CONTENTS

5TH ANNUAL JUDICIAL SYMPOSIUM ON CIVIL JUSTICE ISSUES
GEORGE MASON JUDICIAL EDUCATION PROGRAM
DECEMBER 5-7, 2010

EDITED TRANSCRIPTS

195  EMERGING CIVIL JUSTICE ISSUES
    J. Russell Jackson, Partner, Skadden, Arps, Slate, Meagher & Flom LLP
    Robert S. Peck, President, Center for Constitutional Litigation
    Moderator: Paige V. Butler, Director, George Mason Judicial Education Program,
                George Mason Law & Economics Center

211  UPDATE ON THE FEDERAL RULES ADVISORY COMMITTEE
    Alexander Dimitrief, Vice President and Senior Counsel, General Electric
    Bruce H. Kobayashi, Professor of Law, George Mason University School of Law
    Emery G. Lee III, Senior Researcher, Federal Judicial Center
    Martin H. Redish, Professor of Law, Northwestern University School of Law
    Donald H. Slavik, Partner, Habush Habush & Rottier, S.C.
    John Vail, Vice President and Senior Litigation Counsel, Center for Constitutional Litigation
    Moderator: The Honorable Lee H. Rosenthal, U.S. District Court, Southern District of Texas

249  OBESITY LITIGATION
    John F. Banzhaf III, Professor of Public Interest Law,
    George Washington University Law School

259  PROTECTING THE PUBLIC HEALTH: LITIGATION AND OBESITY
    John F. Banzhaf III, Professor of Public Interest Law,
    George Washington University Law School
    Theodore H. Frank, President and Founder, Center for Class Action Fairness
    Stephen Gardner, Litigation Director, Center for Science in the Public Interest
    Joseph M. Price, Partner, Faegre & Benson LLP
    Todd J. Zywicki, Professor of Law, George Mason University School of Law
    Moderator: Linda E. Kelly, Director, George Mason Attorneys General Education
                Program, George Mason Law & Economics Center

281  ASBESTOS BANKRUPTCY TRUSTS AND THEIR IMPACT ON THE TORT SYSTEM
    The Honorable Mark Davidson, Harris County MDL Asbestos Docket
    Lloyd Dixon, Senior Economist, RAND Corporation
    Nathan D. Finch, Member, Motley Rice
    James L. Stengel, Partner, Orrick, Herrington & Sutcliffe LLP
    Moderator: Henry N. Butler, Executive Director, George Mason Law & Economics Center

307  PERSPECTIVES ON DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT
    Daniel F.C. Crowley, Partner, K&L Gates LLP
    J.W. Verret, Assistant Professor of Law, George Mason University School of Law
    Todd J. Zywicki, Professor of Law, George Mason University School of Law
    Moderator: Geoffrey J. Lysaught, Director, Searle Civil Justice Institute,
                George Mason Law & Economics Center
325 **CLIMATE CHANGE LITIGATION**

*Richard O. Faulk*, Partner, Gardere Wynne Sewell LLP  
*Eric Moyer*, Partner, Susman Godfrey LLP  
*Joseph F. Speelman*, Partner, Blank Rome LLP  
*Jason S. Johnston*, Professor of Law, University of Virginia School of Law

Moderator: *Henry N. Butler*, Executive Director, George Mason Law & Economics Center

351 **THE BALANCING OF MARKETS, LITIGATION AND REGULATION**

*K. N. Hylton*, Professor of Law, Boston University School of Law  
*Larry E. Ribstein*, Professor of Law, University of Illinois College of Law  
*Paul H. Rubin*, Professor of Economics, Emory University  
*Todd J. Zywicki*, Professor of Law, George Mason University School of Law

Moderator: *Geoffrey J. Lysaught*, Director, Searle Civil Justice Institute, George Mason Law & Economics Center

