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HOUSE OF REPRESENTATIVES
REPORT
108–432

PERSONAL RESPONSIBILITY IN FOOD CONSUMPTION ACT

MARCH 5, 2004.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 339]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 339) to prevent frivolous lawsuits against the manufacturers, distributors, or sellers of food or non-alcoholic beverage products that comply with applicable statutory and regulatory requirements, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

CONTENTS

THE AMENDMENT

The amendments are as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Personal Responsibility in Food Consumption Act".

SEC. 2. PURPOSE.

The purpose of this Act is to allow Congress, State legislatures, and regulatory agencies to determine appropriate laws, rules, and regulations to address the problems of weight gain, obesity, and health conditions associated with weight gain or obesity.

SEC. 3. PRESERVATION OF SEPARATION OF POWERS.

(a) IN GENERAL.—A qualified civil liability action may not be brought in any Federal or State court.

(b) DISMISSAL OF PENDING ACTIONS.—A qualified civil liability action that is pending on the date of the enactment of this Act shall be dismissed immediately by the court in which the action was brought or is currently pending.

(c) DISCOVERY.—

(1) STAY.—In any qualified civil liability action, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss unless the court finds upon motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

(2) RESPONSIBILITY OF PARTIES.—During the pendency of any stay of discovery under paragraph (1), unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under applicable Federal or State rules of civil procedure, as the case may be. A party aggrieved by the willful failure of an opposing party to comply with this paragraph may apply to the court for an order awarding appropriate sanctions.

(d) PLEADINGS.—In any action of the type described in section 4(5)(A), the complaint initiating such action shall state with particularity the Federal and State statutes that were allegedly violated and the facts that are alleged to have proximately caused the injury claimed.

SEC. 4. DEFINITIONS.

In this Act:

(1) ENGAGED IN THE BUSINESS.—The term "engaged in the business" means a person who manufactures, markets, distributes, advertises, or sells a qualified product in the person's regular course of trade or business.

(2) MANUFACTURER.—The term "manufacturer" means, with respect to a qualified product, a person who is lawfully engaged in the business of manufacturing the product in interstate or foreign commerce.

(3) PERSON.—The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.

(4) QUALIFIED PRODUCT.—The term "qualified product" means a food (as defined in section 201(f) of the Federal Food Drug and Cosmetic Act (21 U.S.C. 321(f))).

(5) QUALIFIED CIVIL LIABILITY ACTION.—The term "qualified civil liability action" means a civil action brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, penalties, declaratory judgment, injunctive or declaratory relief, restitution, or other relief arising out of, related to, or resulting in injury or potential injury resulting from a person's consumption of a qualified product and weight gain, obesity, or any health condition that is associated with a person's weight gain or obesity, including an action brought by a person other than the person on whose weight gain, obesity, or health condition the action is based, and any derivative action brought by or on behalf of any person or any representative, spouse, parent, child, or other relative of any person, but shall not include—

(A) an action in which a manufacturer or seller of a qualified product knowingly and willfully violated a Federal or State statute applicable to the manufacturing, marketing, distribution, advertisement, labeling, or sale of the product, and the violation was a proximate cause of injury related to

a person's weight gain, obesity, or any health condition associated with a person's weight gain or obesity;

(B) an action for breach of express contract or express warranty in connection with the purchase of a qualified product; or

(C) an action regarding the sale of a qualified product which is adulterated (as described in section 402 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 342)).

(6) SELLER.—The term "seller" means, with respect to a qualified product, a person lawfully engaged in the business of marketing, distributing, advertising, or selling a qualified product in interstate or foreign commerce.

(7) STATE.—The term "State" includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States, and any political subdivision of any such place.

(8) TRADE ASSOCIATION.—The term "trade association" means any association or business organization (whether or not incorporated under Federal or State law) that is not operated for profit, and 2 or more members of which are manufacturers, marketers, distributors, advertisers, or sellers of a qualified product.

Amend the title so as to read:

A bill to prevent legislative and regulatory functions from being usurped by civil liability actions brought or continued against food manufacturers, marketers, distributors, advertisers, sellers, and trade associations for claims of injury relating to a person's weight gain, obesity, or any health condition associated with weight gain or obesity.

PURPOSE AND SUMMARY

Today, the American food industry, the nation's leading private sector employer, is facing a barrage of legal claims alleging it should pay monetary damages and be subject to equitable remedies based on legal theories holding it liable for the over-consumption of its legal products by others. H.R. 339 would preserve the separation of powers, support the principle of personal responsibility, and protect the largest employers in the United States from financial ruin in the face of frivolous liability claims related to obesity.

H.R. 339 provides that a "qualified civil liability action" may not be brought in any Federal or State court, and that a qualified civil liability action that is pending on the date of the enactment of this Act shall be dismissed immediately by the court in which the action was brought or is currently pending. A "qualified civil liability action" is a civil action brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, penalties, declaratory judgment, injunctive or declaratory relief, restitution, or other relief arising out of, related to, or resulting in injury or potential injury arising from a person's consumption of a qualified product and a person's resulting weight gain, obesity, or any health condition that is associated with a person's weight gain or obesity. Such actions include those brought by a person other than the person on whose weight gain, obesity, or health condition the action is based, and any derivative action brought by, or on behalf of, any person or any representative, spouse, parent, child, or other relative of any person. The term "qualified product" means a food, as defined in section 201(f) of the Federal Food Drug and Cosmetic Act (21 U.S.C.321(f)). The term "qualified civil liability action" does not include—(A) an action in which a manufacturer or seller of a qualified product knowingly and willfully violated a Federal or State statute applicable to the manufacturing, marketing, distribution, advertisement, labeling, or

sale of the product, and the violation was a proximate cause of injury related to a person's weight gain, obesity, or any health condition associated with a person's weight gain or obesity; (B) an action for breach of express contract or express warranty in connection with the purchase of a qualified product; or (C) an action regarding the sale of a qualified product which is adulterated as defined in section 402 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 342).

BACKGROUND AND NEED FOR THE LEGISLATION

According to a recent article in *Fortune* magazine:

> On August 3, 2000, the parody newspaper The Onion ran a joke article under the headline "Hershey's Ordered to Pay Obese Americans $135 Billion" . . . Some joke. Last summer New York City attorney Sam Hirsch filed a strikingly similar suit—against McDonald's . . . News of the lawsuit drew hoots of derision. But food industry executives aren't laughing—or shouldn't be. No matter what happens with Hirsch's suit, he has tapped into something very big.[1]

To put this problem in perspective, back in 1985, a Federal judge stated that plaintiff's unconventional application of tort law in the case would also apply to automobiles, knives, axes and even high-calorie food "for an ensuing heart attack" and that it would be "nonsensical" to claim that a product can be defective under the law when it has no defect.[2] In 1999, a State court judge similarly observed that personal injury lawyers "have envisioned . . . the dawning of a new age of litigation during which the gun industry, liquor industry, and purveyors of 'junk' food would follow the tobacco industry in reimbursing government expenditures . . ."[3] Only a few years later, this tragic "new age" of litigation—and an assault on principles of personal responsibility—is already upon us. According to Michael Jacobson, executive director of the Center for Science in the Public Interest, which supports such lawsuits, "It's going to take a whole lot of lawsuits to . . . affect the dietary habits of the thousands that suffer obesity-related disease."[4]

THE FOOD INDUSTRY—THE NATION'S LARGEST EMPLOYER OUTSIDE GOVERNMENT—IS NOW THE TARGET OF COORDINATED LAWSUITS DESIGNED TO REAP BILLIONS OF DOLLARS

The food service industry employs some 11.7 million people, making it the nation's largest employer outside of government.[5] The vital food industry has recently come under attack by waves of lawsuits alleging it should pay monetary damages and be subject to

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[1] Roger Parloff, "Is Fat the Next Tobacco?" *Fortune* (January 21, 2003).
[2] *Patterson* v. *Rohm Gesellschaft,* 608 F. Supp. 1206, 1211–12 (N.D. Tex. 1985).
[3] *Ganim* v. *Smith & Wesson Corp.,* No. X06 CV 990153198S, 1999 Conn. Super. LEXIS 3330 at *14 (Conn. Super. Ct. Dec. 10, 1999).
[4] Marguerite Higgins, "Advocates Meet to Plan Big Mac Attack on Fat; Legal Assault on Fast-food Industry Will Follow Blueprint Used Against Tobacco Firms," *The Washington Times* (June 22, 2003) at A1.
[5] *See Personal Responsibility in Food Consumption Act:* Hearings on H.R. 339 Before the Subcomm. on Commercial and Administrative Law of the House Committee on the Judiciary, 108th Cong., 1st Sess. 33 (June 19, 2003) (statement of Christianne Ricchi, the National Restaurant Association).

equitable remedies based on legal theories holding it liable for the misuse or overconsumption of its legal products by others.

From June 20 to 22, 2003, the Public Health Advocacy Institute gathered personal injury lawyers from all across the country and hosted a conference it says will "encourage and support litigation against the food industry."[6] Attendees were required to sign an affidavit in which they agreed to keep the information they learned confidential and to refrain from consulting with or working for the "food industry" before December 31, 2006, apparently setting a deadline for bringing the industry to its knees.[7]

As one recent report has noted, because the trial bar is an industry unto itself just like any other big business, "[f]or Trial Lawyers, Inc., a few early unsuccessful cases represent nothing more than new product development costs" toward one successful case in one court before one jury that sets the one precedent that opens the food industry to limitless liability.[8] As the views of John Banzhaf, a former personal injury attorney who is credited as the mastermind behind recent lawsuits against obesity-related restaurants, were described by *The Washington Post*, "Banzhaf argues that, as was the case with tobacco, it takes time for legal theories to coalesce in a way that forces major societal change."[9] Regarding such lawsuits, personal injury lawyer Richard Daynard, head of Northeastern University's Tobacco Products Liability Project, said "I think we'll see a progression similar to what we saw with tobacco."[10] Mr. Daynard said this even though he himself admits he lost weight because "I ate a lot less."[11] The tobacco industry, facing lawsuits brought by 48 States, was ultimately forced to settle those cost-prohibitive and potentially bankrupting cases for $246 billion.[12] Lawyers demonized the tobacco industry. Now Ralph Nader compares fast food companies to terrorists and tells the *New York Times* that the double cheeseburger is "a weapon of mass destruction."[13]

On September 3, 2003, a Federal district judge in New York threw out Mr. Hirsch's lawsuit for the second time, this time with prejudice. The judge did this because Mr. Hirsch again failed to state a claim, despite having been given explicit guidance by the court when his first case was dismissed regarding what he needed to demonstrate for his case to proceed.[14] However, this will not

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[6] Abraham Genauer, "Conference Highlights Assault on 'Big Food,'" *The Hill* (June 11, 2003) at 36.

[7] The affidavit can be found at: *http://www.phaionline.org/conference/affidavit.html.*

[8] The Manhattan Institute, Center for Legal Policy, Trial Lawyers, Inc. (2003), available at *http://www.triallawyersinc.com,* at 18.

[9] Blaine Harden, "Eatery Joins Battle With 'The Bulge': Obesity Lawsuits Spur Dessert Protest," *The Washington Post* (September 20, 2003) at A3.

[10] Erin Duggan, "Tobacco-suit Tactics Now Target Fast Food," *Albany Times Union* (April 6, 2003) at A1.

[11] Daniel Akst, "Finding Fault for the Fat," *The Boston Globe* (December 7, 2003) ("Doesn't personal choice enter the equation? Couldn't we simply have ordered a salad? Daynard himself says he doesn't often eat this way; he's usually careful, because he knows better. He lost 25 pounds a couple of years back, and when I ask him how, he says simply, 'I ate a lot less.'").

[12] Walter Olson, "A Spanking for the Trial Lawyers," *The Wall Street Journal* (May 23, 2003) at A10.

[13] David Wallis, "Questions for Ralph Nader," *The New York Times* (June 16, 2002).

[14] *See Pelman* v. *McDonald's Corp.,* S.D.N.Y. 02 Civ. 7821 (RWS), at 34–35 (September 3, 2003) ("[A]ll of plaintiffs' claims in the amended complaint have been dismissed as a matter of law . . . The plaintiffs have not only been given a chance to amend their complaint in order state a claim, but this Court laid out in some detail the elements that a properly pleaded complaint would need to contain. Despite this guidance, plaintiffs have failed to allege a cause of action for violations of New York's consumer protection laws with respect to McDonald's adver-

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stop the personal injury industry, however, from continuing to pursue such cases. Personal injury attorney John Banzhaf[15] said recently, "You may not like it . . . but we'll find a judge. And then we'll find a jury"[16] that will find restaurants liable for their customers' overeating. The same lawyers have recently added ice cream manufacturers to a target list that just keeps growing.[17]

As one recent report has stated, "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 a year in revenues—50% more than Microsoft or Intel and twice those of Coca-Cola."[18] This figure even excludes the staggeringly large fees—up to tens of thousands of dollars per hour—that trial lawyers received from settlements in the tobacco litigation of the late 1990's.[19] Given the vast amounts of money at stake, Trial Lawyer Inc.'s litigation war will not stop with lawsuits against big "fast food" companies. As one commentator has written:

> First, one should understand who is at risk, who "Big Food" really is. It is not just McDonald's, KFC, Burger King, and Wendy's. In the words of the Barber [a plaintiff in a lawsuit against various restaurants] complaint, it is any food company that distributes, owns, sells, produces and markets "food products that are high in fat, salt, sugar and cholesterol content." It also includes any company whose foods cause customers to become "obese [or] overweight, [or to develop] diabetes, coronary heart disease, high blood pressure, elevated cholesterol levels, and/or other detrimental and adverse health effects and/or diseases." *In short, it is every food company in the country.*

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tisements and other publicity . . . The plaintiffs have been warned that they must make specific allegations about particular advertisements that could have caused plaintiffs' injuries, and to provide detail on the alleged connection between those injuries and the consumption of McDonald's foods. They have failed to remedy the defects of the initial complaint in the face of those warnings. Granting leave to amend would therefore be futile. In light of the previous decision and the granting of leave to amend, the complaint will be dismissed with prejudice.").

[15] According to the *Washington Post,* Mr. Banzhaf "has sued Hertz, Spiro Agnew and the Interstate Commerce Commission, filed legal complaints against dry cleaners, male-only clubs, the National Park Service, Rep. Barney Frank and Mrs. Simpson's Dance Classes, threatened Dulles Airport, and delivered a Freedom of Information Act [request] to the Office of the President . . . On Banzhaf's Web site, he boasts of having been called a 'legal terrorist.' He has built a public persona on this principle, for decades teaching a legal activism course that encourages law students to bring to court social reform lawsuits. His favorite saying—'Sue the bastards'—has been linked to him so many times, it's downright trite to bring it up. The saying is on his office wall, and also on his office wall in Latin. His license plate says SUE BAST . . . Banzhaf and his cohorts argue that the concept of 'free will' is a fallacy . . . But could we sue gun companies? Alcohol manufacturers? Banzhaf says it's all fair game; some economic theory would suggest such suits would be beneficial to society. They would cause the prices of certain products to rise, forcing those who buy them to pay for the crime and accidents that inevitably occur. It might even be possible to increase the extent to which dog owners are held liable for the cost of keeping their dogs, even if they aren't negligent, on the principle that there are an inevitable number of dog bites yearly." Libby Copeland, "Snack Attack: After Taking on Big Tobacco, Social Reformer Jabs at a New Target: Big Fat," *The Washington Post* (November 3, 2002) at F1.

