the coffers of its political allies to gain unprecedented influence at the national and state levels. The Association of Trial Lawyers of America—the “home office” of Trial Lawyers, Inc.—routinely ranks among the top five PACs in federal campaign donations, leaning strongly to Democrats.<sup>173</sup> In 2002, ATLA was the third most generous PAC, contributing \$2.8 million;<sup>176</sup> 89% of that money went to Democrats, making ATLA the largest PAC contributor to the Democratic party (see graph).<sup>177</sup>

ATLA's PAC contributions are merely the tip of the iceberg when it comes to Trial Lawyers, Inc.'s political influence. Through individual and soft money contributions, as well as PAC donations, the lawsuit industry has surpassed all others in political giving in every electoral cycle since 1990 (see graph on next page).<sup>178</sup> Several leaders of Trial Lawyers, Inc. are regulars on top-donor lists: in the 2002 electoral cycle, members of Williams & Bailey, one of the largest personal-injury firms in Texas, gave \$2.4 million to federal campaigns; securities class action giant Milberg Weiss gave \$1.4 million; Baron & Budd, headed by former ATLA president and asbestos class action lawyer Fred Baron, accounted for \$1.1 million; and prominent asbestos and tobacco litigator Peter Angelo's firm gave \$1.9 million.<sup>179</sup> Each of these firms' members gave at least 99% of their contributions to Democrats.<sup>180</sup> All told, the litigation industry has contributed \$470 million to federal campaigns since 1990.<sup>181</sup>

### The Lawsuit Industry's "Favorite Son"

Epitomizing Trial Lawyers, Inc.'s drive for political influence is the career of U.S. Senator John Edwards (D-NC), a former personal-injury lawyer. Campaigning for the Senate in 1998, Edwards received more than half his total outside contributions from his friends in the lawsuit industry.<sup>182</sup> Edwards has in turn enthusiastically supported key provisions backed by Trial Lawyers, Inc., including helping to defeat proposed limitations on personal-injury lawsuits in the event of a terrorist attack and seeking to make it easier to sue health maintenance organizations.<sup>183</sup>

Although Edwards's 2004 presidential run seems thus far to be floundering, his campaign certainly opened eyes to the political power of Trial Lawyers, Inc.: by the end of the first quarter of 2003, Edwards topped all 2004 Democratic presidential hopefuls in fund-raising—with almost two-thirds of the \$7.4 million he had raised coming from trial lawyers, their families, and their staffs.<sup>184</sup> As noted by the *Wall Street Journal*, “even political professionals seem[ed] stunned by the degree to which his candidacy ha[d] become a wholly owned financial subsidiary of the national tort bar.”<sup>185</sup>

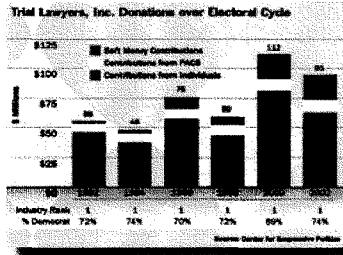


### Justice for Sale

At the same time, and with less fanfare, Trial Lawyers, Inc. has ratcheted up its longstanding activity in financing state judicial races. Lawyers traditionally have been the largest group of givers to state supreme court judicial races, and these formerly sleepy races have become the new hot spots.<sup>186</sup> Texas is historically notorious for high-spending judicial campaigns; as long ago as 1980, Texas became the first state to have a statewide

**All told, the litigation industry has contributed a staggering \$470 million to federal campaigns since 1990.**

TRIAL LAWYERS INC.

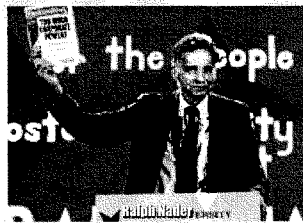


judicial race cost \$1 million.<sup>187</sup> In Madison County, Illinois, a "magnet court" jurisdiction (see box on page 8), over 75% of all recent judicial race contributions came from Trial Lawyers, Inc.<sup>188</sup> Underwriting such campaigns has been a key tactic in preserving friendly judicial philosophies and rewarding judges congenial to expansive tort laws. This notion of "justice for sale" is a serious threat to judicial independence and the rule of law.

**CONSUMMATE ALLIES**

While Trial Lawyers, Inc. has used its huge political contributions to buy influence in Washington and in state capitals, its operators continue to rely on alliances with so-called consumer groups to gain favorable media attention and win the public relations battle on many tort issues. By collaborating with advocacy organizations and even creating some of its own groups, Trial Lawyers, Inc. has successfully portrayed itself as a defender of the little guy—obscuring the huge revenues the industry reaps from expanding civil justice activity, ultimately at the expense of ordinary citizens.

The model for this symbiotic relationship is between Trial Lawyers, Inc. and consumer advocate Ralph Nader. This strategic alliance goes back decades, to at least the time that Nader published his article and book attacking the safety of the Corvair automobile,<sup>189</sup> and Nader institutionalized his allegiance by founding various nonprofit organizations such as the Center for Study of Responsive Law and Public Citizen. Over the years, these organizations supported Trial Lawyers, Inc. on issues ranging from resisting changes in California's auto-insurance system (changes that brought down insurance rates for ordinary citizens) to fighting against securities-litigation reform (which kept Trial Lawyers, Inc. from decimating the value of highly volatile stocks). A bevy of prominent members of Trial Lawyers, Inc. told *Forbes* magazine that they contributed heavily to Nader groups over the years and considered the consumer advocate's support crucial in drumming up favorable publicity for their suits.<sup>190</sup>



Not content merely to have such groups as their allies, Trial Lawyers, Inc. has directly funded its own advocacy organizations that present themselves as unbiased allies of Joe Q. Public. One startling example of this practice comes from New York, where the state's Trial Lawyers Association created the Alliance for Consumer Rights to lobby as a consumer group for legislation advantageous to trial lawyers.<sup>191</sup> Over the years, Trial Lawyers, Inc. has frequently cited research by the Alliance in editorials and op-ed pieces in support of its positions, conveniently neglecting to mention that this group is sponsored by Trial Lawyers, Inc.'s local affiliate and actually operates out of the New York State Trial Lawyers Association headquarters.<sup>192</sup>

Trial Lawyers, Inc. has also established its own foundations to support "consumer advocacy" at the national level. In 1986, members of the American Trial Lawyers Association and several activists founded the Civil Justice Foundation, whose mission is to strengthen connections between Trial Lawyers, Inc. and consumer groups.<sup>193</sup> The foundation has awarded more than \$1 million to dozens of consumer organizations,<sup>194</sup> which often have direct but unobvious links to Trial Lawyers, Inc. For example, one foundation grant recipient, Citizens for Safe and Reliable Highways, lists its goal as improved truck and vehicle safety,<sup>195</sup> yet eight out of nine of the sponsors listed on the group's website are trial law firms specializing in suing for damages on behalf of victims of motor-vehicle accidents.<sup>196</sup>

Finally, Trial Lawyers, Inc. also has a presence in research and academic institutions. Since 1956, ATLA has been the quiet sponsor of the Roscoe Pound Institute, a think tank named after the former dean of Harvard Law School. It publishes research, offers scholarships, and sponsors conferences on trial law.<sup>197</sup>

Leadership Team

# MOTLEY'S CREW

Top lawyers dominate the headlines and earnings of Trial Lawyers, Inc.

Although the litigation industry has no "organizational structure" like an actual corporation, leading plaintiffs' attorneys tend to dominate lines of business to such a degree that they might indeed be deemed "division presidents." Thus, the individuals below in a very real sense constitute the "leadership team" for Trial Lawyers, Inc.



**Ron Motley**

*Founder and Chairman*

A noted trial attorney, Motley led the asbestos charge in the 70s, reaped hundreds of millions in the tobacco settlements, and now takes on lead paint, hoping to score billions more.<sup>198</sup>

AP PHOTO/ALJA ILLINGWORTH

**Dickie Scruggs**

*President, Tobacco*

Trent Lott's brother-in-law raked in nearly a billion as the chief tobacco settlement negotiator; now he goes after health maintenance organizations.<sup>199</sup>

AP PHOTO/GELO SOLE



**Peter Angelos**

*Co-President, Asbestos*

Angelos, along with Motley and Fred Baron, was one of the earliest asbestos warriors; he's recently sued cell-phone manufacturers.<sup>200</sup>

AP PHOTO

**Mel Weiss**

*Co-President, Class Actions (Securities)*

Having never met a stock-price drop they didn't like, Weiss and erstwhile partner Bill Lerach recently extracted three mega-settlements worth over \$300 million each.<sup>201</sup>

AP PHOTO/KEE BUR



**Elizabeth Cabraser**

*President, Class Actions (General)*

Leading class action lawsuits against industries from pharmaceuticals to insurance, Cabraser has extracted billions for Trial Lawyers, Inc., including in the infamous breast-implant case.<sup>202</sup>

SAN FRANCISCO CHRONICLE/ALAMY

**John Edwards**

*President, Government Relations*

After making millions as a personal-injury lawyer, Edwards has turned his attention to the Senate with an eye toward the White House —mostly funded by Trial Lawyers, Inc.<sup>203</sup>

GETTY IMAGES/RAIN COOPERANCE THE NATION



**Ralph Nader**

*Co-President, Public Relations*

Long the best friend of the plaintiffs' bar,<sup>204</sup> Nader has recently pursued presidential ambitions of his own in advancing his crusade against American business.

GETTY IMAGES/JOHN S. SMITH/REUTERS

**Joan Claybrook**

*Co-President, Public Relations*

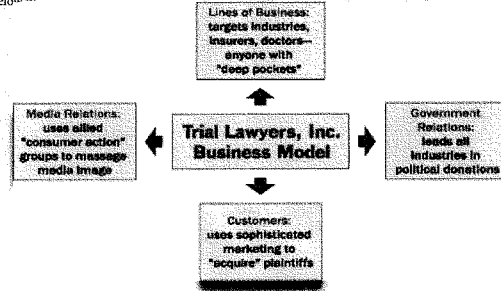
Longtime Nader ally Claybrook has headed Public Citizen since 1982 and has emerged as Trial Lawyers, Inc.'s *de facto* public voice.<sup>205</sup>

AP PHOTO/TERU YAMAGAI



**BUSINESS SUMMARY**

Facing virtually no barriers to entry, Trial Lawyers, Inc. continues to leverage its effective business model (see graphic) to expand rapidly into new markets. Increasingly, it is difficult to find an area of commerce, or indeed an area of life, beyond the lawsuit industry's reach. Exemplifying the breadth of markets under siege by Trial Lawyers, Inc. is the list of "litigation groups" published on the American Trial Lawyers Association's own website, shown below.<sup>23</sup>



**LINES OF BUSINESS**

- Access-Disability Discrimination
- AIDS
- Attorneys Information Exchange Group, Inc. (AIEG)
- Automatic Doors
- Avandia
- Bad Faith Insurance
- Baycol
- Benzene/Leukemia
- Birth Defects
- Birth Trauma
- Breast Cancer
- Carbon Monoxide
- Casino Gaming
- CCA Pressure-Treated Wood
- Child Sex Abuse
- Clinical Trials
- Complex Regional Pain Syndrome (“RSD”)
- Construction Defects-Property Damages (Residential and Commercial Properties)
- Construction Site Accidents
- Construction Site Accidents Subgroup: Nailguns
- Cox-2 Inhibitors (Arthritis Drugs, primarily Celebrex and Vioxx)
- Crane and Aerial Lift Injury
- Daubert
- Diet Products: Fen-Phen
- Electrical Accidents
- Ephedra
- ERISA/Employee Benefits
- Firearms and Ammunition
- Firefighters & EMS Hearing Loss
- Funeral Services
- Gas Cans
- Gas Fire & Explosions
- Health Care & Disability
- Healthcare Management Organization
- Herbicides & Pesticides (Incl. Dioxin & PCBs)
- Herbicides & Pesticides: Subgroup: Allercare
- Inadequate Security
- Inadequate Security Subgroup: Walmart Task Force
- Interstate Trucking
- Laparoscopy
- Laser Eye Surgery Malpractice
- Latex Allergy
- Lead Paint
- Liquor Liability
- Lotronex
- Low Impact Collision
- Mandatory Arbitration
- Medical Negligence Information Exchange Group
- Meridia
- Methyl Tertiary Butyl Ether (MTBE)
- Mining & Oil Field Products and Accidents
- Nursing Homes
- Orthopedic Implant Devices (Non-Sulzer)
- OxyContin
- Paxil
- Pharmacy Liability
- Phenylpropanolamine (PPA)
- Propulsid
- Qui Tam
- Railroad/Highway Crossing & Derailment
- Rezulin
- Stadol
- Steroids
- Sudden Acceleration/Transmissions
- Sulzer
- Tap Water Burns
- Tire
- Tobacco Products
- Toxic Mold
- Toys and Recreational Equipment
- Traumatic Brain Injuries
- Truck Underride
- Vaccines
- Workplace Injury



Conclusion

# IS REFORM POSSIBLE?

Efforts to contain Trial Lawyers, Inc. continue.

Since 1975, lawsuits have cost the U.S. economy almost \$3 trillion (see chart on next page), and the tab keeps rising. Is there anything that can stem the growth of Trial Lawyers, Inc.? Unfortunately, change won't be easy: the huge fees the lawsuit industry now accumulates not only have served as capital for new litigious ventures but also have made Trial Lawyers, Inc. the most powerful lobbying group and political funder in America.

Nevertheless, the Bush administration has set its sights on a series of tort reforms targeting the core business lines for Trial Lawyers, Inc.—class actions, asbestos, and medical malpractice (see box).<sup>207</sup> At the state level, various lawmakers have advanced legislation to control skyrocketing noneconomic- and punitive-damages verdicts and to modify rules that permit some defendants to assume a share of damages grossly disproportionate to their share of liability.<sup>208</sup> And other industries have begun to challenge Trial Lawyers, Inc.'s historical grip on state judicial elections.<sup>209</sup>

Many judges, too, see the need to rein in the lawsuit industry's worst excesses. In its landmark *Campbell v. State Farm* decision in April, the Supreme Court put a constitutional limit on a jury's ability to set punitive damages at an extreme multiple of actual damages.<sup>210</sup> And while courts have traditionally been reluctant to enforce state codes of ethics prohibiting excessive fees,<sup>211</sup> judges may finally be cracking down in the wake of the outrageous tobacco settlements: New York State judge Nicholas Figueroa recently threw out as excessive a \$1.3 billion claim by the Castano group for work allegedly done on the California tobacco settlement.<sup>212</sup>

Only time will tell whether these promising steps signal an end to the worst abuses of America's lawsuit culture, or whether they are anomalies bucking the trend of the litigation industry's continuing growth. Will the public come to acknowledge the threat posed by the litigation industry's size, influence, and lack of transparency? Will policymakers and judges have the foresight and will to act in the public interest? One thing is certain: our nation's future economic health depends on affirmative answers to these questions—on Americans standing up to the rapacious behemoth that is Trial Lawyers, Inc.

## KEY FEDERAL REFORM INITIATIVES

### Class Actions

The fight for class action reform has been a largely uphill battle, since tightening down on one state's "magnet court" merely sends Trial Lawyers, Inc. scrambling for another favorable venue. For instance, after Alabama's infamous tort system was finally reformed in 1999,<sup>213</sup> the lawsuit industry simply relocated to Illinois, Mississippi, and West Virginia.<sup>214</sup>

The Class Action Fairness Act currently pending before Congress seeks to address this issue of venue shopping by removing to federal court any large national class action cases.<sup>215</sup> At the time this publication went to press, the Senate was expected to take up the bill imminently; passage of the act could be the critical first step in containing the class action menace.