375 **THE ROLE OF THE CIVIL JUSTICE SYSTEM IN ALLOCATING SOCIETAL RISK**

*Robert Cusumano*, General Counsel, ACE Limited  
*John E. Heintz*, Partner, Dickstein Shapiro LLP  
*Philip K. Howard*, Founder, Common Good  
*John Vail*, Vice President and Senior Litigation Counsel, Center for Constitutional Litigation

Moderator: *The Honorable Ben F. Tennille*, North Carolina Business Court
OBESITY LITIGATION

John F. Banzhaf III

LINDA KELLY: I want to introduce the topic of our next two sessions, and clearly someone has a good sense of humor to introduce a discussion of obesity litigation while you’re eating your dessert. And that’s true. We do have a sense of humor at the LEC. The growing obesity rate in America is a public health concern and statistics from the Centers for Disease Control indicate that a substantial majority of adults in the country are either obese or overweight. And it’s a growing issue among children as well.

There has been a range of responses proposed to this issue from a more laissez-faire approach, to a personal responsibility approach, to education efforts such as First Lady Michelle Obama’s “Let’s Move Initiative.” The imposition of “sin taxes” has been proposed in a number of jurisdictions. Zoning regulations have been proposed and there has also been discussion of using the litigation process to address this problem. And one of the pioneers of this approach to addressing the problem is with us here today. Professor John Banzhaf is a Professor of Public Interest Law, and the Dr. William Cahan Distinguished Professor of Law at George Washington University.

He is a well known legal activist. He teaches torts and administrative law at GW, but I think perhaps his most famous course is a course in legal activism, which I believe is a clinical course where the students actually get involved in launching public interest litigation. And he has been involved in a number of very high profile issues. He is known variously among his proponents and opponents as the Ralph Nader of the tobacco industry; one of the 100 most powerful people in Washington and my favorite—and the only reason that I would say this is because he is proud enough of it to put it on his bio—the Osama bin Laden of torts. I thought that was interesting.

So without further ado, please join me in welcoming Professor John Banzhaf.

JOHN F. BANZHAF: Thank you. May it please the court? Alright, well, in any case, please continue enjoying your lunch before I sue the Law and Economic Center for failing to disclose the calorie content of this meal. Yes, as Linda said, I’ve been called a legal terrorist, the Osama bin Laden of torts, a legal bomb thrower and a legal flame thrower, and not just by our host Professor Henry Butler. That’s a joke. Actually, I’m honored to be here to be invited by Professor Butler to address you since his views and mine often don’t coincide, as you might guess.

But I have, in fact, been called all of those names and many more, some of which we can’t repeat in polite company or here, and I’ve also
been accused of being both a billionaire and one of the 100 most powerful people in Washington, both of which are not true. At a congressional hearing on the infamous cheeseburger bill, which was designed to stop this obesity litigation, I was accused of subverting the democratic process, trying to take away consumer freedom and fostering regulation through litigation. The bill’s author, former congressman Rick Heller, whose Orlando District is a fast food haven that maxed out on PAC contributions from various fast food companies like McDonald's, Wendy's and KFC, opined that I was undermining the principles of freedom of choice, common sense and personal responsibility.

Many at the congressional hearings on this bill, which fortunately died a well-deserved death, reportedly called the “fat litigation,” which I helped to inspire, frivolous. Even though ten out of ten of those legal actions have already been successful, there's an eleventh one which just came down which I’ll tell you about in a few minutes. In any case, the interesting thing is that they argued that big companies needed protection from frivolous lawsuits filed by law professors. I don't know.

Well, there’s a brief introduction. What I would like to do now before I address you again this afternoon at the afternoon panel is to explain why public interest litigation aimed at America’s obesity epidemic is not only consistent with both fundamental, economic and democratic principles, but actually a necessary component if we want the invisible hand of Adam Smith in our checks and balances form of government to deal with public health problems like obesity.