[16] MSNBC, "Abrams Report" (January 23, 2003) (transcript).

[17] *See* Marguerite Higgins, "Lawyers Scream About Ice Cream," *The Washington Times* (July 25, 2003) at A1 ("Trial lawyers . . . sent letters to Baskin-Robbins Inc., Ben & Jerry's Homemade Holdings Inc., Cold Stone Creamery, the Haagen-Dazs Shoppes Inc., TCBY and Friendly Ice Cream Corp., telling the chains to add healthier alternatives and put nutritional facts on their store menu boards or face potential litigation . . . The letter was signed by George Washington University law professor John Banzhaf III, a leader in the obesity-lawsuit movement, and Michael F. Jacobson, executive director of the Center for Science in the Public Interest. It's the third type of notice Mr. Banzhaf has sent in the last month since organizing a conference on obesity lawsuits.").

[18] The Manhattan Institute, Center for Legal Policy, Trial Lawyers Inc. (2003), available at http://www.triallawyersinc.com, at 2.

[19] *See id.,* at 2, 6 ("Significantly, these estimates *exclude* the tobacco settlements, most contract and securities litigations, and most punitive damages . . .").

If McDonald's is liable for selling high caloric meals, then so are the local pizzeria and grocery stores.[20]

Frivolous litigation against the "fast food" industry, if allowed to proliferate, will lead to lawsuits against the food industry generally, since even the portion sizes of foods cooked at home have grown substantially in the last two decades.[21] Researchers have concluded that the large portion size increases for food consumed at home indicates "a shift that indicates marked changes in eating behavior in general." [22]

According to Michael Greve at the American Enterprise Institute, "It won't be too long before State attorney generals get in on this [lawsuits against the food industry]. There's too much money on the table." [23]

H.R. 339 IS NARROWLY TAILORED LEGISLATION THAT PRESERVES STATE AND FEDERAL LAWS

Lawsuits alleging harm was caused by the food industry's violation of State or Federal food labeling laws, including laws that prevent misleading and untruthful advertising, could still go forward under H.R. 339. Every State has its own deceptive trade practices laws, and a violation of any of such State laws could allow suits to go forward under the legislation. Further, under Federal law,[24] States remain free to require labeling of food sold at restaurants.[25] Consequently, States remain free to pass laws requiring that the restaurant industry provide nutritional information to customers. If a State passed such a labeling law, a violation of such law that caused injury could go forward under H.R. 339. H.R. 339 also allows lawsuits to proceed when there is a breach of express contract or express warranty,[26] and when a covered product is adulterated

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[20] C. Spencer, K. Schmid, and J. Zanetti, "Fast Food in the Gunsights—Class Actions as Political Weapons," *Toxics Law Reporter* (November 21, 2002) at 1093 (emphasis added).

[21] *See* Nielsen and Popkin, "Patterns and Trends in Food Portion Sizes, 1977–1998" JAMA.2003; 289: 450–453 ("Between 1977 and 1996, both inside and outside the home, portion size increased for salty snacks, desserts, soft drinks, fruit drinks, french fries, hamburgers, cheeseburgers, and Mexican food . . . [T]he most surprising result [of the study] is the large portion size increases for food consumed at home—a shift that indicates marked changes in eating behavior in general.").

[22] *Id.* at 453.

[23] Julia Duin, "Obese People Use Lawsuits to Get Government Involved," *The Washington Times* (June 11, 2003) at A5.

[24] *See* Nutrition Labeling and Education Act, Pub. L. No. 101–535.

[25] *See* 21 U.S.C. § 343(q)(5)(A)(i)–(ii) ("Subparagraphs (1), (2), (3), and (4) [of paragraph (q) titled 'Nutrition information'] shall not apply to food—(i) which is served in restaurants or other establishments in which food is served for immediate human consumption or which is sold for sale or use in such establishments, (ii) which is processed and prepared primarily in a retail establishment, which is ready for human consumption, which is of the type described in subclause (i), and which is offered for sale to consumers but not for immediate human consumption in such establishment and which is not offered for sale outside such establishment . . .").

[26] *See* H.R. 339 as reported, Sec. 4(5)(B). As indicated in Section 4(5)(B), a qualified civil liability action shall not include an action for breach of express contract or express warranty in connection with the purchase of a qualified product. The term "express warranty" is utilized in the context of its specific meaning in the common law of torts. First, the plaintiff must justifiably rely on the express warranty. Justifiable reliance is a matter "about which a reasonable person would attach importance in determining a choice of action." *See Prosser & Keeton on Torts,* 753 (5th ed. 1984); *Restatement (Third) of Torts: Products Liability*, § 9 (Comment B). The statement must also be a highly specific one about the health and safety of a product. For example, "this product warranties that a person will lose weight based on consumption of food." *See Baxter* v. *Ford Motor Co.*, 12 P.2d 409 (1932) (glass will not fly or shatter under the hardest impact). Mere generalizations in advertisements are regarded as "dealer talk" or puffery and do not constitute a breach of express warranty. *See Prosser & Keeton* at 753–54 and *Restatement (Third) of Torts*, § 9; *Smith* v. *Anheauser-Busch, Inc.*, 599 A.2d 320 (R.I. 1991) (stating that no reasonable person could have relied on any alleged representation in media advertising that driving while intoxicated is safe or acceptable); *Jakubowski* v. *Minn. Mining & Mfg.*, 193 A.2d 275, 280 (N.J. Super.

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as defined by Federal law.[27] Also, H.R. 339 only applies to claims based on "weight gain" or "obesity." Lawsuits can go forward under the bill if, for example, someone gets sick from a tainted hamburger. In such a case, the claim would not be injury due to weight gain from eating too many hamburgers over time, but rather a claim for injury due to eating a contaminated hamburger.

THE PUBLIC OVERWHELMINGLY OPPOSES THE LAWSUITS H.R. 339 WOULD PROHIBIT

According to a recent Gallup Poll: "[n]early 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." [28]

The public appears to recognize what has also been clear to the Supreme Court, and to one principal Founding Father, James Madison. As the Supreme Court has stated, quoting Madison, "Some degree of abuse is inseparable from the proper use of every thing. . . ." [29] Even the Chairman of the American Council for Fitness and Nutrition, Susan Finn, has written that "Although obesity is a serious health threat to millions of Americans, lawsuits and finger pointing are not realistic solutions. If you are obese, you don't need a lawyer; you need to see your doctor, a nutritionist and a physical trainer. Playing the courtroom blame game won't make anyone thinner or healthier . . ." [30] Even the *Los Angeles Times* has editorialized against such lawsuits, stating "If kids are chowing down to excess on junk food, though, aren't their parents responsible for cracking down? And if parents or other grown-ups overindulge, isn't it their fault, not that of the purveyors of fast food? . . . Why boost their food bills because of legal jousting? People shouldn't get stuffed, but this line of litigation should." [31]

H.R. 339 WOULD BRING THE FOCUS BACK TO PERSONAL RESPONSIBILITY

The lobbying organization for personal injury attorneys, the Association of Trial Lawyers of America, has published a book that advises personal injury attorneys to keep people who believe in "personal responsibility" off juries. According to that book, "Often, a juror with a high need for personal responsibility fixates on the responsibility of the plaintiff . . . According to these jurors, the plaintiff must be accountable for his or her own conduct . . . The

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Ct. App. Div. 1963) (representation that a grinding disk was stronger, sharper, and longer-lived than ever before available anywhere was mere puffery and not an express warranty). Failure to confine the words "express warranty" within the meaning of the words under the common law could substantially undermine the purpose of the legislation, which is to prevent tort law from being engaged in a regulatory function outside the normal confines of tort law. *See* Victor Schwartz, *Violation of Express Warranty: A Useful Tort that Must Be Kept Within Rational Boundaries*, 3 J. of Prod. Liab 147 (1992).

[27] *See* H.R. 339 as reported, Sec. 4(5)(C).

[28] Gallup Poll, Analysis, "Public Balks at Obesity Lawsuits" (July 21, 2003) (available at http://www.gallup.com/poll/releases/pr030721.asp) (results based on telephone interviews with a randomly selected national sample of 1,006 adults, 18 years and older, conducted July 7–9, 2003).

[29] *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 271 (1964) (quoting James Madison).

[30] Susan Finn, Chairman of the American Council for Fitness and Nutrition, *The Washington Times* (Letter to the Editor) (October 22, 2003) at A22.

[31] Editorial, "Fast Food Foolishness," *The Los Angeles Times* (July 7, 2003) at B10.

personal responsibility jurors tend to espouse traditional family values . . . Often, these jurors have strong religious beliefs . . . The only solution is to identify these jurors during voir dire and exclude them from the jury."[32]

Unfortunately, blame-shifting lawsuits continue to erode the traditional American value of personal responsibility by fomenting a culture of blame. Our lawsuit culture is even eroding parental responsibility. As Dr. Jana Klauer, a fellow at the New York City Obesity Research Center of St. Luke's Roosevelt Hospital has said, "I just wonder, where were the parents when (kids were) having these McDonald's breakfasts every morning? Were they incapable of pouring a bowl of cereal and some milk?"[33] As Will Rogers once observed, Americans are "letting lawyers instead of their conscience be their guide."

The current lawsuit culture threatens fundamental liberties. As Philip Howard has written:

> Our founding fathers would be shocked. There is no "right" to bring claims for whatever you want against someone else. Suing is a use of State power. A lawsuit seeks to use government's compulsory powers to coerce someone else to do something . . . Sticking a legal gun in someone's ribs . . . is not a feature of what our founders intended as individual rights. The point of freedom is almost exactly the opposite: We can live out lives without being cowed by the use of legal power.[34]

Juries exercise government power and, just like any other exercise of government power, should be subject to reasonable checks. No government power should be able to, without any limit on its authority, impose unlimited liability for unlimited numbers of claims. Even prominent personal injury attorneys have scoffed at obesity-related lawsuits against the food industry. As the Washington Post reported:

> [Y]ou'd be surprised to hear that some of the skeptics are among lawyers who normally file such suits on behalf of plaintiffs. Jack H. Olender, the dean of the D.C. trial lawyers, and Michael Hausfeld, author of many class-action lawsuits against corporations, pooh-poohed the McDonald's suit . . . Many in the plaintiff's bar, normally willing to find fault and sue, are asking, "Where's the beef?" . . . Hausfeld, of Cohen, Milstein, Hausfeld & Toll, also isn't shy about filing class-action lawsuits. But of the McDonald's case, he said: "That was one that took the law beyond the bounds . . ."[35]

But still, such lawsuits will continue, driven by the allure of unlimited damage awards. The following exchange between a 60 Minutes correspondent and Caesar Barber, a plaintiff in a lawsuit against various restaurants, is instructive.

> CAESAR BARBER: I'm saying that McDonald's affected my health. Yes, I am saying that.

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[32] David A. Weiner, "Utilizing the Personal Responsibility Bias," in *ATLA's Litigating Tort Cases* (Roxanne Barton Collin and Gregory S. Cusimano, editors-in-chief) (June 2003).

[33] Erin Duggan, "Tobacco-suit Tactics Now Target Fast Food," *Albany Times Union* (April 6, 2003) at A1.

[34] Philip K. Howard, *The Collapse of the Common Good* (New York: 2001) at 22–23.

[35] Hearsay: The Lawyer's Column, *The Washington Post* (January 27, 2003) at E10.

RICHARD CARLETON (CBS News, 60 Minutes): So what do you want in return?

CAESAR BARBER: I want compensation for pain and suffering.

RICHARD CARLETON: But how much money do you want?

CAESAR BARBER: I don't know . . . maybe $1 million. That's not a lot of money now.[36]

As Philip Howard has written, "First it was millions that took our breath away, then tens of millions, then hundreds of millions. Now it's billions. Pretty soon, one lucky victim may own the world." [37]

H.R. 339 will encourage society to focus on the true cause of obesity: a lack of exercise. Obesity is caused by a combination of too much consumption and too little exercise. While the U.S. Surgeon General has stated that "[a]pproximately 300,000 deaths a year in this country are currently associated with overweight and obesity,"[38] according to the Department of Health and Human Services, "physical inactivity contributes to 300,000 preventable deaths a year in the United States."[39]

In April, 2003, at a scientific conference of the Federation of American Societies for Experimental Biology, Nutritionist Lisa Sutherland of the University of North Carolina at Chapel Hill presented her findings that over the past twenty years, teenagers have, on average, increased their caloric intake by 1 percent. During that same time period, the percentage of teenagers who said they engaged in some sort of physical activity for thirty minutes a day dropped from 42% to 29%. Not surprisingly, teenage obesity over the twenty year period increased by 10%, indicating that it is not junk food that is making teenagers fat, but rather their lack of activity.[40] Similarly for adults, as manual labor has become less prevalent and sedentary jobs has become more prevalent, adult obesity has risen.[41]

Exercise appears to be the best response to weight gain. As a recent study in the *American Journal of Preventive Medicine* concluded:

> Because of the reasonable assumption that increased caloric intake should lead to obesity and its consequences, dietary restriction has been a standard public health recommendation . . . [However,] it would appear that caloric intake might not be a primary determinant of CVD [cardiovascular disease] outcome. The fact is that those who exercised more and ate more nevertheless had low CVD

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[36] "Food Fight," CBS News "60 Minutes" (Australia) (September 15, 2002) (transcript).

[37] Philip K. Howard, *The Collapse of the Common Good* (New York: 2001) at 58.

[38] U.S. Department of Health and Human Services, "The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity 2001" at 7.

[39] President's Council on Physical Fitness and Sports, "Fact Sheet: Physical Activity and Health," available at http://www.fitness.gov/physical—activity—fact—sheet.html (citing U.S. Department of Health and Human Services and other Federal agency data) (emphasis added).

[40] L.A. Sutherland, "Health Trends in US Adolescents Over the Past 20 Years," Program No. 708.7, Abstract 7714.

[41] *See* Todd G. Buchholz, "Burger, Fries and Lawyers: The Beef Behind Obesity Lawsuits" (conducted for U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform) (July 2, 2003) at 11–12 ("In 1952, 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 contrast, employers pay workers to stay in their seats.*") (emphasis in original).

> mortality. Thus, energy expenditure may be the key . . . Therefore, eating less may not necessarily equate with leanness, nor does eating more necessarily translate into obesity . . . Thus, perhaps the greatest practical value of this study is the finding here that a focus on increasing energy expenditure, rather than reducing caloric intake, may offer the most productive behavioral strategy by which to extend healthy life.[42]

H.R. 339 WILL PROTECT THE AUTONOMY AND FUNDING OF PUBLIC SCHOOLS

Public schools could offer more physical education classes, of course, but according to food litigation and personal injury attorney John Banzhaf, school boards that allow vending machines in schools will be the next targets of obesity-related lawsuits,[43] which threatens to take money away from schools, including physical education programs, and give it to personal injury attorneys.