### Asbestos

The key players in Washington continue to haggle over potential solutions to the asbestos mess. Although no workable legislation has yet emerged, the outlines of reform include establishing a "trust fund" to pay asbestos claimants, setting defined medical standards for asbestos claims, and addressing the problems of forum shopping and legal fees.<sup>216</sup> Since support for asbestos reform is broad, the outlook for reform of some kind remains hopeful. Asbestos litigation reform would add certainty to the marketplace and could save billions of dollars.<sup>217</sup> The downside is that a multi-year trust fund might serve both to legitimate spurious claims and to provide a sizable, definite funding stream for yet more ventures by Trial Lawyers, Inc.

### Medical Malpractice

On July 9, Democrats in the Senate voted unanimously to defeat President Bush's proposed medical liability reform, the HEALTH Act of 2003 (Senators Jeffords [I-VT], Graham [R-SC], and Shelby [R-AL] also voted against the bill).<sup>218</sup> The HEALTH Act would cap noneconomic damages in medical malpractice suits at \$250,000, establish time limits for bringing malpractice suits, and preclude "double-dipping" by allowing judges to apprise juries of other payments plaintiffs have already received for their injuries.<sup>219</sup> Despite the setback in the Senate, the beat for medical malpractice reform goes on, at the state as well as the federal level.<sup>220</sup>



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**Summary of All Tort System Costs, 1975-2001**  
(\$ Billions)

	Insured Liabilities	Self-Insured Liabilities	Medical Malpractice	Total Cost	Tort Costs, % GDP
1975	17.9	1.0	1.2	20.1	1.23%
1976	20.7	1.2	1.5	23.4	1.28%
1977	24.1	2.1	1.9	28.1	1.38%
1978	27.6	2.8	2.3	32.7	1.43%
1979	30.9	3.2	2.8	36.9	1.44%
1980	34.1	5.4	3.5	43.0	1.54%
1981	38.9	6.4	4.3	49.6	1.58%
1982	44.4	7.5	5.1	57.0	1.75%
1983	50.0	8.5	6.1	64.6	1.83%
1984	51.2	9.1	6.6	66.9	1.70%
1985	64.5	12.8	6.6	83.9	1.99%
1986	78.2	17.7	6.5	102.4	2.30%
1987	85.1	19.1	6.9	111.1	2.34%
1988	88.5	16.1	7.0	113.6	2.22%
1989	97.0	20.6	8.1	125.7	2.29%
1990	100.6	20.3	8.7	129.6	2.23%
1991	101.0	21.0	9.4	131.4	2.20%
1992	106.7	24.2	10.4	141.3	2.24%
1993	108.6	23.6	11.5	143.7	2.16%
1994	112.0	22.9	12.5	147.4	2.09%
1995	118.5	26.6	13.6	158.9	2.15%
1996	115.4	24.9	14.5	154.8	1.98%
1997	113.6	24.9	16.1	154.6	1.89%
1998	121.4	27.9	17.1	166.4	1.89%
1999	122.9	27.7	18.4	169.0	1.82%
2000	129.5	30.3	19.8	179.6	1.83%
2001	146.3	38.1	21.0	205.4	2.04%
<b>Total Tort Costs, 1975-2001</b>				<b>\$2,841,100,000,000</b>	

Source: CIP, "Tort Costs in the United States, 1975-2001," 2002.



## Endnotes

1. See TILTINGHAST-TOWERS PERRIN, U.S. TORT COSTS: 2002 UPDATE, TRENDS AND FINDINGS ON THE COSTS OF THE U.S. TORT SYSTEM 19 (Feb. 2003) [hereinafter "TILTINGHAST-TOWERS PERRIN REPORT (2003)"]; TILTINGHAST-TOWERS PERRIN, U.S. TORT COSTS: 2000, cited in COUNCIL OF ECONOMIC ADVISERS, WHO PAYS FOR TORT LIABILITY CLAIMS? AN ECONOMIC ANALYSIS OF THE U.S. TORT LIABILITY SYSTEM 11 (Apr. 2002) [hereinafter "CEA REPORT"].
2. See TILTINGHAST-TOWERS PERRIN REPORT (2003), *supra* note 1, at 1.
3. See *id.* at A1. Compound annual growth rates are based on numerical calculations using underlying data.
4. See *id.* at 17, 19. The \$40 billion figure is derived by multiplying the 1996 tort cost share of plaintiffs' attorneys times the \$205.4 billion overall tort cost. Revenue data for Intel and Coca-Cola are for full-year 2001, as published in the companies' annual reports. Revenue data for Microsoft are for the final two quarters of FY 2001 and first two quarters of FY 2002, as publicly filed by the company, to correspond to the 2001 calendar year.
5. See *id.* The basis for the Trial Lawyers, Inc. revenue figure and revenue numbers for Microsoft, Intel, and Coca-Cola are described in note 4. Pfizer revenue data are for full-year 2001 as published in the company's annual report. Cisco revenue data are from the final two quarters of FY 2001 and first two quarters of FY 2002, as publicly filed by the company, to correspond as best as possible to CY 2001 (covering 1/28/01-1/26/02).
6. See *id.* The basis for Trial Lawyers, Inc. revenue is described in note 4; Trial Lawyers, Inc. revenue would equal \$42.6 billion in 2002 given Tillinghast-Towers Perrin's estimated overall tort cost of \$224 billion.
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8. See Mary Alexander, *Smart Searching*, TRIAL, Nov. 2002, at 9 (touting ATLA's members-only website, <http://www.exchange.atla.org>, which makes available litigation packets and contains features "that make it easier to tap into [ATLA's] database of pleadings, pretrial and discovery documents, articles, expert witnesses, depositions, and other vital information that will help members prepare—and win—clients' cases"); see also C.L. Mike Schmidt et al., *Manage Big Case Expenses Wisely*, TRIAL, Nov. 2002, at 82 (explaining that one way "to spread out the expense of long-term litigation is to establish a joint venture with other small firms practicing in similar fields").
9. See, e.g., Jason L. Riley, *Salivating over Fast-Food Torts*, WALL ST. J., June 30, 2003, at A16; James K. Glassman, *A Por Belly of Gold: Tobacco-Style Lawsuits Aimed at Food Processors and Restaurants*, CAPITALISM MAG., Mar. 28, 2003, available at <http://www.capmag.com>; Robert Levy, *Turning Lead into Gold*, LEG. TIMES, Aug. 23, 1999, at 21.
10. See, e.g., Advertisement, National Lawsuit Funding LLC, Providing You with the Cash You Need Before Your Lawsuit Settles, <http://www.nationallawsuitfunding.com>; Press Release, RD Legal Funding LLC, Class Action and Personal Injury Attorneys Turn to RDLF for over \$1,000,000 in Funding, <http://www.legalfunding.com>; see also <http://www.lawyersfunding.com/attorney.htm> ("Why invest your time and continue to put your money at risk when there are **risk free alternatives**? We provide practical, financial solutions to your cash flow problems. Use our money and we'll assume 100% of the risk, if there's no recovery.") (emphasis in original).
11. See Gordon Fairclough & Vanessa O'Connell, *Co-Dependent: Once Tobacco Fees, States Are Hooked on Settlement Cash*, WALL ST. J., Apr. 2, 2003, at A1 (explaining how states plan to raise cash by issuing bonds backed by future payments from tobacco companies under the 1997 Master Settlement Agreement); Editorial, *Smoke Screens*, WALL ST. J., Feb. 20, 2001, at A22 (reporting that in February 2001, a group of tobacco plaintiffs' lawyers "sold bonds to institutional investors backed by \$1 billion in fee payments over the next 12 years, realizing \$308 million in ready cash"); Jonathan Weil, *Tobacco Deal May Back State Bonds*, WALL ST. J., Mar. 31, 1999, at T1 (Texas state senator seeking to enact legislation allowing the financing of large construction projects by borrowing against proceeds of state's tobacco settlement).
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13. See CEA REPORT, *supra* note 1, at 10.
14. See Jim Copland, Editorial, *The Tort Tax*, WALL ST. J., June 11, 2003, at A16. Analysis assumes that the \$205 billion 2001 tort cost compounds annually at 9.11% or 14.34% for ten years; growth rates are derived from underlying Tillinghast-Towers Perrin data; see TILTINGHAST-TOWERS PERRIN REPORT (2003), *supra* note 1, at A3.
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20. See Editorial, *The Truth about Thimerosal*, WALL ST. J., Dec. 5, 2002, at A18.
21. See National Childhood Vaccine Injury Act, Pub. L. No. 99-660, Title III, § 301, 100 Stat. 3755 (1986).
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23. See *Medical Liability Restructuring: Hearing Before the House Comm. on the Judiciary* (Mar. 4, 2003) (statement of Lawrence E. Smart, president of the Physician Insurers Association of America) (contingency fees in medical malpractice cases can exceed 40% of the award, excluding costs).
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- Hwang, *A Little-Known Lawyer, a Billion-Dollar Bill*, WALL ST. J., Dec. 10, 1998, at B1 (reporting on efforts of Texas attorney general Dan Morales to obtain a \$1.5 million share of the state attorneys general tobacco settlement for a Houston lawyer who "never took a deposition and never wrote a brief for the case").
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33. See Stuart Taylor Jr., *Perverting the Legal System: The Lead-Paint Rip-Off*, NAT'L L.J., Feb. 19, 2003, available at ATLANTIC ONLINE, <http://www.theatlantic.com/politics/nj/taylor2003-02-19.htm>.
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35. See CBS Evening News: *HMOs Face Racketeering Lawsuits* (CBS television broadcast, July 1, 2002), available at <http://www.cbsnews.com/stories/2002/07/01/evolvingnews/main513904.shtml>.
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41. See TULLINGHAFT-TOWERS PERBIN REPORT (2003), *supra* note 1, at 17, 19.
42. See Pete Slover, *Morales' Plea May Help Friend's Fraud Case, Attorney Says*, DALLAS MORNING NEWS, July 19, 2003, available at <http://www.dallasnews.com/sharedcontent/dallas/tsw/stories/071903dntextmorales.55d96.html>.
43. See John Moritz, *Dan Morales Indicted in Tobacco Case*, STAR-TELEGRAM, Mar. 6, 2003, available at <http://www.dfw.com/ml/dfo/news/state/5333435.htm>; see also Associated Press, *Former Attorney General Dan Morales Indicted on Fraud Charges*, AP WIRE, Mar. 7, 2003.
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47. See generally Schwartz, Behrens & Lorber, *supra* note 45, at 492-95.
48. See Mirel Testimony, *supra* note 22.
49. See <http://www.classactionamerica.com>.
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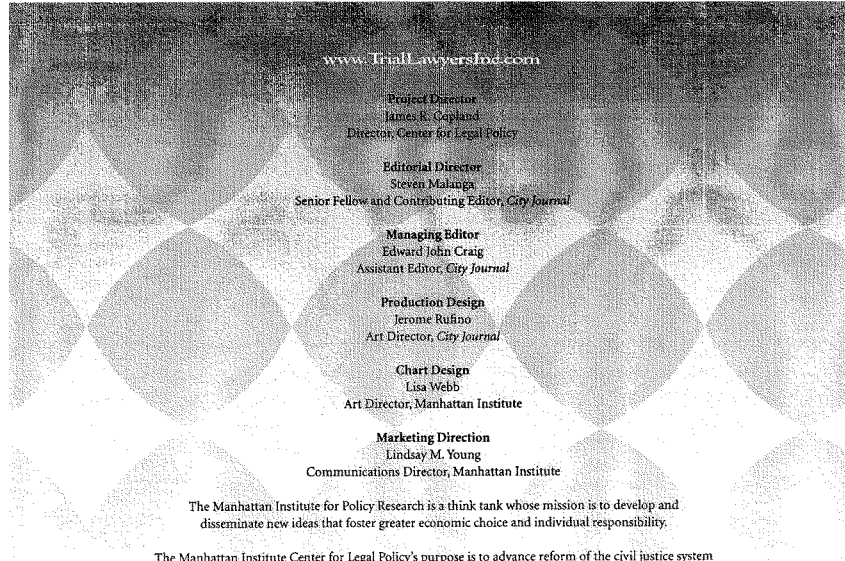
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October 21, 2003

The Honorable Jeff Sessions  
Chairman  
Subcommittee on Administrative Oversight and the Courts  
Committee on the Judiciary  
Room 323  
Dirksen Senate Office Building  
Washington, D.C. 20510

Re: hearing on S. 1428

Dear Senator Sessions:

On behalf of our 700,000 members in the United States, I request that you make this letter part of the record of the October 16, 2003 hearing on S. 1428, The Commonsense Consumption Act of 2003.

The Center for Science in the Public Interest ("CSPI")<sup>1</sup> strongly opposes S. 1428. The bill bans any lawsuit based on injury resulting from a person's "weight gain, obesity, or any health condition that is related to weight gain or obesity" against a manufacturer, distributor, or seller of a food unless the plaintiff proves that the defendant knowingly and willfully violated a federal or state statute and that that violation was a proximate cause of the plaintiff's injury.

Despite Senator McConnell's stated purpose of seeking to ban frivolous lawsuits, his bill ignores the fact that the food industry brings lawsuits which many view as frivolous. For example, McDonald's recently sued an Italian food critic for millions of dollars for simply alleging that fast food is "repellant." Last summer Monsanto sued a small Maine dairy in federal court in Boston because its milk cartons say "Our farmers' pledge: no artificial growth hormones." Such hormones are banned in Canada and the European Union, and the state of Maine requires that dairies seeking to use Maine's quality seal of approval on their products must receive signed affidavits from dairy farmers who have pledged not to use artificial growth hormones on their cows.

S. 1428 also 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 – such as obesity – and so the victims must turn to the courts for help. Meritorious lawsuits can, of course, spur the food industry to improve its practices, and frivolous suits are quickly rejected

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

by the courts. As explained in the written statement of Victor Schwartz (whose law firm has been retained by the National Restaurant Association), the dismissal of the class action complaint in the federal obesity suit against McDonald's indicates that "there are substantial barriers to overcome before such cases can be successful." These barriers explain why only a couple of obesity lawsuits have been filed in either state or federal courts.

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. 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, those 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. It took the FDA more than nine years – until July 2003 – to issue a final rule requiring such disclosure.

In conclusion, S. 1428 should be rejected because it is not even-handed in how it treats the food industry and 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 Charles E. Schumer  
Ranking Member  
Subcommittee on Administrative Oversight and the Courts

CHAMBER OF COMMERCE  
OF THE  
UNITED STATES OF AMERICA

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1615 H STREET, N.W.  
WASHINGTON, D.C. 20062-2000  
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July 17, 2003

TO THE MEMBERS OF THE U.S. SENATE:

On behalf of the U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses of every size, sector, and region, I strongly urge you to support The Commonsense Consumption Act, introduced today by Senator McConnell.

This bill is a reasonable and targeted response to the latest trial lawyer-inspired litigation scheme—suing our nation's food industry for decisions freely made by individuals. While statistics bear out that more than half our nation's population is overweight, the solution to that problem is not a rush to the courthouse.

As a practical matter, our court system is not structured to handle the many complicated policy questions raised by an issue such as obesity, nor should it be the place where such a debate is held. Obesity cannot be attributed to any single cause and therefore should not be blamed on any single industry. Any serious effort to address the obesity problem would focus on educating individuals about their diets and not on dragging fast food companies into court.

If enacted, The Commonsense Consumption Act would prevent frivolous lawsuits against our nation's food industry. However, it would allow litigation against food purveyors if they are in violation of applicable statutory and regulatory requirements. By reinforcing the long-standing principle of personal responsibility and choice, Senator McConnell's bill would help protect the public from another round of unnecessary and costly lawsuits.

Freedom and personal responsibility are cornerstones of the American way of life. What one eats and drinks is a matter of personal choice, not a matter for the courts. Accordingly, the U.S. Chamber of Commerce strongly supports The Commonsense Consumption Act.