And actually, I’m going to begin by putting the issue in context alongside the public interest legal actions aimed at another big public health problem, which is smoking. Because it’s my lifelong involvement with anti-smoking legal actions which led directly to this new fat litigation movement, and they have so much in common that not too long ago, Fortune Magazine in a cover story asked “Is Fat the Next Tobacco?”

Well, by way of background, when I was twenty-six years old, fresh out of Columbia Law School, and ironically while working as a gigolo on a cruise ship—that’s using the word in the original sense—I brought a legal action which required TV and radio stations to make hundreds of millions of dollars worth of broadcast time available completely free for anti-smoking messages. As a result, cigarette consumption fell for the first time. Something even the Surgeon General’s report several years earlier wasn’t able to accomplish. As a result, millions of people quit smoking, and cigarette commercials were eventually driven off the air. And all this would have been virtually impossible, probably even unconstitutional, if I had attempted to do it through legislation.

This convinced me that legal action could be a powerful and important tool against major social problems, which was a very novel idea at the time. And I went on to use legal action to start the nonsmokers rights movement by helping to get smoking initially restricted and then banned on airplanes
and in many public places, to get higher health insurance rates for smokers, to encourage the torts litigation against the tobacco companies which led, in addition to the many individual victories, to a almost quarter of a trillion dollar multi-state settlement, as well as the death of Joe Campbell and cigarette billboards. Again, things I couldn’t possibly have accomplished through legislation.

Then, suddenly out of the blue, in 2002 a reporter asked me, “In view of the amazing successes which people have had using legal action as a weapon against smoking, would legal action—could legal action be effective against the newly emerging concerns of obesity?” And I said, “Yes,” and that started the modern fat litigation movement with an avalanche of publicity conferences and additional legal actions, some of which you will hear about on the panel this afternoon. In making that pronouncement, or prediction, which kicked it all off, I was mindful of the role that litigation has often played in social change, both in starting entirely new movements as well as in helping to make other movements far more effective.

I think in a very real way, *Brown v. Board of Education* kicked off the modern civil rights movement at a time when there wasn’t sufficient public or legislative support to attack separate but equal segregation. Indeed, in a pattern, which would soon become familiar, *Brown* generated the publicity. The publicity led in turn to public support, and that in turn led to public pressure, which eventually led to modern civil rights litigation. As some of you may know, the famous PARC case was brought on constitutional grounds on behalf of disabled children. That likewise sensitized the public to the plight of the disabled and the need to give statutory protection to their rights, which led in turn, of course, to the federal Rehabilitation Act and the ADA, which was subsequently passed largely, I think, as a result of that trigger.

In addition to the modern anti-smoking movement which started with *Banzhaf v. FCC*, a legal action my law students and I brought to get no-smoking sections on airplanes, first raised the public consciousness about the need to protect non-smokers from tobacco smoke pollution. That, in turn, eventually led to more and more legislation banning smoking in workplaces and public places—and, in some situations, even outdoors or in private homes. In short, litigation often breaks down barriers long before legislators are willing to act. And in doing so, generates the publicity and public support necessary to pressure legislators to act often against powerful money interests, which otherwise could easily defeat legislative attempts to reign them in.

Even when litigation doesn’t start a movement, as it did with civil rights, disability rights, anti-smoking, nonsmokers’ rights, and perhaps even environmental protection, it often serves as a very powerful and necessary tool for social change in areas as diverse as women’s rights, our rights, safety, drunk driving, consumer product safety, gay rights and so on. The legal action has been, and will continue to be, a powerful tool for social
change—something that allows individuals like myself and small organizations to take on and often triumph over powerful interest groups, which could otherwise defeat us in the legislature as in the case of the cheeseburger bill, can no longer be doubted. But some argue that these activities are inconsistent with modern economic theory, and with our free enterprise system and philosophy. But they’re wrong and here’s why.