According to one article, "Brita Butler-Wall, executive director of Seattle-based Citizens' Campaign for Commercial-Free Schools, has been lobbying the school board for more than a year to get rid of [its] Coca-Cola contract. Yet, as a parent of an eighth-grader in a local public school, she says, 'I don't want to see our district spending its money hiring more lawyers to fight a legal battle.' Adam Drewnowski, director of the Center for Public Health Nutrition at the University of Washington, says, 'If you want to influence the school board, you run for a seat on the board. Threatening a lawsuit is almost like blackmail. It's just unconscionable.'"[44] According to the National Association of Secondary School Principals, such lawsuits against schools threaten their ability to raise funds for vital programs.[45] Indeed, today only one State—Illinois—requires daily physical education classes for kindergarten through 12th grade.[46]

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[42] Jing Fang, Judith Wylie-Rosett, Hillel W. Cohen, Robert C. Kaplan and Michael H. Alderman, "Exercise, body mass index, caloric intake, and cardiovascular mortality," 25 A*merican Journal of Preventive Medicine* 4: 283–89, 287–88 (November 2003).

[43] *See* "Banzhaf: School Boards Are Next in Line for Obesity Lawsuits" 1 Obesity Policy Report 6 (May 1, 2003) ("Banzhaf confirmed the suspicions (and fears) of many by stating flatly that school boards that allow vending machines in schools will be the next targets of obesity-related lawsuits."). *See also* Deborah Bach, "Coke Deal Could Make Schools Targets of Suits," *The Seattle Post-Intelligencer* (July 2, 2003) at A1 ("A prominent Washington, D.C., law professor who led billion-dollar victories against the tobacco industry warned the Seattle School Board yesterday that it might become the target of an anti-obesity lawsuit for allowing middle and high schools to peddle soda to students . . . The contract allows only Coca-Cola products to be sold in school vending machines and nets about $400,000 annually for school activities . . . Adam Drewnowski, director of the Center for Public Health and Nutrition at the University of Washington, was outraged at the suggestion of a lawsuit. 'This is just bottom-fishing. For the School Board to be making decisions under the threat of a lawsuit, I think that's scandalous,' he said.").

[44] Laura Bradford, "Fat Foods: Back In Court" *TIME Online,* Inside Business (August 3, 2003).

[45] *See* Marguerite Higgins, "Food Fight," *The Washington Times* (October 19, 2003) at A7 ("About 70 percent of 832 public schools polled in 2001 said they had a partnership with a food or beverage company to fund programs, a National Association of Secondary School Principals report said. Some principals are worried about losing their ability to have food fund-raising programs in schools, said Michael Carr, spokesman for the Reston association.").

[46] *See* Susan Finn, *The Washington Times* (Letter to the Editor) (October 22, 2003) at A22 ("When you consider that only one State—Illinois—requires daily physical education classes for kindergarten through 12th grade and that technological improvements have created an increasingly sedentary lifestyle, it's no wonder our nation's weight problem is getting worse.").

H.R. 339 WILL PRESERVE THE SEPARATION OF POWERS

The drive by overeaters to blame those who serve them food and to collect unlimited monetary damages is also an attempt to accomplish through litigation that which has not been achieved by legislation and the democratic process.

John Banzhaf, a personal injury attorney described above at note 15, is now advising the lawyers involved in the litigation against various restaurants. In an interview on *60 Minutes*, Mr. Banzhaf said:

> If we can win one out of 10 cases, if we can persuade one out of ten juries to hit these people with big verdicts, the way we have with tobacco, we can force them to make important changes and finally somebody will be doing something about the problem of obesity, because, at this point nobody else, not the health educators, not the bureaucrats, *not our legislators*, are doing a damn thing about it.[47]

Mr. Banzhaf has also said, "if the legislatures won't legislate, then the trial lawyers will litigate."[48]

Various courts have described similar lawsuits against the firearms industry for harm caused by the misuse of its products by others as attempts to "regulate . . . through the medium of the judiciary"[49] and "improper attempt[s] to have [the] court substitute its judgment for that of the legislature, something which [the] court is neither inclined nor empowered to do."[50] Such lawsuits break down the separation of powers of the branches of government.

Large damage awards and requests for injunctive relief have the potential to force the judiciary to intrude into the decision-making process properly within the sphere of another branch of government, namely legislatures.[51] Those filing such lawsuits seek to circumvent legislatures and the popular will.

CONGRESS HAS THE CLEAR CONSTITUTIONAL AUTHORITY TO ENACT H.R. 339

The lawsuits against the food industry that H.R. 339 addresses directly implicate core federalism principles articulated by the United States Supreme Court in *BMW of North America, Inc.* v. *Gore,*[52] which has made clear that "one State's power to impose burdens on the interstate market . . . is not only subordinate to the Federal power over interstate commerce, but is also constrained by the need to respect the interests of other States . . ."[53] Congress can of course exercise its authority under the Commerce Clause to prevent a few State courts from bank-

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[47] "Food Fight," CBS News "60 Minutes" (September 15, 2002) (transcript) (emphasis added).
[48] National Public Radio, "Fast Food on Trial" (8/8/02).
[49] *Penelas* v. *Arms Technology Inc. et al.,* No. 3D00–113, dismissal affirmed (Fla. Dist. Ct. App., 3d Dist., Feb. 14, 2001).
[50] *See Cincinnati* v. *Beretta U.S.A. Corp.,* No. A9902369, 1999 WL 809838 (Ohio Com. Pl. Oct. 7, 1999) at *1.
[51] *See Gordon* v. *Texas,* 153 F.3d 190, 194 (5th Cir. 1998) (citing *Koohi* v. *United States*, 976 F.2d 1328, 1332 (9th Cir. 1992) ("[B]ecause the framing of injunctive relief may require the courts to engage in the type of operational decision-making beyond their competence and constitutionally committed to other branches, such suits are far more likely to implicate political questions. ").
[52] 517 U.S. 559 (1996).
[53] *Id.* at 571 (citations and footnotes omitted).

rupting the food industry, the largest non-governmental employer in the Nation.

In fast food lawsuits, personal injury attorneys seek to obtain through the courts stringent limits on the sale and distribution of food beyond the court's jurisdictional boundaries. By virtue of the enormous compensatory and punitive damages sought, and because of the types of injunctive relief requested, these complaints in practical effect would require manufacturers of lawfully produced food to curtail or cease all lawful commercial trade in that food in the jurisdictions in which they reside—almost always outside of the States in which these complaints are brought—to avoid potentially limitless liability. Insofar as these complaints have the practical effect of halting or burdening interstate commerce in food, they can be appropriately addressed by Congress.

The Supreme Court in *Healy* v. *Beer Institute*[54] elaborated on these principles concerning the extraterritorial effects of State regulations as follows:

> The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. . . . [T]he practical effect of the statute must be evaluated not only by considering the consequences of the [law] itself, but also by considering how the challenged [law] may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar [laws]. Generally speaking, the Commerce Clause protects against inconsistent [laws] arising from the projection of one State regulatory regime into the jurisdiction of another State.[55]

H.R. 339 INCLUDES APPROPRIATE DISCOVERY AND PLEADING PROVISIONS

H.R. 339 includes the very same discovery provisions designed to prevent fishing expeditions that are already part of our Federal securities laws. These provisions[56] provide that discovery of documents be stayed in actions allowed to proceed under the Personal Responsibility in Food Consumption Act while the court decides whether the case should be dismissed unless the court decides that particular discovery is necessary to preserve evidence or to prevent undue prejudice to a party. Such provisions also provide for court sanctions if a defendant destroys any documents relevant to the litigation. These provisions are the same as those contained in the Federal securities fraud laws, namely 15 U.S.C. § 77z–1(b)(1)–(2) and 15 U.S.C. § 78u–4(b)(3)(B)–(C). Obesity-related lawsuits against the food industry are just as frivolous, if not much more frivolous, than the abusive securities fraud lawsuits Congress addressed by enacting the same discovery provisions in the Federal securities laws.

As one legal commentator has described the same provisions in the Federal securities laws, the "two provisions . . . should curb the filing of improper motions [to dismiss]. [T]o ensure that defendants cannot use the discovery stay as an opportunity to allow po-

[54] 491 U.S. 324 (1989).
[55] 491 U.S. at 336–37 (citations omitted).
[56] *See* H.R. 339 as reported, Sec. 3(c).

tential evidence to disappear, the Act provides significant protections for plaintiffs . . .''[57]

The language providing that a party treat documents in their control ''as if they were the subject of a continuing request for production of documents from an opposing party under'' applicable State or Federal rules of procedure is explained in the Conference Report accompanying the Federal securities legislation. According to the Conference Report, those provisions are intended to make it unlawful for a defendant to ''willfully to destroy or otherwise alter relevant evidence.''[58] While the Conference Report states that these provisions are not intended to impose ''liability where parties inadvertently or unintentionally destroy what turns out to be relevant documents,''[59] the risk of sanctions should lead defendants to take pains to prevent the loss of evidence. The sanctions provision also will discourage defendants from filing frivolous motions to dismiss merely for the purpose of obtaining a discovery stay.

H.R. 339 also appropriately requires that any complaint alleging that a lawsuit should go forward under the exception in the bill that allows cases to proceed when the violation of a State or Federal law was the proximate cause of harm must state the State and Federal laws that were allegedly violated, and the facts that are alleged to have proximately caused the injuries claimed.[60] This provision simply saves the time and money of all litigants, as it provides the court with crucial information early in the proceedings with which to determine whether the case can go forward at all. This provision costs neither party to such lawsuit anything because it requires statements of the same allegations that would have to be made in the case if the litigation is to be successful. It simply provides that such necessary information be provided to the court sooner rather than later, thus facilitating the court's decision as to whether the case may proceed. That saves the court's resources, as well as those of all the litigants.

HEARINGS

The Committee's Subcommittee on Commercial and Administrative Law held a hearing on H.R. 339 on June 19, 2003. Testimony was received from John Banzhaf, Professor, George Washington University Law School; Victor Schwartz, Shook, Hardy & Bacon; Christianne Ricchi, The National Restaurant Association; and Richard Berman, the Center for Consumer Freedom, with additional material submitted by individuals and organizations.

COMMITTEE CONSIDERATION

On January 28, 2004, the Committee met in open session and ordered favorably reported the bill H.R. 339 with amendments by voice vote, a quorum being present.

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[57] David C. Mahaffey, ''Pleading Standards and Discovery Stays Under the Private Securities Litigation Reform Act: An End to Fishing Expeditions?'' 10 No. 2 *Insights* 9, 12 (1996).

[58] H.R. Rep. No. 369, 104th Cong., 1st Sess. 37 (1995).

[59] *Id.* at 37.

[60] *See* H.R. 339, Sec. 3(d).

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of Rule XIII of the Rules of the House of Representatives, the Committee notes that the following rollcall votes occurred during the Committee's consideration of H.R. 339.

1. Mr. Keller offered an amendment to H.R. 339 to replace all after Sec. 1 of the bill with provisions including discovery and pleading requirements, and exceptions allowing suits to proceed if State or Federal laws have been violated, for breach of express contract and express warranty, and for the sale of adulterated products. By a rollcall vote of 18 yeas to 9 nays, the amendment was agreed to.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble	X		
Mr. Smith	X		
Mr. Gallegly			
Mr. Goodlatte	X		
Mr. Chabot	X		
Mr. Jenkins			
Mr. Cannon	X		
Mr. Bachus	X		
Mr. Hostettler	X		
Mr. Green	X		
Mr. Keller	X		
Ms. Hart	X		
Mr. Flake	X		
Mr. Pence	X		
Mr. Forbes			
Mr. King	X		
Mr. Carter	X		
Mr. Feeney	X		
Mrs. Blackburn	X		
Mr. Conyers		X	
Mr. Berman		X	
Mr. Boucher			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee			
Ms. Waters			
Mr. Meehan		X	
Mr. Delahunt			
Mr. Wexler			
Ms. Baldwin			
Mr. Weiner		X	
Mr. Schiff	X		
Ms. Sánchez		X	
Mr. Sensenbrenner, Chairman	X		
Total	18	9	

2. Mr. Watt offered a second degree amendment to the Keller amendment that would have limited H.R. 339's application to Federal courts. By a rollcall vote of 11 yeas to 15 nays, the amendment was defeated.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith		X	
Mr. Gallegly			
Mr. Goodlatte			
Mr. Chabot		X	
Mr. Jenkins			
Mr. Cannon		X	
Mr. Bachus		X	
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Ms. Hart		X	
Mr. Flake		X	
Mr. Pence		X	
Mr. Forbes			
Mr. King		X	
Mr. Carter		X	
Mr. Feeney		X	
Mrs. Blackburn			
Mr. Conyers	X		
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters			
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler			
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez	X		
Mr. Sensenbrenner, Chairman		X	
Total	11	15	

Committee Oversight Findings

In compliance with clause 3(c)(1) of Rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of Rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of Rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of Rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 339, the following estimate and comparison prepared

by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 10, 2004.

Hon. F. JAMES SENSENBRENNER, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 339, the "Personal Responsibility in Food Consumption Act."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Lanette J. Walker (for Federal costs), who can be reached at 226–2860, Melissa Merrell (for the State and local impact), who can be reached at 226–3220, and Paige Piper/Bach (for the private-sector impact), who can be reached at 226–2940.

Sincerely,

DOUGLAS HOLTZ-EAKIN.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 339—Personal Responsibility in Food Consumption Act.

H.R. 339 would require courts to dismiss certain lawsuits filed against manufacturers and sellers of any food product as well as the trade associations that represent them. Specifically, the bill would affect lawsuits seeking damages for injury resulting from weight gain, obesity, or any health condition associated with obesity as a result of consumption of these products. CBO estimates that implementing H.R. 339 would not have a significant impact on the Federal budget. Enacting the bill would not affect direct spending or revenues.

H.R. 339 would impose both an intergovernmental and a private-sector mandate as defined in the Unfunded Mandates Reform Act (UMRA) by prohibiting State, local, and tribal governments and the private sector from pursuing certain civil lawsuits concerning obesity or related health conditions. The bill also would preempt State liability laws and the authority of State courts to hear such cases.

The direct cost of the mandates would be the forgone net value of damage awards. According to academic and government sources, no such lawsuits have been completed. In addition, those sources indicate that although individuals have filed two lawsuits claiming that certain food products caused their obesity, both cases were dismissed and they expect that it is unlikely there will be many new cases filed in the future. Consequently, CBO estimates that the direct cost of the mandates (in expected value terms) would be negligible and would fall well below the annual thresholds established by UMRA for intergovernmental mandates ($60 million in 2004, adjusted annually for inflation) and private-sector mandates ($120 million in 2004, adjusted annually for inflation).

The CBO staff contacts for this estimate are Lanette J. Walker (for Federal costs), who can be reached at 226–2860, Melissa

Merrell (for the State and local impact), who can be reached at 226–3220, and Paige Piper/Bach (for the private-sector impact), who can be reached at 226–2940. The estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

H.R. 339 does not authorize funding. Therefore, clause 3(c)(4) of Rule XIII of the Rules of the House of Representatives is inapplicable.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of Rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8, of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

This section by section discusses the bill as reported by the Committee.

Sec. 1. Short Title. Section 1 provides that this Act may be cited as the "Personal Responsibility in Food Consumption Act."

Sec. 2. Purpose. Section 2 provides that the purpose of this Act is to allow Congress, State legislatures, and regulatory agencies to determine appropriate laws, rules, and regulations to address the problems of weight gain, obesity, and health conditions associated with weight gain or obesity.

