

PERSONAL RESPONSIBILITY IN FOOD CONSUMPTION ACT  
OF 2005

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JUNE 14, 2005.—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

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 554]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 554) 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, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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## THE AMENDMENT

The amendment is 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 of 2005”.

### SEC. 2. FINDINGS; PURPOSE.

(a) FINDINGS.—Congress finds that—

(1) the food and beverage industries are a significant part of our national economy;

(2) the activities of manufacturers and sellers of foods and beverages substantially affect interstate and foreign commerce;

(3) a person’s weight gain, obesity, or a health condition associated with a person’s weight gain or obesity is based on a multitude of factors, including genetic factors and the lifestyle and physical fitness decisions of individuals, such that a person’s weight gain, obesity, or a health condition associated with a person’s weight gain or obesity cannot be attributed to the consumption of any specific food or beverage; and

(4) because fostering a culture of acceptance of personal responsibility is one of the most important ways to promote a healthier society, lawsuits seeking to blame individual food and beverage providers for a person’s weight gain, obesity, or a health condition associated with a person’s weight gain or obesity are not only legally frivolous and economically damaging, but also harmful to a healthy America.

(b) PURPOSE.—The purpose of this Act is to allow Congress 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 action that is allegedly of the type described in section 4(5)(B) seeking to impose liability of any kind based on accumulative acts of consumption of a qualified product, the obligation of any party or non-party to make disclosures of any kind under any applicable rule or order, or to respond to discovery requests of any kind, as well as all proceedings unrelated to a motion to dismiss, shall be stayed prior to the time for filing a motion to dismiss and during the pendency of any such motion, unless the court finds upon motion of any party that a response to a particularized discovery request 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), the responsibilities of the parties with regard to the treatment of all documents, data compilations (including electronically recorded or stored data), and tangible objects shall be governed by applicable Federal or State rules of civil procedure. A party aggrieved by the failure of an opposing party to comply with this paragraph shall have the applicable remedies made available by such applicable rules, provided that no remedy shall be afforded that conflicts with the terms of paragraph (1).

(d) PLEADINGS.—In any action that is allegedly of the type described in section 4(5)(B) seeking to impose liability of any kind based on accumulative acts of consumption of a qualified product, the complaint initiating such action shall state with particularity—

- (1) each element of the cause of action;
- (2) the Federal and State statutes or other laws that were allegedly violated;
- (3) the specific facts alleged to constitute the claimed violation of law; and
- (4) the specific facts alleged to have caused the claimed injury.

(e) **RULE OF CONSTRUCTION.**—No provision of this Act shall be construed to create a public or private cause of action or remedy.

**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.

(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.**—

(A) **IN GENERAL.**—Subject to subparagraph (B), the term “qualified civil liability action” means a civil action brought by any person against a manufacturer, marketer, distributor, advertiser, 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, or related to a person’s accumulated acts of consumption of a qualified product and weight gain, obesity, or a 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 that person.

(B) **EXCEPTION.**—A qualified civil liability action shall not include—

(i) an action based on allegations of breach of express contract or express warranty, provided that the grounds for recovery being alleged in such action are unrelated to a person’s weight gain, obesity, or a health condition associated with a person’s weight gain or obesity;

(ii) an action based on allegations that—

(I) a manufacturer or seller of a qualified product knowingly violated a Federal or State statute applicable to the marketing, advertisement, or labeling of the qualified product with intent for a person to rely on that violation;

(II) such person individually and justifiably relied on that violation; and

(III) such reliance was the proximate cause of injury related to that person’s weight gain, obesity, or a health condition associated with that person’s weight gain or obesity; or

(iii) an action brought by the Federal Trade Commission under the Federal Trade Commission Act (15 U.S.C. 41 et seq.) or by the Federal Food and Drug Administration under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.).

(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.

(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.

**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 claiming it should be held liable for the over-consumption of its legal products. H.R. 554 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 obesity-related liability claims.

H.R. 554 as reported by the Committee 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 the legislation 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, marketer, distributor, advertiser, 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, or related to a person’s accumulated acts of consumption of a qualified product and weight gain, obesity, or a health condition that is associated with a person’s weight gain or obesity. 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: (1) an action based on allegations of breach of express contract or express warranty, provided that the grounds for recovery being alleged in such action are unrelated to a person’s weight gain, obesity, or a health condition associated with a person’s weight gain or obesity; (2) an action based on allegations that a manufacturer or seller of a qualified product knowingly violated a Federal or State statute applicable to the marketing, advertisement, or labeling of the qualified product with intent for a person to rely on that violation, such person individually and justifiably relied on that violation, and such reliance was the proximate cause of injury related to that person’s weight gain, obesity, or a health condition associated with that person’s weight gain or obesity; or (3) an action brought by the Federal Trade Commission under the Federal Trade Commission Act (15 U.S.C. 41 *et seq.*) or by the Federal Food and Drug Administration under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*).

#### 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 . . . 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.<sup>1</sup>

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

<sup>1</sup> Roger Parloff, “Is Fat the Next Tobacco?” *Fortune* (January 21, 2003).

law when it has no defect.<sup>2</sup> 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 . . .”<sup>3</sup> 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.”<sup>4</sup>

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.<sup>5</sup> The food industry has recently come under attack by waves of lawsuits alleging it should pay monetary damages and be subject to equitable remedies based on legal theories holding it liable for the misuse or overconsumption of its legal products.

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.”<sup>6</sup> Attendees were required to sign an affidavit in which they agreed to keep the information they learn 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.<sup>7</sup>

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.<sup>8</sup> As the views of John Banzhaf, a personal injury attorney who is credited as the mastermind behind recent obesity-related lawsuits against 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.”<sup>9</sup> Regarding such lawsuits, personal injury lawyer Richard Daynard, head of Northeastern University’s Tobacco Products Liability Project, said “I think we’ll

<sup>2</sup>*Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206, 1211–12 (N.D. Tex. 1985).

<sup>3</sup>*Ganim v. Smith & Wesson Corp.*, No. X06 CV 990153198S, 1999 Conn. Super. LEXIS 3330 at \*14 (Conn. Super. Ct. Dec. 10, 1999).

<sup>4</sup>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.

<sup>5</sup>See *Personal Responsibility in Food Consumption Act*, 108th Cong. 33 (June 19, 2003) (statement of Christianne Ricchi, the National Restaurant Association before the House Commercial and Administrative Law Subcommittee).

<sup>6</sup>Abraham Genauer, “Conference Highlights Assault on ‘Big Food,’” *The Hill* (June 11, 2003) at 36.

<sup>7</sup>The affidavit can be found at: <http://www.phaionline.org/conference/affidavit.html> (last visited March 5, 2004).

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

<sup>9</sup>Blaine Harden, “Eatery Joins Battle With ‘The Bulge’: Obesity Lawsuits Spur Dessert Protest,” *The Washington Post* (September 20, 2003) at A3.

see a progression similar to what we saw with tobacco.”<sup>10</sup> Mr. Daynard said this even though he himself admits he lost weight because “I ate a lot less.”<sup>11</sup> The tobacco industry, facing lawsuits brought by 48 states, was ultimately forced to settle those cost-prohibitive and potentially bankrupting cases for \$246 billion.<sup>12</sup> 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.”<sup>13</sup> 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.”<sup>14</sup>

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.<sup>15</sup> However, in January, 2005, the United States Court of Appeals for the Second Circuit revived the lawsuit and allowed it to continue, stating that “We hold that the district court incorrectly dismissed plaintiffs’ claims under New York General Business Law § 349 . . . What is missing from the [plaintiff’s] amended complaint . . . is any express allegation that any plaintiff specifically relied to his/her detriment on any particular representation made in any particular McDonald’s advertisement or promotional material . . . [However,] a private action brought under § 349 does not require proof of actual reliance.”<sup>16</sup>

Consequently, in light of these recent and troubling legal developments, H.R. 554 was amended at Committee to make clear that any allegation of fraud can only be brought by someone who can prove they actually suffered harm as a result of the fraud, namely by showing that someone made a materially false statement about a food product, and that the person suing individually and justifiably relied on the false statement, and that reliance was the proximate cause of their injury. These standards are derived from traditional, stringent fraud elements.<sup>17</sup>

<sup>10</sup>Erin Duggan, “Tobacco-suit Tactics Now Target Fast Food,” *Albany Times Union* (April 6, 2003) at A1.

<sup>11</sup>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.”).

<sup>12</sup>Walter Olson, “A Spanking for the Trial Lawyers,” *The Wall Street Journal* (May 23, 2003) at A10.

<sup>13</sup>David Wallis, “Questions for Ralph Nader,” *The New York Times* (June 16, 2002).

<sup>14</sup>Julia Duin, “Obese People Use Lawsuits to Get Government Involved,” *The Washington Times* (June 11, 2003) at A5.

<sup>15</sup>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 advertisements 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.”).

<sup>16</sup>*Pelman v. McDonald’s Corp.*, 396 F.3d 508, 510–11 (2d. Cir. 2005).

<sup>17</sup>See Black’s Law Dictionary (defining “fraud” as “[a] knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”) (8th ed. 2004) (fraud).

Personal injury attorney John Banzhaf<sup>18</sup> said recently, “You may not like it . . . but we’ll find a judge. And then we’ll find a jury”<sup>19</sup> 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.<sup>20</sup>

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.”<sup>21</sup> 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.<sup>22</sup> 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:

[O]ne 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.* If McDonald’s is liable for selling high caloric meals, then so are the local pizzeria and grocery stores.<sup>23</sup>

Frivolous litigation against the “fast food” industry, if allowed to proliferate, will lead to lawsuits against the food industry gen-

<sup>18</sup> 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.

<sup>19</sup> MSNBC, “Abrams Report” (January 23, 2003) (transcript).

<sup>20</sup> 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.”).

<sup>21</sup> The Manhattan Institute, Center for Legal Policy, Trial Lawyers Inc. (2003), available at <http://www.triallawyersinc.com>, at 2.

<sup>22</sup> See *id.*, at 2, 6 (“Significantly, these estimates *exclude* the tobacco settlements, most contract and securities litigations, and most punitive damages . . .”).

<sup>23</sup> 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).

erally, since even the portion sizes of foods cooked at home have grown substantially in the last two decades.<sup>24</sup> 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.”<sup>25</sup>

According to *The Washington Times*:

An overhead projection on display yesterday at a [2004] public health law conference summed up the group’s efforts: “Patience, hell. Let’s sue somebody.” . . . A panel of four lawyers argued that the fat lawsuit movement . . . would need to extend beyond the obvious targets like restaurants, fast-food chains and food manufacturers to bring about substantial policy changes like tobacco lawsuits did . . . “We must remember that the anti-tobacco movement did not just sue the tobacco companies. *We sued lots of people*,” Mr. [John] Banzhaf said.<sup>26</sup>

Also according to *The Washington Times*, “A single lawsuit against the food industry is not enough . . . That message was the underlying theme for the conference on legal approaches to obesity that commenced [in Boston] . . . ‘We know that litigation ultimately wins,’ said George Washington University law professor John Banzhaf III, one of the leaders of the obesity lawsuits.”<sup>27</sup>

H.R. 554 IS NARROWLY TAILORED LEGISLATION THAT PRESERVES  
STATE AND FEDERAL LAWS

Every state has its own deceptive trade practices laws, and a knowing violation of any of such state laws could allow suits to go forward under the legislation if the criteria specified in Sec. 4(5)(B)(ii) are met. Further, under Federal law,<sup>28</sup> states remain free to require labeling of food sold at restaurants.<sup>29</sup> Consequently, states remain free to pass laws requiring that the restaurant industry provide nutritional information to customers. H.R. 554 also allows lawsuits to proceed when there is a breach of express contract or express warranty provided that the grounds for recovery alleged are unrelated to a person’s weight gain, obesity, or a health condition associated with a person’s weight gain or obesity.<sup>30</sup> In addition, H.R. 554 does not affect actions brought by the Federal Trade Commission under the Federal Trade Commission Act, or by the Federal Food and Drug Administration under the Food, Drug, and Cosmetic Act.<sup>31</sup> Finally, H.R. 554 makes clear that “No provision of this Act shall be construed to create a public or private cause of action of remedy.”<sup>32</sup>

<sup>24</sup> 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.”).

<sup>25</sup> See *id.* at 453 (citing the “most surprising result [of] the large portion-size increases for food consumed at home—a shift that indicates marked changes in eating behavior in general.”).

<sup>26</sup> Marguerite Higgins, “Lawyers See Obese U.S. Ripe for Fat Lawsuits,” *The Washington Times* (September 20, 2004) at A4, A11 (emphasis added).

<sup>27</sup> Marguerite Higgins, “Anti-obesity Group Mulls Swell in Suits: Doctors Eyed for Legal Action,” *The Washington Times* (September 19, 2004) at A2.

<sup>28</sup> See Nutrition Labeling and Education Act, Pub. L. No. 101–535.

<sup>29</sup> See 21 U.S.C. § 343(q)(5)(A)(i)–(ii).

<sup>30</sup> See H.R. 554, Sec. 4(5)(B)(i).

<sup>31</sup> See H.R. 554, Sec. 4(5)(B)(iii).

<sup>32</sup> See H.R. 554, Sec. 3(e).



H.R. 554 only applies to obesity-related claims—that is, to claims based on “weight gain” or “obesity” or an associated health condition. 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. 554 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. Only 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.”<sup>33</sup> And another recent poll shows that only 6% of Americans think food companies and restaurants are primarily responsible for obesity. As reported in *The Washington Times*:

In a recent poll conducted by Dutko Worldwide (800 registered voters, March 21–26, 2005), we asked voters “who bears the greatest responsibility for obesity” in the United States—individuals, parents, doctors, schools, restaurants, food companies or nutrition educators. An overwhelming majority of voters (63 percent) believes “individuals themselves” bear the greatest responsibility, followed next by parents (22 percent). Not only are these results impressive for those advocating more personal responsibility, but the percentage that believe food companies (4 percent), restaurants (2 percent) and schools (1 percent) bear responsibility is stunningly low, given all the media attention implicating these institutions in the obesity crisis.<sup>34</sup>

As another recent survey revealed:

Even more striking, consumers are strongly against obesity lawsuits being allowed against fast food chains. Using a scale of 1 through 10, a hefty 74% chose “1,” indicating that they strongly disagreed that these suits should be allowed. The results suggest that Americans very much agree with Congress’ recent efforts to prohibit these kinds of law suits against the food industry.<sup>35</sup>

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. . . .”<sup>36</sup>

*USA Today* stated in an editorial opposing obesity lawsuits that “lawsuits . . . are no way to trim the nation’s midsection. Market forces and public education work better . . . Ultimately, good eat-

<sup>33</sup> 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).

<sup>34</sup> Gary Andres, “The Waistline Wars,” *The Washington Times* (April 20, 2005) at A19.

<sup>35</sup> Deloitte Consumer Business, “The Weight Debate,” (2004) at 3.

<sup>36</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) (quoting James Madison).

ing habits are a matter of personal and parental responsibility. As the trial judge in the McDonald's case put it: 'If a person knows or should know that eating copious orders of supersized McDonald's products is unhealthy and may result in weight gain, it is not the place of the law to protect them from their own excesses.'<sup>37</sup> 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."<sup>38</sup>

H.R. 554 WILL HELP RESTORE A MEASURE OF  
PERSONAL RESPONSIBILITY

Dr. Gerard Musante is a clinical psychologist with training at Duke University Medical Center who has worked for more than 30 years with thousands of obese patients. He is the founder of Structure House, a residential weight loss facility in Durham, North Carolina. Dr. Musante said the following at a Senate hearing on similar legislation during the last Congress:

"Lawsuits are pointing fingers at the food industry in an attempt to curb the nation's obesity epidemic. These lawsuits do nothing but enable consumers to feel powerless in a battle for maintaining one's own personal health. The truth is, we as consumers have control over the food choices we make, and we must issue our better judgment when making these decisions. Negative lifestyle choices cause obesity, not a trip to a fast food restaurant or a cookie high in trans fat . . . *Through working with obese patients, I have learned that the worst thing one can do is to blame an outside force to get themselves 'off the hook,' to say it's not their fault, and that they are a victim . . . Congress has rightly recognized the danger of allowing Americans to continue blaming others for the obesity epidemic. It is imperative that we prevent lawsuits from being filed against any industry for answering consumer demands. The fact that we are addressing the issue here today is a step in the right direction.*"<sup>39</sup>

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 . . .*"<sup>40</sup>

As the *Wall Street Journal* recently editorialized, "Earlier [last] year, the House of Representatives passed the Personal Responsibility in Food Consumption Act, which would shield food vendors from civil claims premised on weight gain . . . [A]llowing trial law-

<sup>37</sup>"Don't Blame the Burgers," *USA Today* (editorial) (January 31, 2005) at 10A.

<sup>38</sup>Editorial, "Fast Food Foolishness," *The Los Angeles Times* (July 7, 2003) at B10.

<sup>39</sup>Written Testimony of Dr. Gerard Musante, Founder, Structure House, before the Senate Subcommittee on Administrative Oversight and the Courts (October 16, 2003), available at <http://judiciary.senate.gov/testimony.cfm?id=963&wit—id=2730>.

<sup>40</sup>Susan Finn, *The Washington Times* (Letter to the Editor) (October 22, 2003) at A22.

yers to exploit the obesity epidemic—and encouraging Americans to blame their dietary excesses on someone else—isn’t going to make anyone healthier.”<sup>41</sup>

On the other hand, 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 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.*”<sup>42</sup>

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?”<sup>43</sup> 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.<sup>44</sup>

Philip Howard has also written that “It is precisely [lawmakers’] responsibility to decide, on behalf of the common good, when people should be able to sue and when they should not. Law is not a free-market commodity. Suing is the use of state power by one citizen against another.”<sup>45</sup>

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 plain-

<sup>41</sup>“Round Figures,” *The Wall Street Journal* (editorial) (November 30, 2004) at A18.

<sup>42</sup>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).

<sup>43</sup>Erin Duggan, “Tobacco-suit Tactics Now Target Fast Food,” *Albany Times Union* (April 6, 2003) at A1.

<sup>44</sup>Philip K. Howard, *The Collapse of the Common Good* (New York: 2001) at 22–23.