Sincerely,



R. Bruce Josten



October 15, 2003

The Honorable Mitch McConnell  
 U.S. Senator  
 361A Russell Senate Office Building  
 Washington, DC 20510

Dear Senator McConnell:

We would like to take this opportunity to thank you for being a continued friend of U.S. agriculture, and for sponsoring S. 1428, "The Commonsense Consumption Act of 2003."

The recent, much-publicized efforts to bring frivolous and abusive lawsuits against the food producing and manufacturing industries are a direct threat to U.S. corn growers and corn refiners and do nothing to stem America's rising obesity rates.

The truth is America's obesity epidemic has been caused by an increase in daily caloric consumption *concurrent with* a major lack of physical activity. Between 1977 and 1995, individual caloric intake increased by almost 200 calories per day, from 1,876 calories to 2,043 calories. Theoretically, consuming an extra 100 calories a day for a year can lead to a gain of 10 pounds.

At the same time Americans are consuming more calories, they have become physically inactive. According to the President's Council on Physical Fitness and Sports, nearly half (4 in 10) of all American adults engage in no daily physical activity. Only about one-half of U.S. young people (ages 12 to 21) regularly participate in vigorous physical activity, and one-fourth reported no vigorous physical activity at all. On the flip side, one-quarter of U.S. children spend four hours or more watching television daily.

This is an issue of personal responsibility. Rather than casting blame on the food industry through frivolous lawsuits, we should be trying to educate Americans on the benefits of balanced nutrition and increased physical activity.

S. 1428 would prohibit these frivolous lawsuits and prevent major damage to America's corn growing and refining industries that produce ingredients found in many of the food products being targeted. These ingredients include high fructose corn syrup (HFCS). Nationally, more than 545 million bushels of corn annually are consumed in the production of HFCS. The production of HFCS employs thousands of hard-working men and women in the corn refining industry and benefits tens of thousands of corn growers throughout the country. The futures of all these men and women are threatened by the needless legal assaults on America's food industry.

We thank you for your consideration of our views and for protecting U.S. agriculture by sponsoring S. 1428, "The Commonsense Consumption Act of 2003."

Sincerely,

Corn Refiners Association, Inc.  
 National Corn Growers Association

**NEWS ADVISORY**

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**DecisionQuest and DRI—The Voice of the Defense Bar—Jury Poll Reveals  
Americans' Attitudes Toward Litigation on Discrimination,  
Obesity/Fast-food, and Environment**

**Washington, DC** (October 16, 2003) – Findings from two recent nationwide studies of juror attitudes by DecisionQuest, a company wholly owned by Bowne & Co., and DRI—The Voice of the Defense Bar (DRI), reveal new insights into some of today's most pressing litigation issues facing Corporate America. The research, to be announced tomorrow at DRI's annual meeting in Washington, DC, sheds light on juror views regarding three prominent corporate litigation issues: workplace discrimination, fast-food, and the environment. The studies also reveal a surprising pro-corporate stance among young Americans.

"Perhaps most interesting about these studies was that, on the whole, jurors with more money, youth, and education tended to side with Corporate America on a range of litigation issues, pointing to what may become a generational backlash against frivolous lawsuits and 'victim mentality,'" said DecisionQuest CEO Dr. Philip Anthony.

On workplace discrimination lawsuits, the findings showed that most American jurors, particularly those ages 18-24, believe corporations have done a good job fighting discrimination and promoting diversity.

The findings also showed that most American jurors do not support lawsuits against fast-food companies for causing obesity. However, more than half of jurors believe fast-food companies should not be able to target children and one-third believe companies should have warned consumers of the possible risks associated with eating their food.

"Jurors might believe a lawsuit against fast-food companies for causing obesity is ridiculous, yet they could support a lawsuit that punishes the company for not warning customers about the food's fat content. It's these shades of gray, an almost gap in logic, that is providing a large enough hole for plaintiffs to possibly garner multi-million dollar awards," said Anthony.

Jurors' attitudes on environmental litigation were the strongest against Corporate America. The overwhelming majority of jurors stated they would side with an environmental group in any given litigation, and a third of jurors believe corporations should have to compensate perfectly healthy individuals for "speculative damages" in the event they may become sick in the future as a result of having been exposed to the company's product.

Jurors' attitudes on issues include:

**Discrimination:**

- 72 percent believe Corporate America has done an adequate to very good job fighting discrimination and promoting diversity in the workplace. The young particularly agree, with 52 percent of those ages 18-24 rating corporations good to very good on the issue.

(more)

- 81 percent believe it is important to know if there are minorities among the senior managers and directors of a company faced with a discrimination claim.

**Obesity and fast-food:**

- 89 percent do not support lawsuits against fast-food companies by customers who claim to have become obese eating their food. However, 24 percent of those earning less than \$30,000 and 18 percent of those who have less than a high school degree support the lawsuits.
- 83 percent do not feel that fast-food companies are responsible for addicting their customers to fatty foods. However, 27 percent of those earning less than \$20,000 per year and 29 percent of high school dropouts believe that fast-food companies are responsible for addicting their customers.
- 36 percent feel that fast-food companies should have warned their customers about possible risks associated with eating their food. Of note, 45 percent of those making less than \$30,000 per year, 54 percent of high school dropouts, and 48 percent of those in racial minority groups agree.
- 56 percent believe fast-food companies should not be allowed to target children in their advertisements because children don't know that fast food may be bad for them. Among those making less than \$20,000 per year, 67 percent agree. Of those, 63 percent of those ages 50 and older agree while only 44 percent of those ages 18-24 agree.

**Environment:**

- 52 percent believe people who think they have become sick from breathing pollution generated by manufacturing facilities should be compensated by the companies who released the fumes, even if there is little evidence that the fumes released into the air by that company have harmed anyone. Of note, 23 percent of those with less than a high school education agree with this statement, compared to only six percent of those who have their bachelor's degree. Additionally, 64 percent of those in racial minority groups, and 68 percent of those earning less than \$20,000 per year agree.
- 79 percent would side with the environmental group in a case brought by an environmental group against a corporation for violating pollution laws.
- 35 percent think that corporations should have to compensate healthy individuals who think they may become sick in the future as a result of having been exposed to the company's product that contains hazardous elements just in case he/she becomes sick in the future. Of note, 60 percent of those with less than a high school-level education agree, compared to 31 percent of those who have gone beyond high school. Among those in racial minority groups, 50 percent agree, compared to only 28 percent of whites. Among people earning less than \$20,000 per year, 43 percent agree, compared to 27 percent of those earning \$100,000 or more.

"Corporate America understands all too well that common sense alone does not always win in the courtroom. It needs to understand where jurors come from, who they are, and what they expect," said Sheryl Willert, president of DRI.

The research, led by DecisionQuest's Galina Davidoff, Ph.D. and Nancy Neuffer, was based on the combined findings of two national surveys. The first was a phone survey of 1,101 jury-eligible participants from around the country and Puerto Rico, conducted in September. The second was a survey of

(more)

(DecisionQuest/DRI...3)

1,018 in-person interviews in 18 states conducted as part of DecisionQuest's ongoing research from June through September. The complete surveys will be released later this fall.

Los Angeles-based Bowne DecisionQuest is the nation's leading trial consulting firm and specializes in jury research, demonstrative exhibits, jury selection, courtroom technology, litigation software, and strategic communications. DecisionQuest is a strategic communications firm which applies the rigors of social science research and the persuasive powers of multimedia graphic design to the problems faced by law firms, corporations and public agencies. The company has more than 160 employees and 20 offices nationwide, including those in Dallas, Chicago, New York, and Washington, DC. DecisionQuest can be accessed via the Internet at <http://www.decisionquest.com>.

DRI—The Voice of the Defense Bar, is the national organization of more than 21,000 defense trial lawyers and corporate counsel. DRI provides numerous educational and informational resources to members and offers many opportunities for liaison among defense trial lawyers, Corporate America, and state and local defense organizations. DRI also has an international presence, seeking to enhance understanding of the law among members of the defense community who have reason to be concerned with the expanding globalization of litigation defense. The organization can be reached at [www.dri.org](http://www.dri.org).





**Bowne DecisionQuest and DRI—The Voice of the Defense Bar—Survey Findings of American Juror Attitudes Against Corporate America**

Bowne DecisionQuest has partnered with two leading legal industry organizations, DRI—The Voice of the Defense Bar and Minority Corporate Counsel Association, to explore key issues that were identified as being of the highest concern to Corporate America. The research findings will be released in two parts, the first focusing on litigation trends and the second on corporate accountability. Below is information regarding litigation trends, provided in partnership with DRI. The complete findings will be released later this fall.

The research, led by DecisionQuest's Galina Davidoff, Ph.D. and Nancy Neuffer, was based on the combined findings of two national surveys.

The first was a phone survey of 1,101 jury-eligible participants from around the country and Puerto Rico, conducted in September. The first survey included questions relevant to discrimination and fast-food litigation.

The second was a survey of 1,018 in-person interviews in 18 states conducted as part of DecisionQuest's ongoing research from June through September. To explore these attitudes and beliefs, Bowne DecisionQuest prepared a short written survey that was handed out prior to mock jury research sessions conducted around the country from June through September. A total of 1,011 participants from eighteen states across the country, as well as Puerto Rico, completed the survey during this time period. The second survey included questions relevant to environmental litigation.

Please find the questions and findings from the surveys as follows.

## **BOWNE DECISION QUEST**

### **Bowne DecisionQuest and DRI—The Voice of the Defense Bar--Survey Findings of American Juror Attitudes Against Corporate America**

**Survey One: Questions on discrimination and fast-food litigation.**

**Demographic information of Survey One is as follows:**

<b>Region:</b>	Northeast 20.1%	West 19.8%	North Central 27.3%	South 32.8%
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<b>Gender:</b>	Male 48%	Female 52%
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<b>Age:</b>	18-24 13.7%	25-34 19.6%	35-49 30.4%	50-64 19.6%	65+ 16.9%
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**Ethnicity:**

White/Caucasian 70.1%	African-American 12.2%	Hispanic 12.3%
Asian 4.3%	Other: 1.1%	

**Highest level of Education Completed:**

Less Than High School Graduate 17.9%	High School Graduate 27.9%	Some College 28.5%
College Graduate 18.6%	Post Graduate School 7.1	



**Bowne DecisionQuest and DRI—The Voice of the Defense Bar—Survey Findings of American Juror Attitudes Against Corporate America**

**Household Income:**

Less than \$20,000 23.3%	\$20,000 – \$29,999 17.5%	\$30,000 - \$39,999 12.1%	
\$40,000 - \$49,999 13.4%	\$50,000 - \$74,999 15.7%	\$75,000 - \$99,999 9.5%	\$100,000 + 8.6%

**Questions:**

**1. How good a job has corporate America done in fighting discrimination and promoting diversity in the workplace?**

14%	Very good
24%	Good
34%	Adequate
19%	Poor
9%	Very poor

**Subgroup Differences:**

Those who are older (35 years or above), divorced or widowed, and Influentials<sup>1</sup> are more likely to think corporate America has done a poor or very poor job. The youngest group (18-24) is more likely to believe that corporate America has done a good job. Those who have a college education or better are less likely to think corporate America is doing a good or very good job. African-Americans are more likely to think corporate America is doing a poor or very poor job.

**2. If you were a juror in a lawsuit where minority employees were claiming racial discrimination by their company, how important would it be for you to know if there are minorities among the senior managers and directors of that company?**

47%	Very important
34%	Somewhat important
19%	Not important

<sup>1</sup> Influentials are people who have engaged in three or more of the following activities in the last twelve months: 1) attended a public meeting on town affairs; 2) written or called any politician; 3) written a letter to the editor of a newspaper or magazine or called a live TV or radio show to express an opinion; 4) served on a committee for some local organization; 5) served as an officer for some organization; 6) been an active member of any group that tries to influence public policy or government; and 7) made a speech. A shorter definition is: Influentials are people who are particularly involved with political and community affairs. These people were identified through use of a participation in political and community activities scale.

## **BOWNE DECISION QUEST**

### **Bowne DecisionQuest and DRI—The Voice of the Defense Bar--Survey Findings of American Juror Attitudes Against Corporate America**

**Subgroup Differences:**

The youngest (18-24), those with lower income (under \$40K), those with young children, and those in minority racial groups are the most likely to think it is very or somewhat important to know. Those who are married are more likely to think not important to know.

**3. Do you support lawsuits against fast food companies by customers who claim to have become obese eating their food?**

11% Yes  
89% No

**Subgroup Differences:**

Those of lower income (under \$30K), those in minority racial groups, those who do not have Internet access, and those with less than a high school degree are more likely to support lawsuits.

**4. Do you feel that fast food companies should have warned their customers about possible risks associated with eating their food?**

36% Yes  
64% No

**Subgroup Differences:**

Those of lower income (under \$30K), high school dropouts, those in minority racial groups, those without Internet access, and those from the East Coast are more likely to think fast food companies should warn. Influentials and married people are less likely.

**5. Do you feel that fast food companies are responsible for addicting their customers to fatty foods?**

17% Yes  
83% No

**Subgroup Differences:**

Those of lower income (under \$20K), high school dropouts, widowed or divorced people, those without Internet access, and those in minority racial groups are more likely to believe fast-food companies are responsible for addicting their customers while Influentials are less likely.



**Bowne DecisionQuest and DRI—The Voice of the Defense Bar--Survey Findings of American Juror Attitudes Against Corporate America**

**6. Fast-food companies should not be allowed to target children in their advertisements, because children don't know that fast food may be bad for them.**

- 26% Strongly Agree
- 30% Somewhat Agree
- 19% Somewhat Disagree
- 26% Strongly Disagree

**Subgroup Differences:**

Those of lower income (under \$20K), those without younger children at home, older people (50 and over), widowed and divorced people, those without Internet access, and Asians are more likely to believe fast food companies should not be allowed to target children.

## **BOWNE DECISIONQUEST**

### **Bowne DecisionQuest and DRI—The Voice of the Defense Bar--Survey Findings of American Juror Attitudes Against Corporate America**

#### **Survey Two: Questions on environmental litigation.**

##### **Demographic information of Survey Two is as follows:**

<b>Region:</b>	East	West	Midwest	South
	32%	27%	21%	16%

<b>Gender:</b>	Male	Female
	46.7%	51.4%

<b>Is the area where you live:</b>	Urban	Suburban	Rural
	38.1%	33.7%	20.4%

<b>Age:</b>	18-24	25-34	35-44	45-54	55-64	65+
	11.7%	19.5%	24.7%	21.3%	14.4%	8.0%

##### **Ethnicity:**

White/Caucasian	African-American	Hispanic
67.8%	19.8%	8.9%
Asian	Native-American	Other:
.8%	1.2%	1.6%

##### **Highest level of Education Completed:**

Less than High School graduate	High school graduate	Technical/trade school	Some College
4.8%	21.9%	6.3%	40.3%
Bachelor's degree	Some post-graduate work	Masters/Ph.D.	
15.8%	4.4%	6.1%	

# BOWNE DECISIONQUEST

## Bowne DecisionQuest and DRI—The Voice of the Defense Bar—Survey Findings of American Juror Attitudes Against Corporate America

**Occupation (if retired or unemployed, please describe most recent occupation):**

Sales/Service 18.0%	Blue Collar 14.1%	Homemaker 7.8%	Student 5.9%
Professional 25.2%	Management/White Collar 13.8%	Clerical 11.3%	

**Household Income:**

Less than \$20,000 24.8%	\$20,000 – \$29,999 20.5%	\$30,000 - \$39,999 14.5%	
\$40,000 - \$49,999 11.3%	\$50,000 - \$74,999 17.5%	\$75,000 - \$99,999 6.8%	\$100,000 + 3.5%

**Have you ever supervised other employees at work?**

Yes	No
71.0%	26.5%

**Environment Questions:**

1. Should people who believe they have become sick from breathing pollution generated by manufacturing facilities be compensated by the companies who released the fumes; even if there is little evidence that the fumes released into the air by that company have harmed anyone?