Sec. 3. Preservation of Separation of Powers. Section 3 provides that a qualified civil liability action may not be brought in any Federal or State court, and that a qualified civil liability action that is pending on the date of the enactment of this Act shall be dismissed immediately by the court in which the action was brought or is currently pending. Section 3 also provides that in any action that is allowed to proceed under this Act, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss unless the court finds upon motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party. During the pendency of any such stay of discovery, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under applicable Federal or State rules of civil procedure, as the case may be. A party aggrieved by the willful failure of an opposing party to comply with this paragraph may apply to the court for an order awarding appropriate sanctions. Section 3 also provides that in any action brought pursuant to a violation of State or Federal law, the complaint initiating such action shall state with particularity the Federal and State statutes that were allegedly violated and the facts that are alleged to have proximately caused the injury claimed.

Sec. 4. Definitions. Section 4 sets out the definitions of various terms as used in the Act. The term "qualified product" means a

food (as defined in section 201(f) of the Federal Food Drug and Cosmetic Act (21 U.S.C. § 321(f)). The term "qualified civil liability action" means a civil action brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, penalties, declaratory judgment, injunctive or declaratory relief, restitution, or other relief arising out of, related to, or resulting in injury or potential injury resulting from a person's consumption of a qualified product and weight gain, obesity, or any health condition that is associated with a person's weight gain or obesity, including an action brought by a person other than the person on whose weight gain, obesity, or health condition the action is based, and any derivative action brought by or on behalf of any person or any representative, spouse, parent, child, or other relative of any person, but shall not include——

(A) an action in which a manufacturer or seller of a qualified product knowingly and willfully violated a Federal or State statute applicable to the manufacturing, marketing, distribution, advertisement, labeling, or sale of the product, and the violation was a proximate cause of injury related to a person's weight gain, obesity, or any health condition associated with a person's weight gain or obesity; (B) an action for breach of express contract or express warranty in connection with the purchase of a qualified product; or (C) an action regarding the sale of a qualified product which is adulterated (as described in section 402 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 342)).

After the Committee on the Judiciary's markup of H.R. 339, the Committee on Energy and Commerce expressed concerns that the definition of "qualified civil liability action" might be construed to include actions under the Federal Trade Commission Act or actions under the Federal Food, Drug and Cosmetic Act. The Committee on the Judiciary did not intend to include such actions in the definition and did not believe that the actions were included within its clear terms. Notwithstanding that, both Committees agree on the policy that such actions should not be precluded by H.R. 339. To make this policy agreement abundantly clear, a manager's amendment to be offered during floor consideration of H.R. 339 will strike the current language in § 4(5)(C) excluding adulteration suits and replace it with language stating explicitly that the definition shall not be construed to include actions under the Federal Trade Commission Act or the Federal Food, Drug, and Cosmetic Act. The Committee on the Judiciary believes that this language will resolve the practical concerns of the Committee on Energy and Commerce.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of Rule XIII of the Rules of the House of Representatives, the Committee notes that this bill does not change existing law.

COMMITTEE JURISDICTION LETTERS

Congress of the United States
House of Representatives
Washington, D.C. 20515

March 4, 2004

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Sensenbrenner:

On January 28, 2004, the Committee on the Judiciary ordered reported H.R. 339, the Personal Responsibility in Food Consumption Act. As ordered reported by your Committee, this legislation contains a number of provisions that could fall within the jurisdiction of the Committee on Energy and Commerce.

Specifically, I believe that H.R. 339 would impose a new scienter requirement with respect to certain enforcement actions taken by agencies and statutes within our jurisdiction. This requirement could fundamentally alters how agencies, such as the Federal Trade Commission and the Food and Drug Administration, enforce violations of laws they administer.

Recognizing your interest in bringing this legislation before the House expeditiously, the Committee on Energy and Commerce agrees not to seek a sequential referral of the bill. In exchange, you have agreed to eliminate our jurisdictional concerns with a floor amendment that expressly eliminates lawsuits brought under the Federal Trade Commission Act and the Federal Food, Drug, and Cosmetic Act from the definition of "qualified civil liability action" under the legislation.

By agreeing not to seek a sequential referral, the Committee on Energy and Commerce does not waive its jurisdiction over the bill as your committee ordered it reported. In addition, the Committee on Energy and Commerce reserves its right to seek conferees on any provisions within its jurisdiction which are considered in any House-Senate conference.

I request that you include this letter and your response as part of the Congressional Record during consideration of this bill by the House.

Sincerely,

Joe Barton
Chairman

WJT/jdb

cc: The Honorable John D. Dingell
The Honorable John Conyers
The Honorable Charles W. Johnson, III

March 5, 2004

The Honorable Joe Barton
Chairman
Committee on Energy and Commerce
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Barton:

Thank you for your letter regarding H.R. 339, the "Personal Responsibility in Food Consumption Act." I appreciate your willingness not to seek a sequential referral of the bill.

I strongly disagree with your assertion of jurisdiction over the bill. I do not believe that H.R. 339, as reported, contains provisions that affect lawsuits by the Federal Trade Commission or the Food and Drug Administration, and the drafters did not intend to include such suits. Nor do I agree with the description of the bill in the second paragraph of your letter. However, I will include language (a copy of which is attached) in a manager's amendment on the floor to make it clear that such suits are not precluded or otherwise affected by the bill. I will also include language our staffs have discussed in the Committee's report (a copy of which is attached) to further clarify this point.

By agreeing to this resolution of this matter, the Committee on the Judiciary does not acknowledge that the Committee on Energy and Commerce had jurisdiction over provisions of the bill. In addition, the Committee on the Judiciary does not waive any of its jurisdictional claims in these matters.

I will include your letter and this response in the Committee's report on H.R. 339 and in the Congressional Record during the consideration of this bill in the House. I appreciate your cooperation in this matter.

Sincerely,

F. JAMES SENSENBRENNER, JR.
Chairman

cc: The Honorable Dennis Hastert
The Honorable Tom DeLay
The Honorable John Conyers, Jr.
The Honorable John Dingell
The Honorable Charles Johnson

AMENDMENT LANGUAGE

Strike the current § 4(5)(C) (the language that excludes suits relating to adulterated foods) and insert:

"(C) Such term shall not be construed to include an action brought under the Federal Trade Commission Act (15 U.S.C. 41 et seq.) or the Federal Food, Drug, and Cosmetic Act (21 U.S. 301 et seq.)."

REPORT LANGUAGE

After the Committee on the Judiciary's markup of H.R. 339, the Committee on Energy and Commerce expressed concerns that the definition of "qualified civil liability action" might be construed to include actions under the Federal Trade Commission Act or actions under the Federal Food, Drug, and Cosmetic Act. The Committee on the Judiciary did not intend to include such actions in the definition and did not believe that the actions were included within its clear terms. Notwithstanding that, both Committees agree on the policy that such actions should not be precluded by H.R. 339. To make this policy agreement abundantly clear, a manager's amendment to be offered during floor consideration of H.R. 339 will strike the current language in § 4(5)(C) excluding adulteration suits and replace it with language stating explicitly that the definition shall not be construed to include actions under the Federal Trade Commission Act or the Federal Food, Drug, and Cosmetic Act. The Committee on the Judiciary believes that this language will resolve the practical concerns of the Committee on Energy and Commerce.

MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, JANUARY 28, 2004

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:04 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

[Intervening business.]

Chairman SENSENBRENNER. Pursuant to notice, I now call up the bill H.R. 339, the "Personal Responsibility in Food Consumption Act" for purposes of markup, and move its favorable recommendation to the House. Without objection, the bill will be considered as read, and open for amendment at any point.

[The bill, H.R. 339, follows:]

I

108TH CONGRESS
1ST SESSION

H. R. 339

To prevent frivolous lawsuits against the manufacturers, distributors, or sellers of food or non-alcoholic beverage products that comply with applicable statutory and regulatory requirements.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 27, 2003

Mr. KELLER (for himself, Mr. NEY, Mr. GRAVES, Mr. TIBERI, Mrs. BIGGERT, Mr. CRENSHAW, and Mr. PETERSON of Minnesota) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To prevent frivolous lawsuits against the manufacturers, distributors, or sellers of food or non-alcoholic beverage products that comply with applicable statutory and regulatory requirements.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Personal Responsibility in Food Consumption Act''.

SEC. 2. LITIGATION MANAGEMENT FOR MANUFACTURERS, DISTRIBUTORS, AND SELLERS OF FOOD AND NON-ALCOHOLIC BEVERAGE PRODUCTS THAT COMPLY WITH APPLICABLE STATUTORY AND REGULATORY REQUIREMENTS.

(a) PREVENTION OF FRIVOLOUS LAWSUITS.—The manufacturer, distributor, or seller of a food or non-alcoholic beverage product intended for human consumption shall not be subject to civil liability, in Federal or State court, whether stated in terms of negligence, strict liability, absolute liability, breach of warranty, or State statutory cause of action, relating to consumption of food or non-alcoholic beverage products unless the plaintiff proves that, at the time of sale, the product was not in compliance with applicable statutory and regulatory requirements.

(b) EFFECTIVE DATE.—This Act shall take effect on the date of the enactment of this Act and shall apply to any civil action described in subsection (a), unless a trial or retrial with regard to that civil action has commenced as of that date.

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Chairman SENSENBRENNER. Rather than the Chair recognizing himself for an opening statement, the Chair defers to the gentleman from Florida, Mr. Keller, the author of the bill, for 5 minutes.

Mr. KELLER. Thank you, Mr. Chairman.

The food industry is the largest private sector employer in the United States, providing 12 million jobs for Americans. There is a real and present danger of an uncontrollable avalanche of frivolous lawsuits against restaurants, pizza parlors, public schools, grocery stores, and companies that make ice cream, soft drinks, and cookies. Of course, the consequence of these lawsuits against the food industry is that consumers would pay a higher price in restaurants and grocery stores for food costs. This legislation, in essence, provides that a seller or maker of lawful food products shall not be subject to civil liability where the claim is premised upon an individual's weight gain resulting from the consumption of food. This is a narrowly drawn measured piece of legislation. It doesn't immunize the food industry. This bill only applies to obesity-related claims, that is, to claims based on weight gain or obesity. That means that lawsuits can go forward under this bill if, for example, someone gets sick from eating a tainted hamburger. In such case, the claim would not be injury due to weight gain from eating too many hamburgers over time, but rather a claim for injury due to eating a contaminated hamburger.

This legislation doesn't preclude lawsuits for false advertising, mislabeling of food, adulterated food, or injuries from eating tainted food. The gist of the legislation is that there should be common sense in the food court, not blaming other people in a legal court, whenever there is an excessive consumption of food. Most people have enough common sense to realize that if they eat an unlimited amount of super-sized fries, milkshakes, chocolate sundaes, and cheeseburgers, it can possibly lead to obesity. But in a country like the United States where freedom of choice is cherished, nobody is forced to super-size their fast-food meals or to choose less healthy options on the menu. Similarly, nobody is forced to sit in front of the TV all day instead of walking or bike riding.

Richard Simmons, the famous exercise guru, recently said that: People who bring these lawsuits against the food industry don't need a lawyer, they need a psychiatrist. The American public seems to agree. In a recent Gallup poll, 9 out of 10 Americans oppose holding the fast-food industry legally responsible for the diet-related health problems of overweight individuals.

Which brings me to the subject of lawyers and why we are here. Some of the same lawyers who went after the tobacco industry now have the goal of seeking $117 billion from the food industry, which is the amount the Surgeon General estimates is the public health-related cost attributable to being overweight. Based on a contingency fee of 40 percent, these lawyers would stand to recover $47 billion for themselves in attorneys fees. Indeed, lawsuits have already been brought against McDonald's, Burger King, Wendy's, KFC, and Kraft-Nabisco, with additional lawsuits now threatened against the makers of ice cream.

The New York lawsuits against McDonald's were brought by a 400-pound 15-year-old boy and a 272-pound 56-year-old man

named Cesar Barber. Mr. Barber recently appeared on the CBS television show 60 Minutes. He had this to say:

BARBER: I want compensation for pain and suffering.

60 MINUTES: How much money do you want?

BARBER: Maybe $1 million. That's not a lot of money right now.

Of course, the litigation against the food industry would not make a single individual any skinnier. It would, however, make the trial attorneys' bank accounts a lot fatter.

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

In closing, this narrowly-drawn legislation is modeled closely on H.R. 1036, the "Protection of Lawful Commerce and Arms Act," which received 285 votes in the House and enjoyed broad bipartisan support. I urge my colleagues to also vote yes on this legislation.

Mr. CANNON. Would the gentleman yield?

Mr. KELLER. Yes.

Mr. CANNON. I would just like to say that we held a hearing in our Subcommittee on this issue. The arrogance of the Trial Bar is hard to restate here. I think Mr. Bonzhoff at one point said: All I need is one judge and one jury in one place, and we will make it a law for America.

I thought that was extraordinary, and I thought the Committee should be aware of that. Thank you. And I yield back.

Mr. KELLER. Thank you, Mr. Chairman. And I yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

I am at loss to understand what brings on some of the legislation before the Committee today. I can understand when we are rushing to get things through in time thereof an appropriation bill or we have got to acknowledge the beginning of a fiscal year. But this bill is a curious departure from what originally has been the role of the Committee of the Judiciary in terms of its responsibilities.

In this bill, we propose to authorize the dismissal of pending actions as a matter of law. Now, this assumes that the judges are having some trouble with this legislation or with these kinds of cases, or that there is something that is so out of whack in the judicial system that it is important that the Committee on the Judiciary in the House of Representatives in January 2004, that we weigh in on this. And my question is, what for?

And I—the author of the bill, my friend from Florida, may or may not be aware of the fact that we are dealing with when actions should be dismissed as if there is some problem in the courts about this. And since he has held hearings and listened to arrogant lawyers, I would like to just ask him, what is it about this kind of a case that makes it important that we act on this matter today?

Mr. KELLER. Well, thank you. And first of all, your statement that it is unprecedented is untrue. H.R. 1036, the "Protection of Lawful Arms and Commerce Act," has the same exact language regarding the dismissal of the actions. And the reason is, while the firearms industry has won 100 percent of their claims, they spend about $100 million a year in defending these frivolous claims.

Mr. CONYERS. Hold on. I want to hear you out. But we haven't passed that law, either, my friend.

Mr. KELLER. We passed in the House by 285 votes.

Mr. CONYERS. That proves your point then?

Mr. KELLER. No. The reason——

Mr. CONYERS. What does that establish?

Mr. KELLER. Well, the reason you have a dismissal of the actions rather than set a specific date for when this will take effect is because that would encourage the filing of hundreds of additional cases right before the date of enactment, which is what recently happened in Texas and Mississippi when they enacted legal reforms.

Mr. CONYERS. Well, what about the—what is it that brought you to this point to introduce the bill? I mean, I am just trying to talk with you. We haven't talked about this before. And I don't mean any discourtesy, but what brought this to your attention that we have got to step into this matter that is already in the courts?