Now I’m only a former MIT engineer turned law professor and practitioner of legal activism of public interest law, and I’m not really a true economist. But my understanding is that we have and treasure a largely free enterprise system rather than a government dominated one, because we believe that millions of business people are able to make much better decisions regarding what will be produced and how it will be produced than the so called pointy headed bureaucrats and pencil pushers in Washington or state capitols. These independent businessmen and women, and not the government, are in a much better position to decide what shall be produced and how it shall be produced, because they have to balance the costs of various components of production against the increase and the expected demand for their various products. If they have accurate information, they, we believe, can do a much better job than the government.

But as many of us realize this system, making use of the invisible hand of Adam Smith, works only to the extent that the corporate decision makers actually bear those costs, and therefore, have a clear economic incentive to reduce them to the extent economically feasible. But where the company does not, in fact bear the costs, a situation in which the costs are said to be external, or externalities, it has no financial incentive to reduce them. The invisible hand of Adam Smith stops working, and some form of government intervention is appropriate, if not absolutely necessary.

The classic example, of course, is pollution. If companies generating power or making coal or refining oil don’t have to pay for the cost their pollution causes, the Coase Theorem, and other forms of economic analysis, all say the government must step in to limit production—to limit pollution one way or the other. The same economic problems would naturally apply to businesses which cause great and very costly harm to the public health. For example, smoking costs the American public almost $200 billion a year, more than enough, by the way, to cover all the costs of healthcare reform or to make a significant slice in the federal deficit. And most of that is paid right now by nonsmokers in the form of higher taxes and bloated health insurance premiums. Indeed, one reason why the industry is so damned profitable is that they don’t have to pay any of the costs of the injuries and deaths that they cause.

So using litigation to both encourage reform—which legislatures are reluctant, or in some cases even fearful, to impose—or simply as a step in shifting costs to the industry, and through the industry to increase prices to those who use the products, seems both fair and appropriate from an economic point of view. Indeed, failing to do so—failing to shift these costs
and making the great majority of nonsmokers bear these costs, seems grossly unfair as well as economically inefficient. Similarly, obesity is now said to cost us almost $150 billion a year, but unlike smoking, which is on the decline, obesity seems to be rising—its unnecessary medical care costs are soaring. And again, they are being paid largely by those who are not obese.

Major economic and other studies identify two major causes, culprits, if you will. The fast food industry, with its ubiquitous advertising, fat and calorie laden meals and supersizing, is said to be responsible for at least half of it; and the soft drink industry, the major totally unnecessary source of empty calories in a typical American’s diet is also responsible. So it seems only fair, and logical, and economically justified to bring legal actions designed to shift some of those costs to the industry and to the consumers of their products, and to provide them with the necessary economic incentive to reduce those unnecessary costs, as they are now beginning to do so in part because of the pressure of fat litigation.

For example, looking just at McDonald’s, it now has some entrees which are reasonably low in fat and calories. It also has some more healthful desserts to replace those calorie laden deep fried pies which always burn our tongues. It eliminated super-sizing, strangely, just before the movie “Super Size Me” came out. Wasn’t that a coincidence? That’s the first time I was ever in a movie by the way. Again, a more conspicuous disclosure of calories before it was required to do so. At least one McDonald’s company actually came out and warned people, don’t eat at McDonald’s more than once a week, believe it or not.

Well, that was McDonald’s France and once McDonald’s of America found out, they shut him up. But for one brief shining moment they did. And it reformulated its Chicken McNuggets: the one dish singled out in the child obesity litigation by a federal judge who termed them a “McFrankenstein creation” with far more calories than most people are likely to imagine.

Also, as you will hear this afternoon, other major companies in the food industry have also made significant changes as a result of legal action and/or the threat of legal action; including the bad publicity which can result from lawsuits, as well as the threat of disclosure through pretrial discovery of the type of embarrassing and incriminating documents which fueled the anger of jurors in the smokers suits against big tobacco.