<sup>45</sup>Philip K. Howard, “It’s No Fun Playing Torts,” *Legal Times* (November 15, 2004).

tiffs. 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 . . ." <sup>46</sup>

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.

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. <sup>47</sup>

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." <sup>48</sup>

H.R. 554 will encourage society to focus on the true causes of obesity: a lack of exercise. According to the Department of Health and Human Services, "*physical inactivity* contributes to 300,000 preventable deaths a year in the United States." <sup>49</sup>

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. <sup>50</sup> Similarly for adults, as manual labor has become less prevalent and sedentary jobs have become more prevalent, adult obesity has risen. <sup>51</sup>

<sup>46</sup> Hearsay: The Lawyer's Column, *The Washington Post* (January 27, 2003) at E10.

<sup>47</sup> "Food Fight," CBS News "60 Minutes" (Australia) (September 15, 2002) (transcript).

<sup>48</sup> Philip K. Howard, *The Collapse of the Common Good* (New York: 2001) at 58.

<sup>49</sup> 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).

<sup>50</sup> L.A. Sutherland, "Health Trends in US Adolescents Over the Past 20 Years," Program No. 708.7, Abstract 7714.

<sup>51</sup> 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).

Furthermore, Harvard University researchers tracked the snack food intake during 1996–1998 of almost 15,000 children aged 9 to 14 years. Their results were reported in the *International Journal of Obesity*. The researchers concluded, “Our results suggest that although snack foods may have low nutritional value, they were not an important independent determinant of weight gain among children and adolescents.”<sup>52</sup>

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 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.<sup>53</sup>

H.R. 554 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,<sup>54</sup> 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

<sup>52</sup> Steven Millor, “Snack Foods Don’t Fatten Kids,” *Fox News Channel* (September 24, 2004).

<sup>53</sup> 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 *American Journal of Preventive Medicine* 4: 283–89, 287–88 (November 2003).

<sup>54</sup> 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.”). Currently, only one state, Illinois, still mandates physical education classes for grades K–12. 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.”).

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.”<sup>55</sup>

According to the National Association of Secondary School Principals, such lawsuits against schools threaten their ability to raise funds for vital programs.<sup>56</sup> Indeed, today only one state—Illinois—requires daily physical education classes for kindergarten through 12th grade.<sup>57</sup>

#### H.R. 554 WILL PRESERVE THE SEPARATION OF POWERS

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

John Banzhaf, a personal injury attorney who helped spearhead lawsuits against tobacco companies, 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.<sup>58</sup>

Mr. Banzhaf has also said, “if the legislatures won’t legislate, then the trial lawyers will litigate.”<sup>59</sup>

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”<sup>60</sup> 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.”<sup>61</sup> Such lawsuits erode down the separation of powers of the branches of government.

Large damage awards and requests for injunctive relief attempts to have the judiciary intrude into the decision-making process properly within the sphere of another branch of government, namely

<sup>55</sup>Laura Bradford, “Fat Foods: Back In Court” *TIME Online*, Inside Business (August 3, 2003).

<sup>56</sup>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.”).

<sup>57</sup>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.”).

<sup>58</sup>“Food Fight,” CBS News “60 Minutes” (September 15, 2002) (transcript).

<sup>59</sup>National Public Radio, “Fast Food on Trial” (8/8/02).

<sup>60</sup>*Penelas v. Arms Technology Inc. et al.*, No. 3D00-113, dismissal affirmed (Fla. Dist. Ct. App., 3d Dist., Feb. 14, 2001).

<sup>61</sup>See *Cincinnati v. Beretta U.S.A. Corp.*, No. A9902369, 1999 WL 809838 (Ohio Com. Pl. Oct. 7, 1999) at \*1.

legislatures.<sup>62</sup> Those filing such lawsuits seek to circumvent legislatures and the popular will. As Philip Howard has written, “legislatures must reclaim the responsibility to set the boundaries who can sue for what. That’s what it means to live under the rule of law.”<sup>63</sup>

CONGRESS HAS THE CLEAR CONSTITUTIONAL AUTHORITY  
TO ENACT H.R. 554

The lawsuits against the food industry H.R. 554 addresses directly implicate core federalism principles articulated by the United States Supreme Court, 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 . . .”<sup>64</sup> Congress may exercise its authority under the Commerce Clause to prevent a few state courts from bankrupting 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.

As the Supreme Court elaborated in *Healy v. Beer Institute*,<sup>65</sup> concerning the extraterritorial effects of state regulations:

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.<sup>66</sup>

James Madison, in Federalist No. 42, described the purpose of the Commerce Clause as follows:

<sup>62</sup> 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.”).

<sup>63</sup> Philip K. Howard, “Charity Case,” *The Wall Street Journal* (March 17, 2005).

<sup>64</sup> 517 U.S. 559, 571 (1996).

<sup>65</sup> 491 U.S. 324 (1989).

<sup>66</sup> 491 U.S. at 336–37 (citations omitted).

A very material object of this power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former.<sup>67</sup>

That is, Madison foresaw the problem in which products or services would be made to cost more to consumers in one state because other states those products and services passed through would levy duties on them. That is precisely the problem today: some states, by allowing frivolous lawsuits to be brought for unlimited damages in cases involving products or services that touch their jurisdictions are raising the costs of providing those products and services to out-of-state customers, resulting in higher prices and lost jobs across multiple states or nationwide. It is the duty of Congress to prevent such unfairness.<sup>68</sup>

#### H.R. 554 INCLUDES APPROPRIATE DISCOVERY AND PLEADING PROVISIONS

H.R. 554 includes discovery provisions designed to prevent fishing expeditions.<sup>69</sup> These provisions provide that discovery of documents be stayed while a court decides whether the case should be dismissed unless a court decides that particular discovery is necessary to preserve evidence or to prevent undue prejudice to a party. As the *Wall Street Journal* editorialized, “What has the personal-injury set so excited is that . . . discovery proceedings will cost defendants millions of dollars, which gives the plaintiffs leverage in any potential settlement talks.”<sup>70</sup> Such provisions also allows for court sanctions under applicable rules if a defendant destroys any documents relevant to the litigation.<sup>71</sup>

H.R. 554 also appropriately requires that any complaint alleging that a lawsuit should go forward under the exceptions in Sec. 4(5)(B) of H.R. 554 must state with particularity each element of the cause of action, the Federal and State statutes or other laws that were allegedly violated, the specific facts alleged to constitute the claimed violation of law, and the specific facts alleged to have caused the claimed injury.<sup>72</sup> 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 liti-

<sup>67</sup>*The Federalist Papers*, Federalist No. 22 (Madison) at 267–68 (Clinton Rossiter ed., 1961).

<sup>68</sup>James Madison, according to his own notes of what he argued at the Constitutional Convention (he referred to himself in the third person), made clear that Congress must have the power to regulate commerce in this manner: “Whether the States are now restrained from laying tonnage duties depends on the extent of the power ‘to regulate commerce.’ . . . He was more & more convinced that the regulation of Commerce was in its nature indivisible and ought to be wholly under one authority.” Debates on the Adoption of the Federal Constitution in the Convention Held at Philadelphia in 1787 (Jonathan Elliot, ed. 1845) (as reported by James Madison, notes of May 31, 1787) at 548.

<sup>69</sup>See Sec. 3(c)(1).

<sup>70</sup>“Fat Chance,” *The Wall Street Journal* (editorial) (February 1, 2005) at A12.

<sup>71</sup>See Sec. 3(c)(2).

<sup>72</sup>See H.R. 554, Sec. 3(d).



gation is to be successful. Rather, 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 on the Judiciary held no hearings on H.R. 554 during the 109th Congress.

COMMITTEE CONSIDERATION

On May 25, 2005, the Committee met in open session and ordered favorably reported the bill H.R. 554 with an amendment by a recorded vote of 16 yeas to 8 nays, a quorum being present.

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. 554.

1. Mr. Watt offered an amendment to preclude the application of the Act to lawsuits in State court. By a rollcall vote of 8 yeas to 17 nays, the amendment was defeated.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde .....			
Mr. Coble .....		X	
Mr. Smith (Texas) .....		X	
Mr. Gallegly .....			
Mr. Goodlatte .....			
Mr. Chabot .....		X	
Mr. Lungren .....		X	
Mr. Jenkins .....		X	
Mr. Cannon .....		X	
Mr. Bachus .....		X	
Mr. Inglis .....		X	
Mr. Hostettler .....		X	
Mr. Green .....			
Mr. Keller .....		X	
Mr. Issa .....		X	
Mr. Flake .....			
Mr. Pence .....		X	
Mr. Forbes .....			
Mr. King .....		X	
Mr. Feeney .....		X	
Mr. Franks .....		X	
Mr. Gohmert .....		X	
Mr. Conyers .....	X		
Mr. Berman .....			
Mr. Boucher .....			
Mr. Nadler .....			
Mr. Scott .....	X		
Mr. Watt .....	X		
Ms. Lofgren .....			
Ms. Jackson Lee .....	X		
Ms. Waters .....	X		
Mr. Meehan .....	X		
Mr. Delahunt .....			
Mr. Wexler .....			

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Weiner .....			
Mr. Schiff .....	X		
Ms. Sánchez .....	X		
Mr. Smith (Washington) .....			
Mr. Van Hollen .....			
Mr. Sensenbrenner, Chairman .....		X	
Total .....	8	17	

2. Mr. Watt offered an amendment that would have precluded application of the Act to cases in which a judgment had been entered by a trial or appellate court, and where a settlement had been reached and signed by both parties. By a rollcall vote of 8 yeas to 16 nays, the amendment was defeated.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Hyde .....			
Mr. Coble .....		X	
Mr. Smith (Texas) .....		X	
Mr. Gallegly .....			
Mr. Goodlatte .....			
Mr. Chabot .....		X	
Mr. Lungren .....		X	
Mr. Jenkins .....		X	
Mr. Canno .....		X	
Mr. Bachus .....		X	
Mr. Inglis .....		X	
Mr. Hostettler .....		X	
Mr. Green .....			
Mr. Keller .....		X	
Mr. Issa .....		X	
Mr. Flake .....		X	
Mr. Pence .....		X	
Mr. Forbes .....			
Mr. King .....		X	
Mr. Feeney .....			
Mr. Franks .....		X	
Mr. Gohmert .....			
Mr. Conyers .....	X		
Mr. Berman .....			
Mr. Boucher .....			
Mr. Nadler .....			
Mr. Scott .....	X		
Mr. Watt .....	X		
Ms. Lofgren .....			
Ms. Jackson Lee .....	X		
Ms. Waters .....			
Mr. Meehan .....	X		
Mr. Delahunt .....			
Mr. Wexler .....			
Mr. Weiner .....			
Mr. Schiff .....	X		
Ms. Sánchez .....	X		
Mr. Smith (Washington) .....			
Mr. Van Hollen .....	X		
Mr. Sensenbrenner, Chairman .....		X	
Total .....	8	16	

3. Mr. Watt offered an amendment to strike Section 3(d) of the bill and eliminate its pleading requirements. By a rollcall vote of 8 yeas to 15 nays, the amendment was defeated.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Hyde .....			
Mr. Coble .....		X	
Mr. Smith (Texas) .....		X	
Mr. Gallegly .....			
Mr. Goodlatte .....			
Mr. Chabot .....		X	
Mr. Lungren .....		X	
Mr. Jenkins .....		X	
Mr. Cannon .....		X	
Mr. Bachus .....			
Mr. Inglis .....		X	
Mr. Hostettler .....		X	
Mr. Green .....			
Mr. Keller .....		X	
Mr. Issa .....		X	
Mr. Flake .....		X	
Mr. Pence .....		X	
Mr. Forbes .....			
Mr. King .....		X	
Mr. Feeney .....			
Mr. Franks .....		X	
Mr. Gohmert .....			
Mr. Conyers .....	X		
Mr. Berman .....			
Mr. Boucher .....			
Mr. Nadler .....			
Mr. Scott .....	X		
Mr. Watt .....	X		
Ms. Lofgren .....			
Ms. Jackson Lee .....	X		
Ms. Waters .....			
Mr. Meehan .....	X		
Mr. Delahunt .....			
Mr. Wexler .....			
Mr. Weiner .....			
Mr. Schiff .....	X		
Ms. Sánchez .....	X		
Mr. Smith (Washington) .....			
Mr. Van Hollen .....	X		
Mr. Sensenbrenner, Chairman .....		X	
Total .....	8	15	

4. Mr. Scott offered an amendment that would have provided that notwithstanding any other provision to the contrary in this Act, this Act does not apply to an action brought by a State agency to enforce a State consumer protection law concerning mislabeling or other unfair and deceptive trade practices. By a rollcall vote of 8 yeas to 16 nays, the amendment was defeated.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Hyde .....			
Mr. Coble .....		X	
Mr. Smith (Texas) .....		X	
Mr. Gallegly .....			

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Goodlatte .....			
Mr. Chabot .....		X	
Mr. Lungren .....		X	
Mr. Jenkins .....		X	
Mr. Cannon .....		X	
Mr. Bachus .....			
Mr. Inglis .....		X	
Mr. Hostettler .....		X	
Mr. Green .....			
Mr. Keller .....		X	
Mr. Issa .....		X	
Mr. Flake .....		X	
Mr. Pence .....		X	
Mr. Forbes .....			
Mr. King .....		X	
Mr. Feeney .....		X	
Mr. Franks .....		X	
Mr. Gohmert .....			
Mr. Conyers .....	X		
Mr. Berman .....			
Mr. Boucher .....			
Mr. Nadler .....			
Mr. Scott .....	X		
Mr. Watt .....	X		
Ms. Lofgren .....			
Ms. Jackson Lee .....	X		
Ms. Waters .....			
Mr. Meehan .....	X		
Mr. Delahunt .....			
Mr. Wexler .....			
Mr. Weiner .....			
Mr. Schiff .....	X		
Ms. Sánchez .....	X		
Mr. Smith (Washington) .....			
Mr. Van Hollen .....	X		
Mr. Sensenbrenner, Chairman .....		X	
Total .....	8	16	

5. Motion to report with an amendment in the nature of a substitute was agreed to by a rollcall vote of 16 yeas to 8 nays.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Hyde .....			
Mr. Coble .....	X		
Mr. Smith (Texas) .....	X		
Mr. Gallegly .....			
Mr. Goodlatte .....			
Mr. Chabot .....	X		
Mr. Lungren .....	X		
Mr. Jenkins .....	X		
Mr. Cannon .....	X		
Mr. Bachus .....			
Mr. Inglis .....	X		
Mr. Hostettler .....	X		
Mr. Green .....			
Mr. Keller .....	X		
Mr. Issa .....	X		
Mr. Flake .....	X		
Mr. Pence .....	X		
Mr. Forbes .....			

## ROLLCALL NO. 5—Continued

	Ayes	Nays	Present
Mr. King .....	X		
Mr. Feeney .....	X		
Mr. Franks .....	X		
Mr. Gohmert .....			
Mr. Conyers .....		X	
Mr. Berman .....			
Mr. Boucher .....			
Mr. Nadler .....			
Mr. Scott .....		X	
Mr. Watt .....		X	
Ms. Lofgren .....			
Ms. Jackson Lee .....		X	
Ms. Waters .....			
Mr. Meehan .....		X	
Mr. Delahunt .....			
Mr. Wexler .....			
Mr. Weiner .....			
Mr. Schiff .....		X	
Ms. Sánchez .....		X	
Mr. Smith (Washington) .....			
Mr. Van Hollen .....		X	
Mr. Sensenbrenner, Chairman .....	X		
Total .....	16	8	

## 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. 554, 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, June 6, 2005.*

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. 554, the "Personal Responsibility in Food Consumption Act of 2005."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Gregory Waring (for Federal costs), Melissa Merrell (for the State and local impact), and Paige Piper/Bach (for the private-sector impact).

Sincerely,

DOUGLAS HOLTZ-EAKIN.

Enclosure.

*H.R. 554—Personal Responsibility in Food Consumption Act of 2005*

H.R. 554 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. 554 would not have a significant impact on the Federal budget. Enacting the bill would not affect direct spending or revenues.

H.R. 554 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 resolved, and those sources expect that it is unlikely that there will be many new cases filed in the future. Consequently, CBO estimates that the direct cost of the mandates (the expected value of foregone court awards) would be negligible and would fall well below the annual thresholds established by UMRA for intergovernmental mandates (\$62 million in 2005, adjusted annually for inflation) and private-sector mandates (\$123 million in 2005, adjusted annually for inflation).

The CBO staff contacts for this estimate are Gregory Waring (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

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 554 would protect the American food industry, the nation's leading private sector employer, from unfair legal claims alleging it should pay monetary damages and be subject to equitable remedies based on legal theories claiming it should be held liable for the over-consumption of its legal products by others. H.R. 554 would preserve the separation of powers, support the principle of personal responsibility, and protect the largest private sector employers in the United States from financial ruin in the face of frivolous obesity-related liability claims.

## 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, clause 3 of the Constitution.

## SECTION-BY-SECTION ANALYSIS AND DISCUSSION

The following discussion describes the bill as reported by the Committee.

## SEC. 1. SHORT TITLE

This section provides that this Act may be cited as the “Commonsense Consumption Act of 2005.”

## SEC. 2. FINDINGS; PURPOSE

This section sets out the findings and purpose of the legislation.

## SEC. 3. PRESERVATION OF SEPARATION OF POWERS

This section provides in subsections (a) and (b) 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.

This section also provides in subsection (c) that in any action that is allegedly of the type described in section 4(5)(B) seeking to impose liability of any kind based on accumulative acts of consumption of a qualified product, the obligation of any party or non-party to make disclosures of any kind under any applicable rule or order, or to respond to discovery requests of any kind, as well as all proceedings unrelated to a motion to dismiss, shall be stayed prior to the time for filing a motion to dismiss and during the pendency of any such motion, unless the court finds upon motion of any party that a response to a particularized discovery request is necessary to preserve evidence or to prevent undue prejudice to that party. This subsection also provides that during the pendency of any stay of discovery under this legislation, the responsibilities of the parties with regard to the treatment of all documents, data compilations (including electronically recorded or stored data), and tangible objects shall be governed by applicable Federal or State rules of civil procedure. A party aggrieved by the failure of an opposing party to comply with this paragraph shall have the applicable remedies made available by such applicable rules, provided that no remedy shall be afforded that conflicts with the terms of this legislation.