Mr. KELLER. Well, what brought this to my attention, Congressman, is in approximately August of the prior year, you had the same attorneys who got together to go after big tobacco and the firearms industry gather here in Washington, D.C. with Mr. Banzhaf and announce that they were going to sue the food industry, and put at risk 12 million jobs based on the food industry selling a lawful product. And as far as I could see, the only crime that the food industry committed is that they were someone who had deep pockets. And I thought this would be crippling litigation for them to face in terms of discovery costs and so on and so forth even if they were to prevail. And in fact, since that time, I have found that suits have been filed all across the country. And I didn't think that we should pay higher costs as consumers when we go to the grocery stores and restaurants for food.

Chairman SENSENBRENNER. The gentleman's time has expired. Without objection, all Members may include opening statements in the record at this point.

[The prepared statement of Mr. King follows:]

PREPARED STATEMENT OF THE HONORABLE STEVE KING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IOWA

I support H.R. 339, the "Personal Responsibility in Food Consumption Act." We must stop junk lawsuits. However, stopping the frivolous lawsuits aimed at restaurants is just the beginning. We must root out junk lawsuits in all areas of our economy. Frivolous lawsuits undermine our economic growth and cause businesses to spend time, money and energy defending against junk lawsuits instead of producing valuable products and services. Lawyers, not consumers, benefit from these unnecessary lawsuits—some lawyers stand to gain millions cooking up junk lawsuits; others are paid to defend against them. However, our court system is not just for the lawyers; it is there to ensure justice and settle the disputes of all Americans. The people who have the most to lose from junk lawsuits are the American people who suffer from the drag these lawsuits place on our economy, increased insurance rates, and the increased litigation costs that companies are forced to pass along to consumers and shareholders. This bill today deals with an important issue, but I

believe we should expand these reforms to cover all industries to protect against frivolous litigation.

Chairman SENSENBRENNER. Are there amendments? The gentleman from Florida——

Mr. CONYERS. Mr. Chairman, can I gain 2 additional minutes?

Chairman SENSENBRENNER. Without objection, the gentleman will be given 2 additional minutes.

Mr. CONYERS. Thank you for your courtesy.

To my dear friend from Florida. The suit that you bring to our attention was dismissed.

Mr. KELLER. Well, I brought several suits to your attention. The McDonald's suit was dismissed, and then it was refiled and then recently it was dismissed with prejudice after McDonald's incurred several hundreds of thousands of dollars in attorney's fees, which is precisely the problem here. We don't want them and other restaurants who sell lawful products to have to incur millions if not hundreds of millions, like the firearms industry, for selling lawful food products.

Mr. CONYERS. But are you suggesting this is a practice you may choose to turn into law whenever it occurs in the course of litigation?

Mr. KELLER. No.

Mr. CONYERS. Well, then why did you pick this one?

Mr. KELLER. Well, I articulated the problem. Just——

Mr. CONYERS. Well, I know what the problem is. But I mean, why did this bother you so much?

Mr. KELLER. It bothers me when you have the largest private sector employer in the country employing 12 million people faced with an avalanche of frivolous lawsuits and incurring millions of dollars in fees for selling a lawful product.

Mr. CONYERS. Did you bother to check whether McDonald's stock was ever affected by this litigation?

Mr. KELLER. The price of McDonald's stock is irrelevant to me.

Mr. CONYERS. Oh. All right.

I ask unanimous consent to have my statement put in the record. And I thank my colleague from Florida.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

I rise in strong opposition to this legislation which is completely unwarranted. Although headlines of obesity lawsuits have been splashed across the newpapers as plaguing our legal system, very few if any suits are successful. Even those states that have passed "obesity legislation" have recognized that no such cases have come before the state court system. If there are no such lawsuits, there is clearly no need for congressional intervention.

I agree with proponents of the bill that people should maintain personal responsibility for their own choices, but this legislation is not about that. This legislation is a platform for tort reform that is inconsistent with our Constitutional system of federalism and recent Supreme Court decisions interpreting the Congressional power to legislate under the Commerce Clause. This is an issue that is traditionally left to the states and does not require Congressional involvement.

The bill is not limited to cases where someone is suing McDonald's because he gained weight—it would extend to those cases where the food manufacturer put out false information about the food's fat content, nutritional value, or safety. For instance, although the legislation cites an exception to the legislation if a manufacturer or seller "willing or knowingly" violates FDA standards, there is no exception for instances in which negligence is involved. Clearly if a seller or manufacturer

could have or should have know their behavior could cause harm, they should be held liable.

Finally, the section of the legislation which authorizes the dismissal of pending actions is absolutely against good public policy. People who are in court today should have their day in court without the Congress kicking their case. Again we should not interfere in the judicial system. The courts are constantly monitoring filing and handling the suits according. We have a long tradition in this Congress of making sure that our bills do not impact pending cases. Why? Because retroactivity generally disrupts cases and adds years of additional litigation. It is the same thing as changing the rules in the middle of the game to benefit one side.

I urge my colleagues to vote no regarding this legislation. This is a matter for the courts and not for the Congress.

Chairman SENSENBRENNER. Without objection, so ordered. And, again, without objection, all Members' opening statements will be included in the record.

Are there amendments? The gentleman from Florida.

Mr. KELLER. Yes, Mr. Chairman. I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H.R. 339 offered by Mr. Keller. Strike section 2 and all that follows, and insert the following.

[The amendment follows:]

AMENDMENT TO H.R. 339
OFFERED BY MR. KELLER

Strike section 2 and all that follows and insert the following:

SEC. 2. PURPOSE.

The purpose of this Act is to allow Congress, State legislatures, and regulatory agencies to determine appropriate laws, rules, and regulations to address the problems of weight gain, obesity, and health conditions associated with weight gain or obesity.

SEC. 3. PRESERVATION OF SEPARATION OF POWERS.

(a) IN GENERAL.—A qualified civil liability action may not be brought in any Federal or State court.

(b) DISMISSAL OF PENDING ACTIONS.—A qualified civil liability action that is pending on the date of the enactment of this Act shall be dismissed immediately by the court in which the action was brought or is currently pending.

(c) DISCOVERY.—

(1) STAY.—In any qualified civil liability action, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss unless the court finds upon motion of any party that par-

ticularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

(2) RESPONSIBILITY OF PARTIES.—During the pendency of any stay of discovery under paragraph (1), unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under applicable Federal or State rules of civil procedure, as the case may be. A party aggrieved by the willful failure of an opposing party to comply with this paragraph may apply to the court for an order awarding appropriate sanctions.

(d) PLEADINGS.—In any action of the type described in section 4(5)(A), the complaint initiating such action shall state with particularity the Federal and State statutes that were allegedly violated and the facts that are alleged to have proximately caused the injury claimed.

SEC. 4. DEFINITIONS.

In this Act:

(1) ENGAGED IN THE BUSINESS.—The term ''engaged in the business'' means a person who manufactures, markets, distributes, advertises, or sells a qualified product in the person's regular course of trade or business.

(2) MANUFACTURER.—The term ''manufacturer'' means, with respect to a qualified product, a person who is lawfully engaged in the business of manufacturing the product in interstate or foreign commerce.

(3) PERSON.—The term ''person'' means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.

(4) QUALIFIED PRODUCT.—The term ''qualified product'' means a food (as defined in section 201(f) of the Federal Food Drug and Cosmetic Act (21 U.S.C. 321(f)).

(5) QUALIFIED CIVIL LIABILITY ACTION.—The term ''qualified civil liability action'' means a civil action brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, penalties, declaratory judgment, injunctive or declaratory relief, restitution, or other relief arising out of, related to, or resulting in

injury or potential injury resulting from a person's consumption of a qualified product and weight gain, obesity, or any health condition that is associated with a person's weight gain or obesity, including an action brought by a person other than the person on whose weight gain, obesity, or health condition the action is based, and any derivative action brought by or on behalf of any person or any representative, spouse, parent, child, or other relative of any person, but shall not include—

(A) an action in which a manufacturer or seller of a qualified product knowingly and willfully violated a Federal or State statute applicable to the manufacturing, marketing, distribution, advertisement, labeling, or sale of the product, and the violation was a proximate cause of injury related to a person's weight gain, obesity, or any health condition associated with a person's weight gain or obesity;

(B) an action for breach of express contract or express warranty in connection with the purchase of a qualified product; or

(C) an action regarding the sale of a qualified product which is adulterated (as described

in section 402 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 342)).

(6) SELLER.—The term ''seller'' means, with respect to a qualified product, a person lawfully engaged in the business of marketing, distributing, advertising, or selling a qualified product in interstate or foreign commerce.

(7) STATE.—The term ''State'' includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States, and any political subdivision of any such place.

(8) TRADE ASSOCIATION.—The term ''trade association'' means any association or business organization (whether or not incorporated under Federal or State law) that is not operated for profit, and 2 or more members of which are manufacturers, marketers, distributors, advertisers, or sellers of a qualified product.

Amend the title so as to read: ''A bill to prevent legislative and regulatory functions from being usurped by civil liability actions brought or continued against food

manufacturers, marketers, distributors, advertisers, sellers, and trade associations for claims of injury relating to a person's weight gain, obesity, or any health condition associated with weight gain or obesity.''.

Mr. KELLER. Mr. Chairman, I ask unanimous consent that the amendment be considered as read.

Chairman SENSENBRENNER. Without objection, so ordered. And the gentleman is recognized for 5 minutes.

Mr. KELLER. Just a very brief summary of this amendment. The gist of this amendment, Mr. Chairman, is that a seller or maker of lawful food products shall not be subject to civil liability where the claim is premised on an individual's weight gain resulting from the consumption of food.

I have offered this amendment to my original bill just to make this a very narrowly drawn measured piece of legislation that doesn't immunize the food industry. Key exceptions of suits that are allowed to go forward are mislabeling of food, false advertising, breach of contract, adulterated food. So, for example, the types of suits that would still go forward under this amendment: If something had a label on it that didn't indicate that there was peanut in the product, and in fact, someone had an allergy to peanuts and there were peanuts there, that suit could go forward.

If they said that a product had 50 calories and it really had 500 calories, that suit could still go forward. If you were to eat a hamburger that had *e-coli* or mad cow disease, that suit could still go forward. This legislation is just narrowly limited to those claims related to obesity or weight gain, and I ask my colleagues to vote yes on this amendment.

Mr. SCOTT. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, this includes a provision that would require the court to dismiss—any court in which a case is presently pending, including an appeal, to dismiss the case, which would give it retroactive effect. This is part of the bad policy that we are presenting in this amendment and in the underlying bill. It is bad policy to single out one industry for special treatment under tort laws. It was bad policy, in my judgment, to single out firearms as for special liability protection. It was bad policy to suggest that tobacco or to have special treatment for liability, increased liability. And now it is bad policy to give special immunity to fast food industries for certain cases.

Our tort laws should not be changed and different for those who have the legislative clout to try their cases in Congress rather than in a court. Apparently, Mr. Chairman, there is no problem. All of the cases which have been filed apparently have been dismissed, and so the courts are doing apparently a good job. We don't need to substitute ourselves as the trial court. The courts are doing okay. So there is no compelling reason to take a special extraordinary action. Furthermore, Mr. Chairman, the contingent fee system by which most of the cases are brought would mean that if you bring a frivolous case you get zero fee. That would certainly discourage lawyers from taking the case. And if the lawyer files a frivolous case, rule 11 would be the appropriate response from the court.

Again, Mr. Chairman, it just seems to me that trying to using—providing special treatment for special legislatively powerful groups is an inappropriate way for a system of justice that is supposed to be equal under the law. And I would hope that we would oppose the substitute and oppose the underlying bill. And I yield back.

Ms. HART. Mr. Chairman.

Chairman SENSENBRENNER. The gentlewoman from Pennsylvania, Ms. Hart.

Ms. HART. Move to strike the last word.

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. HART. I yield to Mr. Keller.

Mr. KELLER. Thank you, Congresswoman.

I just want to narrowly reply to the issue raised that this applies to pending suits, as if that were unique and that it is applying retroactively. The same exact language appeared in H.R. 1036, the "Protection of Lawful Commerce and Arms Act." There is a good common-sense reason for having this language. And that is, if the amendment that Mr. Scott is talking about passed, all that would happen is that hundreds of additional cases would be filed right before the date of enactment. We know that because that is what happened recently in Texas and Mississippi regarding their recently enacted legal reforms.

Regarding the issue of retroactivity, the Supreme Court has held that the Congress can impose rules that apply retroactively if it does so pursuant to an economic policy. The Court said that the strong deference accorded legislation in the field of national economic policy is no less applicable when the legislation is applied retroactively. And a bill that aims to save the national food industry from bankruptcy due to pending lawsuits is certainly an enactment pursuant to national economic policy, and other Supreme Court cases have also upheld retroactive liability provisions such as in the case of the *Pension Benefit Guaranty Corp.* v. *R.A. Gray*. So I urge my colleagues to vote no on Mr. Scott's amendment.

Mr. SCOTT. Would the gentlelady from Pennsylvania yield?

Ms. HART. I am just going to give my time back to the Chairman.

Mr. WATT. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt.

Mr. WATT. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. And I will yield to Mr. Scott.

Mr. SCOTT. Thank you.

I would just like to respond very briefly to the gentleman from Florida. I will acknowledge that this policy is legal, I will acknowledge that we have done it before. I would also knowledge that I think it was bad policy when we did it in the gun bill; that although it was legal, it is bad policy—it was bad policy then and it is bad policy now to try to have cases tried in the Legislative Branch rather than in the court. I yield back.

Mr. WATT. Mr. Chairman, let me just make a couple comments about the amendment in the nature of a substitute. In some ways——

Chairman SENSENBRENNER. Just is a matter of clarification. It is a simple amendment, not in the nature of a substitute.

Mr. WATT. Well, okay, whatever. It wipes out the whole bill and institutes a new bill. From my perspective, that is pretty much an amendment in the nature of a substitute.

But if—in some ways I agree with Mr. Keller that the amendment improves the bill, although certainly not enough to justify my being willing to support and vote for it. In other ways, the amendment actually makes the bill worse by making the retro activity a lot more expansive and unfair, and by increasing the pleading requirements. And so I think, on balance, while Mr. Keller has tried to deal with some of the concerns that have been raised about the bill, the primary purpose of his amendment is to increase its application to pending cases to have the effect of wiping all of them out as opposed to some of them out, and to take more and more discretion away from judges who apparently he thinks aren't capable of exercising their discretion in an appropriate manner in the courts, either in Federal or State courts. So I would encourage a vote against Mr. Keller's amendment. And I will yield back the balance of my time—I will yield to Mr. Scott briefly.

Mr. SCOTT. Thank you.

Mr. Chairman, I have been reminded that in the bill we just passed, H.R. 1073, the original version had this retro active thing in it; however, that retroactivity was taken out, which again makes the point that those who have the legislative clout to jury rig the judicial system to help them are coming to Congress and exercising that legislative clout that ought to be exercised in the court where the court can fairly hear the evidence and not have the case fixed with legislative contributions and however else you get things tried in Congress rather than in the court.

Mr. WATT. I yield back, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Wisconsin, Mr. Green.

Mr. GREEN. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. GREEN. I yield my time to Mr. Keller.

Mr. KELLER. Just to briefly address again, I don't want to belabor it. Mr. Scott is now raising separation of powers claims and now legislative contributions.

Let me take legislative contributions first here just in the interest of straight talk. Probably the biggest beneficiary you could argue under this bill would be the McDonald's Corporation, and probably the biggest opponents would be the Trial Lawyers of America. Last legislative cycle, the Trial Lawyers out-contributed McDonald's 46 to one. So if this is about money, I sure as heck picked the wrong side. I can tell you it is about common sense and personal responsibility.