Some people, of course, doubt that these changes were brought about by fast food litigation and the threat of fat litigation. But in many of the newspaper articles, these companies admitted that that was the cause. Many lawyers and scholars who strongly object to these legal actions, nevertheless, have publicly recognized that they’re having a major legal impact. And most of the impartial reporters who wrote these stories wrote that the lawsuits were a major factor in each of these big decisions.

But as you might suspect, many, especially those on the losing side, who suffer when public health is at an advantage or protected, are com-
plaining. They call these effects “regulation by litigation” as if there is something inherently wrong with this approach. And talk about legislators subverting representative democracy. But is it? I’m not a constitutional scholar, just a humble practitioner, but it seems to me that there are three branches of our government, all of which are equal. Each is designed to play a different role in overall governance and in making law, but all of them have the power, and, perhaps in appropriate cases, the responsibility to make new law.

Legislators, of course, make law by passing statutes, but we also know that the Executive Branch, as well as the so-called independent agencies, make a tremendous amount of law by issuing regulations, adjudicating individual controversies, and by so-called “executive action.” For more than 200 years we’ve recognized that courts and judges do not look up into the sky and proclaim preexisting common law, but rather by adjudicating cases and controversies properly brought before them, make new law; it’s as important in many cases as the law made by legislative bodies, and in some cases, perhaps even more important if it’s based on constitutional grounds, and cannot then be overturned by simple legislative enactment.

No one branch of government is superior to any other. I know of no requirement that new law, or even law in certain areas, must be made by the legislature rather than the executive or judicial branches. It’s also well known that lawyers involved in litigation will often have a choice of judicial forums. Not just federal versus state, but sometimes different geographical locations, and quite naturally they’re going to pick the one which is most likely to advantage their client and his cause. And naturally, the same is true for an attorney seeking to make law about issues involving public health, whether it’s smoking, obesity or anything else.

When I was concerned about the harmful effect of ubiquitous cigarette advertising back in 1966, I would hardly turn to Congress. They just passed the law toning down the health warnings that the FTC had proposed for cigarettes and given the industry a major block of preemption immunity. Instead, I proceeded before a federal agency, where I was successful in achieving not regulation through litigation but regulation of favorable ruling, and resulting in the ban on cigarette commercials I could never have obtained from Congress or from a court.

Similarly, when McDonald’s claimed that its french fries were cooked in “100% pure vegetable oil,” but deliberately, and despite repeated requests, refused to disclose they were precooked in—beef fat—my law students logically did not turn to Congress. The way the food industry has so much clout, I almost succeeded in getting a cheeseburger bill against us. Instead, they brought a legal action, which I’ll describe a little bit more in a minute. We went to the courts because in the courts, the wealth of one side is not supposed to buy an unfair advantage. But interestingly enough, instead of allowing a court to settle the matter in a proceeding in which neither side would be given an advantage because of wealth or potential politi-
cal influence or size, and each side would have an opportunity to present its case in a fair, open and impartial proceeding. McDonald’s, which had once characterized the lawsuit as frivolous, chickened out, settled for over $12 million and agreed to provide the relief we had requested.

This in fact, has been the history of many of these so-called fat legal actions, which, by the way, are not the same as obesity lawsuits. Obesity lawsuits have as a central premise that plaintiffs became obese because they were induced to eat defendant’s food through unfair or deceptive advertising or some other culpable conduct, failure to disclose material facts, whatever it might be. And that is the basis of the so-called obesity lawsuits. But a fat legal action on the other hand, is any legal action, in any form, based on any legal theory which seeks to attack fat and/or obesity. And it need not and often does not make any claims based upon the obesity of the plaintiffs. This is exactly the approach that my colleagues and I used so successfully against the problem of smoking.

