Testimony of

Mr. Victor Schwartz

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TESTIMONY BY

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BEFORE THE

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

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

on

OCTOBER 16, 2003

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

For the first fifteen years of my professional life, I worked part-time as a plaintiffs' attorney and full-time as a professor of law. I was and still am committed to helping develop sound public policies in America's tort law. I co-author the most widely used torts casebook in America, Prosser, Wade & Schwartz's Torts, now in its 10th edition. I also have served on all three Advisory Committees for the American Law Institute's new Restatement of Torts, Third, including the project on product liability.

I worked under the Ford and Carter Administrations, chairing the Inter-Agency Task Force on Product Liability, and the Department of Commerce's Task Force on Accident, Compensation and Insurance. That opportunity helped me appreciate the broad public policy implications of our liability system.

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

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

Purveyors of food were the first product sellers to be subject to strict liability. If food contained a manufacturing defect - such as a can of peas that contains a pebble, or a bowl of soup that contains a nail - and the defect injured a person, the seller was liable. There were, and are, no excuses. Sellers of food also may be subject to liability for failure to warn. Here is an example under the principles provided in the Restatement of Torts, Third: Products Liability. If a seller of a candy bar failed to inform a consumer in the ingredients list that the candy contained peanuts, a well-known allergen, and the consumer was injured, then the manufacturer may be subject to liability. Moreover, sellers of food may be subject to liability when their product fails to conform to applicable safety statutes or administrative regulations. For example, if a

regulation stipulates that hamburgers are to be cooked at more than 160ºF, and the seller of food fails to do so, and a person is injured because of that failure, the seller is liable.

Until very recently, the only real issue in food cases arose when an ingredient that caused a plaintiff's harm was an inherent aspect of the product Again turning to the Restatement of Torts, Third, a typical question was whether a one-inch chicken bone in a chicken enchilada or a fishbone in chowder could be considered a manufacturing defect, or was an inherent aspect of the product. The new Restatement contains a rule to address those situations. It focuses on whether a reasonable consumer would not expect the food to contain that item. If the consumer would not expect a one-inch chicken bone to be present in a chicken enchilada and he or she is injured, the seller is liable. That is more than two hundred years of food law in the proverbial "nutshell."

Regulation through Litigation

While tort law has always had a public policy component to help assure that wrongdoers pay for a harm they cause, tort law has achieved those goals under traditional standards such as those I have outlined today. Over the past decade, however, a new phenomenon has arisen in the law of torts. Former Secretary of Labor Robert Reich aptly called this phenomenon "regulation through litigation." Here, the focus of tort law shifts away from its main purpose - compensating someone who has been injured by the wrongful conduct of another. The shift is toward a judge allowing a jury to make determinations that traditionally are the decisions of Congress, state legislatures, or regulatory agencies. The threat of massive liability exposure is used to change the behavior of a defendant. For example, to lower the price of a drug, to restrict the sale of a weapon beyond what is required by law or to cause a seller of food to change how it markets a product. In that way, those who are generally not elected and do not gather information through public hearings may, through one judicial decision, regulate or change how much we pay for things, what products we own, and how much they cost.

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

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

Regulatory bodies can, and have, stepped in to address issues of obesity and food. For example, regulatory bodies in California now ban traditional soft drinks in public schools. This will take effect at the beginning of 2004. While some people may vigorously disagree with that regulatory decision, it was rendered in the context of the check and balance of American politics. If people do not agree with the decision, through election or propositions in California to the Constitution, they can change it. The electorate in that state has recently shown that it knows how to use that power.

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

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

First, if traditional rules are followed, the plaintiff is going to have to show that his or her obesity was caused by food, not by failure to exercise or other lifestyle choices, or genetics. Second, the plaintiff would

have to show that a particular defendant's food caused this harm. This will be very difficult to do, considering the multiple sources of products that we consume. Finally, there will have to be a major change in the definition of what constitutes a product defect.

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

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

Consumer activist Ralph Nader has called the double cheeseburger "a weapon of mass destruction."

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

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

Should Congress Take Action?

If Congress believes that regulation of food should be left to federal and state legislatures as well as regulatory bodies, Congress should act to preserve the proper jurisdiction of these bodies. Congress has already worked to change current tort law. It has done so in the law of torts. For example, in the General Aviation Recovery Act of 1994, the Paul D. Coverdell Teacher Protection Act of 2001, and the Biomaterials Access Assurance Act of 1998. All of these measures limited existing and, what was believed to be, excessive liability that created very unsound nationwide public policy. The policy followed by Congress produced sound results.

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

Senator McConnell's bill takes the correct approach. It respects and retains the 240-year history of the common law of torts in fact. But it also preserves the right of Congress, state legislatures and appropriate regulatory bodies to address the very real problem of obesity in this country.

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

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