CONTENTS

5TH ANNUAL JUDICIAL SYMPOSIUM ON CIVIL JUSTICE ISSUES
GEORGE MASON JUDICIAL EDUCATION PROGRAM
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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, President, 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
Keith 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
PROTECTING THE PUBLIC HEALTH: LITIGATION AND OBESITY

John F. Banzhaf III, Theodore H. Frank, Stephen Gardner, Joseph M. Price, Todd J. Zywicki
Moderator: Linda E. Kelly

JOSEPH M. PRICE: Thank you. This is the largest en banc panel I have ever been on before. My name is Joe Price and I am not here today to represent the food industry, or the restaurant industry, or anybody. I am speaking on my own behalf. Listening to Professor Banzhaf before I thought I would have been introduced as Darth Vader representing the evil empire, but I’m speaking as a litigator who’s trying to bring thirty-eight years of mass tort litigation experience to hand to examine this question. And in its simplest form I think the question is, “Can you solve obesity through litigation?” and I think in its simplest form the answer is, “No.”

From a public policy standpoint, litigation is a blunt weapon which plaintiffs propose to use to coerce companies into making changes that the plaintiffs feel are necessary. I think many of you’ll agree with me, that you can’t make satisfactory policy changes with coercion. With litigation, you do not build the kind of consensus, the support for consensus that’s needed to make a lasting public policy decision. Much of the food litigation to date is less designed to solve the obesity problem and more to enrich the plaintiff’s bar. As you’ll see, even the public interest side has a financial interest in this.

One of the fallacies that I think we’ve heard from Professor Banzhaf, and that we hear from the Center for Science in the Public Interest and the Public Health Advocacy Institute, is the attempt to analogize this litigation to tobacco litigation. This is not tobacco litigation—it never has been, it never will be. Tobacco in any form over any time period is bad. Food, in almost any form over appropriate time periods and in appropriate amounts, is good. The plaintiffs try to analogize the tobacco litigation and the food litigation on the idea of addiction. Well, yes, we’re all addicted to food, without food none of us would be here and it’s again a question of how much you eat: calories in, calories out. There is no question that tobacco causes disease. But as I think I’ll show you as we go forward here, it’s not established that food causes obesity per se.

The court system is not a satisfactory vehicle for creating public policy. The legislative and executive branches are far better equipped to address these broad issues. Courts, as you all know far better than I, adjudicate a single specific dispute based on the evidence presented by the parties. Litigation, by its nature, is narrow. It is case specific. It may give a distorted view of larger issues due to the individual party’s interest in the outcome.
Litigation usually revolves around money damages, not around policy considerations; and presentation by a party, either good or bad, can lead to a result which may or may not suffice for the specific dispute—but may not work as public policy. Society at large may have to deal with the ramifications of an inadequate presentation in a single court case or a slanted individual case presentation and resolution. Obviously, the influence of attorney’s fees may affect counsel’s decision on trial, on settlement, or appeal. And as I said, everybody has some kind of an interest in it.

This is a consultant’s disclosure from Professor Daynard with the Public Health Advocacy Institute in an article he wrote several years ago, and if you look at it, even Professor Daynard, who’s a “public-healthier,” has an interest in furtherance of the litigation. Also, lawyers for parties have ethical duties to the specific individual whom they are representing, and that interest may not necessarily be consistent with society at large. Legislators and executives are better equipped to enact broad policy goals. Input can be gained from wider numbers of sources, not just the parties to the lawsuit.

Legislatures can accumulate more information from more sources. Just recently we’ve seen the passage of the Child Nutrition Act. We’ve seen the passage of the Food Safety Bill. Neither of those, I submit to you, would have been possible if they had been engendered only by litigation. Litigation is uncertain, outcome is unpredictable, and the laws of the fifty states will vary on the issues. You will have multiple jury verdicts coming down, based on multiple different laws. Juries are all over the board on these types of cases, and nothing at the trial level is ever a final resolution because there’s always an appeal somewhere down the road.

It’s expensive; it’s time consuming; and we’ve heard a lot this morning about the expense of litigation. These kinds of nationwide cases and frontal assaults are going to engender a vigorous defense by the defendants. There is no guarantee that the appeals will not cost more. The damages will go to the parties, not to some sort of public policy or educational initiative, and the cost of litigation will ultimately get passed onto the consumers. There are, as you will recognize, tremendous proof issues that go into this litigation.

There is no guarantee that classes will be certified, and in many of these cases where you’re talking about consumer fraud issues, you are dealing with such small monetary damage amounts in an individual case, that if you do not have a class action you’re not going to have a case that is even worth bringing. You’re going to be confronted, if you’re a plaintiff, with a variety of legal defenses. You’re going to have preemption, you’re going to have Daubert issues—you all can name them better than I can—and you’re going to be confronted with the defense of personal responsibility.

And I know Professor Banzhaf. The hair just went up on the back of his neck and he’s chomping at the bit to come back and talk about that. But personal responsibility is, in fact, a legitimate defense in this litigation and I will guarantee you, I have done a lot of jury research over the years, and
you all have seen juries react this way. Personal responsibility, in this country, at this time, is significant.

The idea of using litigation to fight obesity started in 2003 with the *Pelman v. McDonald’s* case. That case was brought by several youngsters who had eaten, I think, every day of the week at McDonald’s, claiming that they became obese, then became ill. *Pelman* was ridiculed and the case gained no traction. It was the subject of late night comedy and the like, for a variety of reasons; not the least of which was, to be able to show causation, you have to be able to show a connection between the obesity, the disease, and the food. And the question is, “What causes obesity?” It’s really calories in, calories out. But is it because working families are predominating today? Does that cause obesity? Because there’s no time to cook healthy meals at home, and fewer family dinners mean that people go out for more fast foods? Is that why we have obesity? Is it using food stamps to purchase sodas?

Well, what about using food stamps to purchase donuts? Or what about using food stamps to purchase candy? Is it a failure to have grocery stores in low-income neighborhoods? Is it lack of exercise? This is from the Let’s Move initiative that Mrs. Obama has been working on, and this was a startling figure to me: eight to eighteen-year-olds devote an average of seven and a half hours to using entertainment media including TV’s, computers, video games, cell phones, and movies in a typical day. Think about that ladies and gentlemen. There are fewer physical education programs, and kids are on their computers and the video games.