Definitely Yes	Probably Yes	Probably No	Definitely No
7.6%	44.0%	41.5%	5.8%

2. If I were a juror in a case brought by an environmental group against a corporation for violating pollution laws I would be more likely to:

Side with the environmental group	Side with the corporation
78.8%	13.7%



**Bowne DecisionQuest and DRI—The Voice of the Defense Bar—Survey Findings of American Juror Attitudes Against Corporate America**

3. If a healthy individual thinks he/she may become sick in the future as a result of having been exposed to a company's product that contains hazardous elements, the company should have to compensate that person now in case he/she becomes sick in the future.

Strongly Agree	Somewhat Agree	Somewhat Disagree	Strongly Disagree
11.9%	23.0%	34.1%	29.7%



**CARE TO INDULGE?  
WE GIVE YOU  
“THE BULGE”**

Warning: The Banzhaf Commission reports that consumption of this food item may cause obesity in some individuals.

John Banzhaf believes the American public cannot make its own decisions on what to eat! We Object! And since we can't batter & fry an overzealous trial lawyer, we use a banana instead.

First we batter it, roll it in sugar then fry it up crispy. Then its topped with a scoop of vanilla bean ice cream, caramel & chocolate sauces & fresh whipped cream. We'll testify under oath that a dusting of macadamia nuts, cinnamon & powdered sugar provides for one sweet release.

Speaking of release, if you want to order this baby, grab your pen 'cause you gotta sign a "release form" that your personal legal assistant (your server) will be happy to provide.

**\$5.75**

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The above is used at The 5 Spot restaurant.  
Feel free to use the name "The Bulge"  
to apply to your own menu item!

Warning: The Banzhaf Commission reports that consumption of this food item may cause obesity in some individuals.

Warning: The Banzhaf Commission reports that consumption of this food item may cause obesity in some individuals.

**The 5 Spot Bulge**  
~ Release Form ~

I, \_\_\_\_\_, release \_\_\_\_\_  
from all liability of any weight gain that may result  
from ordering and devouring this sinfully fattening treat.  
I will not impose any sort of "Obesity-Related"  
lawsuit against \_\_\_\_\_  
or consider any similar type of frivolous legislation  
created by a hungry trial lawyer.

\_\_\_\_\_ will not be held  
liable in any way if the result of my eating this dessert  
leads to a "Spare Tire", "Love Handles", "Saddle Bags",  
or "Junk in my Trunk". If I have to go to "Fat Camp" at  
some time in my life, I will not mail my bill to  
\_\_\_\_\_.

I knowingly and willingly accept full and personal  
responsibility for my choices and actions.

Signed \_\_\_\_\_

Date \_\_\_\_\_

Reach us at [www.chowfoods.com](http://www.chowfoods.com)

THE GALLUP ORGANIZATION

POLL ANALYSES

July 21, 2003

Public Balks at Obesity Lawsuits

*Most say food industry should not be held responsible for consumers' weight problems*

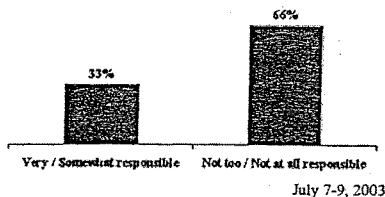
by Lydia Saad

GALLUP NEWS SERVICE

PRINCETON, NJ -- Echoing the legal arguments made by smokers against the tobacco industry, some obese Americans are now trying to blame fast-food chains and other food suppliers for their health problems. The Senate's No. 2 Republican, Mitch McConnell of Kentucky, filed a bill last Thursday -- backed by the restaurant industry, but opposed by the Association of Trial Lawyers of America -- that would shield the food industry from such lawsuits.

A new Gallup Poll, conducted July 7-9, indicates that Americans are solidly aligned with McConnell on this issue. Only a third of Americans believe the fast-food industry bears much responsibility for the health problems faced by obese Americans. Just 6% say the industry is very responsible and 27% say it is somewhat responsible. The remainder believes the industry is generally not responsible, including 25% saying "not too responsible" and 41% saying "not responsible at all."

*How responsible is the fast food industry for the health problems faced by obese people in this country -- very responsible, somewhat responsible, not too responsible, or not responsible at all?*



Even more to the point, nearly 9 in 10 Americans (89%) oppose holding the fast-food industry legally responsible for the diet-related health problems of people who eat that kind of food on a regular basis. Just 9% are in favor. Those who describe themselves as overweight are no more likely than others to blame the fast-food industry for obesity-related health problems, or to favor lawsuits against the industry.



*Would you favor or oppose holding the fast food industry legally responsible for the diet-related health problems of people who eat fast food on a regular basis?*



	Favor	Oppose
	%	%
2003 Jul 7-9		
National adults	9	89
Overweight	10	89
Weight about right	7	90
Underweight	10	88

**Testimony of Senator Mitch McConnell  
United States Senate Committee on the Judiciary  
Subcommittee on Administrative Oversight and the Courts  
October 16, 2003  
“Common Sense Consumption: Super-Sizing Versus Personal Responsibility”**

Thank you Chairman Sessions and Members of the Subcommittee for holding this important hearing. I appreciate the opportunity to testify today about my bill, The Commonsense Consumption Act, S. 1428.

This bill is my latest attempt at constructive reform of our nation’s legal system. Since I first came to the Senate in 1985, I have sought to bring some sense of equity to a litigation system run amok. Some of my efforts have proposed dramatic changes while others have included modest attempts at reform in particular and discreet areas. In each case, I advocated legal reform initiatives as a response to abuses evident in the system. From my “Auto Choice” proposal that would reduce auto insurance premiums and claims for pain and suffering – to requiring lawyers to disclose fees up front to the victims they represent, I have suggested changes that I believe would reduce abusive litigation practices.

This bill, the Commonsense Consumption Act, is no different in that regard. The particular topic, or potential defendant may be different, but the point of the bill is consistent: We need to impose some sanity on our tort system.

Let me begin by saying I recognize that obesity is a serious problem in America. It is a particularly tragic problem among children. There may be arguments about the accuracy or

appropriateness of the methods used to measure obesity, but we need only look around to see that many Americans are overweight or obese. The question is who is responsible for causing this extra weight?

Incredibly, if not predictably, some plaintiff's attorneys believe the person selling the food should be responsible for the weight gain. But I, and most of America – according to recent polls – believe it is the person eating the food, not the person selling the food, who bears responsibility.

Obesity suits against food companies are premised on blaming the food seller for how much the food buyer chooses to eat. That is absurd. Yet, over zealous lawyers are filing these suits anyway. And they have already cost companies plenty in legal fees. Left unchecked, these suits threaten to drive up food prices and ultimately drive some food businesses into bankruptcy. At first blush such a scenario may seem far-fetched. But we have seen this same pattern in other industries with disastrous consequences.

And that pattern is clear. Initially there are only a few suits and most of those are dismissed. But over time more and more suits are filed, new venues are probed, different plaintiffs are substituted, new judges hear the cases, untested defendants with deep pockets are targeted, novel theories are proposed, new juries are picked, and eventually the personal injury lawyer hits the jackpot. All along the way, companies are subjected to legal bills running into the thousands, hundreds of thousands, and eventually millions of dollars. Even if the company successfully wards off the frivolous suits, it pays handsomely in defense costs. This eventually forces

companies to make a simple economic decision about whether to spend a fortune to exonerate themselves or pay a slightly smaller fortune to make the plaintiff's lawyer go away. Being forced into that kind of decision is not fair and it is not just. And it should not be the American way.

Those companies that escape the initial wave of lawsuits are not, however, safe from the costs of this abusive litigation. Once the plaintiff's bar sets its sights on an industry, it will not be long until all members of that industry face additional insurance costs. It appears this is already happening in the wake of the obesity suits of the past year. Zurich North America, one of the largest writers of product liability insurance in the U.S., said it is tracking these suits carefully because of the potential increased insurance risk. A related company, Zurich London, has already increased insurance rates. They even issued a press release warning the food and drink sector that they could be hit with even bigger rate increases "*if the trend to blame and claim takes hold.*"

We all know who ultimately pays the tab when business costs increase: The consumer. If these suits are expensive for the defendants – or potential defendants – that cost will be passed along to people at the cash register in their local grocery store or restaurant. That is why we need to stop these abusive suits before they drain more resources from an industry that employs millions of people and feeds virtually everyone. Every dollar a business owner spends defending – or settling - a frivolous lawsuit is a dollar not invested in creating jobs and building the business. I am not suggesting that all tort claims against all defendants should be prohibited. I am merely arguing for a little sanity to the system – a little commonsense, if you will.

My bill, the Commonsense Consumption Act is short and easy to understand. It is similar to a bill introduced in the House by Representative Ric Keller of Florida who early this year asked Congress to take action against these ridiculous suits. My bill simply prohibits lawsuits against food producers or sellers, in state or federal court, for claims of injury resulting from a person's weight gain, obesity or health condition related to weight gain or obesity. Upon enactment of this bill, if any of these types of suits are pending, they will be dismissed.

I want to emphasize that this bill does not provide blanket immunity to the food industry. In fact, I expressly exclude from protection traditional claims for breach of contract, breach of warranty, claims for adulterated food, and violations of Federal and State statutes. In the simplest terms, this bill provides protection from abusive suits by people seeking to blame someone else for their poor eating habits.

Pundits love to discuss the erosion of personal responsibility in America. Many argue that we have become a nation of hapless victims; and these obesity lawsuits certainly support that observation. Can there be any better indication that we have hit rock bottom than when we begin blaming others for what – and how much - we choose to put in our mouth? There has to be some measure of personal responsibility for the choices we make in life. And there has to be some parental responsibility for our children's food consumption and lifestyle. It is not always someone else's fault. Sometimes it is your own fault.

Obesity lawsuits say, in essence, that people have no free will; that they lack the power to stop eating; that someone else made them do it. Do we really think that someone forces us to eat

more than we want to eat? Do we really think that people do not know that cake and ice cream isn't as healthy for you as fruit and vegetables? Do we really think that suing the person selling you food is going to help you lose weight?

The logic of these suits is ridiculous. If we keep this up, it will not be long until we sue car dealers when we get speeding tickets. After all, *it is not my fault that I exceeded the speed limit – it is the fault of the guy who sold me the car. They should know better than to sell cars that go fast.*

Mr. Chairman and members of the committee: Make no mistake. This is a debate about personal responsibility. Activists on the other side of this debate will not even utter the words “personal responsibility,” “choice,” or “free will.” They want us to believe that we are hapless victims with no control over our destiny; that we are manipulated by some powerful force that makes us do things against our will. I am happy to report that the American public overwhelmingly and correctly rejects that view.

When it comes to assigning responsibility for what we eat, the American public points the finger at itself. Shortly after I introduced this bill, the Gallup organization conducted a poll about American's views on obesity and who is to blame. That poll indicates 89% of Americans oppose holding the food industry legally responsible for diet-related health problems. The same survey shows that even those people who describe themselves as overweight oppose these lawsuits by the same percentage – 89%. Obviously, most people think these suits are ridiculous. Unfortunately, some activists and greedy lawyers have different ideas.



The obesity blame game is really starting to get interesting. Recently, there was a report issued saying suburban sprawl is to blame for our weight gain. If that is the case, then perhaps next we'll sue the homebuilders. And just last weekend there was an article in the New York Times blaming obesity on our farm subsidy program. Now there is a novel idea that some enterprising lawyer will no doubt turn into a legal theory for liability.

Sure, we have a lot of food in this country. America is a blessed nation. Our farmers are the most productive in the world and we enjoy food choices that our grandparents could have only imagined. But it is wrongheaded to say that the people producing and selling the food are responsible for causing obesity. I am not a dietician or a medical expert, but let me suggest something bold: Overeating, in conjunction with a sedentary lifestyle, causes obesity.

I do not understand why some insist on overlooking the obvious and instead want to blame the food portions in restaurants. Why not blame the remote control, the recliner, or the automatic garage door opener? All of those conveniences have saved us from unwanted, though perhaps needed, exercise.

There always seems to be a group of activists out there running around telling us how bad everything is in America. The food police are now sounding the alarm and saying that the rise in obesity "corresponds" to the increased availability of "fast food." What they want you to believe is that the food sellers are "causing" the obesity. That is ridiculous.

The rise in obesity may “correspond” to the increased availability of “fast food”, but you know what? The rise in obesity also corresponds to the rise in household income, the rise in educational levels, and the rise in life expectancy. Does that mean we have the capability to earn more, learn more and live more, yet we have no control over what we put in our mouth?

In sum, Mr. Chairman, obesity is a problem in America, but suing the people who produce and sell food is not going to solve the problem. Fattening the wallets of personal injury lawyers will not help people lose weight. Bankrupting the people who make and sell food – or forcing them to settle ridiculous suits because it is cheaper than taking your chances with a jury – will not help anyone lose weight. We each must take responsibility for what – and how much – we eat. Parents must take responsibility for what – and how much – their children eat. And we must take responsibility for our lack of exercise. Poor eating habits and a sedentary lifestyle cause weight gain. Frivolous lawsuits and irresponsible personal injury lawyers cause job loss and economic hardship. More obesity lawsuits will just result in driving up food costs for the consumer. We must take action to stop these abusive and costly lawsuits and passing the Commonsense Consumption Act is a good first step.

Mr. Chairman and members of the Committee, I appreciate the opportunity to testify today. I have some letters in support of the bill from the National Food Processors Association, the United States Chamber of Commerce, and the Corn Refiners Association and National Corn Growers Association. I ask that they be included in the record. I will be happy to answer any questions you may have.

Congressional Statement/Testimony  
Dr. Gerard J. Musante  
Clinical Psychologist, CEO and Founder  
Structure House, Residential Weight Loss and Life Style Change Clinic

SENATE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON  
ADMINISTRATIVE OVERSIGHT AND THE COURTS

October 16, 2003

Good afternoon, Chairman Sessions and Honorable members of the Subcommittee on Administrative Oversight and the Courts. I am Dr. Gerard J. Musante and I appreciate the opportunity to appear before you today. I have been called here to share my expertise and educated opinion on the importance of personal responsibility in food consumption in the United States. This lesson is one I have been learning about and teaching for more than 30 years to those who battle moderate to morbid obesity - a lesson that emphasizes the criticality of taking responsibility for one's own food choices. I am testifying before you today because I am concerned about the direction in which today's obesity discourse is headed. We cannot continue to blame any one industry or any one restaurant for the nation's obesity epidemic. Instead, we must work together as a nation to address this complex issue, and the first step is to put the responsibility back into the hands of individuals.

As a clinical psychologist with training at Duke University Medical Center and The University of Tennessee, I have worked for more than 30 years with thousands of obese patients. I have dedicated my career to helping Americans fight obesity. My personal road, which included the loss and maintenance of 50 of my own pounds, began when I undertook the study of obesity as a faculty member in the Department of Psychiatry at Duke University Medical Center. There, I began developing an evidenced-based, cognitive-behavioral approach to weight loss and lifestyle change. I continue to serve Duke University Medical Center as a Consulting Professor in the Department of Psychiatry. Since the early 1970's, I have published research studies on obesity and have made presentations at conferences regarding obesity and the psychological aspects of weight management.

Today, I continue my work at Structure House - a residential weight loss facility in Durham, North Carolina - where participants come from around the country and the world to learn about managing their relationship with food. Participants lose significant amounts of weight while both improving various medical parameters and learning how to control and take responsibility for their own food choices. Our significant experience at Structure House has provided us with a unique understanding of the national obesity epidemic.

Some of the lessons I teach my patients are examples of how we can encourage Americans to take personal responsibility for health and weight maintenance. As I tell my participants, managing a healthy lifestyle and a healthy weight certainly are not easy to do. Controlling an obesity or weight problem takes steadfast dedication, training and

self-awareness. Therefore, I give my patients the tools they need to eventually make healthy food choices as we best know it. Nutrition classes, psychological understanding of their relationship with food, physical fitness training and education are tools that Structure House participants learn, enabling them to make sensible food choices.