Second, on the separation of powers issue, it is up to us as a legislative body to make the laws and up to the judges to interpret the laws. And that is what I am trying to do. This is unchartered territories; we are trying to give the judges crystal clear, this is what the law is. It is precisely the opposite side that wants to blur the separation of powers. Mr. Banzhaf at the hearing, a trial law-

yer, said: If the legislators won't legislate, then the trial lawyers will litigate.

They are trying to accomplish through these actions the making of laws, and that is precisely what we are trying to fix and not have in this case.

So, Mr. Chairman, I will yield back.

Mr. GREEN. I yield back my time.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from Florida, Mr. Keller. Those in favor will say aye. Opposed no.

Chairman SENSENBRENNER. The no's appear to have it.

Mr. KELLER. Ask for rollcall.

Chairman SENSENBRENNER. rollcall will be ordered. Those in favor of the Keller amendment will, as your names are called, answer aye. Those opposed no. And the clerk will call the roll.

The CLERK. Mr. Hyde.
[no response.]
The CLERK. Mr. Coble.
Mr. COBLE. Aye.
The CLERK. Mr. Coble votes aye.
Mr. Smith.
Mr. SMITH. Aye.
The CLERK. Mr. Smith votes aye.
Mr. Goodlatte.
[no response.]
The CLERK. Mr. Chabot.
Mr. CHABOT. Aye.
The CLERK. Mr. Chabot votes aye.
Mr. Jenkins.
[no response.]
The CLERK. Mr. Cannon.
Mr. CANNON. Aye.
The CLERK. Mr. Cannon votes aye.
Mr. Bachus.
Mr. BACHUS. Aye.
The CLERK. Mr. Bachus votes aye.
Mr. Hostettler.
Mr. HOSTETTLER. Aye.
The CLERK. Mr. Hostettler votes aye.
Mr. Green.
Mr. GREEN. Aye.
The CLERK. Mr. Green votes aye.
Mr. Keller.
Mr. KELLER. Aye.
The CLERK. Mr. Keller votes aye.
Ms. Hart.
[no response.]
The CLERK. Mr. Flake.
[no response.]
The CLERK. Mr. Pence.
Mr. PENCE. Aye.
The CLERK. Mr. Pence votes aye.
Mr. Forbes.
[No response.]
The CLERK. Mr. King.

Mr. KING. Aye.
The CLERK. Mr. King votes aye.
Mr. Carter.
Mr. CARTER. Aye.
The CLERK. Mr. Carter votes aye.
Mr. Feeney.
Mr. FEENEY. Aye.
The CLERK. Mr. Feeney votes aye.
Mrs. Blackburn.
Mrs. BLACKBURN. Aye.
The CLERK. Mrs. Blackburn votes aye.
Mr. Conyers.
Mr. CONYERS. No.
The CLERK. Mr. Conyers votes no.
Mr. Berman.
Mr. BERMAN. No.
The CLERK. Mr. Berman votes no.
Mr. Boucher.
[no response.]
The CLERK. Mr. Nadler.
Mr. NADLER. No.
The CLERK. Mr. Nadler votes no.
Mr. Scott.
Mr. SCOTT. No.
The CLERK. Mr. Scott votes no.
Mr. Watt.
Mr. WATT. No.
The CLERK. Mr. Watt votes no.
Ms. Lofgren.
Ms. LOFGREN. No.
The CLERK. Ms. Lofgren votes no.
Ms. Jackson Lee.
[no response.]
The CLERK. Ms. Waters.
[no response.]
The CLERK. Mr. Meehan.
Mr. MEEHAN. No.
The CLERK. Mr. Meehan votes no.
Mr. Delahunt.
[no response.]
The CLERK. Mr. Wexler.
[no response.]
Ms. Baldwin.
[no response.]
The CLERK. Mr. Weiner.
Mr. WEINER. No.
The CLERK. Mr. Weiner votes no.
Mr. Schiff.
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff votes aye.
Ms. Sánchez.
Ms. SÁNCHEZ. No.
The CLERK. Ms. Sánchez votes no.
Mr. Chairman.
Chairman SENSENBRENNER. Aye.

The CLERK. Mr. Chairman votes aye.

Chairman SENSENBRENNER. Are there Members in the Chamber who wish to cast or change their vote? The gentleman from Mr. Flake.

Mr. FLAKE. Aye.

The CLERK. Mr. Flake votes aye.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Aye.

The CLERK. Mr. Goodlatte aye.

Chairman SENSENBRENNER. The gentlewoman from Pennsylvania, Ms. Hart.

Ms. HART. Aye.

The CLERK. Ms. Hart aye.

Chairman SENSENBRENNER. Further Members in the Chamber who wish to cast or change their votes? If not, the clerk will report.

The CLERK. Mr. Chairman, there are 18 ayes and 9 nos.

Chairman SENSENBRENNER. And the amendment by Mr. Keller is agreed to.

Are there further amendments?

Mr. SCOTT. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. I have an amendment at the desk labeled Conyers 87.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H.R. 339 offered by Mr. Scott. Page 4, lines 12 to 13, strike "knowingly" and "willingly."

[The amendment follows:]

AMENDMENT TO THE AMENDMENT TO H.R. 339
OFFERED BY MR. CONYERS

Page 4, lines 12–13, strike ''knowingly and willfully''.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, this is an amendment that will correct a major flaw in the legislation. Currently, the bill allows litigation to be brought if the manufacturer or seller of a product knowingly or willfully violated FDA standards that caused obesity. However, that leaves a loop hole and allows protection for those manufacturers and sellers who did not know but should have known that their products should cause obesity. Specifically, a Florida company sold as, quote, reduced fat ice cream when it, in fact, had tripled the calories and more than doubled the carbohydrates indicated on the label. The product had simply been mislabeled. The product had been on the market for years.

The consumers, however, had brought the correct labeling information forward and not the—and it wasn't the due diligence of the company. The company was negligent labeling, mislabeling their ice cream, and should not be protected in that case, a case like that should not be protected by this legislation. The amendment should hold people responsible for negligent behavior. And so I encourage my colleagues to support the amendment. I yield back.

Chairman SENSENBRENNER. Without objection, the amendment offered by Mr. Scott will be designated as an amendment offered to the Keller amendment which had been adopted earlier.

The gentleman from Florida, Mr. Keller.

Mr. KELLER. Thank you, Mr. Chairman.

This amendment by Mr. Scott should be defeated. This bill allows cases to go forward any time a Federal or State statute has been knowingly and willfully violated, and that violation is a proximate cause of the injury. It is the same standard that we have used in other legislation that has received broad bipartisan support, the same standard, for example, in H.R. 1036, the "Protection of Lawful Commerce and Arms Act," which received a bipartisan vote of 285 votes in the House. Anyone who voted for H.R. 1036 and who votes for this amendment by Mr. Scott will be voting for stronger protections for firearms manufacturers than for the food industry, which is the largest private sector employer providing jobs to some 12 million Americans.

Also, the claim that it is too burdensome to require that a person knowingly violate the law before they can fill these exceptions doesn't take into account the typical jury instructions regarding the so-called *mens rea* requirement of knowing, which says, quote, "knowledge may be proved by all the facts and circumstances surrounding the case and the jury may infer knowledge from a combination of suspicion and indifference to the truth." So this knowing standard is certainly flexible enough to produce justice in the courts.

Finally, the case he mentioned of an ice cream being mislabeled, that certainly could go forward under this bill. H.R. 339 allows cases to go forward if they involve a breach of express contract or breach of express warranty. If you warrant something has X calories and it doesn't, it can go forward. If you warrant that it has X carbohydrates, it can go forward under this exception. So I would urge my colleagues to defeat this amendment, and yield back.

Chairman SENSENBRENNER. The question is on the Scott amendment. Those in favor will say aye. Opposed no. The nos appear to have it. The nos have it. The Scott amendment is not agreed to.

Are there further amendments?

Mr. WATT. Mr. Chairman, I have an amendment at the desk, 001.

Chairman SENSENBRENNER. The Clerk will report the amendment.

The CLERK. Amendment to the amendment to H.R. 339 offered by Mr. Watt: Page 1, line 9, strike "or State." .

[The amendment follows:]

H.L.C.

the Keller amdt.

AMENDMENT TO THE AMENDMENT TO H.R. 339

OFFERED BY MR. WATT

Page 1, line 9, strike ''or State''.

Chairman SENSENBRENNER. Without objection, the caption of the amendment is modified to state that it is an amendment to the amendment offered by Mr. Keller, earlier adopted. And the gentleman from North Carolina is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman, and I thank the Chairman for his procedural help on this also, because it should have been an amendment to Mr. Keller's amendment, and I acknowledge that.

Let me just say a couple of things about this issue. First of all, my purpose here is not to defend the kind of "fat" lawsuits that have been filed or future "fat" lawsuits. I think they are ridiculous and, in fact, in each case in which they have been filed, the courts have determined that they are ridiculous, because in each case, they have been dismissed.

My purpose is, however, to defend the Federal form of Government that has served us so well over the years, and it seems to me that, once again, people on this Committee who profess that they believe in States rights are a lot more concerned about the results that the courts are giving in a particular case than preserving States rights, because this bill and Mr. Keller's amendment to the bill makes the bill applicable to both suits that have been filed in the Federal courts and suits that have been filed in the State courts.

Tort law has historically been the province of the State courts. These lawsuits have been brought under the tort law and, all of a sudden, because of some interest in protecting a particular industry or business or contributor or whatever, we seem to have lost sight of the fact that our jurisdiction here in this Committee and our jurisdiction at the Congress, which is a Federal body, is subject to the framework that our founders set up for us, which should respect State law. And while I have not studied how I would address this issue were I a member of a State legislature, North Carolina State Legislature, for example, I might well think that this was a good idea. But I think it is a terrible idea for us to federalize this issue completely and do harm to the whole system that we give so much lip service to of respecting the rights of States.

It is one thing to apply this bill to the Federal courts and suits that are filed in the Federal courts. To me, it strikes me that it is an entirely different thing to apply to both Federal and State court actions, and I think we do ourselves and this Committee and the Congress a severe disservice, and we certainly do the concept of States rights and any kind of acknowledgment that we have of States rights a disservice by making this bill this broad.

I encourage my colleagues to oppose the concept of States rights for a change and to support this amendment to apply the bill only to the Federal courts and not to the State courts.

I yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from Florida, Mr. Keller.

Mr. KELLER. Thank you, Mr. Chairman. I would urge my colleagues to vote "no" on Mr. Watt's amendment, just to give you 3 reasons.

First, lawsuits alleging that the harm was caused by the food industry's violation of Federal or State food labeling laws, including laws that prevent misleading or untruthful advertising, can still go forward under H.R. 339 because we have made it so much more narrow. In fact, every State has its own deceptive trade practice laws, and a violation of any such State laws could still go forward under H.R. 339.

Second, under Federal law, States remain free to require labeling of foods sold at restaurants. Consequently, States remain free to pass laws that require the restaurant industry, for example, to provide nutritional information to customers, and if a State passed such a law and there was a violation of such a law, that suit could still go forward under this bill.

Finally, the Commerce Clause certainly gives us authority to prevent a few States from bankrupting the entire food industry, which is the largest nongovernmental employer in the country. In fact, the Supreme Court has said that the Commerce Clause protects against inconsistent laws arising from the projection of one State's regulatory scheme into the jurisdiction of another State.

So I would urge my colleagues to vote "no" on this, and I yield back.

Chairman SENSENBRENNER. The question is on the Watt amendment. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman from Virginia (Mr. Scott) is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, again, this is a bad policy to single out one industry. I yield the balance of my time to the gentleman from North Carolina.

Mr. WATT. Mr. Speaker, let me just—I thank the gentleman for yielding, and let me take a couple of minutes to just respond to Mr. Keller's three points, because I think each of them illustrates the exact point that I am raising.

First of all, the last point he made about the commerce clause is about the most expansive reading of the commerce clause I have ever heard anybody give, and I think if anybody should be paying attention to what the commerce—to what the Federal Government can and cannot do, should and should not do under the ambit of the commerce clause, it ought to be this Committee.

If we read the commerce clause as broadly as Mr. Keller has just encouraged us to read it, there really would not be any more State jurisdiction, because just about everything moves in food—every kind of product moves in interstate commerce in some way, and that never has been the criteria on which the Federal courts or the State courts have determined the applicability of the commerce clause.

Second, this argument about unfair and deceptive trade practices proves exactly the point that I am making. It is the tort laws that I am concerned about that have historically been about the province of State jurisdiction. Unfair and deceptive trade practices really is more of a contract or a consumer theory as opposed to a tort theory. So the notion that you can wipe out all State court jurisdiction under the tort laws just because you are preserving the right for somebody to proceed under an unfair and deceptive trade practices law just seems unreasonable to me.

I think this is a very, very broad stretch. This is one of those times where I long to have somebody on your side, even Bob Barr if he were here, to stand up for States rights. I mean, give me a break. It is about time that you all quit giving lip service to the concept of States rights and start voting for it every once in a while.

With that, I yield back to Mr. Scott.

Mr. SCOTT. I yield back, Mr Chairman.

Chairman SENSENBRENNER. The question is on the Watt amendment.

Those in favor will say aye.

Opposed, no.

The noes appear to have it.

Mr. WATT. Mr. Chairman, I ask for a recorded vote.

Chairman SENSENBRENNER. The question is on agreeing to the amendment offered by the gentleman from North Carolina, Mr. Watt, to the amendment offered by the gentleman from Florida, Mr. Keller, which has already been adopted.

Those in favor of the Watt amendment will, as your names are called answer aye.

Those opposed, no.

The Clerk will call the roll.

The CLERK. Mr. Hyde.

[no response.]

The CLERK. Mr. Coble.

Mr. COBLE. No.

The CLERK. Mr. Coble, no.
Mr. Smith.
Mr. SMITH. No.
The CLERK. Mr. Smith, no.
Mr. Gallegly.
[No response.]
The CLERK. Mr. Goodlatte.
[No response.]
The CLERK. Mr. Chabot.
Mr. CHABOT. No.
The CLERK. Mr. Chabot, no.
Mr. Jenkins.
[No response.]
The CLERK. Mr. Cannon.
Mr. CANNON. No.
The CLERK. Mr. Cannon, no.
Mr. Bachus.
Mr. BACHUS. No.
The CLERK. Mr. Bachus, no.
Mr. Hostettler.
Mr. HOSTETTLER. No.
The CLERK. Mr. Hostettler, no.
Mr. Green.
Mr. GREEN. No.
The CLERK. Mr. Green, no.
Mr. Keller.
Mr. KELLER. No.
The CLERK. Mr. Keller, no.
Ms. Hart.
Ms. HART. No.
The CLERK. Ms. Hart, no.
Mr. Flake.
Mr. FLAKE. No.
The CLERK. Mr. Flake, no.
Mr. Pence.
Mr. PENCE. No.
The CLERK. Mr. Pence, no.
Mr. Forbes.
[No response.]
The CLERK. Mr. King.
Mr. KING. No.
The CLERK. Mr. King, no.
Mr. Carter.
Mr. CARTER. No.
The CLERK. Mr. Carter votes no.
Mr. Feeney.
Mr. FEENEY. No.
The CLERK. Mr. Feeney, no.
Mrs. Blackburn.
[No response.]
The CLERK. Mr. Conyers.
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye.
Mr. Berman.
Mr. BERMAN. Aye.