There are no sandlot sports like we used to have when you would come home after school. Everybody’s driven every place. There are no sidewalks for you to walk or ride your bike. These are factors that go into obesity. And then the question is, “What food causes obesity?” Was it the pizza or was it the ice cream? Was it the chips? Was it the soda? How are you going to establish, in any given case, what caused an individual to become obese? Then, here’s another article that recently appeared: scientists now think that there may be a viral link to obesity, and if that’s not enough scientists also believe that genetics may have a role in obesity.

All of these factors will be used to refute the argument that you can come in and say it was a McDonald’s cheeseburger that caused this person to get fat. About a month ago, I was asked to speak at the Institute of Medicine here in Washington to a childhood obesity group. I looked around the room, and there were people who knew more about obesity, knew more about what causes people to become obese, understood marketing, understood restaurants, fast food—all of them understood this—and I would say about 20% to 25% of those people had a weight problem. It’s not because they were snookered by the fast food companies.

Let he or she who is of a BMI of less than 25 cast the first stone. Even if you can show what causes obesity, then you have to show: did it cause a disease? Did it cause diabetes? Did it cause heart disease? Well, what
causes these things? Answer that question and you get the Nobel Prize. Some people who are skinny have these diseases; some people who are fat don’t have these diseases. Many people eat badly, and, you know, some of them never get sick at all. Genetics is obviously a part of it. If science can’t answer these questions, lay juries are going to have a very difficult time doing so; and the plaintiffs agree.

There is an article written by Professor Richard Daynard with the Public Health Advocacy Institute about the lessons from tobacco to obesity lawsuits—I’m sure Professor Banzhaf is familiar with this. In this article, Professor Daynard notes that there’s little support for these cases because the people and the courts are critical of overweight citizens who claim restaurant food and food products made them fat. Causation issues in food litigation are complicated, and it’s just what I said. And the plaintiffs recognize that. They recognize that they have an uphill battle to convince juries that food caused a disease in any given individual.

So they want to shift to consumer protection arguments. They have been talking about this now for years. Professor Daynard and I danced around this issue back in 2004. At that time, the well-honed army of lawyers was getting ready to switch from tobacco to obesity litigation, and the swat troops were getting ready. Ain’t happening. And here’s the esteemed Professor Banzhaf and I and Morgan Spurlock’s film back in 2004. The fact of the matter is that they now want to use consumer fraud instead of the direct obesity approach to try and prove indirectly what they cannot prove directly; it’s a little disingenuous. It’s sort of an “ends justify the means approach.”

Professor Daynard admits that when you can’t come up with the causal link, “Let’s go try to do it through the back door.” For example, you go out and see lawsuits against people who make things like Snapple. They use the term “all natural” and so somebody gets bent out of shape because they spent $1.09 and they did not think it was “all natural” because it has high fructose corn syrup, which Dr. Jacobs on at CSPI agrees is the same as sugar. That was a class action in California that was denied certification. There was a class action in New Jersey that was granted certification. All these things are out there pending as far as whether or not this is a part of the obesity problem, but this case does not have anything to do with obesity.

Same thing with Ben & Jerry’s. CSPI complained about the use of the term “all natural.” Ben & Jerry’s said, “Okay, we’ll take it out of there.” And Mike Jacobson said, “I’m glad Unilever made the right call.” Next thing you know there’s a suit against Ben & Jerry’s over whether the ice cream is “all natural” or not. Give me a break folks—it’s ice cream. This is not health food. You know what you’re getting when you eat it. And then you have the settlement problems, and we’ll hear about that. Kellogg’s settles a $10.5 million class action: class members get three boxes of
cereal and the lawyers get $2 million in fees and expenses. So, where does it leave us?

Kelly Brownell at Yale—who’s another one of the gurus of fat litigation—says that companies ought to suppress their automatic opposition to public health recommendations, and to a certain extent there’s some truth to that. But I submit to you that the plaintiffs also ought to suppress their automatic, knee-jerk reaction to think that everything can be resolved by litigation. Because if we go to litigation, we’re going to go to the mattresses; we’re going to dig in, it’s going to be costly and expensive, and there are better and easier ways to do it. Thank you.

LINDA E. KELLY: All right. Thank you Joe. Now, let’s hear from Ted Frank.

THEODORE H. FRANK: Thank you. I think I’m qualified to speak about obesity class action litigation as an obese class action litigator. I would like to start with the public policy hypothetical. Let’s envision the world where it’s indeed the case that it’s advertising that’s forced me to go to fast food restaurants and buy chicken quesadillas and what not, and results in the shape that I am in today even though it’s the exact same shape as my brother who has a completely different diet. What we’re really looking at here is a problem of advertising. So if we have an advertising problem causing people to be obese, let’s counteract it with more advertising.

As a public policy matter, we might have to really twist Hollywood’s arm into this. But I think we can get to Hollywood and Madison Avenue and say, “What you need to do is, you need to go and convince the American public that what is sexy are people who are svelte—people who are thin; people who are athletically lanky; and stop glorifying the obese in your advertising. Make thin attractive. You should, when you cast roles in comedies and dramas, make sure you’re not putting fat people in them, put athletic, thin, svelte people in there.”

And if you are going to have somebody who’s obese, make sure that you imbue them with qualities like slobbliness and obnoxiousness, maybe you can have—if you have a popular sitcom like Seinfeld—an obnoxious fat neighbor in there. Or maybe you can have some cartoons on Fox on Sunday night where the protagonists are overweight but really obnoxious. That way people will associate fat with negative qualities, and we can maybe have game shows where people lose weight and have people who epitomize sexiness and they’ll be lean and they won’t just be models, we’ll call them supermodels.

And just in general, let’s glorify thinness and make obesity unattractive. And because advertising works, once we do this and it’s not just Hollywood, we can get Washington involved, maybe we can get the First Lady to do some anti-obesity campaign. But once we do this, because advertising works, fat will disappear from our nation once we have Hollywood pre-
sent the message that obesity is not socially acceptable. And okay, everybody gets the joke and we have these mixed messages from advertising and yet we have this growing obesity problem as a country. We have a growing obesity problem on this panel.