As you know, the obesity rates in this country are alarming. The Centers for Disease Control and Prevention have recognized obesity and general lack of physical fitness as the nation's fastest-growing health threat. Approximately 127 million adults in the United States are overweight, 60 million are obese and 9 million are severely obese. The country's childhood obesity rates are on a similar course to its adult rates, as well as increases in type II diabetes. Fortunately Americans are finally recognizing the problem. Unfortunately, many are taking the wrong approaches to combating this issue.

Lawsuits are pointing fingers at the food industry in an attempt to curb the nation's obesity epidemic. These lawsuits do nothing but enable consumers to feel powerless in a battle for maintaining one's own personal health. The truth is, we as consumers have control over the food choices we make, and we must issue our better judgment when making these decisions. Negative lifestyle choices cause obesity, not a trip to a fast food restaurant or a cookie high in trans fat. Certainly we live in a litigious society. Our understanding of psychological issues tells us that when people feel frustrated and powerless, they lash out and seek reasons for their perceived failure. They feel the victim and look for the deep pockets to pay. Unfortunately, this has become part of our culture, but the issue is far too comprehensive to lay blame on any single food marketer or manufacturer. These industries should not be demonized for providing goods and services demanded by our society.

Rather than assigning blame, we need to work together toward dealing effectively with obesity on a national level. Furthermore, if we were to start with one industry, where would we stop? For example, a recent article in the Harvard Law Review suggests that there is a link between obesity and "preference manipulation," which means advertising. Should we consider suing the field of advertising next? Should we do away with all advertising and all food commercials at half time? We need to understand that this is a multi-faceted problem and there are many influences that play a part.

While our parents, our environment, social and psychological factors all impact our food choices, can we blame them for our own poor decisions as it relates to our personal health and weight? For example, a recent study presented at the American Psychological Association conference showed that when parents change how the whole family eats and offer children wholesome rewards for not being couch potatoes, obese children shed pounds quickly. Should we bring lawsuits against parents that don't provide this proper direction? Similarly, Brigham and Women's Hospital in Boston recently reported in "Pediatrics" that children who diet may actually gain weight in the long run, perhaps because of metabolic changes, but also likely because they resort to binge eating as a result of the dieting. Do we sue the parent for permitting their children to diet?

From an environmental standpoint, there are still more outside influences that could be erroneously blamed for the nation's obesity epidemic. The Center for Disease Control has found that there is a direct correlation between television watching and obesity among

children. The more TV watched, the more likely the children would be overweight. Should we sue the television industry, the networks, cable, the television manufacturers or the parents that permit this? And now we have internet surfing and computer games. Where does it stop?

School systems are eliminating required physical education- are we to also sue the school systems that do not require these courses?

Throw social influences into the mix and we have a whole new set of causes for obesity. - Another recent study in "Appetite" indicated that social norms can affect quantitative ratings of internal states such as hunger. This means that other people's hunger levels around us can affect our own eating habits. Are we to blame the individuals who are eating in our presence for our own weight problems?

As evidenced in these studies, we cannot blame any one influencing factor for the obesity epidemic that plagues our nation. Through working with obese patients, I have learned that the worst thing one can do is to blame an outside force to get themselves "off the hook," to say it's not their fault, and that they are a victim. To do this can bring about feelings of helplessness and then resignation. Directing blame or causality outside of oneself allows the individual not to accept responsibility and perhaps even to feel helpless and hopeless. "The dog ate my homework" and "the devil made me do it" allows the individual not to take serious steps toward correction because they believe these steps are not within their power. We must take personal responsibility for our choices.

What does it mean to take personal responsibility for food consumption? It means making food choices that are not detrimental to your health, and not blaming others for the choices we make.

Ultimately, Americans generally become obese by taking in more calories than they expend. But certainly there are an increasing number of reasons why Americans are doing so producing rising obesity rates. Some individuals lack self-awareness and overindulge in food ever more so because of psychological reasons. Others do not devote enough time to physical activity, which becomes increasingly difficult to do in our society. Others lack education or awareness as it relates to nutrition and/or physical activity particularly in view of lessened exposure to this information. And still others may have a more efficient metabolism or hormonal deficiencies. In short, honorable members of the Subcommittee, there is yet much to learn about this problem.

Congress has rightly recognized the danger of allowing Americans to continue blaming others for the obesity epidemic. It is imperative that we prevent lawsuits from being filed against any industry for answering consumer demands. The fact that we are addressing the issue here today is a step in the right direction. No industry is to blame and should not be charged with solving America's obesity problem.

Rather than pointing fingers, we should be working together on a national level to address the importance of personal responsibility in food consumption. The people who come to Structure House have a unique opportunity to learn these lessons, but they are only a select few. These lessons need to be encouraged on a national level, from an early

age - in schools, homes and through national legislation that prevents passing this responsibility onto the food or other related industries.

In closing, I'd like to highlight the fact that personal responsibility is one of the key components that I teach my patients in their battle against obesity. This approach has allowed me to empower more than 10,000 Americans to embrace improved health. I urge you to consider how this type of approach could affect the obesity epidemic on a national level. By encouraging Americans to take personal responsibility for their health by limiting frivolous lawsuits against the food industry, we can put the power back into the hands of the consumers. This is a critical first step on the road toward addressing our nation's complex obesity epidemic.

For years, I have seen presidents call for "economic summits." I urge that we consider an "obesity summit." Let me suggest instead of demonizing industries that we bring everyone to the table - representatives in the health care industry, advertising, restaurants, Hollywood, school systems, parent groups, the soft drink industry, and the bottling industry. Instead of squandering resources in defending needless lawsuits by pointing fingers, let's make everyone part of the solution. Let us encourage a national obesity summit where all the players are asked to come to the table and pledge their considerable resources toward creating a national mind set toward solving this problem. That would be in the interest of the American people.

I feel privileged to be a part of the Subcommittee's efforts. I want to thank you for allowing me to testify here before you today and I will now be glad to answer any questions.

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# NEWS RELEASE

NATIONAL FOOD PROCESSORS ASSOCIATION • 1350 I Street, NW • Suite 300 • Washington, DC 20005

FOR IMMEDIATE RELEASE  
July 17, 2003

Contact: Timothy Willard (202/637-8060)  
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**NFPA Calls McConnell Bill "A Timely and Needed Response  
To Threat of Food Lawsuits"**

(Washington, D.C.) – The National Food Processors Association (NFPA) today applauded a bill introduced by Sen. Mitch McConnell (R-Kentucky) to protect the food industry from liability claims that food products are responsible for causing weight gain or obesity in consumers.

"Senator McConnell's bill is a timely, strategic and needed response to the threat of lawsuits seeking to pin the responsibility for obesity in this country on the food industry," said John R. Cady, NFPA's President and CEO.

Cady praised McConnell's extensive legislative experience in the tort reform arena, which dates back to the 1980s. "Senator McConnell, who serves as the Senate's Assistant Majority Leader, is a powerfully effective advocate for any issue he embraces," Cady noted.

"NFPA agrees with Senator McConnell that seeking to portray consumers as the hapless victims of the food industry is outrageous," Cady said. "The threatened lawsuits against food companies – now being discussed at events such as the 'how-to-sue' meeting held recently in Boston – are absolutely the wrong way to address the serious issue of obesity. Unfortunately, this litigation offensive makes a legislative remedy such as the McConnell bill necessary."

Cady said "America's safe, nutritious and affordable food supply is one of the world's great success stories. This outstanding achievement must not be endangered by litigation run amok, which will do nothing to address the real issues surrounding obesity."

"The U.S. government has stated that obesity has become a serious national health issue, affecting both adults and children," Cady noted. "The food industry strongly believes that more energy must be put into solving the problem of obesity, and less into assigning blame for the purpose of collecting legal fees. We need to start helping consumers understand how they can balance their food choices in order to create a healthful diet.

-M-O-R-E-

We also must help them to understand that a lack of physical activity in the lives of many Americans – adults and children – is having a serious negative impact on their health.”

Cady stated “The answer to the obesity issue is not lawsuits seeking to ruin the U.S. food industry. Senator McConnell’s legislation will help to focus the debate where it belongs: on positive actions that can help consumers, not needless litigation.”

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The National Food Processors Association (NFPA) is the voice of the food processing industry on scientific and public policy issues involving food safety, food security, nutrition, technical and regulatory matters and consumer affairs. NFPA’s three scientific centers, its scientists and professional staff represent food industry interests on government and regulatory affairs and provide research, technical services, education, communications and crisis management support for the association’s U.S. and international members. NFPA members produce processed and packaged fruit, vegetable, and grain products, meat, poultry, and seafood products, snacks, drinks and juices, or provide supplies and services to food manufacturers.





Statement of Wayne Reaves  
Owner, Manna Enterprises, Inc.  
t/a Jack's Family Restaurants, Anniston, AL  
On behalf of the National Restaurant Association  
Administrative Oversight and the Courts Subcommittee  
of the Senate Judiciary Committee  
U.S. Senate  
October 16, 2003

Thank you, Mr. Chairman. Chairman Sessions and members of the Committee, my name is Wayne Reaves and I am the owner of Manna Enterprises, Inc. in Anniston, Alabama. I own and operate 7 quick-service restaurants operating in the region as Jack's Family Restaurants. 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 S. 1428 – the Commonsense Consumption Act of 2003. 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 pleased to say that our nation's restaurant industry is the cornerstone of the economy, careers and community involvement.

Mr. Chairman, I'd first like to start by giving you a very brief background on my business. I proudly have spent my entire professional career working in the restaurant industry for Jack's Family Restaurants. Jack's is a quick-service concept that serves breakfast, lunch and dinner with a wide variety of options on our menu. I started out working in Jack's as a cook back in high school and was promoted to General Manager of the store shortly after I graduated. Out of high school, I was drafted and served in the Army before returning to Jack's where I worked my way up the management ladder. Today, as the only Jack's franchisee, I own and operate 7 restaurants. And while I am certainly not the only one to work their way up in our industry, it is more rewarding and gratifying to have done so within the same concept for over three decades.

The restaurant industry has been very good to me and I hope to one day pass my business on to my son so that he can hopefully share the same experiences, rewards and challenges that I have.

However, one of the challenges that the restaurant-and-foodservice industry has been confronted with recently is the string of frivolous lawsuits being filed against our industry, claiming they are the cause of some individuals' overweight- or obesity-related health conditions. These senseless and baseless attempts by representatives of the trial bar are nothing more than a distraction from finding sensible solutions to this very complex issue, and are a clear abuse of our judicial system.

The issue of obesity is a very serious and multi-faceted issue. However, certain special interest groups, along with these trial attorneys, are looking for scapegoats and trying to target food as the culprit to the obesity issue. To blame the restaurant-and-foodservice industry is overly simplistic, and 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.

The American public also sees through the trial bar's misguided approach and understands the frivolity of these irresponsible lawsuits. And, I'm pleased to share the good news that personal responsibility remains a strong American value. In a Gallup poll conducted in July, 89 percent of Americans indicated that the food industry should not be blamed for issues of obesity and overweight. 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. And, we are also fortunate that common sense has prevailed with the ruling in September by Judge Robert Sweet in New York, dismissing the most recent lawsuit against a restaurant chain claiming it caused obesity among some Americans.

There is no doubt in my mind that trial attorneys will persist in trying to file other similar lawsuits, as they have made no secret of their intentions to continue their efforts. As you may be aware, this past June, members of the trial bar community convened a three-day workshop in

Boston entitled "Legal Approaches to the Obesity Epidemic". Some of the same individuals who were associated with the tobacco litigation played significant roles at the workshop.

Mr. Chairman, in the simplest of terms, this type of legal action, if permitted to go forward, could be very costly to my business. It would only take one lawsuit of this nature to potentially put me out of business and take away all that I have worked for. As a franchisee of a larger chain, I operate much like any other independent small businessman. And if I were to face one of these suits, I would be responsible for defending myself and for bearing the brunt of any judgment against me. As a businessman who employs 196 individuals, this is a grave concern of mine. For more than half of my employees, the job I provide them serves as the primary source of income for their families. My employees depend on their job for their livelihoods – and so do their families

But beyond the costs of defending a potential suit and the risks to my business that go along with it, there are other significant and detrimental effects. For instance, the mere threat of such a suit can have a direct impact on the cost of insuring my business. Insurance companies have acknowledged that they are watching these lawsuits very closely, and they recognize that this litigation is very much a factor in how they may price future liability products for food companies. One insurance industry publication has even coined the phrase "food fright" in discussing this recent legal phenomenon and its potential repercussions in the insurance markets. The foodservice industry accounts for 4% of our nation's GDP. If this type of litigation is not kept in check, there could not only be negative consequences for the foodservice industry, but for our nation's economy.

In the restaurant industry, clearly the customer comes first. However, the thought that an individual can file a lawsuit based in part on a voluntary choice he/she has made regarding where and what to eat is disturbing. Perhaps no other industry offers a greater variety of choices to consumers than restaurants. And, one of the many strengths of the restaurant industry is the broad spectrum of cuisines and culinary options that customers are offered.

In any one of our nation's 870,000 restaurants, consumers have 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, he or she is presented with an array of choices designed to accommodate any individual's tastes and preferences. Customers are also capable of customizing their meals, whether it is food-preparation method or substitution of food items to meet their dietary needs. And, as you may know, more and more restaurants have recently announced new menu items or "healthier" options. But, let me be clear in underscoring that the restaurant industry is driven by consumer demand. These recent changes by various companies are in response to American consumers and the marketplace - not by the threat of potential litigation.

The lawsuits we are discussing this afternoon not only 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.

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. Sen. McConnell is to be commended for introducing S. 1428 which would help prevent these misguided lawsuits in the future. More attention needs to be paid to educating the American public on the importance of healthy lifestyles, moderating, and personal responsibility, not more senseless litigation.

Mr. Chairman and members of the Committee, thank you again for this opportunity to appear before you today.

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**TESTIMONY BY**

**VICTOR E. SCHWARTZ  
SHOOK, HARDY & BACON LLP  
WASHINGTON, D.C.**

**BEFORE THE**

**SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT  
AND THE COURTS  
OF THE SENATE JUDICIARY COMMITTEE  
UNITED STATES CONGRESS**

**REGARDING S.1428  
"THE COMMONSENSE CONSUMPTION ACT OF 2003"**

**on**

**OCTOBER 16, 2003**

Mr. Chairman, thank you for your kind invitation to testify today about how to prevent frivolous lawsuits against manufacturers, distributors and sellers of food. I serve as counsel to the American Tort Reform Association, and my firm has been retained by the National Restaurant Association, but the views I express today are my own. Let me briefly state the basis for those views.

For the first fifteen years of my professional life, I worked part-time as a plaintiffs' attorney and full-time as a professor of law. I was and still am committed to helping develop sound public policies in America's tort law. I co-author the most widely used torts casebook in America, *Prosser, Wade & Schwartz's Torts*, now in its 10<sup>th</sup> edition. 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. That opportunity helped me appreciate the broad public policy implications of our liability system.

Currently, I chair the Public Policy Group in the Washington office of the law firm of Shook, Hardy & Bacon L.L.P. Shook, Hardy & Bacon is

principally a defense firm, and has helped me gain the perspective of those who are sued in our legal system.

**Liability of Commercial Sellers and Distributors  
for Harms Caused by Defective Food Products**

Purveyors of food were the first product sellers to be subject to strict liability. If food contained 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 was liable. There were, and are, no excuses. Sellers of food also may be subject to liability for failure to warn. Here is an example under the principles provided in the *Restatement of Torts, Third: Products Liability*. If a seller of a candy bar failed to inform a consumer in the ingredients list that the candy contained peanuts, a well-known allergen, and the consumer was injured, then the manufacturer may be subject to liability. Moreover, sellers of food may be subject to liability when their product fails to conform to applicable safety statutes or administrative regulations. For example, if a regulation stipulates that hamburgers are to be cooked at more than 160°F, and the seller of food fails to do so, and a person is injured because of that failure, the seller is liable.