While some of those lawsuits allege that smoking caused individual plaintiffs’ diseases like lung cancer, the lawsuits targeted secondhand smoke, claims by states that smoking increased their medical costs, cases brought under the ADA, cases brought under the doctrine of nuisance and trespass and covenant of quiet enjoyment, and many other different legal theories and arguments. Indeed, many of the anti-smoking legal actions were brought not before courts at all, but rather before regulatory agencies: FCC, FTC, FDAC, AB, OSHA, the Department of HHS, Maryland OSH, workers compensation commissions, and many others.

The same now appears to be true regarding so-called fat legal actions, at least ten of which have now been successful. And all because the other side, frequently after assuring the public that the plaintiffs’ claims were frivolous, chicken out and either settle or capitulate. It wasn’t because some giant law firm or huge anti-obesity organizations were overwhelming tiny powerless little defendants—unless you think that McDonalds and KFC and Coca-Cola and Kraft and Pepsi Cola and Kellogg are tiny—largely powerless defendants unable to withstand the might of a couple law students, a Hindu attorney, a few law professors, another individual lawyer out in San Francisco, or that mighty Goliath known as CSPI, Center for Science in the Public Interest.

Here’s a quick rundown of the ten fat lawsuits which I consider to have been successful, again not because we won in court, because in each case they chickened out and gave us what we wanted. I think they were not only concerned about the possible loss, but about the adverse publicity in court and also the possibility of the discovery of documents that they would rather not have disclosed.

The first one, as I mentioned, was the suit my law students put together against McDonald’s for failing to disclose that their french fries were cooked in beef fat. Settlement was $12.6 million and they made the disclosure. There were two others where companies, one Big Daddy Ice Cream,
another Pirate’s Booty Diet Food, grossly misrepresented the amount of fat and calories in their food. Each one was a class action, each one was settled, and they made the proper disclosures. Another one was a suit against Kraft Oreo cookies for failing to disclose that the Oreo cookies contain dangerous transfat. The company settled out of court, and removed the transfat; resulting in cookies which certainly were healthier and probably had fewer calories.

Another was a suit against New York City School Board, who agreed to settle a suit by banning all sugary soft drinks and most fattening foods from its classrooms. There was another suit against McDonald’s that involved transfat. They were sued after they announced with great fanfare that they would remove transfat, and then quietly reneged on the promise. They then agreed to make the required disclosure and paid $8 million to settle the lawsuit. Another one didn’t even go to a suit. It was simply my threat to sue the individual members of the Seattle School Board for breach of their fiduciary duty if they renewed what we call a pouring rights contract. Sometimes known as a “Coke for Kickback” contract under which schools get a certain amount of money for every Coke or Pepsi or whatever it is that they sell. As a result of those threats, they grossly modified the contract, agreed to turn off the vending machine during most of the day, require healthy beverages, so on and so forth.

Number eight involved KFC. They were sued for having dangerous levels of transfat. KFC agreed to switch cooking oils to virtually eliminate it. And as far as I can tell, it will also reduce the amount of calories. Number nine involved sodas in schools again, and here there was a coordinated series of class actions, which were about to be brought against the bottlers this time for selling sugary soft drinks. But just on the eve of that being filed, the bottlers agreed to virtually ban the sale of sugary soft drinks in school, especially during school hours.

Number ten involved the Kellogg Company, who avoided a threatened lawsuit by this dreaded Center for Science in the Public Interest campaign for commercial free childhood and Massachusetts parents. Kellogg Company adopted strict nutritional standards for the foods that it advertises to young children. And the latest, number eleven, we actually won an obesity lawsuit. A Brazilian court has just ordered McDonald’s to pay a former franchise manager $17,500 because he gained sixty-five pounds while working there for a dozen years. I know it’s only Brazilian law and I can’t translate it from the Portuguese, but think about it.