It can’t all be because we’re ignorant of how many calories a Big Mac has, because I didn’t have the Big Mac until I was twenty-five. But it shows the problem of addressing this through litigation because there’s obviously a causation issue here. It’s not the advertising that’s doing this. And that’s what eventually doomed the Pelman v. McDonald’s lawsuit. The class certification was denied, and in fact, if you look at the other lawsuits that Mr. Banzhaf singled out at lunch time—he calls these “fat lawsuits”—that are this marvel of public health and you look at what they’re actually doing.

The results are somewhat different. For example, Kraft replaces, in their Oreo cookies, the partially hydrogenated oils with a different kind of vegetable oils. And trans fats are probably cardiologically worse for you than other kinds of fat, but at the end of the day, fat is fat. Each gram of fat still has nine calories, whether it’s partially hydrogenated or not, and the difference is not going to make a difference in the obesity. It is going to transfer some money from consumers to lawyers, certainly. Maybe there will be some marginal improvement in health because Oreos no longer have the partially hydrogenated oil, but it has nothing to do with fat at the end of the day.

And it’s also far from clear that—Ralph Nader has made this wonderful career of finding out that somebody was about to do something—the government or industry is about to act in a certain way, and rush out and hold a press conference and demand that they do it, and then take credit when it happened the next day.

I think that’s what happens with a lot of these lawsuits over trans fats, because there’s been an industry movement to move away from trans fats as people recognize the health problems related to trans fats, and they want to see other kinds of fats in their products. You begin to see across the supermarket aisles—lots of zero trans fat labels on boxes because manufacturers recognize that that’s appealing to consumers. And whether or not Kraft would have gotten there without the litigation—I think they would have. Souls can differ on that, but I don’t think the litigation made a big difference there.

If we look at some of the other fat lawsuits that Mr. Banzhaf has raised, one regarding Pirate’s Booty, another one regarding minor ice cream brands in Florida, these are interesting class actions. What they were, were mislabeled products. Whether intentionally or mistakenly, the products said they had X number of calories and in fact they had X plus Y number of calories, and that’s your basic run-of-the-mill consumer fraud. There’s nothing special about that in terms of fat. These are not unique lawsuits; these are the same kind of consumer fraud lawsuits that have been brought
since the beginning of consumer fraud lawsuits. I have two points to make
about them.

First of all, it’s really not the case that the reason people are fat in
America is because they’re buying 150 calories worth of ice cream and they
think it’s really only 120 calories. That’s not what’s really happening.
We’re consuming more calories, we’re exercising less, and it’s not because
we’re confused about the labels. Certainly, it’s not a bad thing when the
consumer fraud lawsuits are brought against the bad labels. Though in both
of these cases, it was not the lawyers who discovered that there was a prob-
lem, there were newspaper investigations that discovered that the labels
were inaccurate and then the lawyers jumped on the bandwagon and sued
after finding out about it.

But what is interesting about these lawsuits is that these lawsuits are
trumpeted as examples of good public health litigation, in fact, preventing
obesity. The ice cream lawsuit in Florida, you know how that settled? That
settled for millions of dollars for the class action attorneys, as per usual.
And the injured consumers who were grievously injured and consumed all
these extra calories because of the mislabeled ice cream, they got coupons
for free ice cream. And whatever that lawsuit is doing it’s not preventing
obesity. I think the similar thing is happening with McDonald’s.

You can say litigation has caused them to offer salads that they
wouldn’t have otherwise. But if you look at the fast food menus across the
board over the last six years, you’ll see an ebb and flow of companies going
back and forth on this—offering healthy options, discovering that when
people go to fast food restaurants it’s not for the healthy options, and taking
healthy options off the menus, and then putting them back on when there’s
a public backlash.

Certainly, there’s a consumer demand for this. Subway demonstrated
this. They had a troubled young man, who did nothing but eat Subway
sandwiches for a long time and lost a lot of weight doing so, and ran a
whole advertising campaign around him and this encouraged other fast food
restaurants to offer low calorie options. But at the end of the day, they’re
also offering the high caloric options. And something we’ve seen over the
last three, four, five years is these mega-sandwiches—Carl’s Jr. Thick-
burger or what have you—have 900 calories, 1,000 calories, 1,200 calories;
all upping the ante.

Just last night, during the football game, there was a Burger King ad
for a buy one get one free chicken sandwich. Two chicken sandwiches
have 1,320 calories with 720 calories in fat. So, fast food restaurants do not
seem to be all that scared about the litigation to the extent that they’re re-
ducing caloric options. I think it’s reflecting consumer demand. Now,
what can we do in terms of litigation? The whole weight issue, it’s a very
simple plus/minus kind of thing. More calories in versus less calories out is
going to be a weight gain, and vice versa. And 3,500 calories is a pound,
and you start assigning liability on a market share basis, for who knows how much.

Do we sue George Mason for the Snickers bars in back there? It’s not just the food we’re eating but it’s the change in our exercise patterns. A generation ago, I imagine just about everybody in this room, including me, when they were a child, when it came time to washing the dishes, you would manually wash the dishes. That burns an extra 300 calories an hour, and if you’re doing that two minutes a day, that’s ten calories a day. If instead of washing the dishes, you’re putting them in an automatic dish washer, you’re missing out on those ten calories a day. Ten calories a day over the course of a year, that’s a pound a year.

Over a decade that’s ten pounds a decade. What a coincidence, that’s just about enough to get us where we are in terms of weight gain. Do we sue Maytag?

What we are faced with is a change in culture where a century ago our employers would pay us to perform manual labor; we have moved to a service economy where we’re all lawyers sitting and typing at a computer, rather than performing manual labor. We have to go pay gymnasiums to exercise, rather than being paid to exercise, and of course we’re exercising less because of it. Food is cheaper than it was before, we’re eating more of it, and that’s what’s causing our obesity problem. That’s a social issue. And it’s not one that’s going to be solved by litigation. Thank you.

LINDA E. KELLY: All right. Thanks Ted. And now we will hear from Stephen Gardner.

STEPHEN GARDNER: It won’t be solved by litigation, but the same as having a thousand lawyers under ten feet of water, up to their necks in sand—it’s a real good start. There are two arguments that people who do not like lawsuits, and would not hold food companies responsible for violating state and federal law, will use. One is the personal freedom, personal responsibility mantra; and the other (and this very odd), “Well, it will not fix the obesity crisis.” Well, the tobacco litigation resulted in a significant amount of change, especially in the way cigarettes were marketed to little kids. It hasn’t gotten rid of smoking, but it was a really good start. The efforts that John has been making, for longer than most of us have been alive I think, have helped.