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. Again turning to the *Restatement of Torts, Third*, a typical question was whether a one-inch chicken bone in a chicken enchilada or a fishbone in chowder could

be considered a manufacturing defect, or was an inherent aspect of the product. The new *Restatement* contains a rule to address those situations. It focuses on whether a reasonable consumer would not expect the food to contain that item. If the consumer would not expect a one-inch chicken bone to be present in a chicken enchilada and he or she is injured, the seller is liable. That is more than two hundred years of food law in the proverbial "nutshell."

### **Regulation through Litigation**

While tort law has always had a public policy component to help assure that wrongdoers pay for a harm they cause, tort law has achieved those goals under traditional standards such as those 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 a judge allowing a jury to make determinations that traditionally are the decisions of Congress, state legislatures, or regulatory agencies. The threat of massive liability exposure is used to change the behavior of a defendant. For example, to lower the price of a drug, to restrict the sale of a weapon beyond what is required by law or to cause a seller of food to change how it markets a product. In that way, those who are generally not elected and do not gather information through public hearings may, through one judicial decision, regulate or change how much we pay for things, what products we own, and how much they cost.



Regulation through litigation began with products that were very unpopular in some quarters, such as tobacco, and more recently, guns. At the time these suits were filed, I suggested that the "regulation through litigation" concept could be extended to products that were much more popular, such as fast food. I remember in a specific debate when tobacco was the only product declared by a panelist that could kill a person if used as intended. If one eats enough hamburgers (which are intended to be eaten), it can lead to premature death too. A noted consumer advocate, Professor John F. Banzhaf III, and others told me that the "regulation through litigation" concept focused solely on tobacco. I did not concur.

Now we are on the threshold of a new approach to "regulation through litigation," and the focus is food. It is not on food that contains a defect. It is on food that some health advocates believe causes harm, particularly obesity and diseases related to obesity. Everyone knows obesity can occur when people consistently overeat and fail to burn off the excess calories they consume. Everyone knows that repeated consumption of an excessive amount of french fries leads more quickly to obesity than eating a substantial portion of celery or lettuce.

Regulatory bodies can, and have, stepped in to address issues of obesity and food. For example, regulatory bodies in California now ban 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. The electorate in that state has recently shown that it knows how to use that power.

The process is not the same with a decision made by a judge who has decided to make up the law and change it, and a jury that may become captivated by the judge's wishes. This very incident occurred in another field, far removed from food: whether or not an insurance company can offer its insured alternatives to original parts when they have their cars repaired. A huge jury verdict rendered by one court in Illinois faced with resolving a national class action resulted in insurers believing that they could only offer original parts. The net result was a dramatic increase in prices for non-safety related automobile crash replacement parts. This was "regulation through litigation."

I have read the decisions and the literature with respect to cases brought against sellers of food predicated on the fact that over-consumption caused illnesses. Most recently, *Pelman v. McDonalds*, the class action that was discussed by Judge Robert Sweet in a thirty-six page opinion in September 2003. Judge Sweet's opinion reflects that there are substantial barriers to overcome before such cases can be successful. Let me briefly state why.

First, if traditional rules are followed, the plaintiff is going to have to show that his or her obesity was caused by food, not by failure to exercise or other lifestyle choices, or genetics. Second, the plaintiff would have to show that a particular defendant's food caused this harm. This will be very difficult to do,

considering the multiple sources of products that we consume. Finally, there will have to be a major change in the definition of what constitutes a product defect.

But as recent history has demonstrated, the foremost of legal barriers may fall before the legal axe of a pro-regulation through litigation judge's opinion. This occurred in tobacco when a few judges disregarded past legal history and gave the state – which allegedly suffered an indirect economic harm because citizens became sick from smoking – a greater right to sue than the smoker himself or herself. It occurred in guns, when some judges, such as learned Judge Jack Weinstein of the Eastern District of New York, embraced a broad new legal theory called "negligent distribution," which could result in finding liable a gun manufacturer in Minnesota who lawfully distributed its product for a shooting that occurred in Mississippi.

As Professor Banzhaf has candidly observed, "people are wondering if tactics used against the tobacco industry and less successfully against guns could be used against the problems of obesity."<sup>1</sup>

Consumer activist Ralph Nader has called the double cheeseburger "a weapon of mass destruction."<sup>2</sup>

Professor Banzhaf and Professor Daynard last spring held a plaintiff lawyer only symposium to teach plaintiffs' lawyers how to bring successful cases against the manufacturers and purveyors of food.

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<sup>1</sup> *Lawyers See Fat Payoff in Junk Food Lawsuits*, Fox News, Jan. 23, 2002.

Thus, those who suggest that obesity suits are merely frivolous and do not merit the attention of Congress are ignoring both judicial history and current efforts to persuade judges to change the fundamentals of the common law and use the specter of massive liability exposure to regulate the industry.

#### **Should Congress Take Action?**

If Congress believes that regulation of food should be left to federal and state legislatures as well as regulatory bodies, Congress should act to preserve the proper jurisdiction of these bodies. Congress has already worked to change current tort law. It has done so in the law of torts. 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. The policy followed by Congress produced sound results.

With food cases, we have not reached that point. Congress should take proactive measures to prevent individual state courts from engaging in "regulation through litigation" in the area of food, and holding food sellers, manufacturers or distributions liable for obesity.

Senator McConnell's bill takes the correct approach. It respects and retains the 240-year history of the common law of torts in fact. But it also

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<sup>2</sup> C. Spencer, K. Schmidt & J. Zanetti, *Fast Food in the Gunsights – Class Actions as Political Weapons*, 17 BNA Toxic Law Reporter 1090, 1093 (Nov. 21, 2002).

preserves the right of Congress, state legislatures and appropriate regulatory bodies to address the very real problem of obesity in this country.

In sum, S. 1428 would solidify existing law and draw a line where experience and practical wisdom have suggested it should be drawn. It is important that the legislation include a provision that would stop discovery "fishing expeditions" with respect to claims based solely on food causing obesity. Restaurants and other sellers of food should not be subject to the huge costs of such discovery where the subject of the suit is baseless.

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

**CONGRESS HAS THE CONSTITUTIONAL POWER TO ENACT  
PUNITIVE DAMAGE REFORM LEGISLATION; THE TENTH  
AMENDMENT DOES NOT LIMIT THIS POWER**

*Victor Schwartz, Esq.*

**INTRODUCTION**

This paper will very briefly set forth the need for Congressional action on punitive damage reform, why the Commerce Clause of the United States Constitution gives Congress the Power to enact such reform, why the Fourteenth Amendment of the United States Constitution allows Congress to enforce due process rights to protect parties against Constitutionally excessive punitive damage awards, and, finally, why the Tenth Amendment to the United States Constitution does not limit Congress's power to enact such legislation.

**I. THERE IS A NEED FOR CONGRESSIONAL ACTION ON  
PUNITIVE DAMAGE REFORM**

- United States Supreme Court justices have expressed concern that punitive damages in this country are “skyrocketing” (*Browning – Ferris Indus. of Vl., Inc., v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O’Connor, J., concurring in part and dissenting in part), and have “run wild.” (*Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991)).
- “It is the duty of Congress to respond to the [United States Supreme] Court’s concern about punitive damages that are ‘run wild’ by enacting meaningful reforms that will safe-guard constitutionally protected due process rights and remove substantial barriers to interstate commerce.” (S. No. 105-32, at 44-45 (1997) (Senate Committee on Commerce, Science, and Transportation, report on Product Liability Reform Act of 1997).

- Federal punitive damages reform is necessary to assure that lower courts will adhere more closely to the letter and spirit of the United States Supreme Court's punitive damages decisions. Without such legislation, some lower courts will continue to ignore the United States Supreme Court constitutional substantive and procedural due process mandates on the topic. (*See* Editorial, *Punitive Schmunitive*, WALL ST. J., Sept. 10, 2003, at A24).
- Federal action is needed to prevent defendants from being punished multiple times for the same act or course of conduct. (*See* cases cited on p. 9, Testimony of V. Schwartz before the Subcommittee on the Constitution of the Committee on the Judiciary, U.S. H. REP., *Regarding Potential Congressional Responses to State Farm Mut. Auto. Ins. Co. v. Campbell*, 108th Cong. (2003)).

## II. **THE COMMERCE CLAUSE GIVES CONGRESS THE POWER TO ENACT PUNITIVE DAMAGE LEGISLATION**

- The Commerce Clause of the United States Constitution gives Congress the power to regulate interstate commerce. (U.S. CONST. art. I, § 8).
- Traditionally, the United States Supreme Court has defined Congress's interstate commerce power broadly. For example, in a case included in most law school Constitutional Law textbooks, *Wickard v. Filburn*, (317 U.S. 111, 125 (1942)), the Court held that Congress can regulate even totally local activity through the Commerce Power and that Congress can legislate concerning any activity that directly or indirectly "exerts a substantial economic effect on interstate commerce." The United States Supreme Court has upheld a valid Congress's use of its Commerce Power to regulate gambling, crop control, employee wages and hours, professional football, deceptive practices in the sale of products,

fraudulent security transactions, and the misbranding of drugs, among other things. (*Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964)).

- Legislation imposing controls on punitive damages is solidly within Congress's Commerce Power because punitive damage awards are inseparable from a defendant's interstate commercial activity. As the United States Supreme Court recognized in *State Farm Mut. Auto. Ins. Co. v. Campbell*, (123 S. Ct. 1513, 1520 (2003)), in assessing punitive damages, juries consider a defendant's net wealth gained from commercial enterprise and they also have the potential to lash out against out-of-state commercial businesses, "us[ing] their verdicts to express biases against big businesses, particularly those without strong local presences."
- Legislation imposing controls on punitive damages is also within Congress's Commerce Power because such damages directly affect interstate commerce. Costs of punitive damage awards are spread throughout the country and adversely affect national productivity. If they are not kept under legitimate control, they also deter innovation and can cause useful and safe products to be withdrawn from the marketplace. Multi-million and multi-billion dollar awards have the potential to bankrupt companies, causing further disruptions to interstate commerce.
- Arguments of the Association of Trial Lawyers of America do not stand up under scrutiny:
  - For example, distinguished counsel Bob Peck suggested in his September 23, 2003 testimony before the Subcommittee on the Constitution of the Judiciary Committee that the conduct that engenders punitive damages



cannot be regarded as economic activity since there is no commercial market for willful, fraudulent or malicious acts that merit a community's moral condemnation. In *Heart of Atlanta Motel, Inc. v. United States*, (379 U.S. 241 (1964)), the United States Supreme Court disposed of his argument. In that case, opponents of legislation prohibiting discrimination by private hotel owners argued that such legislation was not in the Commerce Power because it prohibited conduct that that was only a moral and social wrong with no impact on interstate commerce. The Court upheld the legislation and undercut this argument, holding that "Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong." (*Id.* at 257-58).

- Mr. Peck argued that the United States Supreme Court's decision *United States v. Lopez*, (514 U.S. 549 (1994)), undermines Congress's authority under the Commerce Clause to regulate punitive damages. But, *Lopez* is simply an example of United States Supreme Court striking down legislation that had no relationship with interstate commerce, a statute standing in stark contrast to punitive damage legislation, which would directly stem from and impact a defendant's interstate commercial activity.
- The *Lopez* Court determined that Congress acted outside of its Commerce Clause power when it enacted a criminal statute prohibiting gun possession in school zones because the law had "nothing to do with

commerce or any sort of economic enterprise, however broadly one might interpret those terms.” (514 U.S. at 561-567).

- The United States Supreme Court’s determination in *Lopez* was understandable because there was no showing of a direct, or even an unattenuated, indirect connection between a criminal statute that affected purely a local activity (e.g., carrying a gun in a school zone) and interstate commerce. Making that connection in *Lopez*, as the Court pointed out, would require a number of steps that would “pile inference upon inference,” including the inferences that “(1) gun-related violence is a serious problem; (2) that problem, in turn, has an adverse effect on classroom learning; and (3) that adverse effect on classroom learning, in turn, represents a substantial threat to trade and commerce.” Unlike the attenuated, indirect link between the *Lopez* statute and interstate commerce, huge punitive damage awards directly impact the economic well being of companies, resulting in disruption to interstate commerce. Under the Court’s reasoning in *Lopez*, the Court would find punitive damage legislation to be within Congress’s Commerce Clause power because there is a direct link between punitive damages and interstate commerce. (514 U.S. at 565-67).
- Mr. Peck also relied on the United States Supreme Court decision *U.S. v. Morrison*, (529 U.S. 598 (2000)), which struck down the Violence Against Women Act (hereinafter “V.A.W.A.”) to support his contention that Congress lacks the power to enact punitive damage legislation. The

United States Supreme Court struck down the V.A.W.A. (a criminal statute prohibiting rape) because, like the gun possession statute in *Lopez*, the V.A.W.A. did not substantially affect interstate commerce.

- The V.A.W.A. is quite unlike federal legislation that would set rational controls upon punitive damages. By way of contrast with such legislation, the V.A.W.A. was a criminal statute having no tie to commercial activity. Punitive damage reform legislation is aimed at the civil torts system; many punitive damages awards are intricately tied to a defendant's commercial activity. (See *Morrison*, 529 U.S. at 613).
- The United States Supreme Court suggested in *Morrison* that under the Commerce Clause power, Congress could constitutionally enact a law against gender-motivated violence if the law affected interstate commerce, as would be the case if the law prohibited violence against "things or persons in interstate commerce." not just against women in general. The United States Supreme Court indicated that so long as Congress directed its laws toward interstate commerce, as it would do in punitive damage reform legislation, the law would be upheld. (529 U.S. at 609).
- Unlike its treatment of the V.A.W.A. in *Morrison*, in *Cleveland v. United States*, (329 U.S. 14 (1946)), the Court upheld a federal law (the Mann Act) that prohibited transporting women across state lines for prostitution purposes, finding that prostitution is a commercial enterprise. If Congress enacted punitive damages legislation, the United States Supreme Court would uphold the legislation just as it did the Mann Act, since punitive

damages often are based upon the value of a defendant's commercial enterprise or significantly impact a defendant's commercial enterprise.

(*Id.* at 19-20).

**III. THE FOURTEENTH AMENDMENT ALLOWS CONGRESS TO ENFORCE DUE PROCESS RIGHTS, GIVING CONGRESS THE POWER TO ENACT PUNITIVE DAMAGE LEGISLATION**

- Congress, through legislation, can enforce Fourteenth Amendment due process rights. (U.S. CONST. amend. XIV, § 5; *Morrison*, 529 U.S. at 619).
- According to the United States Supreme Court, “[p]unitive damages pose an acute danger of arbitrary deprivation of property.” If there are improperly imposed they can affect a defendant’s due process rights. (*State Farm*, 123 S. Ct. at 1520).
- United States Supreme Court cases have recognized that due process places substantive and procedural limits on punitive damages.
  - In *Pacific Mutual Life Insurance Co. v. Haslip*, (499 U.S. 1 (1991)), the Court for the first time acknowledged that excessive punitive damages awards could violate the Fourteenth Amendment.
  - In *TXO Production Corp., v. Alliance Resources Corp.*, (509 U.S. 443, 454 (1993)), a plurality of the United States Supreme Court indicated that “the Due Process Clause of the Fourteenth Amendment imposes substantive limits “beyond which penalties may not go.”
  - In *Honda Motor Co., Ltd., v. Oberg*, (512 U.S. 415 (1994)), the United States Supreme Court held that procedural due process required a state to provide judicial review of the amount of a punitive damages award. The

Court held that states must allow for judicial review of the size of punitive damages awards.