This sections also provides in subsection (d) that in any action that is allegedly of the type described in section 4(5)(B) seeking to impose liability of any kind based on accumulative acts of consumption of a qualified product, the complaint initiating such action shall state with particularity each element of the cause of action; the Federal and State statutes or other laws that were allegedly violated; the specific facts alleged to constitute the claimed violation of law; and the specific facts alleged to have caused the claimed injury.

This section also provides in subsection (e), in a rule of construction, that no provision of this Act shall be construed to create a public or private cause of action or remedy.

#### SEC. 4. DEFINITIONS

This section provides the definitions of various terms as used in the legislation. The term “person” means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity. 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, marketer, distributor, advertiser, 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, or related to a person’s accumulated acts of consumption of a qualified product and weight gain, obesity, or a 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 that person, but a qualified civil liability action does not include an action based on allegations of breach of express contract or express warranty, provided that the grounds for recovery being alleged in such action are unrelated to a person’s weight gain, obesity, or a health condition associated with a person’s weight gain or obesity; an action based on allegations that a manufacturer or seller of a qualified product knowingly violated a Federal or State statute applicable to the marketing, advertisement, or labeling of the qualified product with intent for a person to rely on that violation; such person individually and justifiably relied on that violation; and such reliance was the proximate cause of injury related to that person’s weight gain, obesity, or a health condition associated with that person’s weight gain or obesity; or an action brought by the Federal Trade Commission under the Federal Trade Commission Act (15 U.S.C. 41 et seq.) or by the Federal Food and Drug Administration under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.).

#### 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 H.R. 554 makes no changes to existing law.



MARKUP TRANSCRIPT

**BUSINESS MEETING**

**WEDNESDAY, MAY 25, 2005**

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

The Committee met, pursuant to notice, at 10:02 a.m., in Room 2138, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

Chairman SENSENBRENNER. The Committee will come to order. A working quorum is present.

[Intervening business.]

Chairman SENSENBRENNER. Pursuant to notice, I now call up the bill H.R. 554, the "Personal Responsibility in Food Consumption Act," for purposes of mark up and move its favorable recommendation to the House.

Without objection, the bill will be considered as read and open for amendment at any point, and the Chair recognizes the gentleman from Florida, Mr. Keller, the author of the bill, to explain it.

[The bill, H.R. 554, follows:]

109TH CONGRESS  
1ST SESSION

# H. R. 554

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.

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## IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 2, 2005

Mr. KELLER (for himself, Mr. DELAY, Mr. BLUNT, Ms. PRYCE of Ohio, Mr. SENSENBRENNER, Mr. NEY, Mr. TIBERI, Mr. BOEHNER, Mr. GARRETT of New Jersey, Mr. KENNEDY of Minnesota, Mr. SMITH of New Jersey, Mr. HENSARLING, Mr. FOLEY, Mr. BROWN of South Carolina, Ms. GINNY BROWN-WAITE of Florida, Mr. JONES of North Carolina, Mr. CARTER, Mr. SMITH of Texas, Mr. BACHUS, Mr. PENCE, Mr. SIMPSON, Mrs. CUBIN, Mr. AKIN, Mr. NORWOOD, Mr. OTTER, Mr. STEARNS, Mr. BRADLEY of New Hampshire, Mr. COX, Mrs. BLACKBURN, Mr. FRANKS of Arizona, Mr. MACK, Mr. CALVERT, Mr. PETRI, Mr. KIRK, Mrs. JO ANN DAVIS of Virginia, Mr. GREEN of Wisconsin, Mr. McHUGH, Mr. HASTINGS of Washington, Mr. GILCHRIST, Mr. PETERSON of Pennsylvania, and Ms. BERKLEY) introduced the following bill; which was referred to the Committee on the Judiciary

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## 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.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Personal Responsibility  
5 in Food Consumption Act”.

6 **SEC. 2. PURPOSE.**

7 The purpose of this Act is to allow Congress, State  
8 legislatures, and regulatory agencies to determine appro-  
9 priate laws, rules, and regulations to address the problems  
10 of weight gain, obesity, and health conditions associated  
11 with weight gain or obesity.

12 **SEC. 3. PRESERVATION OF SEPARATION OF POWERS.**

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

15 (b) **DISMISSAL OF PENDING ACTIONS.**—A qualified  
16 civil liability action that is pending on the date of the en-  
17 actment of this Act shall be dismissed immediately by the  
18 court in which the action was brought or is currently pend-  
19 ing.

20 (c) **DISCOVERY.**—

21 (1) **STAY.**—In any action of the type described  
22 in clause (i) or (ii) of section 4(5)(B), all discovery  
23 and other proceedings shall be stayed during the  
24 pendency of any motion to dismiss unless the court  
25 finds upon motion of any party that particularized

1 discovery is necessary to preserve evidence or to pre-  
2 vent undue prejudice to that party.

3 (2) RESPONSIBILITY OF PARTIES.—During the  
4 pendency of any stay of discovery under paragraph  
5 (1), unless otherwise ordered by the court, any party  
6 to the action with actual notice of the allegations  
7 contained in the complaint shall treat all documents,  
8 data compilations (including electronically recorded  
9 or stored data), and tangible objects that are in the  
10 custody or control of such person and that are rel-  
11 evant to the allegations, as if they were the subject  
12 of a continuing request for production of documents  
13 from an opposing party under applicable Federal or  
14 State rules of civil procedure, as the case may be.  
15 A party aggrieved by the willful failure of an oppos-  
16 ing party to comply with this paragraph may apply  
17 to the court for an order awarding appropriate sanc-  
18 tions.

19 (d) PLEADINGS.—In any action of the type described  
20 in section 4(5)(B)(i), the complaint initiating such action  
21 shall state with particularity the Federal and State stat-  
22 utes that were allegedly violated and the facts that are  
23 alleged to have proximately caused the injury claimed.

24 **SEC. 4. DEFINITIONS.**

25 In this Act:

1           (1) ENGAGED IN THE BUSINESS.—The term  
2 “engaged in the business” means a person who man-  
3 ufactures, markets, distributes, advertises, or sells a  
4 qualified product in the person’s regular course of  
5 trade or business.

6           (2) MANUFACTURER.—The term “manufac-  
7 turer” means, with respect to a qualified product, a  
8 person who is lawfully engaged in the business of  
9 manufacturing the product in interstate or foreign  
10 commerce.

11           (3) PERSON.—The term “person” means any  
12 individual, corporation, company, association, firm,  
13 partnership, society, joint stock company, or any  
14 other entity, including any governmental entity.

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

19           (5) QUALIFIED CIVIL LIABILITY ACTION.—(A)  
20 Subject to subparagraphs (B) and (C), the term  
21 “qualified civil liability action” means a civil action  
22 brought by any person against a manufacturer or  
23 seller of a qualified product, or a trade association,  
24 for damages, penalties, declaratory judgment, in-  
25 junctive or declaratory relief, restitution, or other re-

1        lief arising out of, related to, or resulting in injury  
2        or potential injury resulting from a person's con-  
3        sumption of a qualified product and weight gain,  
4        obesity, or any health condition that is associated  
5        with a person's weight gain or obesity, including an  
6        action brought by a person other than the person on  
7        whose weight gain, obesity, or health condition the  
8        action is based, and any derivative action brought by  
9        or on behalf of any person or any representative,  
10       spouse, parent, child, or other relative of any person.

11        (B) Such term shall not include—

12                (i) an action in which a manufacturer or  
13                seller of a qualified product knowingly and will-  
14                fully violated a Federal or State statute applica-  
15                ble to the manufacturing, marketing, distribu-  
16                tion, advertisement, labeling, or sale of the  
17                product, and the violation was a proximate  
18                cause of injury related to a person's weight  
19                gain, obesity, or any health condition associated  
20                with a person's weight gain or obesity; or

21                (ii) an action for breach of express con-  
22                tract or express warranty in connection with the  
23                purchase of a qualified product.

24        (C) Such term shall not be construed to include  
25        an action brought under the Federal Trade Commis-

1 sion Act (15 U.S.C. 41 et seq.) or the Federal Food,  
2 Drug, and Cosmetic Act (21 U.S.C. 301 et seq.).

3 (6) SELLER.—The term “seller” means, with  
4 respect to a qualified product, a person lawfully en-  
5 gaged in the business of marketing, distributing, ad-  
6 vertising, or selling a qualified product in interstate  
7 or foreign commerce.

8 (7) STATE.—The term “State” includes each of  
9 the several States of the United States, the District  
10 of Columbia, the Commonwealth of Puerto Rico, the  
11 Virgin Islands, Guam, American Samoa, and the  
12 Commonwealth of the Northern Mariana Islands,  
13 and any other territory or possession of the United  
14 States, and any political subdivision of any such  
15 place.

16 (8) TRADE ASSOCIATION.—The term “trade as-  
17 sociation” means any association or business organi-  
18 zation (whether or not incorporated under Federal  
19 or State law) that is not operated for profit, and 2  
20 or more members of which are manufacturers, mar-  
21 keters, distributors, advertisers, or sellers of a quali-  
22 fied product.

○

Mr. KELLER. Thank you, Mr. Chairman. This legislation 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.

The policy of the legislation is that there should be commonsense in a food court, not blaming other people in a legal court.

Most people have enough commonsense to realize that if they eat an unlimited amount of french fries, milkshakes, and cheeseburgers, it can possibly lead to obesity. In a country like the United States, where freedom of choice is cherished, nobody is forced to order the milkshake and double cheeseburger instead of the Diet Coke and salad.

Chairman SENSENBRENNER. The Committee will be in order. There's a little too much chatter here.

The gentleman from Florida is entitled to be heard.

Mr. KELLER. Thank you, Mr. Chairman. 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, nine out of 10 Americans opposed holding the fast food industry legally responsible for the diet-related health problems of overweight individuals. Both Congress and the various State legislators share the public's sentiment that it is wrong to allow restaurants to be sued just because an individual over consumes a non-defective, legal food product.

For example, after I filed this legislation in February 2003, 18 States have now passed laws banning these obesity lawsuits.

In addition, this bill passed the U.S. House of Representatives last term, with a large bipartisan vote of 276 to 139. And in the U.S. Senate last term, it was sponsored by Senator Mitch McConnell, and co-sponsored by Senator Harry Reed.

Why is this issue worth our time? The food industry is the largest private sector employer in the United States, providing jobs for 12 million Americans. This vital sector of our national economy has recently come under attack by lawsuits alleging that it should pay monetary damages based on legal theories, holding it liable for the over consumption of its legal products by others.

The consequences of these obesity lawsuits against the food industry is that consumers could pay a higher price in restaurants and grocery stores. Restaurants would face unaffordable insurance rate hikes, and jobs could be cut as a result.

Is the threat of these suits real? Yes. Here are the real facts.

In August 2002, John Banzhaf, a law professor who testified before this Committee and who played a role in suing the tobacco industry, went on national TV and announced the goal of seeking \$117 billion from the food industry. Based on a contingency fee of 40 percent, these lawyers would stand to recover \$47 billion for themselves in attorneys fees.

In January 2003, Banzhaf stated "somewhere there is going to be a judge and a jury that will buy this. And once we get the first verdict, as we did with tobacco, it will open the floodgates."

In June 2003, Banzhaf and other trial lawyers from across the U.S. gathered together in a nationwide conference and signed affi-



davits stating that they “intended to encourage and support litigation against the food industry.”

Indeed, lawsuits have already been filed against four separate fast food companies. On January 25, 2005, the United States Court of Appeals for the Second Circuit allowed one suit in New York to go forward against McDonald’s on procedural grounds.

Now, according to the witness called by the minority at our hearing on this matter, Mr. John Banzhaf, these initial lawsuits against restaurants. He has made the following statements to the media, and I will quote him.

Quote. “We are going to sue them and sue them and sue them. The very fact that lawyers are going to be making money out of suing restaurants is exactly what we are counting on. When lawyers see how lucrative these lawsuits are, they will all join in.”

He goes on to say: “I would not be surprised to see McDonald’s pay more than \$50 billion over the next decade. Never underestimate the tenacity of a lawyer working on a contingency fee. Once we get the first verdict, as we did with tobacco, it will open the floodgates.”

Indeed the threat of obesity lawsuits was sufficient enough to warrant a cover story by Fortune Magazine, which shows a french fry located in an ashtray and asks, is fat the next tobacco? In my view, these lawsuits against the food industry won’t make a single individual any skinnier. It will only make the trial lawyers’ bank accounts fatter.

We need to get 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 old fashion principles of personal responsibility and commonsense, and get away from this new culture where people try to always play the victim and blame others for their problems.

This legislation is a step in the right direction. I urge my colleagues to vote yes once again. Mr. Chairman, I yield back.

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

Mr. CONYERS. Mr. Chairman, this is one incredible piece of legislation. And I’d like to correct the author, the previous speaker about the measure because we have not had any hearings on this in the 109th Congress.

But H.R. 554 does something more than ban private suits brought against the food industry. If you examine this measure, it bans suits for harm caused by dietary supplements and mislabeling, which have nothing to do with excess food consumption, and would prevent State law enforcement officials from bringing legal actions to enforce their own consumer protection laws.

So this bill has a lot more underneath than in between the bun than you might suspect. If you don’t believe me, section 4 paren 5 would prevent any legal action relating to any health condition that is associated with a person’s weight gain or obesity, stemming from the consumption of a food or medicinal product. There’s no requirement whatsoever that the person actually have gained weight as a result of consuming the product. As a result, the bill could prevent persons who develop heart disease or diabetes from dietary supplements, such as Ephedra and PhenFen, from being able to obtain redress.

This is a seriously mischaracterized bill that goes way beyond personal responsibility in food consumption.

Even worse, the bill bans lawsuits on a retroactive basis, so it would throw out medical cases currently pending in court. This is a far cry from the stated concerns that reportedly led to the creation of this legislation.

The final thing that it does. It prevents State law enforcement officials from enforcing their own laws. Under section 4, the bill applies to legal actions brought by any persons, which, in turn, is defined to include any Government entity, which means State attorneys general, who would then be prevented from pursuing actions for deceptive practices and false advertising against the food industry.

Again, this is a vast departure from most of the so-called tort reform bills considered by this Committee, which are drafted to apply to private lawsuits and not to restrain public law enforcement efforts.

So the legislation deals with a nearly non-existent problem. There have been only a handful of private obesity suits that have been brought, and all but one have been dismissed.

The system is working fine. There is absolutely no crisis. Frivolous suits are thrown out of courts, and lawyers who bring them are subject to fines and other sanctions.

And so join with me in holding down the near panic or pseudo panic that has been hyped up around this measure, and let's take this off the table for once and for all.



1000 CALVERT STREET NW  
SUITE 500  
WASHINGTON, DC 20004  
WWW.ALIANCEFORJUSTICE.ORG  
TEL: 202.462.6000  
FAX: 202.462.6000

May 24, 2005

The Honorable F. James Sensenbrenner, Jr., Chair  
The Honorable John Conyers, Jr., Ranking Minority Member  
United States House of Representatives  
Committee on the Judiciary  
Washington DC 20510

PRESIDENT  
NAN ARON  
CHAIR  
JAMES D. WELLS

Dear Congressmen Sensenbrenner and Conyers:

Alliance for Justice opposes the "Personal Responsibility in Food Consumption Act," H.R. 554, because it gives a super-size protection to a single special interest. The bill will prevent consumers from being able to hold the food industry liable for its negligent and reckless conduct.

Under the bill as currently written, the food industry is let off the hook for failing to exercise the reasonable care that the law requires from almost everyone else. For example, a food company that incorrectly labels its product by indicating to the buying public that it has a fraction of the saturated fat that it actually has, or claiming that its food is "healthy" when it is not, escapes liability from private litigation.

There is no justification for giving such special protection given to the food industry. On the heels of much media attention about a lawsuit against McDonald's on behalf of two children who argued that the fast food chain had legal responsibility for deceptively advertising its food as healthy, this bill is being pushed with much fanfare. Public policy by press release, however, rarely produces thoughtful legislation.

We also oppose H.R. 554 because it pre-empts state law. By long standing tradition in our Constitutional system, except in extraordinary situations, tort law is an area left for states. No need exists to strip states of their ability to address food liability cases. The record is clear that state legislatures and state courts have been diligently handling this issue. Moreover, while taking the food industry out of the reach of the court system is bad enough, making the bill retroactive is even worse. It is simply unfair to change the rules in mid-stream for cases already in court, particularly when the rule change overwhelmingly favors the food industry.

We oppose H.R. 554. The bill should be renamed the "Corporate Irresponsibility Protection Act" because it allows the food industry to escape accountability for the harms they cause by negligent and reckless conduct.

Sincerely,

Nan Aron, President





April 27, 2005

Honorable F. James Sensenbrenner, Jr.  
 Chairman  
 House Judiciary Committee  
 Room 2138 Rayburn House Office Building  
 Washington, D.C. 20515

Honorable John Conyers, Jr.  
 Ranking Member  
 House Judiciary Committee  
 Room 2138 Rayburn House Office Building  
 Washington, D.C. 20515

**Re: Consumers Union's opposition to H.R. 554, a bill shielding the fast food industry from liability for the health effects of its food and beverages and failure to disclose those effects.**

Dear Chairman Sensenbrenner and Ranking Member Conyers:

Consumers Union asks you to oppose H.R. 554, the so-called "Personal Responsibility in Food Consumption Act." Regardless of where one stands on the viability of potential lawsuits against the fast food industry, CU believes that providing blanket immunity to any industry is ill-advised. Moreover, a number of important facts should be seriously considered before shielding any behavior from legal scrutiny.

The fast food industry exerts an enormous, potentially harmful impact on lower income consumers:

- According to former U.S. Surgeon General David Satcher, fast food restaurants crowd out access to healthier food in inner-city neighborhoods.<sup>1</sup>
- Experts believe that fast food marketing in inner-city neighborhoods is comparable to overly aggressive tobacco marketing in inner-city neighborhoods during the 1990s.<sup>2</sup>
- "High-fat, high-calorie foods are a common refuge for the hungry and poor, who tend to favor bulk and low prices over nutritional value, experts say."<sup>3</sup>
- According to Northeastern University, "McDonald's alone spent *\$1.1 billion* on advertising in 2001; the government's budget for a pro-fruit/vegetable campaign was *\$1.1 million*." (emphases added)<sup>4</sup>

<sup>1</sup> "Surgeon General: Obesity rivals tobacco as health ill," *USA Today* (12/13/2001).