And there’s no reason that you do not approach something incrementally just because you cannot wave a magic wand at it. I think my mother was scared by a banker when I was in the womb because the only cogent thought I had in high school was that I wanted to be a consumer lawyer. The rest of the time was, “How do I get girls to talk to me?” And that’s what I was able to pull off.

I was a legal services lawyer, the Student’s Attorney at the University of Texas, and then I went to the New York and Texas AG’s offices, work-
ing with Bob Abrams in New York and then Jim Mattox in Texas. For almost thirty years I’ve been bringing suits using consumer protection laws for deceptive claims made by food companies, finance companies, and all sorts of other things. It is my experience that it’s completely legitimate to use consumer protection laws to have a positive effect on the marketplace. In fact, I get calls now from competitors who want me to take action against the other company because the other company is stealing their business.

That’s bad capitalism. We’re trying to make consumers better capitalists, better consumers, and in fact give them more freedom and more freedom of choice. Joe used the natural cases, and for reasons I honestly do not quite understand, to belittle obesity litigation. Of course the natural litigation is not obesity litigation. It’s not on John’s list; it’s not on my list. It, again, is capitalism. HFCS, high fructose corn syrup: there’s a chapter in a book on food science that lays out the process necessary, starting out with corn and then tweaking the molecular structure, to end up with high fructose corn syrup. It isn’t natural, it isn’t close to it.

And calling it natural so people will buy it is purely deceptive. It is absolutely right that at least based on current knowledge, it’s about the same as regular sugar in causing weight gain. There’s emerging science that shows that the false satiety of HFCS is not the same as sugar and therefore people will consume more of it. So developing science indicates that HFCS may be worse; but that’s not the point of the lawsuits we have brought on “natural,” or the lawsuits private lawyers have brought. It’s just, “Tell people the truth.” And no, stopping Snapple from using the word “natural” when it has high fructose corn syrup or Ben & Jerry’s or anybody else, is not going to cure consumer fraud involving fraud. But it’s a real good start.

I’m not going to belabor the cigarette litigation too much because John has talked about it, and I reckon he will again, and others may. But cigarette litigation is not a direct template for food litigation for a couple of very important reasons—well, one really. Food is multifarious. There are thousands of companies, there are all sorts of food, and at this point in time in the law, it is not possible to win. Courts have not bought any way to show that McDonald’s made X person fat. It’s certainly not going to be possible to show that McDonald’s made an entire class of people fat.

But what it is possible to show is that McDonald’s, or Burger King, or Kraft, misled consumers and the fact that that doesn’t cure obesity does not excuse misleading people to sell food or to sell any product. You shouldn’t be able to cheat to sell a product. Although food marketing is not a parallel to cigarette companies, not even the tobacco companies marketed to three-year-old children. McDonald’s does, McDonald’s markets—and I’ll talk more about our planned McDonald’s lawsuit—using toys.

Anybody who is a parent knows the toys in McDonald’s and other fast food companies’ products are there as an attempt to cut into parental responsibility, to cut into parental rights, by going around the parent, no mat-
ter how hard they try to prevent it, and marketing straight to the kids; and 
McDonald’s has a toy for kids under three. So, they’re marketing to three-
year-olds and two-year-olds. That’s something that not even—I don’t think 
so, John might correct me—but I don’t think Joe Camel was aimed at the 
toddler group. It works with children. Children know the golden arches 
and it’s a problem.

I remarked to a couple of people during the break that, “All lawyers, 
even judges, we’re all symptoms of a breakdown of decent societal func-
tion. Lawyers and judges, the whole system would not exist if we all treat-
ed each other fairly.

So it is essential in our society to have lawyers and judges and litiga-
tion to correct any number of problems. As Margo Wootan, who is the 
costar with John in “Super Size Me,” is CSPI’s Director of Nutrition Policy. 
When CSPI’s litigation project was created and I was hired to run it, Margo 
was asked why CSPI got into litigation with all those sleazy lawyers. And 
she said, “Well, Congress hasn’t done anything to address the problem. 
The federal agencies aren’t doing anything. We are just plain out of 
branches of government. We’ve got to go judicial.” And that is the choice 
we have to make.

We have to, when it’s essential, whenever efforts of CSPI and other 
advocates have made to stop a problem does not work, then litigation often 
will work. It will not cure false advertising. It will not cure greed. It will 
not fix the obesity crisis. But it will stop a component of those things, and I 
think it’s very, very important. I also think it’s important to stress that we 
have never asked judges to make new law. We ask judges to apply existing 
law. And with judges who apply existing law, we’re going to win. It’s 
what I would call, the activist judges—I’m sure there are none here—who 
in order to make a point, will ignore what the law says because they do not 
like where it’s going.

But that does not serve as a reason that we should not try. Most all 
judges in my experience apply existing law, and choose to take their oath 
seriously; when that happens, we by and large will win. I was somewhat— 
because I’m not really surprised by anything Joe says, but slightly offend-
ed—when he said that we’re only in it for the money or words to that effect. 
Joe can lose and still get paid. I can lose and still get paid too because I’m 
on a salary. The plaintiff’s lawyers lose and they don’t get paid. Most 
class action lawsuits are not brought for the purpose of making money.

I’m going to get to, in a second, why some are, and why you should 
forgive us for those people. But most of them are not. But even if they 
were, Joe do you work for a buck a year? The defense lawyers do get paid 
and they get paid every month and there’s nothing wrong in our society for 
getting paid for what you do. So, the fact that you might be motivated by 
money is to me a little bit misleading.
Okay, I think I’m through venting. I want to talk about our planned, announced, and much-talked-about lawsuit against McDonald’s, which is based simply on the fact that young children do not understand marketing.

A lot of people say, “Well, I don’t know that I believe that,” and my response is, “Well, I don’t care if you don’t believe that the sun rises in the east. It’s fact. Kids don’t understand marketing.” Top childhood development authorities will testify for us. Kids do not understand and thus they are deceived. We’re talking about McDonald’s marketing using toys directed toward children. Bypassing parents, attempting to cut out the parent’s choice and the parent’s responsibility to accomplish two things. One, get the kid wanting McDonald’s now, and two, get the kid wanting McDonald’s when the kid is no longer a kid. The lawsuit is going to be a tough one. But it is trying to address again, just one component of what is not just obesity, but the health problem that exists in this country.