- In *BMW of North America v. Gore*, (517 U.S. 559 (1996)), the United States Supreme Court held that punitive damages awards were “grossly excessive” and that they violated a defendant’s substantive due process rights. The United States Supreme Court provided three “guideposts” for determining whether punitive damages awards are unconstitutionally excessive: (1) the reprehensibility of the defendant’s conduct; (2) the ratio between the actual damages and the punitive damages award; and (3) the comparable civil and criminal sanctions for the conduct. (*Id.* at 575).
- In *Cooper Industries, Inc., v. Leatherman Tool Group Inc.*, (532 U.S. 424 (2001)), the United States Supreme Court held that appellate courts must engage in a *de novo* review of punitive damages awards to determine if an award is unconstitutionally excessive. Contrary to Mr. Peck’s assertion that this decision was merely the United States Supreme Court exercising its supervisory role over federal courts, the United States Supreme Court made clear in *State Farm* that the *Leatherman* case was based on procedural due process and applied to both federal and state courts. (*State Farm*, 123 S.Ct. at 1519).
- Contrary to Mr. Peck’s assertion that the United States Supreme Court’s most recent opinion in *State Farm Mutual Automobile Insurance Co. v. Campbell* was simply a rehash of prior decisions, the Court’s set forth new and clearer substantive due process standards. In *State Farm*, the Court

delineates one of these standards as a defendant's right not to have its out-of-state conduct factored into a punitive damage award in the forum state. (123 S. Ct. at 1523-1525). The Court also stated that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." (*Id.*). The *only* exception to this rule mentioned by the Court was when compensatory awards were relatively minor and a defendant's conduct was particularly egregious. (*Id.* at 1524).

- Unfortunately, a number of state courts have ignored the United States Supreme Court's guidelines on punitive damages, and as such, have violated the due process rights of defendants. (*See Mertens v. Wilkinson*, 507 U.S. 969 (1993); *Bodie v. City of Huntsville*, 987 F.2d 774 (11th Cir. 1993), *vacated by* 501 U.S. 801 (1993); *Cont'l Trend Res., Inc. v. Oxy USA, Inc.*, (10th Cir. 1995), *vacated by* 517 U.S. 1216 (1996); *Johansen v. Combustion Eng'g, Inc.*, 834 F.Supp. 404 (S.D. Ga. 1993), *vacated by* 517 U.S. 1217 (1996); *BMW of N. Am., Inc. v. Gore*, 646 So. 2d 619 (Ala. 1994), *rev'd*, 517 U.S. 559 (1996); *Am. Pioneer Life Ins. Co. v. Williamson*, 681 So. 2d 1040 (Ala. 1995), *vacated by* 517 U.S. 1231; *Sperau v. Ford Motor Co*, 674 So. 2d 24 (Ala. 1995), *vacated by* 517 U.S. 1217 (1996); *Union Sec. Life Ins. Co. v. Evelyn Crocker*, 667 So. 2d 688 (Ala. 1995), *vacated by* 517 U.S. 1230 (1996); *Life Ins. Co. of Ga. v. Daisey L. Johnson*, 684 So. 2d 685 (Ala. 1996), *vacated by* 519 U.S. 923 (1996); *Simon v. San Paolo U.S. Holding Co., Inc.*, 2001 W.L. 1380836 (Ca. Ct. App. 2001), *vacated by* 123 S.Ct. 1828 (2003); *Textron Fin. Corp v. Nat'l Union Fire Ins. Co. of Pittsburgh, Penn.*,

2001 W.L. 1201631 (Cal. Ct. App. 2001), *Time Warner Entm't Co., L.P. v. Six Flags Over Ga., LLC*, 537 S.E.2d 397 (Ga. Ct. App. 2000), *vacated by* 534 U.S. 801 (2001); *vacated by* 534 U.S. 947 (2001); *Bocce v. Key Pham., Inc.*, 35 P.3d 1106 (Or. Ct. App. 2001), *vacated by* 123 S. Ct. 1781 (2003); *Apache Corp. v. Moore*, 891 S.W.2d 671 (Tex. Ct. App. 1994), *vacated by* 517 U.S. 1217 (1996); *Campbell v. State Farm Auto. Mut. Ins. Co.*, 65 P.3d 1134 (Utah 2001), *rev'd*, 123 S. Ct. 1513 (2003)).

- Through its Fourteenth Amendment enforcement power, Congress can and should codify the United States Supreme Court's holdings regarding punitive damages in order to enforce litigants' due process rights.

**IV. THE TENTH AMENDMENT DOES NOT LIMIT THE CONGRESS'S POWER TO ENACT PUNITIVE DAMAGE REFORM LEGISLATION**

- Although general tort law has long been the province of the states, Congress has enacted numerous federal laws when activities have affected interstate commerce. (Victor E. Schwartz et al., *Federalism and Federal Liability Reform: The United States Constitution Supports Reform*, 36 HARV. J. ON LEG. 274-78 (1999) (listing, e.g., the Federal Employers' Liability Act which defined rights and duties in personal injury cases brought by railroad workers against employers; the Longshore and Harbor Workers' Compensation Act which provided fixed awards to employees for deaths at sea; the General Aviation Revitalization Act which established an eighteen-year statute of repose on bringing litigation; the Small Business Job Protection Act which holds punitive damages received in personal injury suits subject to federal income tax among other things; the Federally Support Health Centers Assistance Act of 1995 which extended Federal Tort

Claims Act coverage to community, migrant, and homeless health centers; the Volunteer Protection Act of 1997 which provided limited immunity for volunteers acting on behalf of a nonprofit organization and created a national standard of punitive damage liability for volunteers; the Biomaterials Access Assurance Act of 1998 which provided suppliers of raw materials and component parts of medical devices a method for dismissing certain torts suits without excessive discovery; and the Year 2000 Information and Readiness Disclosure Act which banned the use of Y2K readiness disclosure statements by plaintiffs as evidence to prove the truth of a company's assertion about dealing with Y2K computer problems.) (*See also* the Strengthening and Improvement of Elementary and Secondary Schools, Preparing, Training, and Recruiting High Quality Teachers and Principals Innovation for Teacher Quality Teacher Liability Protection Act (Paul D. Coverdell Teacher Liability Protection Act of 2001), 20 U.S.C. § 6731 *et seq.* (2002)).

- Federal legislation can provide an effective means of addressing punitive damage problems that are rooted in interstate commerce and that are national in scope. (Victor E. Schwartz et al., *Federalism and Federal Liability Reform: The United States Constitution Supports Reform*, 36 HARV. J. ON LEG. 269 (1999)).
- When the United States Constitution grants power to Congress, such as through the Commerce Power or the power to enforce the Fourteenth Amendment Due Process Clause, Congress may use that power to "impose its will on the states." (*Gregory v. Ashcroft*, 501 U.S. 452, 460 (1990)). All other powers not delegated



to the federal government are reserved to the states through the Tenth Amendment. (U.S. CONST. art. I, § 8).

- Mr. Peck’s suggestion that the Tenth Amendment limits the Congress’s power to set limits on punitive damages is erroneous. As the United States Supreme Court noted in *Gregory v. Ashcroft*, (501 U.S. 452 (1991)), concerning federal government powers to regulate versus those powers reserved to the states by the Tenth Amendment, “[t]he Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause. As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by states.” (*Id.* at 460); See *Cleveland v. the United States*, 329 U.S. at 19 (where the Court upheld the Mann Act’s regulation of marriage as a valid Congressional action, even though regulation of marriage has traditionally been a state matter)).
- Mr. Peck’s argument that punitive damages, because of their function of deterrence and punishment, are intimately related to the process of democratic self-governance and, as such, are protected from Congressional interference by the Tenth Amendment is incorrect. The case to which he refers to support this proposition is *Gregory v. Ashcroft*, (501 U.S. 452 (1990)). where the United States Supreme Court interpreted federal age discrimination legislation narrowly so that it did not interfere with a state law requiring mandatory retirement of state judges at the age of seventy. In dicta, the United States Supreme Court indicated that a state’s decision regarding which officials will exercise governmental authority through a mandatory state judge retirement law is a state decision at the

heart of representative government because this determination is related to how “the State defines itself as a sovereign,” similar to a state’s power to regulate its own elections and to prescribe the qualifications and selection of its officers. (*Id.* at 461-42). These democratic state functions are clearly distinguishable from the arena of state tort law, an area where time and time again Congress has enacted legislation that has preempted state tort law.

- Further, the line of cases establishing a “political function” exemption for laws “intimately related to the process of democratic self-government” that “go to the heart of self-government” make up a limited exception to a very limited area of the law: the narrow exception to the rule that discrimination based on alienage triggers strict scrutiny in Equal Protection cases. As such, these cases are inapposite to the discussion of whether the Commerce Clause or the Fourteenth Amendment due process enforcement power give Congress the right to enact punitive damage legislation. (*Bernal v. Fainter*, 467 U.S. 216, 220 (1984); *Gregory*, 501 U.S. at 462-63).

#### **CONCLUSION**

There is a need for Congressional Action on punitive damage reform. The Commerce Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution provide a Constitutional basis for punitive damage reform. The Tenth Amendment to the United States Constitution and case law construing that Amendment does not create an impediment to Congressional action.

**STATEMENT OF  
SENATOR JEFF SESSIONS  
Chairman, Subcommittee on Administrative Oversight and the Courts  
COMMONSENSE CONSUMPTION: SUPER-SIZING VERSUS PERSONAL  
RESPONSIBILITY  
October 16, 2003**

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Because of the huge impact that litigation has on our economy, it is imperative that we examine novel and expanded legal theories that are arising in our country. For instance, we must examine issues such as whether gun manufacturers should be liable for the illegal actions of individual gun users, rather than for defective products. The potentially detrimental effect of runaway verdicts is well known, but there are huge costs that arise from the defense of unjustified lawsuits as well. Indeed, such lawsuits, no matter how unfounded, can hurt a company and depress its stock.

I emphasize, however, that our utmost duty is to the public. This body should take no step that would provide immunity for deceptive practices or known defects that harm consumers. So, our inquiry today examines whether legislation, such as that filed by Senator Mitch McConnell to provide certain statutory defenses to food companies and restaurants, is justified. Our legal system is based on our laws which are in significant part based on the actions of Congress. Everyday, lawyers take what we pass and take court interpretations of those laws and file lawsuits. Congress has every right to monitor what is going on in the country and has a duty to fix areas of the law where abuses occur.

With that said, Senator McConnell's "Commonsense Consumption Act" would limit the liability of food retailers where the underlying premise for the litigation is not that the food was defective or prepared unlawfully. In fact, the act deals with situations in which the food may be said to be too good; so good the the plaintiff consumed too much of it and suffers from obesity or weight gain because of it. The allegations have transformed from the traditional

complaints of cheating the customer by providing smaller portions than promised to complaints that the promised portions are too large. The question we examine today is whether this type of litigation is so legally unsound and detrimental to lawful commerce that it should be constrained by litigation.

First, is litigation like this legally sound? Under classical tort law, in addition to having an underlying injury, a plaintiff in a lawsuit is required to prove causation. That is, “but for” the action of the defendant the plaintiff would not have suffered an injury. To hold a defendant financially liable for damage to another we must, and until recent years, have adhered to clear standards. For example, but for Wal-Mart placing a product on the shelf, the plaintiff would not be able to purchase the product. Is Wal-Mart liable for obesity? Wal-mart has provided great benefits for the poor by providing large containers of foods at low prices. Does this act by Wal-Mart give rise to an action for obesity by a customer? But for internet advertising, the plaintiff would be unaware of the product’s availability. Is the ad firm liable? Is AOL?

This makes me think about the case that everyone learns about in law school – Palsgraf v. Long Island Railroad Company. The case started innocently with two individuals running to catch the train. One of the individuals happened to be carrying a package of fireworks. When railroad guards helped the individual as he leaped for the train, the fireworks package was dislodged and the fireworks hit the ground and exploded. It happened that Mrs. Palsgraf, who was waiting for another train at the opposite end of the platform, and happened to be standing near some scales, was injured when the firework explosion caused the scales to fall. Mrs. Palsgraf sued the railroad company essentially under the “but for theory.” But for the railroad guard helping the passenger as he leaped for the train, the package would not have been dislodged, the fireworks would not have gone off, the scales would not have fallen, and therefore she would not have been injured. The great Judge Benjamin Cardozo wrote the opinion and refused to allow liability to go that far. Just as the court decided that it was unreasonable to hold the railroad company responsible for Ms. Palsgraf’s injuries, it seems unreasonable to me and to most Americans to hold sellers of food or any other individual entity

responsible for a plaintiff's obesity. The "blame someone else for problems of my own causing" is contrary to our great American philosophy of individual responsibility. But, we must admit that the Olympians who influence our legal system and the plaintiff's lawyers who are quick to use any legal tool available have eroded that principle. Thus, this hearing.

Second, are these lawsuits economically sound? For the lawyers, there is no doubt about that. In a recent study by Tillinghast-Towers Perrin, it was demonstrated that in 2001, trial lawyers made \$39 billion in revenues while Microsoft made only \$26 billion and Coca-Cola \$17 billion. This has a great impact on the economy. But, costs don't end there. The defendant company must hire expensive defense attorneys and have its employees spend countless hours responding to the lawyers. In addition, companies must purchase liability insurance, which takes away the funds necessary for research, expansion, and creating jobs. No other nation must compete in the world marketplace carrying such a large litigation cost. Eventually, these costs are passed on to the consumer. Product prices increase and availability of products becomes scarce.

Finally, what is good public policy? Do consumers benefit when sellers of food are on the brink? Should we shift the country's obesity crisis to restaurants? What are the factors that contribute to obesity? Isn't it our sedentary lifestyles, overeating, snacking between meals, and, some say, genetics? The American people certainly do not support the idea that the overweight should be able to sue the company that provided what the customer asked for. In a recent Gallop poll, nearly 9 out of 10 people rejected holding the fast food industry legally responsible for the diet-related health problems of people who eat fast food on a regular basis. This, I believe, is common sense.

If the practices are deceptive or the product is adulterated, and the consumer is not on due notice, then liability may well lie. But we need to be careful about holding sellers of food liable for selling food products that do not break any laws or violate any regulations, but, in fact, comply with all laws and regulations. We need to think really hard before we hold sellers

of food responsible because consumers eat too much.

We need to address how far the pendulum should swing. Is a grocer liable for simply placing the Oreo cookies on the shelf? Is your mom liable for her good cooking, or are parents liable for not making their children exercise? I tell you, if this litigation continues I think a number of people will be lining up to sue Krispy Kreme. I don't know too many people who can resist stopping in when the "hot now" sign is on, and of course you get a discount when you buy a dozen. We have some outstanding restaurants in Alabama. Once you've had Dreamland BBQ, you will be hard pressed to find a better slab of ribs. And don't forget about the Dirksen South Buffet providing an all you can eat situation for senators and their staff. Maybe we should sue them all.

You laugh and some people do advertise in jest— A restaurant in Seattle requires customers to sign a waiver before eating one of their deserts called "the bulge." While this may be more of a publicity stunt, than a true attempt to prevent legal action, this is no laughing matter. Obesity is no laughing matter. Eroding the legal system is no laughing matter. And doing harm to the economy is no laughing matter. So we might laugh during this hearing. Some of these lawsuits are laughable, but in the end our focus should be on protecting the integrity of the legal system and the safety of consumers. I look forward to hearing the testimony.

Testimony  
United States Senate Judiciary Committee  
Subcommittee on Administrative Oversight and the Courts  
October 16, 2003

S.1428, Commonsense Consumption Act of 2003

Statement of Russel L. Sutter, FCAS, MAAA

Quantifying Tort Costs in the U.S.

Mr. Chairman and members of the Subcommittee: Thank you for allowing me to testify today. My name is Russ Sutter. I am a consulting actuary with Tillinghast – Towers Perrin and a principal of Towers Perrin. I am a Fellow of the Casualty Actuarial Society and a Member of the American Academy of Actuaries.