<sup>2</sup> *Id.*

<sup>3</sup> "The Obesity Crisis: A healthy diet often beyond the means of poor, hungry," *Seattle Post-Intelligencer* (9/9/2004).

<sup>4</sup> "Childhood Obesity Study Tells Only Part of the Story," *News from Northeastern* (January 6, 2004).

- “[P]eople in the poorest urban areas have two and half times more exposure to fast food outlets than people in the wealthiest category.”<sup>5</sup>

The fast food industry may also exert undue influence on children, regardless of their social, economic, and ethnic backgrounds:

- According to CBS News, “[t]he highest levels of fast-food consumption were found in youngsters with higher household income levels, boys, older children, blacks and children living in the South.”<sup>6</sup>
- “Every day, nearly one-third of U.S. children aged 4 to 19 eat fast food, which likely packs on about six extra pounds per child per year and increases the risk of obesity, a study of 6,212 youngsters found.”<sup>7</sup>
- According to *Consumer Reports*, “a 15-year study from Harvard Medical School of more than 3,700 young adults from across the country found that eating fast food more than twice a week increased the risk of obesity by about 50 percent for whites....”<sup>8</sup>

Recent data suggest that nearly 16 percent of our children are obese.<sup>9</sup>

In spite of these alarming statistics, the fast food industry continues to engage in aggressive marketing to children:

- According to a Kaiser Family Foundation report released last year, businesses spend billions of dollars on food advertising, with a typical child viewing 40,000 television ads each year (often featuring their favorite TV and movie characters), a majority of which are for fast food, soda, cereal and candy.<sup>10</sup>
- According to Healthy School Meals Resource System, a project of the USDA, “[a]dvertisers appeal directly to parents AND teach kids to influence their parents’ purchases. The food industry links food with entertainment and toys instead of with growth and health. ... Products are marketed through television, radio, print media, coupons, films and books.”<sup>11</sup> In addition, “[s]oft drink companies have pouring rights contracts in schools. Fast food chains sell food in school and hospital cafeterias. The in-school television network Channel One has advertising. Computer-literate kids are used as research subjects through online panels and chat rooms.”<sup>12</sup>
- According to the Center for Science in the Public Interest, McDonald’s has a Barbie doll “dressed up as a McDonald’s clerk, feeding French fries, burgers, and Sprite to kid sister Kelly in a restaurant playset.”<sup>13</sup>

<sup>5</sup> *Id.*

<sup>6</sup> “Fast Food Linked To Child Obesity,” CBSNEWS.com (January 5, 2003).

<sup>7</sup> *Id.*

<sup>8</sup> “Cut the Fat,” *Consumer Reports*, 13 (January 2004).

<sup>9</sup> “Obesity and Overweight,” Centers for Disease Control and Prevention (April 21, 2005)

<sup>10</sup> “Kaiser Family Foundation Releases New Report on Role of Media in Childhood Obesity,” (Feb. 24, 2004)

<sup>11</sup> “The Marketing of Supersize to Kids,” Healthy School Meals Resource System (March 2003).

<sup>12</sup> *Id.*

<sup>13</sup> “Food Companies Undermine Parents, Overfed Kids, Says Report,” Center for Science in the Public Interest (November 10, 2003).

The facts and figures cited above demonstrate that there is much to learn about the fast food industry's products and marketing practices. Regardless of one's positions on the merits of lawsuits against this industry, this is not the time to provide blanket liability protection on the fast food industry.

Perhaps most important, while initial industry concern about liability brought about changes in their menu offerings, a lack of Congressional action in this area has begun to reverse those positive gains. *Consumer Reports* told our readers last January:

[s]ome big food companies are responding by changing the products they offer. McDonald's has introduced a successful line of entree salads, and it is test marketing a fresh apple dip dessert and an 'adult Happy Meal' that includes salad, bottled water, and a step meter to encourage more walking. Pizza Hut has added a thin crust Fit 'N Delicious pie with half the cheese. Taco Bell customers can now replace cheese with low-calorie, fat free Fiesta Salsa.<sup>14</sup>

And in 2003, *USA Today* reported that the fast food industry was actually starting to sell healthier food out of concern about lawsuits.<sup>15</sup>

But there are indications that this positive trend may be reversing. For example, an article in today's *Washington Post* addressed a controversy surrounding the Center for Consumer Freedom, a non-profit organization that is heavily funded by the tobacco, food and beverage industry, and which is responsible for aggressive advertising countering national concerns about an epidemic of obesity. The article reported, "Some restaurant chains recently have launched new fat-laden products, reversing what seemed to be a concerted effort over the past few years to prove that fast doesn't necessarily mean fat." Burger King introduced an Enormous Omelet Sandwich on March 28, with 760 calories and 50 grams of fat; on November 15, Hardee's introduced a Monster Thickburger with 1,418 calories and 107 grams of fat; and on January 18, Ruby Tuesday introduced the Ultimate Colossal Burger with 1,781 calories and 126 grams of fat.

Right now, 60 million Americans are obese, at risk for a host of related health problems and evidence shows that the situation is not improving, it is getting worse.<sup>16</sup> We urge you to help prevent the rollback of even modest gains relating to fast food industry responsiveness to consumer health, and to oppose H.R. 554.

Sincerely,

Sally Greenberg  
Senior Product Safety Counsel

Chanelle Hardy  
Esther Peterson Fellow

<sup>14</sup> "Cut the Fat," 13.

<sup>15</sup> Horowitz, Bruce. "Under fire, food giants switch to healthier fare," *USA Today* (July 1, 2003).

<sup>16</sup> Obesity and Overweight."



Buyers Up • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group  
**Joan Claybrook, President**

April 27, 2005

Committee on the Judiciary  
U.S. House of Representatives  
Washington, DC 20515

Re: H.R. 554 - "Personal Responsibility in Food Consumption Act"

Dear Chairman Sensenbrenner and Representative Conyers:

H.R. 554, a bill relating to the fast food industry, would exempt manufacturers, distributors and sellers of food and non-alcoholic beverages from civil liability unless the plaintiff proves that the product was not in compliance with applicable statutory and regulatory requirements. For the reasons stated below, we strongly oppose this bill. We ask that you include these comments in the hearing record.

The purpose of this bill is to curb the development of the common law as it relates to the processing of foods. We find this effort quite disturbing. Public Citizen is closely identified with the movement to make automobiles safer. As the lobbyists promoting H.R. 554 well know, the duty to design automobiles so that occupants can survive a crash was first imposed by courts, as the law of torts evolved in recognition of the central role that automobiles play in American society. Today, processed foods are becoming equally ubiquitous. Food manufacturers clearly want to head off the type of judicial scrutiny and analysis that produced the crashworthiness doctrine a generation ago. Some find it easy to ridicule the notion that foods, to the extent that they are engineered, ought to be engineered safely. But the same sentiments were expressed about the then-cutting edge doctrine of crashworthiness when it was first advanced in the 1950s. A few years afterward the doctrine was embraced not only by courts but by Congress. Today no American car buyer would accept anything less.

The bill is presented as a means of defeating "frivolous" lawsuits. It appears to us that the legal system has been quite capably handling the lawsuits that have come before it. Non-meritorious cases such as the much-publicized obesity lawsuit against McDonald's have been dismissed. In Pelman v. McDonald's Corporation, parents sued the fast food restaurant on behalf of their children, claiming that the children became obese and developed serious health problems as a result of consuming McDonald's food, which they did in reliance on representations by the restaurant that the food was healthy. The federal district court judge presiding over the case ruled that the plaintiffs failed to establish a causal connection between McDonald's alleged false

advertising and the health problems of the children. In addition, the judge ruled that the advertising claims at issue were not objectively deceptive. The plaintiffs were denied a second opportunity to amend their complaint, and the case was dismissed with prejudice.

There are other mechanisms to ensure that baseless cases do not flood our courts. Attorneys who bring frivolous cases can be sanctioned under Federal Rule of Civil Procedure 11. Additionally, the contingency fee system operates to prevent attorneys from taking cases that do not meet legal and evidentiary requirements. Safeguards are already in place to ensure that defendants' rights are respected making legislation that would take away consumers' rights unwarranted.

The McDonald's decision provides a glimpse of the constructive role that the tort system can play in ensuring food safety. Although all of the claims were dismissed, the court did highlight one claim that had the potential to succeed had it been factually true: a claim that heightened dangers of fast food products result from their heavy processing and are not commonly known. The court discussed the composition of McDonald's french fries and chicken nuggets and concluded that it could be possible to establish that McDonald's had a duty to inform its customers about possible dangers of the unusual food it had created. The recognition of such a duty by the courts would very likely result in a number of healthy changes being made to the way fast food is both made and marketed. Our common law tort system has taken a restrained approach in the context of food litigation, but it should retain its power to impose new duties when justice requires it.

H.R. 554 is special interest legislation that panders to the fast food industry at the expense of many traditional legal principles. We urge you not to move forward with this bill.

Sincerely,

Frank Clemente  
Director, Public Citizen  
Congress Watch



**CSPI** Center for  
Science in the  
Public  
Interest  
nonprofit  
publisher of *Nutrition Action Healthletter*

April 28, 2005

The Honorable John Conyers, Jr.  
Ranking  
Committee on the Judiciary  
Room 2142  
Rayburn House Office Building  
Washington, D.C. 20515

Dear Representative Conyers:

On behalf of our 800,000 American subscribers and members, I write to advise you of CSPI's strong opposition to H.R. 554, the Personal Responsibility in Food Consumption Act, because it distracts Congress from addressing the problem of obesity and other diet-related chronic diseases, such as heart disease, stroke, cancer, dental caries, and diabetes.

H.R. 554 would restrict lawsuits in both state and Federal courts that allege injury "resulting...from...weight gain, obesity, or any health condition that is associated with a person's weight gain or obesity."

Congress should be debating what it could do to combat the major public health problem of obesity – such as supporting Representative DeLauro's bill to require disclosure in chain restaurants of calorie information (H.R. 3444 in the last Congress). Instead, H.R. 554 is – as the *New York Times* editorial put it on March 12, 2004, after the House passed similar legislation (H.R. 339) last year – "an exercise in special-interest pandering, not calorie counting." *The Washington Post* editorialized on March 24, 2004 "Making policy that could retard an emerging [obesity] epidemic would be a far better use of legislators' time than nixing a waive of litigation that does not exist and that the courts could very likely handle without Congress's help."

There are numerous problems with this legislation:

- H.R. 554 is aimed at what *The New York Times* editorial called a "phantom judicial crisis." Last year's report on H.R. 339 concedes that only one obesity lawsuit – against McDonald's – has been filed.<sup>1</sup>
- H.R. 554 would apply to State Attorneys General as well as private plaintiffs.

<sup>1</sup> H.R. Rept. 108-432 at 5.

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Michael F. Jacobson, Ph.D.  
Executive Director  
340-6

- H.R. 554 might restrict suits against firms that made and sold the dietary supplement ephedra, which was marketed in part as a way to combat obesity<sup>2</sup> (ephedra was banned in 2004 by the Food and Drug Administration, though a recent district court decision negated the ban for at least one company).
- H.R. 554 applies to current suits – such as those involving ephedra – as well as future ones. On at least seven other occasions Congress has not applied limits on liability retroactively.<sup>3</sup>
- H.R. 554 curtails suits in state courts as well as in Federal courts even though state legislatures are competent to handle whatever litigation abuses they see in their courts. At least 18 states – Arizona, Colorado, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Michigan, Missouri, North Dakota, Ohio, South Dakota, Tennessee, Utah, Washington, and Wyoming – have already passed such legislation, and about 20 other states are currently considering such legislation.
- While H.R. 554 restricts suits *against* the food industry, it does nothing about suits *by* the food industry that many consider frivolous. For example, the beef industry sued Oprah Winfrey for criticizing beef. McDonald's sued an Italian food critic for saying that fast food is "repellant." Monsanto sued a small Maine dairy in Federal court because its milk cartons say "Our farmers' pledge: no artificial growth hormones." Such hormones are banned in Canada and the European Union, and the State of Maine requires that dairies seeking to use Maine's quality seal of approval on products must receive signed affidavits from dairy farmers who have pledged not to use artificial growth hormones.
- While H.R. 554 permits obesity-related suits if there is a "knowing and

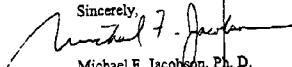
<sup>2</sup> Section 4(5) of H.R. 554 says that the bill applies to "a civil action brought by any person against a manufacturer or seller of a qualified product...resulting in injury or potential injury resulting from a person's consumption of a qualified product and weight gain, obesity, or any health condition that is associated with a person's weight gain or obesity," and section 4(4) defines a "qualified product" as a "food" as defined in section 201(f) of the Federal Food, Drug, and Cosmetic Act ("FFDCA"). However, section 201(ff) of the FFDCA says, in pertinent part, that "a dietary supplement shall be deemed to be a food within the meaning of this Act."

<sup>3</sup> H.R. Rept. 108-432 at 58.

willful" violation of a Federal or state statute, this provision may have the effect of making it more difficult for a plaintiff to win such a suit by immunizing a defendant's behavior that is either negligent or reckless.

In conclusion, Congress should not waste its time on a faulty legislative solution in search of a problem. We urge you to support legislation that will actually help combat obesity.

Sincerely,



Michael F. Jacobson, Ph. D.  
Executive Director

enclosures: *New York Times* editorial "Political Hot-Dogging in the House" (March 12, 2004)

*Washington Post* editorial "Missing a Fat Target" (March 22, 2004)

Mr. CONYERS. Thank you, Mr. Chairman. I return any unused time.

Chairman SENSENBRENNER. Without objection. All Members' opening statements will appear in the record at this point.

The chair recognizes the gentleman from Florida for purposes of offering an amendment in the nature of a substitute.

Mr. KELLER. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. The Clerk will report the amendment.

The CLERK. Amendment in the nature of a substitute to H.R. 554, offered by Mr. Keller—

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

Chairman SENSENBRENNER. Without objection.

[The amendment follows:]

**AMENDMENT IN THE NATURE OF A SUBSTITUTE  
TO H.R. 554  
OFFERED BY MR. KELLER OF FLORIDA**

Strike all after the enacting clause and insert the following:

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the "Personal Responsibility  
3 in Food Consumption Act of 2005".

4 **SEC. 2. FINDINGS; PURPOSE.**

5 (a) FINDINGS.—Congress finds that—

6 (1) the food and beverage industries are a sig-  
7 nificant part of our national economy;

8 (2) the activities of manufacturers and sellers  
9 of foods and beverages substantially affect interstate  
10 and foreign commerce;

11 (3) a person's weight gain, obesity, or a health  
12 condition associated with a person's weight gain or  
13 obesity is based on a multitude of factors, including  
14 genetic factors and the lifestyle and physical fitness  
15 decisions of individuals, such that a person's weight  
16 gain, obesity, or a health condition associated with  
17 a person's weight gain or obesity cannot be attrib-



1       uted to the consumption of any specific food or bev-  
2       erage; and

3       (4) because fostering a culture of acceptance of  
4       personal responsibility is one of the most important  
5       ways to promote a healthier society, lawsuits seeking  
6       to blame individual food and beverage providers for  
7       a person's weight gain, obesity, or a health condition  
8       associated with a person's weight gain or obesity are  
9       not only legally frivolous and economically dam-  
10      aging, but also harmful to a healthy America.

11      (b) PURPOSE.—The purpose of this Act is to allow  
12      Congress, State legislatures, and regulatory agencies to  
13      determine appropriate laws, rules, and regulations to ad-  
14      dress the problems of weight gain, obesity, and health con-  
15      ditions associated with weight gain or obesity.

16      **SEC. 3. PRESERVATION OF SEPARATION OF POWERS.**

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

19      (b) DISMISSAL OF PENDING ACTIONS.—A qualified  
20      civil liability action that is pending on the date of the en-  
21      actment of this Act shall be dismissed immediately by the  
22      court in which the action was brought or is currently pend-  
23      ing.

24      (c) DISCOVERY.—



1 (1) STAY.—In any action that is allegedly of  
2 the type described in section 4(5)(B) seeking to im-  
3 pose liability of any kind based on accumulative acts  
4 of consumption of a qualified product, the obligation  
5 of any party or non-party to make disclosures of any  
6 kind under any applicable rule or order, or to re-  
7 spond to discovery requests of any kind, as well as  
8 all proceedings unrelated to a motion to dismiss,  
9 shall be stayed prior to the time for filing a motion  
10 to dismiss and during the pendency of any such mo-  
11 tion, unless the court finds upon motion of any  
12 party that a response to a particularized discovery  
13 request is necessary to preserve evidence or to pre-  
14 vent undue prejudice to that party.

15 (2) RESPONSIBILITY OF PARTIES.—During the  
16 pendency of any stay of discovery under paragraph  
17 (1), the responsibilities of the parties with regard to  
18 the treatment of all documents, data compilations  
19 (including electronically recorded or stored data),  
20 and tangible objects shall be governed by applicable  
21 Federal or State rules of civil procedure. A party ag-  
22 grieved by the failure of an opposing party to comply  
23 with this paragraph shall have the applicable rem-  
24 edies made available by such applicable rules, pro-



1 vided that no remedy shall be afforded that conflicts  
2 with the terms of paragraph (1).

3 (d) PLEADINGS.—In any action that is allegedly of  
4 the type described in section 4(5)(B) seeking to impose  
5 liability of any kind based on accumulative acts of con-  
6 sumption of a qualified product, the complaint initiating  
7 such action shall state with particularity—

8 (1) each element of the cause of action;

9 (2) the Federal and State statutes or other laws  
10 that were allegedly violated;

11 (3) the specific facts alleged to constitute the  
12 claimed violation of law; and

13 (4) the specific facts alleged to have caused the  
14 claimed injury.