One of the slides that Joe used—he didn’t highlight that part, so you all may not have seen it—said that one of the problems is that there is an environment that encourages fast food. A large part of that environment is fast food companies and food companies in general, marketing junk to people. The discussion of personal responsibility, for one thing, avoids the fact that we’re talking about six-year-olds. So, they really don’t have much personal responsibility. They’re still wetting their pants. They’re not fully matured human beings, and they are the subjects of this marketing.

But even to the extent, and it’s a real extent, that parents can and should control what their kids want to do and should be responsible for controlling them, the parental responsibility argument avoids the fact that the companies who are putting out the ads should be responsible for the effects of the ads too. There is a duty under state consumer protection laws, as well as under federal consumer protection law for companies not to deceive their intended victims. The argument that it’s all about individual responsibility ignores the need for equal responsibility on the other side.

The only other thing I want to mention is that there are some really terrible—they are very much in the minority—but there are some terrible class action lawsuits. We call them greenmailers and copycats. I guess it’s flattering, but every time CSPI files a suit or wins a decision we see copycat cases crop up. We try to persuade these people not to file, but they still do. They are the minority, they’re the lazy ones, but you will see them. You will see people settling for coupons. There are some bad settlements. Most consumer class actions are not.

I do ask you all to keep in mind when you see a really cruddy class action that there are many more of them that have been resolved even before the lawsuit was filed at all. Because class action litigation is a very effective way to achieve the advocacy that I signed on to do. It’s not the only way and it’s not a cure-all, but it is one way to address responsibility of the companies who spend, in the case of kid’s fast food meals, I think it’s about
$15 billion a year trying to pull the children in. And I’m okay with that. Thanks.

LINDA E. KELLY: All right. Thanks Steve and we’ll turn it over to Todd Zywicki.

TODD J. ZYWICKI: Thanks. I listened to Professor Banzhaf’s lunch talk. I worked at the FTC from 2003 to 2004 and what really struck me, listening to Professor Banzhaf, was that he makes a really compelling case for, explaining quite well, why litigation is completely the wrong way to go about addressing public health issues. So, what I’m going to talk to you about is based on my experience at the Federal Trade Commission and how a regulator would look at this—a very complicated issue like this—and why thinking of it through this sort of simple minded approach of litigation on suing for things that you think you can sue, is really a counterproductive way of thinking about this.

And those who have seen me at these programs before: I’ve got this sort of quirky predilection where I feel obsessed to actually have to look at the data and test hypotheses about what’s going on before I decide what is going on. The other thing is that I’ve got this quirky idea that you should actually think about the unintended consequences and the cost of the actions you take. So, while certainly, as Stephen Gardner notes, if there was an overall benefit here, even if it was small, that would be worth doing something; but if the overall benefit is exceeded by the overall cost, then I think you need to reconsider it.

What litigation is really designed to do is think about the benefits and ignore the costs, and this is an area where I think the benefits are very small, and the unintended consequences quite large. And what I’m going to focus on is advertising. Just to give you a small window of the big issue and show you how complicated that little issue is. I’m going to focus on advertising directed at children. And let me first say, obesity and weight is a big issue, so to speak. It’s an important issue, and in many ways, it’s actually a bigger long-term issue than smoking. The difference is obesity is a morbidity issue, which means that obesity really doesn’t kill you.

What obesity does is lower your standard of life and causes you to consume a lot of health expenses for a long period of time. So it’s very costly, very detrimental to people’s health. Smoking is a mortality issue. So, for instance, the evidence seems pretty clear on this that in purely dollar terms—and this is a very politically incorrect thing I’m about to say but it’s the first of many politically incorrect things I’m going to say in the next twelve minutes—smoking is actually a net budgetary benefit to the United States. Because smokers die earlier and they die faster, they don’t consume as many medical expenses—they don’t consume Medicare, they don’t consume Social Security, or any of those sorts of things, right? I’m not saying that people should smoke, obviously. But obesity is a morbidity issue, it is...
a net cost; smoking, from a purely financial situation, is a net benefit, which is in and of itself to give you some sense of the complexity.

So, let’s talk about advertising, and what I would call hypothesis testing. If you’re going to think about this, and the question you ought to think about is: “Is advertising causing kids to get fatter?” Right? Put simply. And then the question would be, even if it is: “What does the evidence show?” Then the question is whether or not we want to do something about it. So, I could think of a variety of ways in which advertising might cause kids to get fatter. Kids might watch more television and thereby see more ads, more minutes of ads. There might be more minutes of ads per hour, so there could be a change in composition.

For example, kids are seeing the same number of ads but a greater percent are junk food ads. There could be a change in the effect of advertising—it could be a change in the effectiveness of advertising. And after all that we’ve got to still think about what other problems there are. Let’s talk about that. So, first question is, “Are kids watching more television?” How many people here think that kids watch more commercial television than they did in the ’70s? It turns out kids watch less commercial television than they did in the past. They are a lot more sedentary. They are spending a lot more time on the computer and that sort of thing, but kids actually watch less television. Overall, if you look at the data, the Federal Trade Commission did a study on this a few years ago. What they found is that the fact that kids are watching less television more than anything else, kids have actually seen 9% fewer TV ads.

Kids, I’m defining, as under the age of eleven. Kids see 9% fewer television ads every year now than they did in 1977 because of that. It also turns out that food ads are a smaller percentage of ads on television. The big thing is that in 1977 when I was a kid, or an older kid, we didn’t have advertisements for video games, and DVD’s, and all this sort of stuff so what you’ve done is basically taken a whole new tranche of things, which of course, are sedentary activities, and that’s competing for ad dollars with food ads.

So, kids are actually seeing—there seems to be no question when you look at TV, and TV’s the big thing; we could talk about other issues—fewer food ads on television. There’s also no indication that food ads have risen versus other products, as we said. And there’s no change in what kind of ads you see, right? When I was a kid they advertised junk food on TV. My daughter, when she watches TV, they advertise junk food on TV. It wasn’t some golden era where every ad we saw was Grape Nuts or whatever like when I was watching Hong Kong Phooey.
My daughter isn’t seeing Grape Nuts ads when she watches Dora. First, there’s no indication kids are seeing more ads. Second question is: have ads become more effective? Well, this is an important question to think about; the economics of advertising as it relates to consumption. Advertising has two different effects. One, it can increase market demand; this would be informational advertising. Say, when the iPod comes out, advertising tells consumers about the existence of the iPod. You would expect that advertising would cause iPod consumption to go up.