The CLERK. Mr. Berman, aye.
Mr. Boucher.
[No response.]
The CLERK. Mr. Nadler.
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye.
Mr. Scott.
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye.
Mr. Watt.
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye.
Ms. Lofgren.
Ms. LOFGREN. Aye.
The CLERK. Ms. Lofgren, aye.
Ms. Jackson Lee.
[No response.]
The CLERK. Ms. Waters.
[No response.]
The CLERK. Mr. Meehan.
Mr. MEEHAN. Aye.
The CLERK. Mr. Meehan, aye.
Mr. Delahunt.
[No response.]
The CLERK. Mr. Wexler.
[No response.]
The CLERK. Ms. Baldwin.
Ms. BALDWIN. Aye.
The CLERK. Ms. Baldwin, aye.
Mr. Weiner.
Mr. WEINER. Pass.
The CLERK. Mr. Weiner, pass.
Mr. Schiff.
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye.
Ms. Sánchez.
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez, aye.
Mr. Chairman.
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Do Members in the chamber wish to cast or change their vote?
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye.
Chairman SENSENBRENNER. Are there further Members who wish to cast or change their vote?
If none, the clerk will report.
The CLERK. Mr. Chairman, there are 11 ayes and 15 noes.
Chairman SENSENBRENNER. And the amendment is not agreed to.
Are there further amendments?
Mr. WATT. Mr. Speaker, I have an amendment at the desk, 002.
Chairman SENSENBRENNER. The Clerk will report the amendment.

The CLERK. Amendment to the Keller amendment to H.R. 339 as passed, offered by Mr. Watt: Strike section 3(b).

[The amendment follows:]

Keller

AMENDMENT TO THE AMENDMENT TO H.R. 339 AS PASSED

OFFERED BY MR. WATT

Strike section 3(b).

Chairman SENSENBRENNER. Without objection, the amendment will be considered as in order, notwithstanding the previous adoption of the Keller amendment, and the gentleman from North Carolina is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman, and again, I thank the Chairman for the procedural help on this amendment.

This amendment omits that portion of the bill that requires the dismissal of all pending actions that fall under the prohibition of the bill. Again, this may be an academic amendment because, as I understand it, every single lawsuit that has been filed under this theory has been dismissed at the State level anyway. But that is not an argument, it seems to me, for adopting a bad policy, which I think is just unfair to litigants who have met the requirements of State or Federal law in the jurisdiction in which they filed and, all of a sudden, here comes the legislature after they are into the middle of the litigation, or even in some cases in the middle of an appeal dismissing their lawsuit as if they were the court as opposed to the legislative body.

I really just think that is a very, very bad precedent and policy, and I encourage my colleagues to adopt this amendment.

I yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from Florida, Mr. Keller.

Mr. KELLER. Thank you, Mr. Chairman. I am just going to be very brief. This is the exact issue we have discussed earlier with Mr. Scott. I would urge my colleagues to vote no.

The same language that is being objected to also appeared in H.R. 1036, the "Protection of Lawful Commerce and Arms Act." We do not want to create incentive for a bunch of new suits to be filed by having a new date of an enactment, and the Supreme Court has held that you can impose rules that apply retroactively pursuant to an economic policy, which is what we are doing.

I urge my colleagues to vote no, and I yield back.

Chairman SENSENBRENNER. The question is on the Watt amendment.

Those in favor will say aye.

Opposed, no.

The noes appear to have it. The noes have it. The amendment is not agreed to.

Are there further amendments? The gentleman from North Carolina, Mr. Watt.

Mr. WATT. Mr. Chairman, I have an amendment at the desk, 003.

Chairman SENSENBRENNER. The Clerk will report the amendment.

The CLERK. Amendment to the Keller amendment to H.R. 339.

Mr. WATT (during the reading). I ask unanimous consent that the amendment be considered as read.

Chairman SENSENBRENNER. Without objection. And, without objection, it will be drafted to the Keller amendment already adopted.

The gentleman is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman.

This amendment omits that portion of the bill that imposes an additional pleading requirement to actions permitted under the bill. Pleading requirements are sufficiently governed by the Rules of Civil Procedures in both Federal and State courts. The bill severely limits the types of actions that may be brought, to include only an action of which a manufacturer or seller knowingly and willingly violates a specified law and the violation was a proximate cause of the injury, and an action for breach of expressed contract or warranty, and an action regarding the sale of a qualified product that is adulterated.

Pleading requirements for such actions have long required that the plaintiff generally make his or her case. The imposition of a particularity requirement on the narrow category of actions permitted under the bill is unduly harsh and unnecessary.

So I encourage my colleagues to adopt this amendment. In some respects, the amendments that were made by the Keller amendment really make these pleading requirements almost useless. But for some reason, it is just not bad enough to pass a bad bill. Apparently, my colleagues are so angry at lawyers in this body—you would never know that a lot of them are lawyers also—that they will go to any lengths to make access to the courts more difficult.

I ask my colleagues to support the amendment, and yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from Florida, Mr. Keller.

Mr. KELLER. Thank you, Mr. Chairman.

The language that the gentleman is complaining of simply states that if you say a statute is violated, tell us specifically which one and allege the facts that support your claim of proximate cause. It is that simple. This provision is there because it simply saves the time and money of all litigants as it provides the court with crucial information early in the proceedings with which to determine whether the case can go forward at all. This provision costs neither party to such lawsuit anything, because it requires statements of the same allegations that would have to be made in the case if the litigation is to be successful. It simply provides that such necessary information be provided to the court sooner rather than later, thus facilitating the court's decision as to whether the case may proceed. This saves the court's resources as well as all of the litigants.

I urge my colleagues to vote no on this amendment and yield back.

Chairman SENSENBRENNER. The question is on the Watt amendment.

Those in favor will say aye.

Those opposed, no.

The noes appear to have it. The noes have it. The amendment is not agreed to.

Are there further amendments?

If there are no further amendments, the question now occurs on the motion to report the bill H.R. 339 favorably, as amended. A reporting quorum is present.

All in favor will say aye.

Opposed, no.

The ayes appear to have it.

Mr. WATT. Mr. Chairman, I ask for a recorded vote.

Chairman SENSENBRENNER. A recorded vote is requested. Those in favor of——

Mr. WATT. Mr. Chairman, I withdraw the request.

Chairman SENSENBRENNER. The ayes have it. The motion to report the bill favorably, as amended, is agreed to.

Without objection, the bill will be reported favorably to the House in the form of a single amendment in the nature of a substitute incorporating the amendment adopted here today. Without objection, the Chairman is authorized to move to go to conference.

Pursuant to House rules, without objection, the staff is directed to make any technical and conforming changes, and all Members will be given 2 days as provided by the rules in which to submit additional dissenting supplemental or minority views.

DISSENTING VIEWS

We oppose H.R. 339 for several reasons. First and foremost, the bill is drafted so broadly, it would immunize defendants for negligent and reckless behavior, including mislabeling of food products. We also object to the fact that the legislation applies retroactively, and is written for the benefit of a single special interest—the fast food industry. Third, we believe the legislation constitutes an unwarranted and hastily considered affront to our system of federalism. Finally, we oppose the bill because there are far preferable ways to respond to this issue than by rushing to judgment to pass a one-size-fits-all Federal law preempting all 50 states. H.R. 339 is opposed by several organizations including Consumers Union [1], Public Citizen [2], Alliance for Justice [3] and the National Conference of State Legislators. For these and the reasons set forth herein, we dissent.

BACKGROUND AND DESCRIPTION OF LEGISLATION

In August 2002, two children brought suit in New York, claiming that McDonald's bore legal responsibility for their obesity and health problems. The deluge of media reports that followed were often critical of the case. In January 2003, Judge Robert Sweet dismissed the action, but granted plaintiffs the right to replead their negligence claims with greater specificity.[4] When the plaintiffs failed to do so in September, 2003, the case was dismissed. H.R. 339 is an apparent response to that dismissed case.

H.R. 339 prohibits an otherwise harmed "person" from bringing a "qualified civil liability action in state or Federal court."[5] A qualified civil liability action is defined as any action under law or equity brought against a food manufacturer, seller or trade association claiming an injury from a person's consumption of food resulting in weight gain, obesity or other weight-related health condition.[6] The ban would supercede state law in all 50 states.[7] The ban operates retroactively, terminating any and all pending litigation

[1] Letter from Sally Greenberg, Senior Product Safety Counsel and Mister Phillips, Esther Peterson Fellow, Consumers Union (February 23, 2004)(on file with the Democratic staff of the House Judiciary Committee).

[2] Letter from Frank Clemente, Director, and Jackson Williams, Legislative Counsel, Public Citizen Congress Watch (February 23, 2004)(on file with the Democratic staff of the House Judiciary Committee).

[3] Letter from Nan Aron, President, Alliance for Justice, (February 23, 2004) (on file with the Democratic staff of the House Judiciary Committee).

[4] *See Pelman* v. *McDonald's Corp.,* 237 F.Supp.2d 512, 533 (S.D.N.Y. 2003) ("As long as a consumer exercises free choice with appropriate knowledge, liability for negligence will not attach to a manufacturer. It is only when that free choice becomes but a chimera—for instance, by the masking of information necessary to make the choice, such as the knowledge that eating McDonald's with a certain frequency would irrefragably cause harm—that manufacturers should be held accountable.")

[5] H.R. 339, 107th Cong. § 4, part 5 (2003).

[6] *Id.* at § 4, part 5.

[7] *Id.* at § 3(a).

at the time of passage.[8] The bill appears to be written in a one-way preemptive manner, so that it supercedes any state law which is not more favorable to defendants than H.R. 339.

H.R. 339 creates three narrow exceptions where a weight-related action would be permitted: (1) in regards to the sale of an adulterated product, (2) in an action for breach of express contract or express warranty, and (3) when the respondent "knowingly and willfully" violates a State or Federal law and that violation is the proximate cause of the weight-related injury.[9] If an action is brought under this final exception, the plaintiff is further required to plead "with particularity" which law has been violated and the facts arising thereto.[10]

I. H.R. 339 WOULD PERMIT NEGLIGENT AND RECKLESS ACTIONS BY FOOD PRODUCERS

H.R. 339 is drafted so broadly that it bars lawsuits that would hold food producers accountable for their negligent and reckless actions—even those that violate state and Federal law.[11] This leaves two critical loopholes in the law—first, if a defendant commits simple negligence or recklessness which is not otherwise prohibited by statute; and second, if a defendant actually violates a Federal or State law (such as a labeling requirement), but does not do so intentionally. By requiring an intent to violate the law, H.R. 339 holds the food industry to a lower standard of conduct than other industries, and indeed, to a lower standard of conduct expected of the average person.[12]

It is not difficult at all to conceive of situations where a food company permits incorrect ingredient or fat content information to appear on its product, thereby contributing to a range of dangerous conditions—from obesity, to heart attacks or even worse. This is not a mere hypothetical concern, as two recent incidents exemplify how these sorts of misconduct by food companies would be sanctioned by this bill.

In 2001, a consumer reporter investigated the calorie and fat content of DeConna Ice Cream Company's Big Daddy Reduced Fat Ice Cream and found that the ice cream had three times more fat and calories than the label claimed.[13] After the mistake became public, two dieters filed a class action suit[14] under Florida's Unfair Trade and Deceptive Practices Act, asserting they were misled by the la-

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[8] *Id.* at § 3(b). While a motion to dismiss is pending, discovery is stayed unless doing so would jeopardize evidence or work an undue prejudice on a party. During the stay, all evidence must be must be preserved as if it were subject to continuing request for production. *See* § 3(c).

[9] *Id.* at § 4, part 5.

[10] *Id.* at § 3(d).

[11] While the bill permits legal actions when the defendant has violated a State or Federal law, the bill permits permitted lawsuits to situations where the law is broken "knowingly and willfully." § 4, part 5(A).

[12] To mitigate this problem, Representative Scott offered an amendment to strike "knowingly and willingly" from Section 4, part 5(A). Had the amendment passed, a suit would still be allowed only when a law or regulation was broken, but would include those instances where the law was broken because of a food company's negligent or reckless behavior. Unfortunately, the amendment was defeated.

[13] Mitch Lipka, *Inside Scoop: Ice Cream Far From Dieter's Dream*, SOUTH FLORIDA SUN-SENTINEL, June 17, 2001.

[14] *Cohen* v. *DeConnna Ice Cream Co.,* No. 01–010780, (Fla. Cir. Ct., Broward Cty., Dec. 20, 2001) (granting class action status).

bel's promises.[15] This past September, DeConna settled the case.[16] In addition to being prohibited from using misleading labeling, the company agreed to periodically verify the accuracy of its labeling information.[17] Rather than receive a financial windfall, the plaintiffs were merely reimbursed for the money they had expended. Had H.R. 339 been law in 2001, the action would likely have been barred under the bill.

H.R. 339 would have also prevented possible private litigation relating to KFC's recent and much criticized advertising campaign. This past fall KFC began advertising its fried chicken as part of a healthy diet. Claiming that fried chicken contributed to "eating better" and helped dieters watch their carbohydrate intake, KFC intimated that eating its chicken was part of a successful weight loss plan.[18] While the ads did display minuscule disclaimers in fine print, viewers were given the distinct impression that eating fried chicken could help them lose weight. After harsh criticism by the advertising industry, some of whom claimed the ads knocked the "credibility not just of KFC but of the entire marketing industry,"[19] the ads were pulled. In response to the ads, the Center for Science in the Public Interest filed a complaint with the Federal Trade Commission seeking an investigation into deceptive advertising practices.[20] Again, had H.R. 339 been law, it is unlikely any form of private litigation against KFC would have been viable.

Compounding the difficulty in bringing a legal action where a food company has harmed consumers by violating a statutory requirement, the bill requires that any allegations in this regard be pleaded with particularity.[21] As Representative Melvin Watt stated during the markup debate when he unsuccessfully sought to delete this heightened pleading requirement, "the imposition of a particularity requirement on the narrow category of actions permitted under the bill is unduly harsh and unnecessary." It would be far preferable if the Committee would continue to leave the development of pleading requirements with the Judiciary, which is free to alter such provisions through the Rules Enabling Act procedure promulgated by Congress.[22]

II. H.R. 339 IS UNFAIRLY RETROACTIVE AND APPLIES TO A SINGLE SPECIAL INTEREST GROUP

We also object to the retroactive and unfair nature of the legislation. First we believe, as a matter of equity, it is unfair to change the rules of litigation in the middle of the game. If an individual

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[15] FLA. STAT. ANN. § 501.200 et. seq. (West 2003).

[16] Patrick Danner, *Fat Chance; A $1.2 Million Settlement in a Class-Action Suit Against Big Daddy Will be Paid Mostly in Ice Cream, Food Labeling*, THE MIAMI HERALD, Sept. 27, 2003.