15 (e) RULE OF CONSTRUCTION.—No provision of this  
16 Act shall be construed to create a public or private cause  
17 of action or remedy.

18 **SEC. 4. DEFINITIONS.**

19 In this Act:

20 (1) **ENGAGED IN THE BUSINESS.**—The term  
21 “engaged in the business” means a person who man-  
22 ufactures, markets, distributes, advertises, or sells a  
23 qualified product in the person’s regular course of  
24 trade or business.





1 (2) MANUFACTURER.—The term “manufac-  
 2 turer” means, with respect to a qualified product, a  
 3 person who is lawfully engaged in the business of  
 4 manufacturing the product.

5 (3) PERSON.—The term “person” means any  
 6 individual, corporation, company, association, firm,  
 7 partnership, society, joint stock company, or any  
 8 other entity, including any governmental entity.

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

13 (5) QUALIFIED CIVIL LIABILITY ACTION.—

14 (A) IN GENERAL.—Subject to subpara-  
 15 graph (B), the term “qualified civil liability ac-  
 16 tion” means a civil action brought by any per-  
 17 son against a manufacturer, marketer, dis-  
 18 tributor, advertiser, or seller of a qualified  
 19 product, or a trade association, for damages,  
 20 penalties, declaratory judgment, injunctive or  
 21 declaratory relief, restitution, or other relief  
 22 arising out of, or related to a person’s accumu-  
 23 lated acts of consumption of a qualified product  
 24 and weight gain, obesity, or a health condition  
 25 that is associated with a person’s weight gain or



1 obesity, including an action brought by a person  
2 other than the person on whose weight gain,  
3 obesity, or health condition the action is based,  
4 and any derivative action brought by or on be-  
5 half of any person or any representative,  
6 spouse, parent, child, or other relative of that  
7 person.

8 (B) EXCEPTION.—A qualified civil liability  
9 action shall not include—

10 (i) an action based on allegations of  
11 breach of express contract or express war-  
12 ranty, provided that the grounds for recov-  
13 ery being alleged in such action are unre-  
14 lated to a person's weight gain, obesity, or  
15 a health condition associated with a per-  
16 son's weight gain or obesity;

17 (ii) an action based on allegations  
18 that—

19 (I) a manufacturer or seller of a  
20 qualified product knowingly violated a  
21 Federal or State statute applicable to  
22 the marketing, advertisement, or la-  
23 beling of the qualified product with in-  
24 tent for a person to rely on that viola-  
25 tion;



1 (II) such person individually and  
2 justifiably relied on that violation; and

3 (III) such reliance was the proximate  
4 cause of injury related to that  
5 person's weight gain, obesity, or a  
6 health condition associated with that  
7 person's weight gain or obesity; or

8 (iii) an action brought by the Federal  
9 Trade Commission under the Federal  
10 Trade Commission Act (15 U.S.C. 41 et  
11 seq.) or by the Federal Food and Drug  
12 Administration under the Federal Food,  
13 Drug, and Cosmetic Act (21 U.S.C. 301 et  
14 seq.).

15 (6) SELLER.—The term "seller" means, with  
16 respect to a qualified product, a person lawfully en-  
17 gaged in the business of marketing, distributing, ad-  
18 vertising, or selling a qualified product.

19 (7) STATE.—The term "State" includes each of  
20 the several States of the United States, the District  
21 of Columbia, the Commonwealth of Puerto Rico, the  
22 Virgin Islands, Guam, American Samoa, and the  
23 Commonwealth of the Northern Mariana Islands,  
24 and any other territory or possession of the United



1 States, and any political subdivision of any such  
2 place.

3 (8) TRADE ASSOCIATION.—The term “trade as-  
4 sociation” means any association or business organi-  
5 zation (whether or not incorporated under Federal  
6 or State law) that is not operated for profit, and 2  
7 or more members of which are manufacturers, mar-  
8 keters, distributors, advertisers, or sellers of a quali-  
9 fied product.



Mr. KELLER. Mr. Chairman, substantively speaking, the amendment in the nature of a substitute is about 99 percent the same bill that we passed in this Committee and on the House floor, aside from a few technical corrections.

There are two provisions in the substitute amendment that are worth noting and pointing out.

First, we added a findings section to the front of the bill to better articulate the intent and purpose of the bill.

Second, we clarified the type of lawsuits that can still go forward under this bill, and showed that it's a narrowly tailored bill.

I'll briefly address each of these changes.

First, with respect to the findings and purpose section regarding our legislative intent, last year I had the chance to speak with Chief Justice William Rehnquist at a small gathering of Members, hosted by our congressional caucus on the judicial branch.

The Chief Justice made a suggestion in general. He said to avoid confusion regarding any particular bill's legislative intent or legislative history, he suggested that Members of Congress specifically state the legislative intent in a particular statute right there in the legislation. That sounded like a good commonsense idea, and we have done just that.

The second change we make is to show that this is a narrowly drawn measured piece of legislation, which doesn't immunize the food industry. It spells out exactly the type of claims that are able to go forward, contrary to what you heard Mr. Conyers say. The words medical cases and dietary supplements don't even appear in this legislation. Claims for mislabeling can still go forward and specifically say so.

Let me tell you what can go forward and what doesn't.

This bill only applies to obesity-related claims, that is the claims based on weight gain or obesity. That means lawsuits can go forward under the 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.

Similarly, if someone had a life threatening allergy to peanuts and they ate a candy bar that was mislabeled because it did not reveal that the candy bar had peanuts, then that claim could still go forward on at least two grounds: first, it doesn't have anything to do with weight gain or obesity; and, second, there is a specific exception for breach of contract or warranty claims which are unrelated to weight gain or obesity.

Finally, the substitute amendment makes clear that certain obesity-related claims could go forward in circumstances in which the plaintiff can specifically allege that they suffered harm as a result of a State or Federal law, including those dealing with marketing, advertising, or labeling of a food product, provided that the plaintiff can allege that he relied upon such inaccurate labeling or advertising and that such reliance was the proximate cause of the injury.

In short, this substitute amendment places the bill within the strike zone of reasonableness. One of the masterminds of the obesity lawsuits, John Banzhaf said, "if the legislators won't legislate, then the trial lawyers will litigate."

Of course, such lawsuits only break down the separation of powers of the branches of Government by improperly asking the court to substitute its judgement for that of the legislative body and by wrongfully attempting to regulate through litigation.

In contrast, this bill gets it right. I urge my colleagues to vote yes on the substitute amendment.

Mr. Chairman, I yield back the balance of my time.

Chairman SENSENBRENNER. Are there any second degree amendments to the Keller Amendment in the nature of a substitute?

The gentleman from North Carolina, Mr. Watt.

Mr. WATT. Mr. Chairman, I have an amendment at the desk. That's Watt Two—02.

Chairman SENSENBRENNER. The Clerk will report the amendment.

The CLERK. Amendment to the amendment in the nature of a substitute to H.R. 554, offered by Mr. Watt. Section 3(a) strike or state—

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

[The amendment follows:]

02

**AMENDMENT TO AMENDMENT IN THE NATURE OF A SUBSTITUTE  
TO H.R. 554  
OFFERED BY MR. WATT**

Section 3(a), strike “or State”.

Mr. WATT. Thank you, Mr. Chairman. If this bill was about only fat lawsuits or unhealthy eating habits, I think I'd be right there. I would have to say I'm not a big fan of fat lawsuits. I think they've gone overboard, too.

But the bill is about a lot more than that in my judgement. It's about our whole federalist form of Government, and some of the points that Mr. Keller made in his opening statement actually illustrate that.

Since the bill was originally introduced, 18 State legislatures have enacted so-called cheeseburger laws to prohibit certain claims from their courts. While most of those enacted apply retroactively, others, specifically Kansas, Arizona, and Colorado, do not. Some provide for a stay of discovery. Others do not. Some establish affirmative defenses. Others do not.

In short, in the considered judgement of each of these 18 State legislatures, laws have been enacted that best serve the residents of those States.

This bill completely preempts those laws and brings it to a screeching halt—brings to a screeching halt the work of 26 other

States that have pending before their State legislatures similar legislative efforts.

This amendment would simply apply the facts of this bill to the Federal courts to the extent that we have jurisdiction and this is a good idea.

We ought to exercise that jurisdiction in the Federal courts and stop pretending that we believe in States rights at the same time that we are trampling on State laws and presuming that State legislatures are either stupid or uncaring about the citizens of their States.

I think the record is there that the States are acting on this. You've got 18 States that have already acted on it. You've got 26 other States that are contemplating action of one kind or another, and this whole idea that we are somehow, because we said at the Federal level more enlightened and more brilliant and—has got to stop at some point.

And I don't know where we stop if we don't at least try to start here in stopping it.

It would be something else if the States—well, for me it wouldn't be something else if the States were doing nothing. I would still respect the States. But at least those of you who have told us time after time after time that you believe in the federalist—Federal form of Government that States have prerogatives. This is one of those areas where States have had prerogatives. And we should respect those prerogatives, and I would hope that with this modest amendment, we could take a step back—at least we—you know, if you all think this is a great idea, which I don't—I mean I'm still going to vote against it—even at the Federal level.

But to the extent that you think it's a great idea, at least limit it to the courts that we have jurisdiction over, and don't get carried away when our State legislatures are acting in this area.

And I would ask your support for this amendment, and yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from Florida.

Mr. KELLER. Thank you, Mr. Chairman. I respect the gentleman as well as his argument. This amendment has been argued before. It as defeated on the House floor by a vote of 158 to 261.

I'll be brief in my remarks. One of the main reasons we have to have this on the Federal level is to prevent forum shopping. Right now, you can't bring this type of suit in my home State of Florida or in Illinois or Kentucky or Ohio, which are all—happen to be headquarters of major fast food companies. You can't bring these suits in 18 States. That's why people go to States like New York, where you have very liberal pleading requirements and file these suits and will proceed.

And I think we have the authority under the Commerce Clause to enact this legislation to prevent a few States from causing great economic harm to the food industry, which is the largest non-governmental employer in the nation, and I would yield back the balance of my time.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from North Carolina, Mr. Watt.

Those in favor will say aye.

Opposed, no.

Chairman SENSENBRENNER. The noes appear to have it.

Mr. WATT. I ask for a recorded vote. I guess he was going to ask for one if you have moved the other way.

Chairman SENSENBRENNER. Yeah. A recorded vote is requested.

Those in favor of the Watt 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. No.

The CLERK. Mr. Coble, no. Mr. Smith?

Mr. SMITH OF TEXAS. 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. Lungren?

Mr. LUNGREN. No.

The CLERK. Mr. Lungren, no. Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no. Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no. Mr. Bachus?

[No response.]

The CLERK. Mr. Inglis?

Mr. INGLIS. No.

The CLERK. Mr. Inglis, no. Mr. Hostettler?

Mr. HOSTETTLER. No.

The CLERK. Mr. Hostettler, no. Mr. Green?

[No response.]

The CLERK. Mr. Keller?

Mr. KELLER. No.

The CLERK. Mr. Keller, no. Mr. Issa?

Mr. ISSA. No.

The CLERK. Mr. Issa, no. Mr. Flake?

[No response.]

The CLERK. Mr. Pence?

[No response.]

The CLERK. Mr. Forbes?

[No response.]

The CLERK. Mr. King?

[No response.]

The CLERK. Mr. Feeney?

[No response.]

The CLERK. Mr. Franks?

[No response.]

The CLERK. Mr. Gohmert?

Mr. GOHMERT. No.

The CLERK. Mr. Gohmert, no. Mr. Conyers?

Mr. CONYERS. Aye.

The CLERK. Mr. Conyers, aye. Mr. Berman?

[No response.]

The CLERK. Mr. Boucher?



[No response.]  
The CLERK. Mr. Nadler?  
[No response.]  
The CLERK. Mr. Scott?  
Mr. SCOTT. Aye.  
The CLERK. Mr. Scott, aye. Mr. Watt?  
Mr. WATT. Aye.  
The CLERK. Mr. Watt, aye. Ms. Lofgren?  
[No response.]  
The CLERK. Ms. Jackson Lee?  
Ms. JACKSON LEE. Aye.  
The CLERK. Ms. Jackson Lee, aye. Ms. Waters?  
Ms. WATERS. Aye.  
The CLERK. Ms. Waters, aye. Mr. Meehan?  
[No response.]  
The CLERK. Mr. Delahunt?  
[No response.]  
The CLERK. Mr. Wexler?  
[No response.]  
The CLERK. Mr. Weiner?  
[No response.]  
The CLERK. Mr. Schiff?  
Mr. SCHIFF. Aye.  
The CLERK. Mr. Schiff, aye. Ms. Sánchez?  
Ms. SÁNCHEZ. Aye.  
The CLERK. Ms. Sánchez, aye. Mr. Smith?  
[No response.]  
The CLERK. Mr. Van Hollen?  
[No response.]  
The CLERK. Mr. Chairman?  
Chairman SENSENBRENNER. No.  
The CLERK. Mr. Chairman, no.  
Chairman SENSENBRENNER. Members who wish to cast or change their vote. The gentleman from Alabama, Mr. Bachus.  
Mr. BACHUS. No.  
The CLERK. Mr. Bachus, no.  
Chairman SENSENBRENNER. The gentleman from Iowa, Mr. King?  
Mr. KING. No.  
The CLERK. Mr. King, no.  
Chairman SENSENBRENNER. The gentleman from Indiana, Mr. Pence?  
Mr. PENCE. No.  
The CLERK. Mr. Pence, no.  
Chairman SENSENBRENNER. The gentleman from Florida, Mr. Feeney?  
Mr. FEENEY. No.  
The CLERK. Mr. Feeney, no.  
Chairman SENSENBRENNER. The gentleman from Massachusetts, Mr. Meehan?  
Mr. MEEHAN. Aye.  
The CLERK. Mr. Meehan, aye.  
Chairman SENSENBRENNER. The gentleman from Arizona, Mr. Franks?  
Mr. FRANKS. No.  
The CLERK. Mr. Franks, no.

Chairman SENSENBRENNER. Further Members who wish to cast or change their votes?

If not, the Clerk will report the vote.

The CLERK. Mr. Chairman, there are 8 ayes and 17 noes.

Chairman SENSENBRENNER. And the amendment in the second degree is not agreed to.

Mr. WATT. Mr. Chairman.

Chairman SENSENBRENNER. Are there further amendments?

The gentleman from North Carolina.

Mr. WATT. Mr. Chairman, I have an amendment at the desk, Watt 05.

Chairman SENSENBRENNER. The Clerk will report the amendment.

The CLERK. Amendment to the amendment in the nature of a substitute to H.R. 554 offered by Mr. Watt. Page 2, Section 2—

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

The CLERK.—to line 12, delete, quote, comma, State legislatures—

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

[The amendment follows:]

05

**AMENDMENT TO AMENDMENT IN THE NATURE OF A SUBSTITUTE**

**TO H.R. 554**

**OFFERED BY MR. WATT**

Section 2, p.2, line 12, delete “, State legislatures,”.

Mr. WATT. Thank you, Mr. Chairman.

I almost have to laugh when I read this. Mr. Keller represented to us that the Chief Justice told him that he ought to put in the purpose of the law, and this is what this one reads: the purpose of this act is to allow Congress, State legislatures, and regulatory agencies to determine appropriate laws, so forth and so on.

We are taking every prerogative that State legislatures have in this area away from them. How in the world could we put in a finding that this bill, the purpose of this bill is to give State legislatures any kind of say? I mean, that can't be. This must be a mistake, and I hope even under the rules of this Committee and just reaffirmed by Lamar Smith and the Chairman that every once in awhile, when you do something that is really outrageous, you would at least acknowledge that it doesn't make any sense, because this one doesn't.

I would just ask that we not insult the States by telling them that we are giving them some authority at the same time as we are taking all of their authority away.

I yield back.

Chairman SENSENBRENNER. The gentleman from Florida.

Mr. KELLER. Thank you, Mr. Chairman.

First, I would make one correction. I didn't sit down with Chief Justice Rehnquist to talk about any specific case or controversy or any specific piece of legislation. He talked about legislation in general, to avoid future debates between justices and litigants about what the legislative history is, he said just tell us your intent. So I don't have any special insight with him with respect to this particular bill. Let me clarify that.

I'm going to oppose your change, and I'll be happy to explain why. If you look at page 6 of the bill starting at line 17, it talks about the claims that can go forward, and that's an action based on allegations that a manufacturer or seller of a qualified product knowingly violated a Federal or State statute applicable to the marketing, advertising, or labeling of a qualified product with the intent for a person to rely on that violation, such person individually and justifiably relied on that violation, and that reliance was the proximate cause of the injury related to that weight gain.

So States are free to come up with statutes that we don't and can bring suit over this. I will give you just one example: under the Nutrition Labeling and Education Act passed by Congress in 1990, restaurants are not required to put nutritional labeling on their menu, but it doesn't prevent States from doing that. And so, States would have that right.

And so, if a State passed some law that said that you must represent what the calories are of a particular product, and someone ran an advertisement for McDonald's saying we want you to buy our Big Macs because they're only 50 calories, and they're really healthy, and you go, relying on that, buy a Big Mac, and you eat it continually, and you eat them over 6 months, and you get fat, because they're really over 500 calories, you'd have a pretty good claim under State law.

So I think we have the appropriate deference in this particular situation, and I would urge my colleagues to vote no and yield back the balance of my time.

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

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

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, it is difficult to debate this. Having just defeated an amendment to give the States some role in this, defeated that amendment, now, we're going to declare that they have some right or some say is just absurd.

I support the amendment and yield to the gentleman from North Carolina.

Mr. WATT. Mr. Chairman, I don't want to belabor this. I just want you all to read lines 11 through 15. It says 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 associ-

ated with weight gain or obesity. And we are taking all of the authority away from State legislatures to do that.

I mean, appreciate the gentleman giving me the time, but I swear I can't say anything more. It's just outrageous.

Chairman SENSENBRENNER. Does the gentleman from Virginia—

Mr. SCOTT. I yield back.

Chairman SENSENBRENNER. Okay; the question is on the amendment offered by the gentleman from North Carolina in the second degree to the Keller substitute.

Those in favor will say aye.

Opposed, no.

The ayes appear to have it, the ayes have it, and the amendment is agreed to.