The second kind of advertising is brand advertising, which does not increase demand for the overall category of the product, it increases the demand for one product versus another; so, this would be buy Chevy versus Ford or buy Coke versus Pepsi or Nike versus Adidas. The effect there, is not to increase the overall demand for that category of product, but to increase demand for one brand versus the other. And in fact, it turns out that if what you have is brand advertising, a likely consequence is that it decreases overall demand for the category. Well, why would that be? Basically, informational advertising tends to decrease price, brand advertising tends to increase price. Why?

By making demand curves. Demand curves become more inelastic, which means you can raise prices and now there’s a cost that you have put into this system that was not there previously. So, the overall effect is to increase price. Increases in price tend to cause downward sloping demand curves, which cause a decrease in consumption of that category.

We don’t know whether or not what kids are eating increases market demand, like the iPod, or builds a brand, but it looks an awful lot like the second to me. That’s just a hypothesis, and to the best of my knowledge, nobody’s tested that hypothesis. But you would want to know it. Why? Well, I’ll give you an example: cigarettes. It turns out the empirical and economic evidence on cigarettes is that cigarette advertising bans do not reduce consumption of cigarettes. That’s what the economic evidence shows. Why?

Well first, almost all advertising of cigarettes is brand advertising, right? Camel’s trying to steal from Marlboro or whatever. They have a shrinking market as it is. So, what happens is, if you ban advertising how do you compete? You compete on price. You reduce the price because now you can’t advertise the product. So, that at least offsets the decrease in advertising because the advertising was never increasing market demand in the first place. The economic evidence shows that getting rid of advertising does not reduce consumption of cigarettes.

Third factor, maybe parents are acquiescing more to their kids? There’s so much more pressure going on there. My daughter’s five years old—she’s precocious I admit—but she has not yet gotten into my car and driven herself to McDonald’s. I wouldn’t put it beyond her, but she hasn’t quite figured that out, which means she has to talk me into going to McDonald’s.
So, is there some evidence that maybe parents are giving in more to their kids now? Well, I don’t know about that directly, but indirectly here’s what we do know: kids eat what their parents eat. And the reason why kids are fat is because their parents are fat. Adults have been getting fatter faster and sooner than kids, and the problem is that the parents eat too much, they eat too unhealthy. As I said, I was guaranteeing political incorrectness so now you’re getting it, right? Kids eat what their parents eat. That’s what the issue is here. If you look at the data, it’s quite clear that what kids eat is what their parents eat and that, if anything, the parents eat worse than the kids do. Well, what about other hypotheses? What if we could run the counterfactual?

Look at societies that don’t have advertising for instance, or have banned advertising to kids, or different cultures—does that make a difference? Well, you can look around the world and what you see, as it turns out, children’s obesity is a global epidemic. You can look at places like Egypt, Ghana, Morocco, Haiti, Costa Rica and the United States; their childhood rates of obesity have maybe tripled. If you look at Ghana, rates of childhood obesity went up 3.8 times between 1988 and the mid-1990s. Morocco, went up 3 times, Brazil went up about 4 times, and Egypt went up about 4 times. Now, Al Jazeera may be awash of Cocoa Pebbles ads. I’m not denying that it’s a possibility that Al Jazeera’s just jamming junk food down the throats of kids in Egypt. Color me skeptical that kids in Egypt are getting fat because of that. We’ve also looked at other situations. Sweden has long ago banned advertising directly to children. They have the same rates of childhood obesity as the rest of Europe. Quebec banned advertising directly to children, they have the same rates of childhood obesity and changes as everybody else in Canada. So, the effect here is that it doesn’t work, and if you don’t believe me, think about the final scenario, which I think of as the PBS diet.

You go to see the pediatrician and the parent says, “Well, Billy’s getting a little heavy. What should we do about it?” And the pediatrician says, “Yeah, you’re right he is. Does he watch TV?” “Oh, yeah, maybe four hours a day.” “What channel?” “Oh, he watches a lot of Nickelodeon.” The doctor says, “There’s the problem. Switch him to the PBS diet. Let him keep watching four hours of TV a day but as long as it’s PBS, not Nickelodeon. All that weight will just come right off.” I don’t know. It doesn’t seem to me that the PBS diet is going to work, right?

So, we could say, I think with a high degree of certainty, that if we go after advertising directed at kids there’s absolutely no indication that it’s the source of the problem. The problem, if anything, is that kids are giving in too much to their parents rather than their parents giving in too much to their kids and so the question becomes, “All right, well maybe if it made a trivial, smidgen, hypothetical difference, maybe it would be worth it.” Well, then we look at the cost. What are the costs? Are we willing to perhaps, get rid of Nickelodeon? Nickelodeon has a lot of food ads. Are we
willing to risk getting rid of Nickelodeon and other children’s programming just because we have some theory that this might work, even though there’s no evidence to support it? You start thinking about the unintended consequences of these things, and it starts to add up.

Let me close by then talking about one of the real problems and why this whole thing is just a side show. As I said, we’re just looking at advertising; if you look at it seriously, it’s not a serious part of the problem and it could have unintended consequences if we did it.

So, what are the real problems? Food is incredibly cheap now. We used to live in a society, up until a few decades ago, where starvation was the biggest problem that we had. Now, obesity’s the biggest problem we have. Most of the problems that you have with obesity are simply a side effect of having solved much more pressing and important social problems. And unless we address that—if we’re going to just fiddle with these gimmicks and stuff and think it’s going to make a difference—we’re not going to focus on the real thing. Food’s incredibly inexpensive, and we’ve become incredibly wealthy, so food costs less. Activity levels are much, much lower. As Ted said, it used to be, “Your boss would pay you to work.”

Most people were engaged in very physically demanding work. Now, you have to pay to exercise. All right, I’m sorry, your boss used to pay you to exercise, just as a byproduct of your work. Now, you have to pay to exercise. Suburbanization makes a difference. Longer commutes. Kids don’t walk to school. Family changes. I promised political incorrectness so here you have it. A clear risk factor is that two parents working is a contributor to rising obesity, for exactly the reasons that Joe alluded to, which is there’s less time to eat at home.