[17] *Id.*

[18] Press Release, Center for Science in the Public Interest, KFC Ad Draws Fire From CSPI (Nov. 7, 2003), *http://www.cspinet.org/new/200311073.html.*

[19] *KFC Blunder in "Health Ads,"* ADVERTISING AGE, Nov. 3, 2003, at 22 (editorial noting that "KFC last week introduced an ad campaign that is as laughable, and damaging, as any we can imagine or recall, and it should be pulled off the air immediately. In the long history of absurd, misleading and ludicrous ad claims, the campaign's position of KFC's breaded, fried chicken as a pat of a healthy diet merits special derision.").

[20] *Id.* The FTC has not confirmed whether or not it will be investigating KFC's advertisements.

[21] H.R. 339 § 3(d).

[22] The Rules Enabling Act, 28 USC 2072, (1948) allows the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district Courts and courts of appeals.

or corporation brings a lawsuit based on a particular set of laws and principles, it is simply unfair to alter those rules and principles after the fact. In addition to suffering a harm, the plaintiff may have expended significant time and resources in the litigation, and it is inequitable for Congress to unilaterally dismiss that claim without providing the harmed party with his or her day in court.

Second, it is inappropriate for the Majority to deny harmed parties their rights in the complete absence of any evidence that the courts are not processing the cases before them in a just and equitable manner. Indeed the evidence we have seen on this count is precisely to the contrary.[23] Similarly, it is inadvisable for the Committee to take such an extraordinary action without conducting any analysis whatsoever of the number or nature of cases currently pending in court.

Third, retroactive application of changes in the law flies not only in the face of fairness, but precedent as well. We would note that the following recent liability legislation enacted into law were not drafted to apply retroactively: the General Aviation Revitalization Act of 1994[24] (statute of limitations on suits against airline manufacturers); the Bill Emerson Good Samaritan Food Donation Act[25] (limits the liability of those who donate food to a charity); the Volunteer Protection Act of 1997[26] (limits the liability of volunteers); Section 161 of the Amtrak Reform and Accountability Act of 1997[27] (limits punitive damages in railroad accidents); the Biomaterials Access Assurance Act of 1998[28] (limits the liability of suppliers of raw materials and medical implant components); the Year 2000 Readiness and Responsibility Act[29] (limits the liability of Y2K defendants); and Terrorism Risk Insurance Act of 2002[30] (limits liability in terrorism-related cases). Of particular note, when the Committee considered the Volunteer Protection Act in the 105th Congress, we voted on a bipartisan basis—22 to 4—in favor of a Scott amendment limiting the bill's limitations to harm which occurred after the bill was passed into law.[31] Ironically, on the very same day H.R. 339 was ordered reported, the Committee voted to repeal the Antidumping Act of 1916, and in doing so had taken specific care to make sure that law would not apply retroactively.[32]

We also believe it is inadvisable for the Committee to be picking and choosing between industries in granting special legal liability status. Legislation of this nature leads to a patchwork system where the ability of consumers to seek relief varies depending upon the relative legislative clout of the affected industry, hardly a desirable policy outcome. This is why, among other reasons, the legislation is opposed by the Physicians Committee for Responsible Medicine and the Center for Science in the Public Interest, which has written:

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[23] *See infra* Section IV and accompanying footnotes.
[24] Pub. L. No. 103–298, 108 Stat. 1552 (1994).
[25] Pub. L. No. 104–210, 110 Stat. 3011 (1996).
[26] Pub. L. No. 105–19, 111 Stat. 218 (1997).
[27] Pub. L. No. 105–34, 111 Stat. 788 (1997).
[28] Pub. L. No. 105–230, 112 Stat. 1519 (1998).
[29] Pub. L. No. 106–37, 106 Stat. 185 (1999).
[30] Pub. L. No. 107–297, 116 Stat. 2322 (2002).
[31] H.R. REP NO. 105–11 (1997).
[32] Although Rep. Thomas introduced H.R. 3557, an anti-dumping repeal bill, in the 107th Congress, H.R. 1073, 108th Cong. (2003), ultimately proceeded because it did not contain a retroactive provision.

> Frivolous lawsuits deserve to be thrown out of court, and frivolous legislation should be thrown out of Congress—and [H.R. 339] is nothing but frivolous. [The proponents] simply want to preemptively take an entire industry off the hook, and make restaurants and food companies a special, protected class—immune from the scrutiny of judges or juries.[33]

When Representative Watt offered an amendment seeking to delete the retroactivity provision,[34] the Majority responded by merely pointing to the fact that H.R. 1036, the gun liability bill, was retroactive and applied to a single industry. However, that effort has merely passed the House, it has not as of yet been considered by the Senate, let alone been enacted into law. Moreover, the fact that a single powerful lobby was able to achieve retroactive applicability on a single occasion hardly serves as a justification to abrogate the ordinary rules of fairness.

III. H.R. 339 CONSTITUTES AN AFFRONT TO OUR SYSTEM OF FEDERALISM

As we have stated on numerous previous occasions, principles of federalism dictate that in all but the most exceptional cases, tort law should be left to the states. Tort law has traditionally been handled by the state legislative and court systems under a framework established by our founders. Indeed, the Committee has received no evidence that the state court legal system is not functioning well and fairly with regard to food liability cases. State courts have dismissed those matters involving food consumption which were non-meritorious.[35] At the same time, Louisiana has enacted a statute limiting obesity lawsuits,[36] while several other states—including Wisconsin, Colorado, and Illinois—are considering similar laws.[37] As Representative Watt stated during the Judiciary Committee markup, ". . . it is a terrible idea for us to federalize this issue completely and do harm to the whole system that we give so much lip service to of respecting the rights of States."[38]

It is with good reason the Federal Government has traditionally deferred to the states regarding tort law. The Conference of State

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[33] Press Release, Center for Science in the Public Interest, Keller Bill Promotes Corporate Irresponsibility (June 19, 2003) *available at http://www.cspinet.org/new/200306192.html;* Press Release, Physicians Committee for Responsible Medicine, Health Advocates Condemn Proposed bill to Shield Junk Food Industry (June 16, 2003) *available at http://www.pcrm.org/new/health030616.html.*

[34] The Watt Amendment was defeated by a voice vote.

[35] *See infra* Section IV.

[36] 2003 La. Act 158 states "any manufacturer, distributor or seller of a food or non-alcoholic beverage intended for human consumption shall not be subject to civil liability for personal injury or wrongful death where liability is premised upon an individual's weight gain, obesity or a health condition related to weight gain or obesity and resulting from his long term consumption of a food or non-alcoholic beverage." The effective date of the law is June 2, 2003.

[37] *See* A.B. 595, 96th Leg., Reg. Sess. (Wi. 2003) (referred to the Senate Committee of the Judiciary); Common Sense Consumption Act, H.B. 1150, 64th Gen. Assem., Reg. Sess. (Co. 2004) (passed the House on January 30, 2004, and has been introduced in the Senate and assigned to the Judiciary Committee); Limited Liability in Civil Actions for Obesity, S.B. 020, 64th Gen. Assem, Reg. Sess. (Co. 2004) (passed the Senate 33–2 on January 23, 2004 and has been introduced in the House and assigned to the Judiciary Committee); Common Sense Consumption Act, H.B. 3891, 93rd Gen. Assem., Reg. Sess., (Ill. 2004) (referred to the House Committee on Rules); Common Sense Consumption Act, S.B. 2813, 93rd Gen. Assem. Sess., (Ill. 2004) (referred to the Senate Committee on Rules).

[38] Representative Watt offered an amendment to limit the bill's applicability to Federal courts. It was defeated by a party line vote of 11–15.

Chief Justices has testified that the search for uniformity through Federal liability legislation will ultimately prove counterproductive:

> It follows that Federal standards, however well articulated, will be applied in many different contexts and inevitably will be interpreted and implemented differently, not only by the State courts but also by the Federal courts . . . Moreover, State Supreme Courts will no longer be, as they are today, the final arbiters of their tort law . . . a legal ticket is inevitable and the burden of untangling it, if it can be untangled at all, will lie only with the Supreme Court of the United States, a court which many experts feel is not only overburdened but also incapable of maintaining adequate uniformity in existing Federal law.[39]

The National Conference on State Legislatures has also decried "one-size-fits-all Federal solution on the States," and noted in other contexts that federalizing tort law would lead to greater confusion rather than certainty:

> [m]ore likely than "predictability" is the prospect that this massive nationalization of civil law will cause years of uncertainty, unpredictability and an increasing flow [of] litigation to the Supreme Court. It is time to set aside old assumptions about the wisdom of Congress and the Supreme Court dictating domestic policy in the states. Federalism offers accountability, innovation and responsiveness in the formulation of public policy. The era of Federal paternalism is over.[40]

In many respects, H.R. 339 is even less justified than the other types of liability legislation previously considered by this Committee because it is so premature. By acting before there is even a single jury verdict, this Committee also departs from its long tradition of letting courts decide new cases before considering stepping in to alter the law where it believes the results are contrary to the public interest. By doing this, Congress never receives the benefit of considering the various fact patterns, legal issues, and evidence that may be presented in the ensuing trials.[41]

Indeed, H.R. 339 is so intrusive that if enacted into law, it may well be found inconsistent with recent Supreme Court decisions interpreting the Congressional power to legislate under the Commerce Clause. Four years ago in *United States* v. *Morrison*, the Court invalidated portions of the Violence Against Women Act, stating that Congress had overstepped its specific constitutional power to regulate interstate commerce.[42] Despite vast quantities of data illustrating the effects that violence against women has on interstate commerce, the Court essentially warned Congress not to extend its constitutional authority in order to, "completely obliterate the Constitution's distinction between national and local au-

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[39] *Product Liability: Hearing on S. 565, The Product Liability Fairness Act of 1995 Before the Senate Comm. on Commerce, Science and Transportation,* 104th Cong., 6–7 (1995) (statement of Stanley Feldman of the Conference of Chief Justices, National Center for State Courts).

[40] *Preemption of Product Liability: Hearing on H.R. 10 Before the House Comm. on the Judiciary,* 104th Cong., (1995) (statement of the National Conference of State Legislatures).

[41] *Hearing on H.R. 339, The Personal Responsibility in Food Consumption Act of 2003 Before the Subcomm. on Commercial and Administrative Law, House Comm. on the Judiciary,* 108th Cong., 7 (2003) (statement of Professor John H. Banzhaf, III).

[42] 529 U.S. 598 (2000).

thority." The same concerns were brought in *United States* v. *Lopez*, which invalidated a Federal law criminalizing the possession of firearms in a school zone. In that case, the Supreme Court cautioned Congress regarding its limited authority in matters traditionally left to the states, Congress's authority is not as broad.[43] This would be particularly true concerning matters of public health and safety of the nature implicated by H.R. 339.

IV. THERE ARE FAR PREFERABLE WAYS TO DEAL WITH LEGAL ACTIONS INVOLVING THE FOOD INDUSTRY

Although headlines of obesity lawsuits have been splashed across the newspapers as plaguing our legal system, the reality is very few, if any, suits are successful in court. Instead the legal system has ably handled the limited number of matters that have come before it.

While many of these cases have been deemed frivolous, others have resulted in positive changes in food industry policies. In fact, some of the cases have highlighted questionable measures taken by the industry that denied consumers information about the contents of certain foods, the foods' nutritional value, or the long-term consequence of the foods' consumption. Consider the following developments—which arguably stem in part from food product related litigation, such as the lawsuit brought against Kraft Foods regarding the dangerous trans fat found in Oreo Cookies.[44]

- Last year, the FDA issued requirements that food labels reveal the levels of trans fats. In doing so, the FDA estimated that merely revealing trans fat content on labels will save between 2,000 and 5,600 lives a year, as people either would choose healthier foods or manufacturers alter their recipes to leave out the damaging ingredient.[45]
- McDonald's now offers a "Go Active Meal" for adult, containing a healthy salad along with exercise tools.[46] Burger King has joined the effort by creating low fat chicken baguettes for health conscious consumers, and Pizza Hut is offering the Fit 'N Delicious pizza that is only 150 calories per large pizza compared to the 450 calories in just one slice of its Stuffed Crust pizza.[47]
- Major food companies, such as McDonald's, Kellogg and PepsiCo have recently promised to change how they produce foods and to take health concerns into greater consideration. For instance, McDonald's and the Frito-Lay division of PepsiCo, plan to eliminate trans fats in their foods. The New York City public school system also banned candy, soda and

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[43] 514 U.S. 549 (1995).

[44] *See Oreo Cookies Lawsuit Crumbles,* CBSNews.com, (May 15, 2003) *at http://www.cbsnews.com/stories/2003/05/13/health/main553619.shtml.*

[45] Lauran Neergaard, *FDA to force foods to reveal artery-clogging trans fat,* ASSOCIATED PRESS, July 9, 2003.

[46] Sherri Day, *McDonald's Enlists Trainer to Help Sell Its New Meal,* NY TIMES, Sept. 16, 2003 at C4 (describing a new pilot program in Indiana).

[47] Bruce Horovitz, *Pizza Hut to Serve UP Slices of Healthier Pie; Altered Fast-Food Favorite Has Less Fat,* USA TODAY, Oct. 15, 2003 at B1.

other sugary snacks from school vending machines to combat obesity among schoolchildren.[48]

At the same time, when non-meritorious lawsuits are brought, our legal system has multiple procedural safeguards to ensure defendants' rights are respected. First, judges monitor filings at every step, and are empowered to dismiss a case that lacks merit at any time. As mentioned above, last year a Federal judge dismissed with prejudice the obesity suit against McDonald's when it found the plaintiffs failed to prove any connection between their weight and McDonald's food.[49] This meant the defendant was able to avoid the expenses of a protracted trial.

Second, attorneys can be punished and subjected to monetary penalties if they bring frivolous cases to court, or otherwise abuse the legal process. Federal Rule of Civil Procedure 11—which has counterparts in all 50 states—allows sanctions against litigants and their attorneys when they make bad-faith arguments or bring a suit for an improper purpose. Specifically, Rule 11 type procedures prohibit bringing a case "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."[50] The rule also requires that every legal argument be supported by existing law or a "nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."[51] If a defendant feels that either of these requirements has been broken, it can simply move for sanctions—and if successful, can recover the expenses incurred as a result of the violation.[52]

Finally, the contingency fee system operates to prevent attorneys from taking baseless cases. Under this system, an attorney only gets paid if he or she wins, so there is little incentive to pursue cases that do not meet legal and evidentiary requirements. If plaintiffs continue to lose obesity cases, we would expect the attorney would hesitate to bring such actions in the future.

CONCLUSION

H.R. 339 is ill-conceived legislation. It is drafted so broadly it would insulate negligent and reckless activity, and would upset cases in the mid-stream of litigation. It has been drafted in the absence of a single verdict against the food industry, and would preempt the laws in all 50 states.

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[48] David Barboza, *Kraft Plans to Rethink Some Products to Fight Obesity,* N. Y. TIMES, July 2, 2003 at C6.

[49] *Pelman* v. *McDonalds Corp.,* No. 02 Civ. 7821(RWS) (S.D.N.Y. Sept. 3, 2003), at 11.

[50] FED. R. CIV. P. 11(b)(1).

[51] *Id.* at (b)(2). *See also* Rule 11(b)(3) which requires that "allegations and other factual contentions have evidentiary support."

[52] *Id.* at (c)(2).

The common law system of tort law implemented by our States has served our citizens well for more than 200 years, and is more than able to handle those frivolous cases which do arise. We should not pass special interest legislation that panders to a single industry at the expense of our system of federalism.

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