Are there further amendments?

Mr. WATT. Mr. Chairman.

The gentleman from North Carolina, Mr. Watt.

Mr. WATT. I have an amendment at the desk, Watt 01.

Chairman SENSENBRENNER. The Clerk will report the amendment.

The CLERK. Amendment to the amendment in the nature of a substitute to H.R. 554, offered by Mr. Watt. Strike Section 3(b).

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

[The amendment follows:]

01

**AMENDMENT TO AMENDMENT IN THE NATURE OF A SUBSTITUTE  
TO H.R. 554  
OFFERED BY MR. WATT**

Strike Section 3(b).

Mr. WATT. Thank you, Mr. Chairman. I will not take 5 minutes. All this does is strike the retroactivity provisions of the bill and apply it prospectively only, and I have made this argument before. I don't think we ought to—I guess the Supreme Court has ruled that you can, and I concede that, but I don't think you ought to change the rules in the middle of somebody's litigation and make these laws retroactively apply, and I hope my colleagues will support the amendment.

Thank you.

Chairman SENSENBRENNER. Does the gentleman yield back?

The gentleman from Florida, Mr. Keller.

Mr. KELLER. Thank you, Mr. Chairman.

Again, I respect the argument, understand it. I'm going to have to reluctantly oppose it. This is the same argument and amendment that was defeated on the House floor by a vote of 164 to 249.

Mr. WATT. Could I get my friend to yield to me just for a second?

Mr. KELLER. Yes.

Mr. WATT. I appreciate the gentleman yielding. I just wanted to point out to him that one of the laws that would be undermined here is the Florida cheeseburger law, which applies prospectively, not retrospectively.

Mr. KELLER. I thank the gentleman for yielding, reclaiming my time. Actually, I don't think Florida would be impacted, because we don't have any pending cases in Florida right now.

But just in brief, why we are going to oppose this: number one, it is allowed under Supreme Court precedent to apply retroactively if it is pursuant to an economic policy. Number two—there are three reasons. Number two, I am concerned that if this amendment passed, all that would happen is that hundreds of additional cases would be filed right before the enactment of the act, because that's what happened in Texas and Mississippi when recently enacted legal reforms that did not preclude pending cases were passed. And third, the suits should be dismissed just substantively, and for these reasons, I ask my colleagues to oppose it.

Mr. SCOTT. Mr. Chairman?

Chairman SENSENBRENNER. Does the gentleman yield back?

The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Mr. Chairman, I support the amendment, because it applies to cases where you have tried your case, you've won your case. It could even be on a frivolous appeal in violation of rule 11 just sitting there on appeal, and if this thing passes, all of a sudden, you've lost your case. That's not right, and the amendment ought to be adopted.

Chairman SENSENBRENNER. The gentleman yield back?

Mr. SCOTT. Yes.

Chairman SENSENBRENNER.

The question is on the amendment in the second degree offered by the gentleman from North Carolina, Mr. Watt.

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. SCOTT. Mr. Chairman, I have an amendment at the desk, Watt 03.

Chairman SENSENBRENNER. The Clerk will report the amendment.

The CLERK. Amendment to the amendment in the nature of a substitute to H.R. 554, offered by Mr. Watt. Section 3(e), page 4, line 17, after remedies—

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

[The amendment follows:]

**AMENDMENT TO AMENDMENT IN THE NATURE OF A SUBSTITUTE  
TO H.R. 554  
OFFERED BY MR. WATT**

Section 3(e), p. 4, line 17, after “remedy” insert “, including any disciplinary or other adverse action against a judge who delays, takes or fails to take action in accordance with subsection (b) of this Section.”

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

Mr. WATT. Mr. Chairman, this amendment responds to what I hope is just hasty draftsmanship of the substitute. While requiring in section 3(b) that a judge immediately dismiss automatically any action covered by the bill, the bill repeatedly makes reference to a motion to dismiss by the parties in the very next section.

Because judges are increasingly an endangered species in this body, my amendment provides protection by barring any efforts by litigants, judicial boards, or Congress to punish judges. Under this amendment, a deliberative judge who, for example, decides to hear argument on a motion to dismiss rather than immediately sua sponte, as the bill would say, dismisses an action, he or she believes meets the definition of a qualified civil liability action under this bill would be immune from a sanction under this bill, under the amendment.

So notwithstanding the rule of construction section of this bill and given the obvious discrepancy implicit in the sections, I believe it's necessary to make explicit that a judge who fails to act under one section while acting under the other sections should not be burdened with the expense and embarrassment of defending charges of misconduct or risking other sanctions. So I would hope my colleagues would make this clarification. This is not a revision. I hope it is just an oversight.

I yield back.

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

Mr. KELLER. Thank you, Mr. Chairman.

This is the first time I have seen this amendment, but the gist of the section he is seeking to amend, the rule of construction, no provision of this act shall be construed to create a public or private cause of action or remedy is just that. We don't want people thinking that this is something other than what it is, and that is a narrow bill designed to prevent litigation from arising from obesity or weight gain claims from eating lawful products. And so, we don't

want people to think just because something is not covered here that all of a sudden, that is a legitimate type of lawsuit that can be filed.

Now, with respect to his amendment, it seeks to essentially say that any disciplinary or adverse action against a judge who delays or takes or fails to take action in accordance with this—I'm not sure what it's trying to do. I guess immunize a judge from any responsibility if he fails to dismiss a claim pursuant to section 3(b), and I don't know if that's necessary. If a claim is not dismissed, and it should be dismissed, once the case is done, there is always an appellate right to remedy that.

So based on my understanding of it, I have no choice but to oppose the amendment.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from North Carolina, Mr. Watt.

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, Watt 08.

Chairman SENSENBRENNER. The Clerk will report the amendment.

The CLERK. Amendment to the amendment in the nature of a substitute to H.R. 554, offered by Mr. Watt. Section 3(b), page 2, line 23, after—

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

Chairman SENSENBRENNER. Without objection, so ordered.

The gentleman is recognized for 5 minutes.

[The amendment follows:]

08

**AMENDMENT TO AMENDMENT IN THE NATURE OF A SUBSTITUTE**

**TO H.R. 554**

**OFFERED BY MR. WATT**

Section 3(b), p. 2, line 23, after "ing" insert the following:

“, except where a settlement has been reached and signed by both parties or a judgment has been entered by the trial or appellate court”.

Mr. WATT. Thank you, Mr. Chairman.

This amendment seeks to impose some equity into the immediate dismissals mandated under this bill. Under the bill, any lawsuit, no matter where it is in the process: in trial, on appeal, in settlement negotiations, before a jury, settled, or in postjudgment proceedings must be dismissed. Litigants who have invested resources and relied on the law as it existed should not be punished for their reliance.

To bar lawsuits at an advanced stage in the litigation process is a waste of judicial economy and undermines public confidence in our legal system. This amendment responds to this injustice by allowing cases in which a judgment has been entered or a settlement reached and signed to proceed. In those actions, there are some reasonable expectations: someone has won or lost, or the parties have reached some finality among themselves, and there is no reason to be requiring that those lawsuits be dismissed. No purpose is served by undoing a valid judicial determination by legislation, and I urge my colleagues to support the amendment.

Chairman SENSENBRENNER. The gentleman from Florida.

Mr. WATT. I yield back.

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

Mr. KELLER. Mr. Chairman, I won't take any time. I've already explained why the dismissal of pending actions is there. This amendment is unnecessary. Who cares if a case is dismissed if you've already settled it and got your money? So I ask that my colleagues vote no.

Chairman SENSENBRENNER. The question is on the—

Mr. SCOTT. Mr. Chairman?

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

Mr. SCOTT. I didn't understand—who cares if they've already settled—move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized.

Mr. SCOTT. The question of who cares about people who have settled a case, if they have settled it, the settlement ought to go through, not dismissed retroactively notwithstanding the settlement. Even if they have gotten their money, they can get it back. Under this, the case is dismissed.

I yield to the gentleman from North Carolina.

Mr. WATT. Or if they've settled a case, and they haven't gotten the money, you don't care about them either, I guess. I mean, that is pretty cold and callous of a Judiciary Committee of Congress to be saying that to people. I mean, give us a break.

Chairman SENSENBRENNER. The question is on the amendment in the second degree offered by the gentleman from North Carolina, Mr. Watt.

Those in favor will say aye.

Those opposed, no.

The noes appear to have it. The noes have it.

Mr. WATT. I think I want a recorded vote on this.

Chairman SENSENBRENNER. Okay; a recorded vote on the Watt Amendment 08 is requested. Those in favor will, as your name is 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. No.  
 The CLERK. Mr. Coble, no.  
 Mr. Smith?  
 Mr. SMITH OF TEXAS. 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. Lungren?  
 Mr. LUNGREN. Pass.  
 The CLERK. Mr. Lungren, pass.  
 Mr. Jenkins?  
 Mr. JENKINS. Pass.  
 The CLERK. Mr. Jenkins, pass.  
 Mr. Cannon?  
 Mr. CANNON. No.  
 The CLERK. Mr. Cannon, no.  
 Mr. Bachus?  
 Mr. BACHUS. No.  
 The CLERK. Mr. Bachus, no.  
 Mr. Inglis?  
 Mr. INGLIS. No.  
 The CLERK. Mr. Inglis, no.  
 Mr. Hostettler?  
 Mr. HOSTETTLER. No.  
 The CLERK. Mr. Hostettler, no.  
 Mr. Green?  
 [No response.]  
 The CLERK. Mr. Keller?  
 Mr. KELLER. No.  
 The CLERK. Mr. Keller, no.  
 Mr. Issa?  
 Mr. ISSA. No.  
 The CLERK. Mr. Issa, 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. Feeney?  
 [No response.]  
 The CLERK. Mr. Franks?  
 Mr. FRANKS. No.  
 The CLERK. Mr. Franks, no.

Mr. Gohmert?  
 [No response.]  
 The CLERK. Mr. Conyers?  
 Mr. CONYERS. Aye.  
 The CLERK. Mr. Conyers, aye.  
 Mr. Berman?  
 [No response.]  
 The CLERK. Mr. Boucher?  
 [No response.]  
 The CLERK. Mr. Nadler?  
 [No response.]  
 The CLERK. Mr. Scott?  
 Mr. SCOTT. Aye.  
 The CLERK. Mr. Scott, aye.  
 Mr. Watt?  
 Mr. WATT. Aye.  
 The CLERK. Mr. Watt, aye.  
 Ms. Lofgren?  
 [No response.]  
 The CLERK. Ms. Jackson Lee?  
 Ms. JACKSON LEE. Aye.  
 The CLERK. Ms. Jackson Lee, aye.  
 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. Mr. Weiner?  
 [No response.]  
 The CLERK. Mr. Schiff?  
 Mr. SCHIFF. Aye.  
 The CLERK. Mr. Schiff, aye.  
 Ms. Sánchez?  
 Ms. SÁNCHEZ. Aye.  
 The CLERK. Ms. Sánchez, aye.  
 Mr. Smith?  
 [No response.]  
 The CLERK. Mr. Van Hollen?  
 Mr. VAN HOLLEN. Aye.  
 The CLERK. Mr. Van Hollen, aye.  
 Mr. Chairman?  
 Chairman SENSENBRENNER. No.  
 The CLERK. Mr. Chairman, no.  
 Chairman SENSENBRENNER. Members who wish to cast or change  
 their votes.  
 If not, the Clerk will report.  
 The gentleman from Tennessee, Mr. Jenkins.  
 Mr. JENKINS. No.  
 The CLERK. Mr. Jenkins, no.  
 Chairman SENSENBRENNER. The gentleman from California, Mr.  
 Lungren.

Mr. LUNGREN. No.  
 The CLERK. Mr. Lungren, no.  
 Chairman SENSENBRENNER. The Clerk will report.  
 The CLERK. Mr. Chairman, there are 8 ayes and 16 noes.  
 Chairman SENSENBRENNER. And the amendment in the second degree is not agreed to.  
 Are there further amendments?  
 Mr. WATT. Mr. Chairman.  
 Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt.  
 Mr. WATT. Mr. Chairman, this will be the final one, 06, Watt 06.  
 Chairman SENSENBRENNER. The Clerk will report the amendment.  
 Mr. WATT. My final one. I'm speaking for myself.  
 The CLERK. Amendment to the amendment in the nature of a substitute to H.R. 554, offered by Mr. Watt. Strike Section 3(d).  
 Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.  
 [The amendment follows:]

**AMENDMENT TO AMENDMENT IN THE NATURE OF A SUBSTITUTE  
 TO H.R. 554**

**OFFERED BY MR. WATT**

Strike Section 3(d).

Mr. WATT. Thank you, Mr. Chairman.  
 The bill identifies three exceptions to a qualified civil liability action otherwise barred by the bill. A plaintiff may bring an action, one, for breach of express contract or express warranty, provided the action is not based on the plaintiff's weight gain or obesity or health conditions caused thereby, or two, against a manufacturer or seller if they knowingly violate a relevant statute, the plaintiff relied upon the violation, and the violation proximately caused the injury complained of, and three, under the Federal Trade Commission Act or the Federal Food, Drug, and Commerce Act.  
 The exceptions provided are extremely narrow, and this amendment seeks to ensure that the suits allowed under the bill are not discouraged by a heightened pleading requirement, therefore effectively eliminating all lawsuits against and accountability of the food industry. The heightened pleading requirement is counter to notice pleading and will take us back to the days when technicalities resulted in the dismissal of many meritorious lawsuits.  
 This provision also demonstrates a complete disregard for State procedural regimes governing pleading practice in State courts. It

is disingenuous, in my opinion, to provide exceptions to prohibited actions while saddling those exceptions with virtually insurmountable barriers to initiating the claims that you have accepted. Moreover, there is absolutely nothing in the findings in this bill that suggests that these claims have been abused.

If the goal of this bill is not to provide a blanket immunity for the food industry, then, this amendment should be noncontroversial and supported, and I would ask my colleagues to support the amendment to preserve standard pleading requirements for the lawsuits that are still available after this bill passes.

I yield back the balance of my time.

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

Mr. KELLER. Thank you, Mr. Chairman.

I am going to oppose the amendment, and I'll tell you why. This provision for the plaintiff to just specifically tell us your allegation saves the time and money of all litigants, as it provides the court with crucial information early in the proceedings in which to determine whether the case can go forward. On April of this year, the Supreme Court made clear that those filing a lawsuit can be made by Congress to plead their complaint with specificity. *Dura Pharmaceuticals v. Broudo*. And Justice Breyer stated that it should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind.

So I would oppose the amendment and yield back the balance of my time.

Chairman SENSENBRENNER. The question is on agreeing to Watt Amendment No. 06 in the second degree.

Those in favor will say aye.

Those opposed, no.

The noes 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 Watt Amendment 06 in the second degree 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. No.

The CLERK. Mr. Coble, no.

Mr. Smith?

Mr. SMITH OF TEXAS. No.

The CLERK. Mr. Smith, no. Mr. Gallegly?

[No response.]

The CLERK. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

[No response.]

The CLERK. Mr. Lungren?

Mr. LUNGREN. No.

The CLERK. Mr. Lungren, no.

Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no.  
Mr. Cannon?  
Mr. CANNON. No.  
The CLERK. Mr. Cannon, no.  
Mr. Bachus?  
[No response.]  
The CLERK. Mr. Inglis?  
[No response.]  
The CLERK. Mr. Hostettler?  
Mr. HOSTETTLER. No.  
The CLERK. Mr. Hostettler, no.  
Mr. Green?  
[No response.]  
The CLERK. Mr. Keller?  
Mr. KELLER. No.  
The CLERK. Mr. Keller, no.  
Mr. Issa?  
Mr. ISSA. No.  
The CLERK. Mr. Issa, 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. Feeney?  
[No response.]  
The CLERK. Mr. Franks?  
Mr. FRANKS. No.  
The CLERK. Mr. Franks, no.  
Mr. Gohmert?  
[No response.]  
The CLERK. Mr. Conyers?  
Mr. CONYERS. Aye.  
The CLERK. Mr. Conyers, aye.  
Mr. Berman?  
[No response.]  
The CLERK. Mr. Boucher?  
[No response.]  
The CLERK. Mr. Nadler?  
[No response.]  
The CLERK. Mr. Scott?  
Mr. SCOTT. Aye.  
The CLERK. Mr. Scott, aye.  
Mr. Watt?  
Mr. WATT. Aye.  
The CLERK. Mr. Watt, aye.  
Ms. Lofgren?  
[No response.]  
The CLERK. Ms. Jackson Lee?

Ms. JACKSON LEE. Aye.  
The CLERK. Ms. Jackson Lee, aye.  
Ms. Waters?  
[No response.]  
The CLERK. Mr. Meehan?  
[No response.]  
The CLERK. Mr. Delahunt?  
[No response.]  
The CLERK. Mr. Wexler?  
[No response.]  
The CLERK. Mr. Weiner?  
[No response.]  
The CLERK. Mr. Schiff?  
Mr. SCHIFF. Aye.  
The CLERK. Mr. Schiff, aye.  
Ms. Sánchez?  
Ms. SÁNCHEZ. Aye.  
The CLERK. Ms. Sánchez, aye.  
Mr. Smith?  
[No response.]  
The CLERK. Mr. Van Hollen?  
Mr. VAN HOLLEN. Aye.  
The CLERK. Mr. Van Hollen, aye.  
Mr. Chairman?  
Chairman SENSENBRENNER. No.  
The CLERK. Mr. Chairman, no.  
Chairman SENSENBRENNER. Members in the chamber who wish to cast or change their vote.  
The gentleman from Massachusetts, Mr. Meehan.  
Mr. MEEHAN. Aye.  
The CLERK. Mr. Meehan, aye.  
Chairman SENSENBRENNER. The gentleman from South Carolina, Mr. Inglis.  
Mr. INGLIS. No.  
The CLERK. Mr. Inglis, no.  
Chairman SENSENBRENNER. The gentleman from Ohio, Mr. Chabot.  
Mr. CHABOT. No.  
The CLERK. Mr. Chabot, no.  
Chairman SENSENBRENNER. Further Members who wish to cast or change their votes.  
If not, the Clerk will report.  
The CLERK. Mr. Chairman, there are 8 ayes and 15 noes.  
Chairman SENSENBRENNER. And the amendment in the second degree is not agreed to.  
Are there further amendments?  
Mr. SCOTT. Mr. Chairman.  
Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott.  
Mr. SCOTT. Thank you, Mr. Chairman.  
I have an amendment at the desk.  
Chairman SENSENBRENNER. The Clerk will report the amendment.  
Mr. SCOTT. The one that says 009 at the end of the bill.