You eat out more, and when you eat out more, you tend to eat bigger meals. Finally, I’ll give you the most politically incorrect reason. This is not for kids, but for adults: smoking. Reducing smoking, which is a very good thing, has led to an increase in obesity. So, I look forward to the situation when Professor Banzhaf sues himself for the rising obesity epidemic. Thanks.

LINDA E. KELLY: Thanks Todd. We certainly have a diversity of views on the table here, and at this point, I would like to turn back to Professor Banzhaf to respond.

JOHN F. BANZHAF: My simple answer is déjà vu: I’ve heard all of this over, and over, and over again. I heard it twenty years ago when we started suing tobacco companies. There is no one simple solution to smoking or obesity. There is no one simple approach. That is why in my presentation, I pointed out that as an advocate, I have only certain choices. I can’t wave a magic wand and make parents do this or that.
I can go to the legislature when it is the most effective, and I can go to the courts when it is the most effective; and I do, and I will continue to do so because we have proven over, and over again, that this stuff works—whether or not all these naysayers believe it. Joe talked about courts making bad decisions. Yes, occasionally courts make bad decisions; but I think it’s likely that legislatures make worse ones because they are directly influenced by big food companies and other companies like that.

At least the hope is that most judges are reasonably impartial and, of course, if a judge makes a decision that is bad and is incorrect, it can be modified through the appellate process; unless he somehow does it on constitutional grounds, which nobody is talking about. The legislature can overturn it, but at least it will force the legislature to finally address the situation of obesity, which most of them are not doing. And I have heard personal responsibility, that’s a good one. It goes back at least twenty years.

They told us we would never be able to win a cigarette suit because of personal responsibility. Bear in mind, there, we are talking about adults, and here, we are talking about children. And the answer is, “Yes, personal responsibility can play a role.” Although, for a six-year-old or a ten-year-old, I’m not sure it’s a very big role. As you know, it’s brought up as a product liability action; personal responsibility diminishes, even if it’s brought on a negligence basis. How much assumption of risk and contributory negligence are you really going to blame on a ten or twelve-year-old child?

Yes, maybe the parents are somewhat responsible, but where does that fit into the equation when the child is the plaintiff and he’s suing a company? We are asking which one is responsible, and the answer is not, “Neither one is responsible,” but, “Both are responsible to a certain extent.” That in fact, is how we continue winning a lot of these tobacco lawsuits despite the same silly argument of personal responsibility. The Pelman case—everybody seems to dump on it. The fact is, that it’s alive and well. Five out of five federal judges have upheld it. Judge Sweet upheld three of the major theories in his first decision and the suit goes on, even though everybody calls it frivolous.

And, as I think Joe pointed out in one of his articles, the Second Circuit has basically given us a road map: they say, “All you need is bare bones pleading,” so anybody in the Second Circuit can file a very similar suit on the same grounds. The big problem everybody seems to be worried about is causation. Again, that is the same thing I have heard for twenty years with lung cancer in smokers, or lung cancer in non-smokers, and so on. But despite that, we continue winning.

Let’s just take a hypothetical case; let’s take little Jimmy who’s ten years old. He and his mother are homeless. They do not have much opportunity for home cooked meals. Joey eats about 40% of his meals at McDonald’s. Joey is morbidly obese and has, what we used to call adult
onset diabetes because it never happened in kids, now because it’s increasingly happening in kids, we call it type two diabetes. If he eats 40% of his meals at McDonald’s, roughly 40% of his calories are coming from McDonald’s. Actually, we’ve done some studies. It turns out the meals he eats at McDonald’s have more calories than the ones elsewhere, so maybe it’s up to 45%.

Can we show that McDonald’s is a substantial factor in causing his obesity? Sure. Is exercise the problem? No. I did some calculations not too long ago, pointing out that sending Ronald McDonald into schools arguing that the answer to obesity is just more physical activity, is a little bit like sending Joe Camel into schools arguing the answer to smoke, is just don’t inhale as much. If a kid eats a typical Happy Meal, he has to play volleyball for about seven and a half hours to work off those calories from one single meal. I’m a volleyball fanatic, but I would never play seven and a half straight hours. Now, Todd, I have to tell you that dishwashers are not the problem of obesity.

Counter advertising does work, and the way we know that is I proved it can work. Give us one out of three ads: every time there’s a fast food ad or a soft drink ad, give us one out of those three spots and we will reduce consumption by coming up with strong anti-obesity ads, the same way we did with smoking. I proved it. We know it works. Dishwashers are not the culprit. We know, for example, that although Europe has much the same society as we do, they have a much lower level of adult obesity; and we know that when people come over from Europe to here, they tend to gain weight. It’s not because their genes change on the flight over. Maybe it’s because we have a toxic environment.

Steve talked about the differences between the issue of tobacco and obesity. There are many differences and we acknowledge them, but some of them work in our favor. For example, unlike the tobacco industry, the fast food industry is very worried about its reputation. Therefore, they are risk averse. They are very worried about discovery. They learned from the tobacco industry. And unlike the tobacco industry, which can not really make a safer cigarette, they can. McDonald’s, Wendy’s, Burger King, can make changes, and I did not have time to go into it, but all of them have made it as a result of this. Do we want bureaucrats like what’s-his-name over here working at the FTC? The FTC has never been a powerhouse of consumer protection.

We call the little old lady of Pennsylvania Avenue, and if I had to have somebody working on my behalf, I would much rather have somebody working on a contingency fee. There is that old saying, “Never underestimate the power of a lawyer on a contingency fee.” In closing, let me remind the judges of what Prosser said with regard to torts. He said it was the business of the courts to make precedent where wrongs call for redress, even if lawsuits must be multiplied.
And if there is a wrong here, where one out of every three kids in school today will come down with diabetes—which is a dangerous and very costly disease—then I think you have to look at the common law, apply it with reason to changed circumstances, and that—as this happened in the past with regard to tobacco and some of our anti-fat suits—judges will begin making changes. I also go by the motto that Cardozo came out with for litigators. He said, “All found, however, in the end, that there was a principle in the legal armory, which when taken down from the wall where it was rusting, was capable of furnishing a weapon for the fight and hewing a path to justice.”