In February 2003, Tillinghast published the study “U.S. Tort Costs: 2002 Update, Trends and Findings on the Cost of the U.S. Tort System.” I was the primary author of the study. That study examined tort costs in the U.S. from 1950 through 2001. We are in the process of publishing a new study that will include results through 2002.

It is my understanding that the subject of this hearing is S.1428, also known as the “Commonsense Consumption Act of 2003.” My testimony does not include specific comments on that bill. Rather, my testimony provides background on the costs of the U.S. tort system, trends in those costs, and a comparison of costs in the U.S. to those in other countries.

Our current research on U.S. tort costs shows the following:

1. The cost of the U.S. tort system was \$233 billion in 2002. This represents 2.2% of U.S. gross domestic product, or GDP.
2. In 2002, U.S. tort system costs increased by 13.3% over 2001. Costs in 2001 increased 14.4% over costs in 2000. This total 2-year change of 29.6% was the highest since 1986-1987. This is in contrast to the 5-year period from 1995 to 2000, during which tort costs increased by an average of 2.6% per year.
3. Since 1950, tort costs have increased an average of 9.8% per year, compared to an average GDP growth of 7.1% per year. (Our analysis uses GDP on a nominal basis, before adjusting for inflation.)
4. U.S. tort costs were \$809 per citizen in 2002. In 1950, torts costs were \$12 per citizen, before adjusting for inflation, and \$89 per citizen after adjusting for inflation. This implies that real tort costs per citizen have increased by more than 800% since 1950.
5. While not part of our current study, two years ago we did a study comparing tort costs in the U.S. to those of 11 other countries. The 11 other countries included 8 from Western Europe, along with Canada, Japan and Australia. That comparison was

based on 1998 data. At that time, the ratio of tort costs to GDP in the U.S. was 1.9%. The other 11 countries had ratios of tort costs to GDP ranging from 0.4% to 1.7%, with an average of 1.0%. In other words, tort costs in the U.S. were approximately twice as high as in the other countries.

6. We attribute the significant increases in costs in 2001 and 2002 to several factors, including asbestos claims, other class action litigation, higher awards in medical malpractice cases, an increase in the number and size of lawsuits against directors and officers of publicly traded companies, and an increase in medical cost inflation.

The charts attached to my written testimony provide details behind some of these findings.

In closing, I would like to point out three items regarding our analysis:

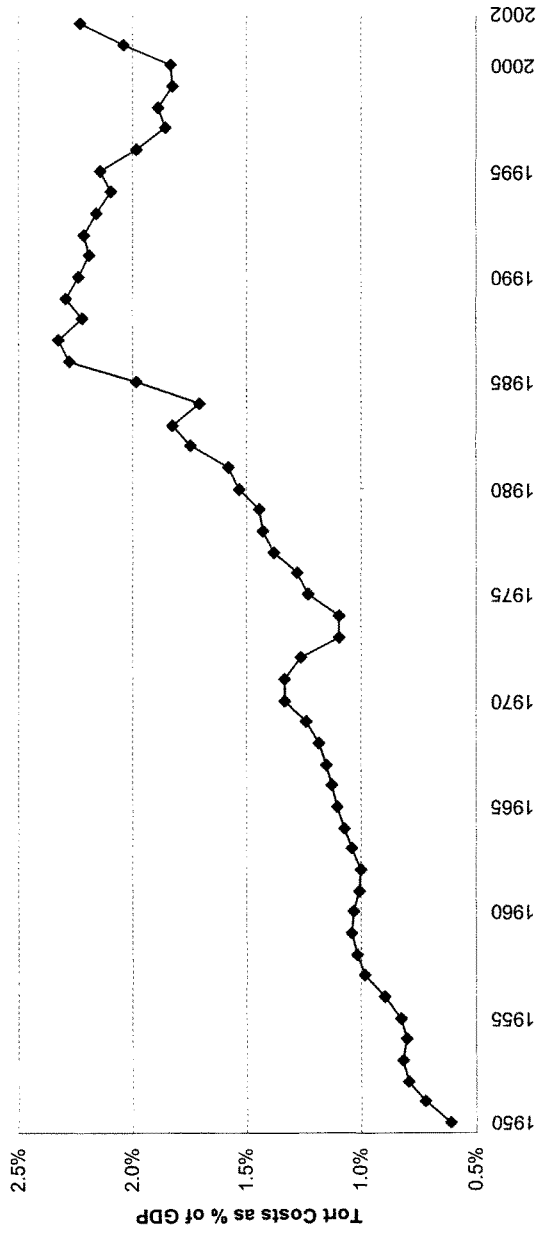
1. This study was not paid for or commissioned by any organization. The study is self-funded by Tillinghast.
2. The study does not attempt to quantify any of the indirect benefits of the tort system, such as acting as a deterrent to unsafe practices and products, or any of the indirect costs of the tort system, such as duplicate or unnecessary medical tests ordered mainly as a defense against possible malpractice allegations.
3. The purpose of the study is not to support any particular viewpoint on tort costs. The study's purpose is to quantify tort costs and the trends in those torts. We do not take any position on whether the costs are too high or too low.

Mr. Chairman, thank you for the opportunity to present this testimony. I will be happy to answer any questions the committee may have.

The publication "U.S. Tort Costs: 2002 Update, Trends and Findings on the Costs of the U.S. Tort System" is available on-line at [www.tillinghast.com](http://www.tillinghast.com).



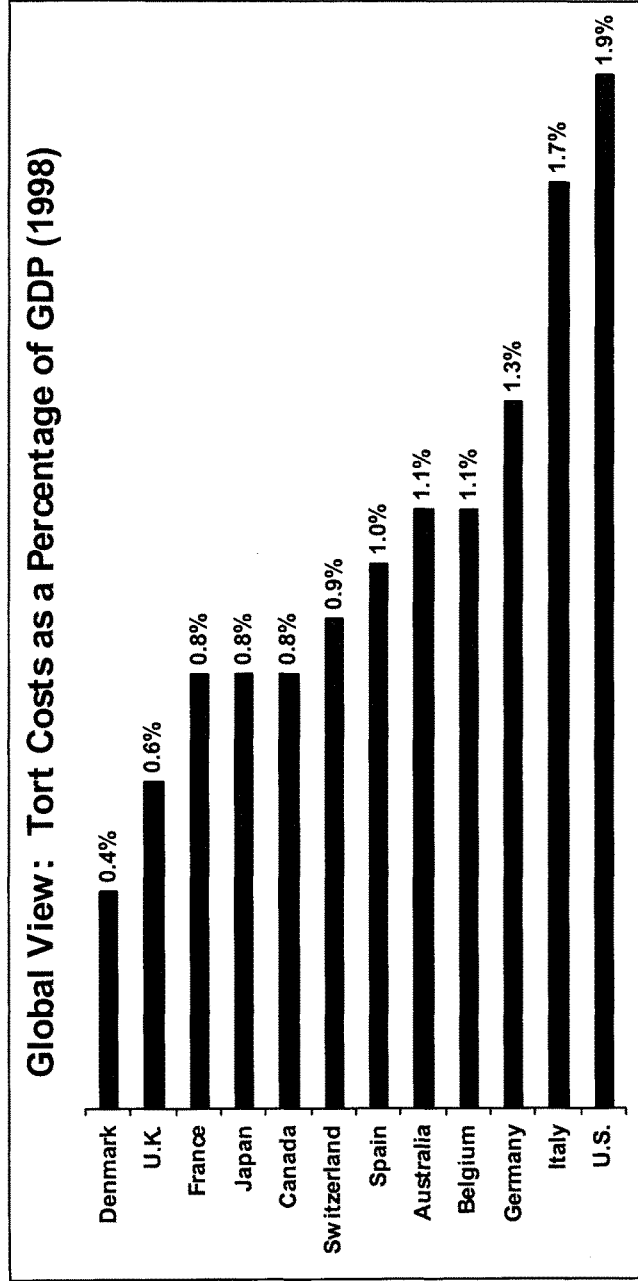
### U.S. Ratio of Tort Costs to GDP 1950 - 2002



	U.S. Population (millions)	U.S. Tort Costs (\$billions)	Tort Cost per Citizen	Inflation-Adjusted* Tort Cost per Citizen
1950	152	\$ 1.8	\$ 12	\$ 89
1960	181	5.4	30	183
1970	205	13.9	68	314
1980	228	42.8	188	410
1990	249	129.8	520	716
2000	281	180.0	640	668
2001	285	206.0	722	733
2002	288	233.4	809	809

\*re-stated in year 2002 dollars.

Source: Tillinghast – Towers Perrin



Source: Tillinghast – Towers Perrin

## REVIEW &amp; OUTLOOK

## Fat Chance

**H**ershey's Ordered to Pay Obese Americans \$135 Billion," screamed the headline. As Senator Mitch McConnell (R., Kentucky) pointed out on the Senate floor last week, that headline dates from August 2000 and appeared as a spoof in the online publication *The Onion*. But what was obvious satire only three years ago has today morphed into all-too-real litigation, with a plaintiffs bar that succeeded against Big Tobacco now targeting everything from Oreos to Big Macs.

The excuse for this is obesity. Already we have articles claiming that fast food is as "addictive" as nicotine or heroin, and any number of lawsuits all angling to lay the blame for our expanding waistlines on America's food industry. As our Jason Riley pointed out on this page only a few weeks ago, in Boston the trial lawyers have even convened the "First Annual Conference on Legal Approaches to the Obesity Epidemic."

That's why Mr. McConnell introduced the

Commonsense Consumption Act of 2003. Similar to legislation already introduced in the House by Ric Keller (R., Florida), Mr. McConnell's bill would still leave the food industry liable for any violation of state or federal health regulations, for injuries from the consumption of adulterated food, etc. But it does insulate the industry from claims of injury resulting from obesity or weight gain.

In explaining the basis for his measure the Senator even invoked an unusual authority: Richard Simmons, the ubiquitous TV weight-loss guru. "There is always going to be greasy, fried, salty, sugary food," the Senator quoted Mr. Simmons as saying. "It is up to the individual to walk in and say, 'I don't want those fries' ... anyone who's trying to sue the fast food places needs a therapist, not an attorney."

We're with the Senator and Mr. Simmons. Along with pushing away those fries, a healthy America would do well to start saying no to the increasingly jumbo helpings of trial lawyers.

THE HILL TUESDAY, JULY 22, 2003

## Food fight

**T**he "food police" are on the prowl, pointing their bony fingers at allegedly fat-friendly miscreants in the corporate world. Trial lawyers, freshly fortified from the anti-tobacco wars, hope to feed off that rich diet for years to come.

Small wonder that Kraft Foods Inc., the second-largest food marketer in the world, copped a plea bargain last month.

After more than two centuries in the food business, Kraft now finds it necessary to form a panel of so-called experts to keep it on the straight and slim on such matters as nutritional values.

We are all in favor of educated consumers and healthy diets. Far be it from us to upbraid Kraft for seeking to become an even better corporate citizen.

But the fat-free crusade is not cost-free, particularly when one considers the agenda of litigants who would turn obesity into a "disease" supposedly spread by irresponsible corporate giants to its unwitting "victims."

*The Washington Times* recently quoted Marion Nestle, an aptly named professor of nutrition at New York University nutrition professor, as asserting: "There is an overabundance of food in this country." What does that mean? That we have more food than we need? If so, then the professor is clearly right; we could survive on much less. Or does he mean that the government should directly — or the courts, indirectly — should curtail food produc-

tion so that there is less to go round? If so, we utterly disagree with him.

Kraft and other major food manufacturers do not require outside boards to advise them that obesity is a complex phenomenon that cannot be eradicated by jury awards.

Frances Smith, executive director of Consumer Alert, a national consumer group based in Washington, notes that in seeking to appease the anti-fat activists, corporations, perhaps unwittingly, lend credence and "greater clout to those people who want to control what we eat by lawsuits and taxes and regulations."

The nation's lawmakers should seriously consider the "Commonsense Consumption Act," introduced last week by Sen. Mitch McConnell (R-Ky.). McConnell, the Senate's second-ranking Republican, says: "You shouldn't be able to sue someone else because of your own eating habits."


His bill would apply only to federal suits that claim injury from weight gain or obesity. It wouldn't affect other potential legal action against the food industry. (It is already against the law to knowingly issue false labels.)

The senator, a thin man who underwent heart bypass surgery earlier this year, reports that he reads food labels and orders sensibly off the menu. We could comfortably dine out on McConnell's legislative entrée.

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**Food and drink sector hit by compensation culture**

26 August 2003

The cost of Public Liability insurance has risen by between 30 and 35% over the last year. But leading insurer Zurich London is warning the food and drink sector that they could be hit by even bigger rate increases for their product and public liability (PL) insurance if the trend to blame and claim takes hold.

The food and drink sector has traditionally been seen as low risk by the insurance industry, with the majority of their claims historically being linked to contamination and their PL premiums for have reflected this. However, Zurich London believes that if there is a rise in litigation or an increase in the fear of litigation then premiums will increase to cover these costs and insurers may apply exclusions to policies to withdraw cover for known risks.

Zurich London believes that the propensity to blame and claim is growing. People are becoming less inclined to think that it is their choice and responsibility if they risk their health by going into a restaurant which has a smoking section, put on weight by over eating, or if they get cirrhosis of the liver by drinking too much alcohol.

John Inwood, Head of Public Liability for Zurich London, said, "We are urging the food and drink sector to revisit their risk management policies, as insurers will be looking more closely than ever before at what the food and drink sector is doing to demonstrate that they are being socially responsible."

Many companies are already becoming more health conscious. Pizza Hut recently announced it would ban smoking in its restaurants and Kraft Foods said earlier in July that it would shrink its ready-made meals and snacks to help combat the obesity epidemic.

Zurich London, who insures restaurants, hotels, clubs, pubs and off licenses, asks all their customers to provide details of their general policy towards alcohol health issues, and their approach to risk management issues such as warnings on labels / adverts and marketing strategy.

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Inwood continued, "In the US alcoholic drinks carry health warnings in the same way cigarettes do. I think there is a strong potential for something similar to happen in the UK. At a time when campaigners are calling for tighter controls on responsible drinking and mandatory labelling of alcohol content, we see an increase in the promotion of alcohol be it larger measures, two for one shots, "alcopops" are on the increase, so is the message getting through?"

Alcohol
Source: Lord Bissell & Brook Report, July 2001
<ul style="list-style-type: none"> <li>* Between 1980 &amp; 2000, deaths from cirrhosis of the liver increased by 121% for men, 68% for women</li> <li>* One to two thirds of special education children are suspected to have Foetal Alcohol syndrome or a related conditions. 82% of those affected are not able to live independently. In the US, institutional and medical costs for 1 FAS child are estimated to be at least \$1.4m over a life-time</li> <li>* Nearly 41% of all fatal car accidents involved alcohol. One third of those killed had not been drinking themselves.</li> <li>* Only 33% of US citizens surveyed knew that consistent consumption of alcohol is associated with cancers of the throat and mouth.</li> </ul>

Obesity
Source: Tackling Obesity in England. National Audit Office 2001
<ul style="list-style-type: none"> <li>* Obesity levels in England have trebled in the last twenty years. Around 1 in 5 adults is obese.</li> <li>* The most common problems linked to obesity are heart disease, type 2 diabetes, high blood pressure, osteoarthritis</li> <li>* Human cost: 18 million sick days/year; 30,000 deaths/year, resulting in 40,000 lost years of working life and lifespan decreased by average of 9 years.</li> <li>* Financial cost: £1/2 billion/year in treatment costs, possibly £2 billion/year impact on economy.</li> <li>* Obesity increased from 5.6% to 9% in boys, and from 9.3% to 13.5% in girls (primary school age) from 1884 to 1994 (the only nationally representative data available).</li> </ul>

#### Notes to the editors

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