The CLERK. Amendment to the amendment in the nature of a substitute to H.R. 554, offered by Mr. Scott of Virginia. At the end of the bill, add the following new section: Section, state consumer protection actions. Notwithstanding any other provision to the contrary in this act, this act does not apply to an action brought by a State agency to enforce——

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

[The amendment follows:]

### **AMENDMENT TO H.R. 554**

#### **OFFERED BY MR. SCOTT OF VIRGINIA**

At the end of the bill, add the following new section:

- 1 **SEC. \_\_\_\_.** **STATE CONSUMER PROTECTION ACTIONS.**
- 2       Notwithstanding any other provision to the contrary
- 3 in this Act, this Act does not apply to an action brought
- 4 by a State agency to enforce a State consumer protection
- 5 law concerning mislabeling or other unfair and deceptive
- 6 trade practices.

Chairman SENSENBRENNER. The gentleman from Virginia is recognized for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, if we take up this legislation and decide that we are going to try to some cases instead of letting them be tried in court, we ought to at least limit that to the fast food rhetoric that we've heard. This bill, in fact, covers not only fast food lawsuits but also litigation involving consumer protection when obesity may be one of the elements of the case.

Now, every single State has laws on the books to protect its consumers. Each State has laws to protect consumers from misleading practices, and each attorney general has the power to enforce those laws. But unfortunately, as written, the bill will prevent State attorneys general from enforcing those laws. It will not just stop the individual fast food lawsuits that my colleagues have been discussing, but because a person who may be a plaintiff is defined in section 4(3) of the bill to include governmental entities, it will prevent States from getting injunctions, cease and desist orders, or imposing fines against those who endanger consumers.

The exceptions for knowing violation is not enough. State deceptive practices are just the like the Federal Trade Commission Act. They allow civil enforcement actions whether or not the defendant willfully or knowingly violated the law. In fact, food labeling and deceptive practices have often exacted strict liability, that is, that the Government can get an injunction whether or not a person intentionally or knowingly was in violation.

Mr. Chairman, my State of Virginia has a consumer protection act. It prohibits, and I quote, representing that foods and services have characteristics, ingredients, uses, benefits, or qualities that they do not have or any other conduct which similarly creates a likelihood of confusion or misunderstanding. Now, a court may order an injunction or restitution to injured parties even if the violation was unintentional.

And in fact, Virginia is not alone. At least 12 other States have specifically adopted the Uniform Deceptive Trade Practices Act, section 3, which says that intentional deceptive action is not necessary to get the injunction, and at least 23 other States have similar standards.

So, Mr. Chairman, my amendment that I present today will fix the problem. It will ensure that attorneys general and State agencies can put an end to mislabeling, deceptive practices, false advertising and other consumer fraud within their borders of the State. Whatever we think of the fast food suits, please do not prohibit attorneys general from protecting their citizens.

Mr. CONYERS. Would the gentleman yield?

Mr. SCOTT. I yield to the gentleman from Michigan.

Mr. CONYERS. I merely want to indicate my strong support for this amendment. This may, in many respects, be again the key amendment to this bill in which we at least save the attorney general from being precluded from doing his job as we move with this Federalization of local laws, and I thank the gentleman again for his contribution. I remember he brought this measure up the last time as well.

Thank you.

Mr. SCOTT. I yield back the balance of my time.

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

Mr. KELLER. Thank you, Mr. Chairman.

I thank the gentleman for his amendment. Same arguments were advanced for and against this amendment on the House floor, and the amendment failed by a vote of 241 to 177.

This bill already precludes lawsuits in which the injury claimed is obesity and weight gain. There are no State consumer protection laws that allow a State agency to sue for damages because someone got fat from eating too much. There are very vague State consumer protection laws such as the one in New York under which the claim was provided; it just says—this was allowed to go forward: deceptive acts or practices in the conduct of any business, trade or commerce.

That is pretty vague, and I don't want to create a situation where State attorneys general go around suing the food industry for obesity-related costs just like they went after the tobacco industry for \$246 billion. If there is some meritorious claim that can be brought, they are allowed under this action to do so if they can



show that a Federal statute dealing with marketing, advertisement or labeling has been violated, and they plead that a person relied on those violations and that was the proximate cause of their weight gain.

And so, I think the statute is best as it is, and this would unnecessarily encourage additional litigation of the type we don't want, and I would urge my colleagues to vote no.

Chairman SENSENBRENNER. Does the gentleman yield back?

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. It is at these times that I most miss Representative Barney Frank on this Committee, because he would always say if you don't want to add something, you make the argument that it is redundant.

If this does not do any harm, if there are no State laws that deal with this, I don't know what harm adding this section at the end of the bill would do. So I'm certainly not persuaded that that is a reason not to put the provision in there. This seems clearly to define a person as, and this is on page 5, line 8, including any governmental entity. I would think the attorney general would be a governmental entity, so if we are going to protect the rights of attorneys general to proceed, I think we need this provision.

I will yield to Mr. Scott.

Mr. SCOTT. I thank the gentleman for yielding.

I also want to add that it's not only damages that are precluded. On page 5, line 19, it says damages, penalties, declaratory judgment, injunctive or declaration relief, restitution or other relief are all prohibited that the attorney general can't do if this bill passes without the amendment. I would hope that we would allow the attorney general to enforce the State laws.

Chairman SENSENBRENNER. The question is on the second degree amendment offered by the gentleman from Virginia, Mr. Scott.

Those in favor will say aye.

Opposed, no.

The noes appear to have it.

A recorded vote is requested. Those in favor of the Scott 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. No.

The CLERK. Mr. Coble, no.

Mr. Smith?

Mr. SMITH OF TEXAS. No.

The CLERK. Mr. Smith, no.

Mr. Gallegly?

[No response.]

The CLERK. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

[No response.]  
 The CLERK. Mr. Lungren?  
 Mr. LUNGREN. No.  
 The CLERK. Mr. Lungren, no.  
 Mr. Jenkins?  
 Mr. JENKINS. No.  
 The CLERK. Mr. Jenkins, no.  
 Mr. Cannon?  
 Mr. CANNON. No.  
 The CLERK. Mr. Cannon, no.  
 Mr. Bachus?  
 [No response.]  
 The CLERK. Mr. Inglis?  
 Mr. INGLIS. No.  
 The CLERK. Mr. Inglis, no.  
 Mr. Hostettler?  
 Mr. HOSTETTLER. No.  
 The CLERK. Mr. Hostettler, no.  
 Mr. Green?  
 [No response.]  
 The CLERK. Mr. Keller?  
 Mr. KELLER. No.  
 The CLERK. Mr. Keller, no.  
 Mr. Issa?  
 Mr. ISSA. No.  
 The CLERK. Mr. Issa, 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. Feeney?  
 [No response.]  
 The CLERK. Mr. Franks?  
 Mr. FRANKS. No.  
 The CLERK. Mr. Franks, no.  
 Mr. Gohmert?  
 [No response.]  
 The CLERK. Mr. Conyers?  
 Mr. CONYERS. Aye.  
 The CLERK. Mr. Conyers, aye.  
 Mr. Berman?  
 [No response.]  
 The CLERK. Mr. Boucher?  
 [No response.]  
 The CLERK. Mr. Nadler?  
 [No response.]  
 The CLERK. Mr. Scott?  
 Mr. SCOTT. Aye.

The CLERK. Mr. Scott, aye.  
 Mr. Watt?  
 Mr. WATT. Aye.  
 The CLERK. Mr. Watt, aye.  
 Ms. Lofgren?  
 [No response.]  
 The CLERK. Ms. Jackson Lee?  
 Ms. JACKSON LEE. Aye.  
 The CLERK. Ms. Jackson Lee, aye.  
 Ms. Waters?  
 [No response.]  
 The CLERK. Mr. Meehan?  
 [No response.]  
 The CLERK. Mr. Delahunt?  
 [No response.]  
 The CLERK. Mr. Wexler?  
 [No response.]  
 The CLERK. Mr. Weiner?  
 [No response.]  
 The CLERK. Mr. Schiff?  
 Mr. SCHIFF. Aye.  
 The CLERK. Mr. Schiff, aye.  
 Ms. Sánchez?  
 Ms. SÁNCHEZ. Aye.  
 The CLERK. Ms. Sánchez, aye.  
 Mr. Smith?  
 [No response.]  
 The CLERK. Mr. Van Hollen?  
 Mr. VAN HOLLEN. Aye.  
 The CLERK. Mr. Van Hollen, aye.  
 Mr. Chairman?  
 Chairman SENSENBRENNER. No.  
 The CLERK. Mr. Chairman, no.  
 Chairman SENSENBRENNER. Members who wish to cast or change their vote.  
 The gentleman from Massachusetts, Mr. Meehan.  
 Mr. MEEHAN. Aye.  
 The CLERK. Mr. Meehan, aye.  
 Chairman SENSENBRENNER. The gentleman from Ohio, Mr. Chabot.  
 Mr. CHABOT. No.  
 The CLERK. Mr. Chabot, no.  
 Chairman SENSENBRENNER. Further Members who wish to cast or change their vote.  
 If not, the Clerk will report.  
 The gentleman from Florida, Mr. Feeney.  
 Mr. FEENEY. No.  
 The CLERK. Mr. Feeney, no.  
 Chairman SENSENBRENNER. Further Members who wish to cast or change their vote?  
 The Clerk will report again.  
 The CLERK. Mr. Chairman, there are 8 ayes and 16 noes.  
 Chairman SENSENBRENNER. And the amendment in the second degree is not agreed to.  
 Are there further amendments?

Mr. SCOTT. Mr. Chairman?

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

Mr. SCOTT. Thank you, Mr. Chairman. I have an amendment at the desk.

Chairman SENSENBRENNER. The Clerk will report the amendment.

The CLERK. Amendment to the amendment in the nature of a substitute to H.R. 554, offered by Mr. Scott of Virginia. On page 6, strike lines 17 to 25, and on page 7—

Chairman SENSENBRENNER. Without objection, the amendment is considered as read, and the gentleman is recognized for 5 minutes. [The amendment follows:]

**Amendment to H.R. 554**  
**Offered by Mr. Scott of Virginia**  
**(Scott\_02)**

On page 6, strike lines 17-25, and on page 7, strike lines 1-7.

Insert on page 6, after line 16:

“(ii) an action in which a manufacturer or seller of a qualified product 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; or

Redesignate accordingly.

Mr. SCOTT. Mr. Chairman, this amendment 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 violated the FDA standards and caused obesity. However, that leaves a loophole and allows protection for those manufacturers who did not know but should have known that their products in fact violated FDA standards.

If they didn’t know, this bill gives them immunity from being held responsible. One example, Mr. Chairman, a Florida company sold ice cream as, quote, reduced fat ice cream when, in fact, it had triple the calories and more than double the carbohydrates indicated on the label. The product had simply been mislabeled. The product had been on the market for years. The consumers were the ones who were responsible the correct labeling information forward, and it was not due to the diligence of the company. The company was negligent in mislabeling the ice cream and should not be protected in such a case.

These cases should not be protected by the legislation. Somebody ought to be able to bring the suit. We have kind of made it more difficult for the attorneys general, but we should not allow these people to violate FDA standards and get away just by pleading ig-

norance. My amendment should hold people responsible for negligent behavior and violation of FDA standards.

I encourage my colleagues to support the amendment. I yield back.

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

Mr. KELLER. I thank the Chairman.

Again, regarding the intentional versus negligently, this is something that was defeated on the House floor by a voice vote. The knowing standard in this bill is exactly the same standard that we have in the H.R. 1036, the "Protection of Lawful Commerce in Arms Act," that overwhelmingly passed the House in a bipartisan fashion. Anyone who voted for H.R. 1036 last Congress and who votes for this amendment will be voting for stronger protections for firearm manufacturers than those in the food industry, the largest private sector employer.

The second problem with this amendment, it takes out the language that I have that talks about the requirement that someone say that he relied upon that representation, and that was the cause of the weight gain. And so, reliance is a critical element and important to weed out the frivolous claims.

So I would urge my colleagues to vote no and yield back.

Chairman SENSENBRENNER. The question is on agreeing to the amendment in the second degree offered by the gentleman from Virginia, Mr. Scott.

Those in favor will say aye.

Opposed, no.

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

Are there further amendments?

Ms. JACKSON LEE. I have an amendment at the desk.

Chairman SENSENBRENNER. The gentlewoman from Texas has an amendment at the desk.

The Clerk will report the amendment.

Ms. JACKSON LEE. 010.

The CLERK. Mr. Chairman, I have a 019.

Ms. JACKSON LEE. 010. Let me look. Let me withdraw right now.

Thank you.

Chairman SENSENBRENNER. Are there further amendments?

There are no further amendments.

The question is on the amendment in the nature of a substitute as amended, offered by the gentleman from Florida, Mr. Keller.

Those in favor will say aye.

Opposed, no.

The ayes appear to have it. The ayes have it. The amendment in the nature of a substitute as amended is agreed to.

The question now occurs on the motion to report the bill H.R. 554 favorably as amended. A reporting quorum is present.

Those in favor will say aye.

Opposed, no.

The ayes appear to have it. The ayes have it, and the motion to report favorably is agreed to.

Mr. CONYERS. Record, yes.

Chairman SENSENBRENNER. Record vote is requested. Those in favor of reporting the bill H.R. 554 favorably as amended 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?

[No response.]

The CLERK. Mr. Smith?

Mr. SMITH OF TEXAS. Aye.

The CLERK. Mr. Smith, aye.

Mr. Gallegly?

[No response.]

The CLERK. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot, aye.

Mr. Lungren?

Mr. LUNGREN. Aye.

The CLERK. Mr. Lungren, aye.

Mr. Jenkins?

Mr. JENKINS. Aye.

The CLERK. Mr. Jenkins, aye.

Mr. Cannon?

Mr. CANNON. Aye.

The CLERK. Mr. Cannon, aye.

Mr. Bachus?

[No response.]

The CLERK. Mr. Inglis?

Mr. INGLIS. Aye.

The CLERK. Mr. Inglis, aye.

Mr. Hostettler?

Mr. HOSTETTLER. Aye.

The CLERK. Mr. Hostettler, aye.

Mr. Green?

[No response.]

The CLERK. Mr. Keller?

Mr. KELLER. Aye.

The CLERK. Mr. Keller, aye.

Mr. Issa?

Mr. ISSA. Aye.

The CLERK. Mr. Issa, aye.

Mr. Flake?

Mr. FLAKE. Aye.

The CLERK. Mr. Flake, aye.

Mr. Pence?

Mr. PENCE. Aye.

The CLERK. Mr. Pence, aye.

Mr. Forbes?

[No response.]

The CLERK. Mr. King?

Mr. KING. Aye.

The CLERK. Mr. King, aye.

Mr. Feeney?

Mr. FEENEY. Yes.

The CLERK. Mr. Feeney, aye.

Mr. Franks?  
 Mr. FRANKS. Aye.  
 The CLERK. Mr. Franks, aye.  
 Mr. Gohmert?  
 [No response.]  
 The CLERK. Mr. Conyers?  
 Mr. CONYERS. No.  
 The CLERK. Mr. Conyers, no.  
 Mr. Berman.  
 [No response.]  
 The CLERK. Mr. Boucher?  
 [No response.]  
 The CLERK. Mr. Nadler?  
 [No response.]  
 The CLERK. Mr. Scott?  
 Mr. SCOTT. No.  
 The CLERK. Mr. Scott, no.  
 Mr. Watt?  
 Mr. WATT. No.  
 The CLERK. Mr. Watt, no.  
 Ms. Lofgren?  
 [No response.]  
 The CLERK. Ms. Jackson Lee?  
 Ms. JACKSON LEE. No.  
 The CLERK. Ms. Jackson Lee, no.  
 Ms. Waters?  
 [No response.]  
 The CLERK. Mr. Meehan?  
 Mr. MEEHAN. No.  
 The CLERK. Mr. Meehan, no.  
 Mr. Delahunt?  
 [No response.]  
 The CLERK. Mr. Wexler?  
 [No response.]  
 The CLERK. Mr. Weiner?  
 [No response.]  
 The CLERK. Mr. Schiff?  
 Mr. SCHIFF. No.  
 The CLERK. Mr. Schiff, no.  
 Ms. Sánchez?  
 Ms. SÁNCHEZ. No.  
 The CLERK. Ms. Sánchez, no.  
 Mr. Smith?  
 [No response.]  
 The CLERK. Mr. Van Hollen?  
 Mr. VAN HOLLEN. No.  
 The CLERK. Mr. Van Hollen, no.  
 Mr. Chairman?  
 Chairman SENSENBRENNER. Aye.  
 The CLERK. Mr. Chairman, aye.  
 Chairman SENSENBRENNER. Further Members who wish to cast  
 or change their vote.  
 The gentleman from North Carolina, Mr. Coble.  
 Mr. COBLE. Aye.  
 The CLERK. Mr. Coble, aye.

Chairman SENSENBRENNER. Further Members who wish to cast or change their vote.

If not, the Clerk will report.

The CLERK. Mr. Chairman, there are 16 ayes and 8 noes.

Chairman SENSENBRENNER. And 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 amendments adopted here today.

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 House rules in which to submit additional dissenting, supplemental, or minority views.

The Chair would like to thank the Members and staff for their patience. We have completed a very ambitious agenda today. There will be no markup tomorrow because the agenda has been completed, and the Committee stands adjourned.

[Whereupon, at 3:43 p.m., the Committee was adjourned.]



#### ADDITIONAL VIEWS

Mr. Chairman, I would like to submit for the record the votes I would have made had I not been unavoidably absent from the markup proceeding on H.R. 554 held on May 25, 2005.

On rollcall #12, the Watt Amendment #2 to H.R. 554 I would have voted No.

On rollcall #13, the Watt Amendment #8 to H.R. 554 I would have voted No.