That is basically what I do and what many of my colleagues do. We look out and we see a major wrong, whether that’s smoking, whether that’s obesity, or something else. We look to see not what is the single one ideal solution, because there is none, and I can not wave a magic wand and get Congress to pass a statute. Whichever one is going to be most effective, I take that weapon down from the wall and I hew it. And the bottom line is that despite all these naysayers, we keep winning. Thank you.

LINDA E. KELLY: If you have an additional point you want to add, and then we will throw it to the judges for questions.

JOSEPH M. PRICE: Just a couple points. Steve, I have nothing against anybody making a buck, and I am as for it as the next person. My point with regard to the money motivation is that when lawyers have a financial motivation in connection with a lawsuit, that shapes how they handle the lawsuit. It shapes the outcomes and that is not the optimal way to shape public policy. And just on this whole thing of obesity of kids: don’t misunderstand me, Your Honors. We have a terrible problem here with obesity in this country. I don’t think anybody up here would deny that. It is an epidemic.

JOHN F. BANZHAF: Well, what have you done about it? What have you, Joe Price, done about the problem of obesity?

JOSEPH M. PRICE: Well, what I have done about it is talked about the fact that there are ways to approach the obesity problem—legislative ways, administrative ways—and as I said before, we would not have things like the Child Nutrition Act or the Food Safety Bill if it had been left to the hands of litigation. Those were the results of the legislative process. So, it is not as though we are all ignoring this. Nobody is in favor of obesity.

What we are talking about here is, what is the best way to solve a very thorny problem; I think it’s a legitimate basis to have a difference of opinion. As far as the best way to go about doing it: what you heard from me is exactly what I think you heard from Professor Zywicki. This isn’t the most effective way to do it. Childhood obesity—you can mock personal respon-
sibility, but at some point, parents have to say to their three-year-olds, “No, you can’t have a Happy Meal.”

LINDA E. KELLY: Ted, any additional points to add briefly?

THEODORE H. FRANK: Certainly. I think Professor Banzhaf proves my point about Europe and dishwashers; the reason Europe is thinner than America is because, for one thing, they exercise more than we do. They have a pedestrian society; we have a pedestrian and biking society, and we have a driving society. New York City for example, which is less car oriented, has a much lower obesity rate. Also, Europe has much fewer dishwashers than we do.

Second, if you’re taking this hypothetical example of the homeless family that’s eating 40% of their meals at McDonald’s, I suggest the solution there is that child services needs to get involved and take the kid away from the mother, who is spending her food budget on McDonald’s instead of on housing. And if you think that is cruel and rights-violating, well how is it that the mother—the parent—is less responsible than McDonald’s in that scenario? Third, not a single one of Professor Banzhaf’s lawsuits on obesity has done anything for consumers. It’s certainly helped the lawyers, it’s certainly helped some third parties, it’s certainly helped some defense lawyers. He can call them victories, but they have not done anything for consumers. And Mr. Gardner suggests that he is against these bad lawsuits that do not do anything for consumers, so I ask him to put his money where his mouth is. I have a case right now in the District of New Jersey against Breyers.

It’s a settlement where consumers get $0 and the attorneys get 100% of the proceeds. It’s called Ercoline v. Unilever.7

And finally, Professor Banzhaf challenged us to come up with a solution. I think it is beyond the scope of this panel because we are talking about obesity litigation, and we were just asked to debate that issue. But I’ll be happy to give a solution. In his lunch talk, he talked about the problem of externalities; people imposing costs upon others, that they are not realizing themselves. Right now, our greatest externality in the field of obesity is that people do not pay their own health costs.

So, when they overeat and when they have health problems because they overeat, those health costs are passed onto third parties because they are not realizing it themselves. If we change our economy so that people are bearing their own health expenses rather than third party insurers or the government, that would have a big difference on our obesity rates.

LINDA E. KELLY: I’m going to turn it over to Steve Gardner. Steve?

STEPHEN GARDNER: Two quickies. To respond to Joe—I agree with you Joe about the financial motivation of lawyers shaping the conditions of liti-
gation—but another area where I have seen abuse is defense lawyers who spend hours and hours arguing over why they should not have to produce relevant documents. I would pose the question: “When you’re in a discovery fight, who’s making money off that?” The guy who’s going to bill on a contingency later, or the guy who’s going to bill monthly and get paid for it? There are financial motivations, but it is not just on the side of plaintiffs’ lawyers. And Todd, you said obesity does not kill you? I wrote that down, but seriously, did I get that right?

**Todd J. Zywicki:** I’ve said it was morbidity, not a mortality issue generally, yes.

**Stephen Gardner:** Okay, well obesity does not kill you anymore than a bullet kills you. The bullet causes your internal organs to shut down and that’s exactly what obesity does. It is not the immediate shutdown, but they both do the same thing. It’s just that a bullet is a little quicker and more direct.

**Todd J. Zywicki:** Well, let me clarify that. Basically, the point is that obesity does not substantially shorten your lifespan in the way smoking does. That’s what I meant by the distinction between morbidity and mortality; because of modern medicine, you can stay alive for a very long time even if you are highly overweight. And so, that was the distinction I was drawing. Smoking kills you earlier, obesity keeps you at a lower level of capacity; they are both obviously problems, they are just different problems, and the obesity problem is a much more expensive problem.

Let me just make a couple points then. First, I’m not going to say these cases are frivolous. As far as I can tell, there is no case in the world that is too frivolous to be brought and survive summary judgment somewhere. So, trying to figure out whether something is frivolous or not, is not a game that I think we can play anymore. What I do think we want to focus on is whether or not the benefits of a particular action exceed the cost. I think it is very clear here: if you just focus on the advertising component and you look at the fact that other countries have in fact tried this with no effect.

There will not be any effect from this and there will be a cost. The question about litigation is, can judges do that sort of cost–benefit analysis to figure out exactly what the benefit is going to be and what the cost is? I think a third question, that’s a larger question: is that a cost?

**Linda E. Kelly:** Well, we’ve put some very controversial thoughts on the table. Please join me in thanking our panelists.

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4 SUPER SIZE ME (2004).


7 See Ercoline v. Unilever, No. 2:10-cv-01747 (SRC-MAS) (D.N.J. filed Apr. 6, 2010).