Well, in summary, to paraphrase an old tobacco industry saying, “We’ve come a long way, baby.” And we’ve done it using legal and law-related actions with regard to both smoking and obesity. Indeed, many colleagues and scholars have admired what’s been happening with regards to tobacco saying, “Well, if they can do that with regard to tobacco, well, why can’t they do it with regard to teenage pregnancy, drug abuse, whatever?” They’re throwing in whatever public health problem they can. It’s also
clear that even though the use of legal action as a weapon against obesity is less than ten years old, starting in roughly 2002 as compared with the forty plus years since I first used legal action to get a blizzard of anti-smoking messages on radio and TV, it has already had a major impact far beyond the results of the individual victories which I have described above. And certainly a much bigger impact than the Surgeon General report on obesity, which had almost none.

It’s just one very telling example. Every spring in Washington, there is a food policy conference. The one held in 2002 following the Surgeon General report, there was not a single panel, not a single discussion on the issue of obesity. The following year after, I had literally gotten hundreds of news items, TV broadcasts, magazine articles, and other publicity about using legal action—the issue of obesity was front and center at that conference. Indeed, the highlight was a spirited debate between me and a spokesman for the National Restaurant Association, who solemnly opined that it will be impossible to require calorie disclosures. Well, he’s wrong. We’re now doing it.

Also, as I noted before, legal action often leads to publicity and drawing public concern, which in turn leads to legislative action, and that’s what seems to have happened with regard to fat legal actions. A few quick examples. New York was first, but now as a result of the Obama Healthcare Legislation, all fast food chain restaurants nationally will be required to disclose the calorie content of their foods, which is one of our major demands. I’m told that more than two dozen jurisdictions now have some tax on, or aimed at, sugary soft drinks. A number of jurisdictions have banned transfat. Some have banned fast food restaurants near schools, some are giving out obesity report cards. And San Francisco is about to ban kiddy meals and calorie and fat-laden Happy Meals at McDonald’s.

The beat goes on as we continue to use legal action against major public health problems like smoking, and doing so, as I noted before, in all three branches of government. For example, I just helped convince the legislative branch, Congress, to permit smokers to be charged up to 50% more for health insurance, even if no wellness requirements are met. I helped persuade a number of state agencies that because they had a fiduciary duty to foster children entrusted to them, they should ban smoking in homes and cars when foster children are present. This is leading to more legislation banning smoking in cars when any children are present.

We also are increasingly turning to the courts when nonsmokers are bothered by tobacco smoke drifting or re-circulating into their apartments from adjacent buildings, or in getting court orders banning smoking in homes to protect children involved in custody disputes. Indeed, we have actually gone abroad and helped to pass, and now effectively to enforce, a new world anti-smoking and nonsmokers rights treaty. And that’s why if any of you have ever had a hankering to go to a smoky Irish pub, I’m sorry, it’s too late. We abolished them. And if you fly into Norway’s major air-
port, you’ll see a big sign out as you arrive and it says, “The only thing we smoke here is salmon.”

So considering that the anti-smoking lawsuits have been going, and around much longer than the anti-obesity or fat lawsuits, I think we have made remarkable progress. And I think as with the tobacco litigation, which took a long time—and I have a very vivid memory of being on a TV show with Victor Schwartz—Schwartz on Torts for those of you who remember him—and Professor Twerski of the restatement, both laughing at me and telling me that we would never even get a tobacco lawsuit into court much less get it to a jury. Well, these things are happening. As somebody who’s made a career out of bringing lawsuits which most people thought were unwinnable and probably even frivolous, I think we are going to continue to win. And I think not too long from now, a number of these private interest attorneys are going to find that as with the tobacco cases, they can not only do well, but do good by bringing anti-fat litigation. Once they learn that they can do well by doing good, indeed, fat may very well become the next tobacco.

Very certainly, this is an area of concern about the public health which is going to continue to be targeted by those of us who believe in the motto “sue the bastards.” Thank you for your attention and not holding me in contempt yet.

2 See Banzhaf v. F.C.C., 405 F.2d 1082 (D.C. Cir. 1968).