On rollcall #14, the Watt Amendment #6 to H.R. 554 I would have voted No.

On rollcall #15, the Scott Amendment #009 to H.R. 554 I would have voted No.

On rollcall #16, the Motion to Report H.R. 554, as amended by the Amendment in the Nature of a Substitute, as amended I would have voted Aye.

MARK GREEN.

## DISSENTING VIEWS

We oppose H.R. 554 because there are far preferable ways of responding to this issue than by approving a one-size-fits-all Federal law that would preempt all 50 states. In the absence of an adequate record, the legislation is drafted so broadly that it would immunize defendants for negligent and reckless behavior, including mislabeling of food products. The legislation also applies retroactively for the benefit of a single special interest—the fast food industry—in a manner that is wholly unfair and sets a precedent that undermines state and Federal consumer protection regimes.<sup>1</sup> For the reasons set out below, we respectfully dissent.

### BACKGROUND AND DESCRIPTION OF LEGISLATION

In August 2002, lawyers in New York filed suit against McDonald's on behalf of two minor children claiming that the fast-food restaurant bore some liability for the obesity and health problems of the plaintiffs. The deluge of media reports that followed were often critical of the case. In January 2003, Judge Robert Sweet dismissed the action in its entirety, but granted plaintiffs the right to replead with greater specificity its negligence claims against the food giant. Contrary to the media reports, deriding the case, Judge Sweet recognized several theories upon which McDonald's could indeed be liable to the plaintiffs for the harmful effects of its food.<sup>2</sup> That case was ultimately dismissed for a second time in September 2003. However, on January 25, 2005, the Second Circuit Court of Appeals remanded the case for further proceedings, holding that the district court erred because it misinterpreted New York's consumer law, which makes it illegal to commit deceptive acts or practices without requiring proof of actual reliance.<sup>3</sup>

H.R. 554 prohibits an otherwise harmed “person” from bringing a “qualified civil liability action in state or Federal court.”<sup>4</sup> A qualified civil liability action is defined as any action under law or equity brought against a food manufacturer, seller or trade associa-

<sup>1</sup>H.R. 554 is opposed by a number of organizations, including the Consumers Union, Public Citizen, the Alliance for Justice and the Center for Science in the Public Interest. See Letter from Sally Greenberg, Senior Product Safety Counsel, and Chanelle Hardy, Esther Peterson Fellow, Consumers Union (April 27, 2005) (on file with the Democratic staff of the House Judiciary Committee); Letter from Frank Clemente, Director, Public Citizen Congress Watch (April 27, 2005) (on file with the Democratic staff of the House Judiciary Committee); Letter from Nan Aron, President, Alliance for Justice (May 24, 2005) (on file with the Democratic staff of the House Judiciary Committee); and Letter from Michael F. Jacobson, Executive Director, Center for Science in the Public Interest (April 28, 2005) (on file with the Democratic staff of the House Judiciary Committee).

<sup>2</sup>See, e.g., *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.”)

<sup>3</sup>*Pelman v. McDonald's Corp.*, 396 F.3d 508 (2005).

<sup>4</sup>H.R. 554, 107th Cong. § 4, part 5 (2003).

tion claiming an injury from a person's consumption of food resulting in weight gain, obesity or other weight-related health conditions.<sup>5</sup> 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. 554.<sup>6</sup> The ban would operate retroactively, terminating any and all pending litigation at the time of passage.<sup>7</sup>

H.R. 554 creates three narrow exceptions where a weight-related action would be permitted: (1) in an action for breach of express contract or express warranty; (2) in a case where the respondent "knowingly" violated a State or Federal law with the intention for a person to rely on that violation, that person then individually and justifiably relied on that violation, and that their reliance was the proximate cause of the weight-related injury; or (3) claims arising from the sale of an adulterated product.<sup>8</sup> 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.<sup>9</sup>

#### I. HR. 554 WOULD PERMIT NEGLIGENT AND RECKLESS ACTIONS BY FOOD PRODUCERS

H.R. 554 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.<sup>10</sup> 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 intent to violate the law, H.R. 554 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.<sup>11</sup>

It is not difficult 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

<sup>5</sup> *Id.* at § 4, part 5.

<sup>6</sup> *Id.* at § 3(a).

<sup>7</sup> *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 preserved as if it were subject to continuing request for production. *See* § 3(c).

<sup>8</sup> *Id.* at § 4, part 5.

<sup>9</sup> *Id.* at § 3(d).

<sup>10</sup> While the bill permits legal actions when the defendant has violated a state or Federal law, the bill permits certain lawsuits in situations where the law is broken "knowingly." § 4, part 5(A).

<sup>11</sup> To mitigate this problem, Representative Scott offered an amendment to strike "knowingly" 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. The amendment was defeated by a voice vote.

calories than the label claimed.<sup>12</sup> After the mistake became public, two dieters filed a class action suit<sup>13</sup> under Florida's Unfair Trade and Deceptive Practices Act, asserting they were misled by the label's promises.<sup>14</sup> In September 2003, DeConna settled the case.<sup>15</sup> In addition to being prohibited from using the misleading label, the company agreed to periodically verify the accuracy of its labeling information.<sup>16</sup> Rather than receive a financial windfall, the plaintiffs were merely reimbursed for the money they had expended. Had H.R. 554 been law in 2001, the action would likely have been barred under the bill and there would have been no remedy for the deceptive practice.

H.R. 554 would have also prevented private litigation relating to KFC's recent and much criticized advertising campaign. During the fall of 2003, 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.<sup>17</sup> 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 undermined the "credibility not just of KFC but of the entire marketing industry,"<sup>18</sup> 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.<sup>19</sup> Again, had H.R. 554 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.<sup>20</sup> As Representative Mel Watt stated during the markup debate when he unsuccessfully sought to delete this heightened pleading requirement, "It is disingenuous, in my opinion, to provide exceptions to prohibited actions while saddling those exceptions with virtually insurmountable barriers to initiating the claims that you have accepted." 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

<sup>12</sup> Mitch Lipka, *Inside Scoop: Ice Cream Far From Dieter's Dream*, SOUTH FLORIDA SUN-SENTINEL, June 17, 2001.

<sup>13</sup> *Cohen v. DeConna Ice Cream Co.*, No. 01-010780, (Fla. Cir. Ct., Broward Cty., Dec. 20, 2001) (granting class action status).

<sup>14</sup> FLA. STAT. ANN. § 501.200 et seq. (West 2003).

<sup>15</sup> 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, <http://www.miami.com/mld/miamiherald/business/6871215.htm>.

<sup>16</sup> *Id.*

<sup>17</sup> 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>.

<sup>18</sup> *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 part of a healthy diet merits special derision.")

<sup>19</sup> *Id.* The FTC has not confirmed whether it will investigate KFC's advertisements.

<sup>20</sup> See H.R. 554 § 3(d).

provisions through the Rules Enabling Act procedure promulgated by Congress.<sup>21</sup>

II. H.R. 554 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 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.<sup>22</sup>

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.<sup>23</sup> 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. 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 an amendment offered by Mr. Scott which eliminated retroactivity and applied the bill's limitations to harm which occurred after the bill was passed into law.<sup>24</sup>

We also believe it is inadvisable for the Committee to pick and choose between industries for the establishment of 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:

Frivolous lawsuits deserve to be thrown out of court, and frivolous legislation should be thrown out of Congress—and [H.R.

<sup>21</sup>The Rules Enabling Act 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. *See, e.g.*, 28 U.S.C.A 2072 (1948).

<sup>22</sup>We would note that the following liability legislation enacted into law was not drafted to apply retroactively: The General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552 (1994) (statute of limitations on suits against airline manufacturers); the Bill Emerson Good Samaritan Food Donation Act, Pub. L. No. 104-210, 110 Stat. 3011 (1996) (limits the liability of those who donate food to a charity); the Volunteer Protection Act of 1997, Pub. L. No. 105-19, 111 Stat. 218 (1997) (limits the liability of volunteers); Section 161 of the Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, 111 Stat. 788 (1997) (limits punitive damages in railroad accidents); the Biomaterials Access Assurance Act of 1998, Pub. L. No. 105-230, 112 Stat. 1519 (1998) (limits the liability of suppliers of raw materials and medical implant components); the Year 2000 Readiness and Responsibility Act, Pub. L. No. 106-37, 106 Stat. 185 (1999) (limits the liability of Y2K defendants); and Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 (2002) (limits liability in terrorism-related cases).

<sup>23</sup>*See infra* Section IV and accompanying notes.

<sup>24</sup>H.R. REP. NO. 105-11 (1997).

554] 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.<sup>25</sup>

When Mr. Watt offered an amendment seeking to delete the retroactivity provision,<sup>26</sup> the Majority responded by expressing concern with the judiciary's case load and stating that hundreds of additional cases would be filed before the enactment of the legislation. This concern is clearly unfounded. The courts have demonstrated that they can very ably handle the number of matters which have raised these claims—one lawsuit at this point in time.

### III. H.R. 554 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.<sup>27</sup> At the same time, sixteen states have enacted a statute limiting obesity lawsuits,<sup>28</sup> while several other states are considering similar laws.<sup>29</sup> 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.”<sup>30</sup>

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

<sup>25</sup> 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.perm.org/new/health030616.html>.

<sup>26</sup> The Watt Amendment was defeated by a voice vote.

<sup>27</sup> See *infra* Section IV.

<sup>28</sup> The following states have enacted laws limiting obesity lawsuits: Arizona, 2004 Ariz. Sess. Law 67 (Chapter 67); Colorado, 2004 Colo. Sess. Law 229, The Commonsense Consumption Act (Chapter 229); Florida, 2004 Fla. Law 88; Georgia, 2005 Ga. Laws 196; Idaho, 2004 Idaho Sess. Laws 380, Commonsense Consumption Act; Illinois, 2004 Ill. Law 3981 (Public Act No. 93-848), Commonsense Consumption Act; Kansas, Governor signed lawsuit preemption legislation on April 15, 2005; Kentucky, Governor signed SB 103 into law on March 8, 2005; Louisiana, 2003 La. Act 158; Michigan, 2004, Mich. Pub. Act 367; Missouri, 2004 Mo. Law 537; North Dakota, Governor John Hoeven signs HB 1241 into law on March 31, 2005; Ohio, Governor signed SB 80 into law on January 6, 2005; South Dakota, the Governor signed the Commonsense Consumption Act into law (HB1282) on March 9, 2004; Tennessee, 2004 Ten. Pub. Act 570; Utah, 2004 Utah Law 78, Chapter 27d; Washington, Wash. Law 139; Wyoming, Governor Dave Freudenthal signed HB 170 into law on February 24, 2005.

<sup>29</sup> The following states are considering legislation: Connecticut, Minnesota, Nebraska, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, and Wisconsin.

<sup>30</sup> Representative Watt offered an amendment to limit the bill's applicability to Federal courts. It was defeated by a party line vote of 17-8.

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 thicket 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.<sup>31</sup>

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.<sup>32</sup>

In many respects, H.R. 554 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.<sup>33</sup>

Indeed, H.R. 554 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.<sup>34</sup> 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 authority.” 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 tra-

<sup>31</sup>*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).

<sup>32</sup>*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).

<sup>33</sup>*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).

<sup>34</sup>529 U.S. 598 (2000).

ditionally left to the states, Congress's authority is not as broad.<sup>35</sup> This would be particularly true concerning matters of public health and safety of the nature implicated by H.R. 554.

#### 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.<sup>36</sup>

- 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.<sup>37</sup>
- McDonald's now offers a "Go Active Meal" for adult, containing a healthy salad along with exercise tools.<sup>38</sup> 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.<sup>39</sup>
- 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 other sugary snacks from school vending machines to combat obesity among schoolchildren.<sup>40</sup>

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

<sup>35</sup> 514 U.S. 549 (1995).

<sup>36</sup> See *Oreo Cookies Lawsuit Crumbles*, CBSNews.com, (May 15, 2003) at <http://www.cbsnews.com/stories/2003/05/13/health/main553619.shtml>.

<sup>37</sup> Lauran Neergaard, *FDA to force foods to reveal artery-clogging trans fat*, ASSOCIATED PRESS, July 9, 2003.

<sup>38</sup> Sherri Day, *McDonald's Enlists Trainer to Help Sell Its New Meal*, N.Y. TIMES, Sept. 16, 2003 at C4 (describing a new pilot program in Indiana).

<sup>39</sup> 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.

<sup>40</sup> David Barboza, *Kraft Plans to Rethink Some Products to Fight Obesity*, N.Y. TIMES, July 2, 2003 at C6.



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.<sup>41</sup> 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.”<sup>42</sup> 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.”<sup>43</sup> 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.<sup>44</sup>

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. 554 is ill-conceived rush to judgment that would set a dangerous precedent. This legislation has been drafted in the absence of a single verdict against the food industry, and would preempt the laws in all 50 states. Its reach is so broad that negligent and reckless activity would be insulated from liability and cases protecting important consumer interest would be interrupted in the mid-stream of litigation. 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 are bound to arise in the ordinary course. We should not pass special interest legislation that panders to a single industry at the expense of our system of federalism.

#### DESCRIPTION OF AMENDMENT OFFERED BY DEMOCRATIC MEMBERS

During the markup eight amendments were offered by Democratic members, six by Mr. Watt and two by Mr. Scott:

<sup>41</sup>*Pelman v. McDonalds Corp.*, No. 02 Civ. 7821(RWS) (S.D.N.Y. Sept. 3, 2003), at 11.

<sup>42</sup>FED. R. CIV. P. 11(b)(1).

<sup>43</sup>*Id.* at (b)(2). See also Rule 11(b)(3) which requires that “allegations and other factual contentions have evidentiary support.”

<sup>44</sup>*Id.* at (c)(2).

### 1. Watt Amendment

*Description of Amendment:* The amendment would strike, “or state,” in Section 3(a), limiting the bill’s applicability to Federal courts.

*Vote on Amendment:* The amendment was defeated by a party-line vote of 17–8. Ayes: Representatives Conyers, Scott, Watt, Jackson Lee, Waters, Meehan, Schiff, Sánchez, Nays: Representatives Sensenbrenner, Coble, Smith, Chabot, Lungren, Jenkins, Cannon, Bachus, Inglis, Hostettler, Keller, Issa, Pence, King, Feeney, Franks, Gohmert.

### 2. Watt Amendment

*Description of Amendment:* The amendment would strike the reference to “State legislatures,” in Section 2, p. 2, line 12 of the Findings. The amendment was designed to highlight the preemptive nature of the legislation.

*Vote on Amendment:* The amendment was approved by voice vote.

### 3. Watt Amendment

*Description of Amendment:* The amendment would strike Section 3(b) which dismisses pending actions. The amendment was designed to strike the retroactive provisions of the bill and allow those cases currently in the court system to proceed.

*Vote on Amendment:* The amendment was defeated by voice vote.

### 4. Watt Amendment

*Description of Amendment:* This amendment would make the following change to the bill: in Section 3(e), p. 4, line 17, strike the period and add, “, including any disciplinary or other adverse action against a judge who delays, takes or fails to take action in accordance with subsection (b) of this Section.” This amendment was designed to ensure that a delay in taking action or failure to take action would not result in a charges of misconduct or other sanction against the presiding judge.

*Vote on Amendment:* The amendment was defeated by voice vote.

### 5. Watt Amendment

*Description of Amendment:* The amendment would make the following change to the amendment: in Section 3(b), p.2, line 23, strike the period and add, “, except where a settlement has been reached an signed by both parties or a judgment has been entered by the trail or appellate court.” This amendment allows cases in which a judgement has been entered or a settlement reached and signed to proceed.

*Vote on Amendment:* The amendment was defeated by a party-line vote of 16–8. Ayes: Representatives Conyers, Scott, Watt, Jackson Lee, Meehan, Schiff, Sánchez, Van Hollen. Nays: Representatives Sensenbrenner, Coble, Smith, Chabot, Lungren, Jenkins, Cannon, Bachus, Inglis, Hostettler, Keller, Issa, Flake, Pence, King, Franks.

#### 6. Watt Amendment

*Description of Amendment:* The amendment would strike Section 3(d) which requires heightened pleadings on the complaint brought based on the consumption of a qualified product.

*Vote on Amendment:* The amendment was defeated by a party-line vote of 15–8. Ayes: Representatives Conyers, Scott, Watt, Jackson Lee, Meehan, Schiff, Sánchez, Van Hollen. Nays: Representatives Sensenbrenner, Coble, Smith, Chabot, Lungren, Jenkins, Cannon, Inglis, Hostettler, Keller, Issa, Flake, Pence, King, Franks.

#### 7. Scott Amendment

*Description of Amendment:* The amendment would exempt state law enforcement actions concerning mislabeling or other unfair and deceptive trade practices from the impact of the legislation.

*Vote on Amendment:* The amendment was defeated by a party-line vote, 16–8. Ayes: Representatives Conyers, Scott, Watt, Jackson Lee, Meehan, Schiff, Sánchez, Van Hollen. Nays: Representatives Sensenbrenner, Coble, Smith, Chabot, Lungren, Jenkins, Cannon, Inglis, Hostettler, Keller, Issa, Flake, Pence, King, Feeney, Franks.

#### 8. Scott Amendment

*Description of Amendment:* The amendment would make the following changes to the bill: strike lines 17–25 on page 6 and 1–7 on page 7 and then insert on page 6, “(ii) an action in which a manufacturer or seller of a qualified product violated a Federal or State statute applicable to the manufacturing, marketing, 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;” allowing an action based on an allegation that a manufacturer or seller simply violated a Federal or State statute to be exempt. This amendment was designed to correct the bill by allowing a simple violation of Federal or State statute by manufacturer or seller to constitute a cause of action.

*Vote on Amendment:* The amendment was defeated by voice vote.

JOHN CONYERS, JR.  
HOWARD L. BERMAN.  
JERROLD NADLER.  
ROBERT C. SCOTT.  
MELVIN L. WATT.  
SHEILA JACKSON LEE.  
MAXINE WATERS.  
MARTIN T. MEEHAN.  
WILLIAM D. DELAHUNT.  
ROBERT WEXLER.  
LINDA T. SÁNCHEZ.  
CHRIS VAN HOLLEN.

