The Truth about Torts: Lawyers, Guns, and Money

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Executive Summary

In the past few years, various industries have sought statutory exemptions from legal liability for past behavior, including oil and gas companies, vaccine and drug manufacturers, and HMOs and other healthcare providers. When the trend began, it often involved the creation of some other and presumably more efficient means of recompense for victims of industry bad behavior.

But in 2005, Congress passed and the President signed a bill granting immunity to the gun industry from certain lawsuits, even though no such lawsuits had ever resulted in jury or judge awards against the industry. That law was the result of intense lobbying by the industry and its champions. The food industry is now seeking to follow suit, arguing that it should be exempted from all lawsuits relating to health conditions associated with weight gain or obesity. In the one such case currently pending (which would be dismissed under the retroactive provision of the bill immunizing the food industry), the plaintiffs allege that McDonald's harmed them by churning out unhealthy foods, while denying consumers the information they need to judge the nutritional profiles of the company's products. In both instances—the now adopted gun industry exemption and the hard-sought food industry exemption—Congress has not seen fit to offer any other means of compensating victims. It has simply offered a blanket protection for industry, without extracting a single penny in relief for potential plaintiffs.

The argument frequently heard in justification of granting industries tort immunity is that tort suits against the industry amount to "regulation by litigation." The phrase, though catchy, is empty rhetoric. All branches—legislative, executive, and judicial—and all levels—municipal, state, and federal—of government "regulate," albeit in different ways depending on their respective powers and jurisdictions. Indeed, the American people have been forced to resort to the courts to provide such protection for decades. Moreover, such litigation has played a vital role in curbing industry misbehavior, protecting the public from future harm, and increasing public awareness of industry's efforts to conceal past deceits.

Indeed, such litigation is entirely consistent with the separation of powers, and plays a vital role in protecting the public. Federal statutory preemption of state common law claims may be appropriate in relatively rare situations in which national uniformity is critical to the overall public interest and legislation makes alternative compensation mechanisms available to injured victims. But Congress should not be in the business of granting wholesale exemptions from state common law protections to economically and politically powerful special interest groups.

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Introduction

In the fall of 2002, John Allen Muhammad and John Lee Malvo terrorized the greater Washington, D.C. area with a series of deadly sniper attacks. Both were tried and convicted of murder, with Muhammad sentenced to death, and Malvo now serving a life sentence without possibility of parole. The pair's weapon for the murder spree was a Bushmaster XM-15 E2S .223 caliber semi-automatic assault rifle. Under federal law, neither should have been able to purchase the rifle: Malvo was a juvenile and an illegal alien, and Muhammad was the subject of a domestic violence restraining order.

According to a civil complaint filed in Washington state by representatives of families of several of the D.C. sniper victims, Muhammad and Malvo obtained the Bushmaster rifle from a gun dealer known as Bull's Eye Shooter Supply, who had no documentation on the weapon (either in the form of a record of sale or a report of the assault rifle as missing). According to the complaint, Bull's Eye had more than 230 firearms "disappear" from its store between 2000 and 2002,[1] ranking the store in the worst one-quarter of one-percent of all firearms dealers nationwide in terms of unexplained inventory loss. According to plaintiffs in the lawsuit, Bull's Eye's extraordinary level of "disappearance" of firearms was well-known to the manufacturer of the assault rifle used by Muhammad and Malvo, Bushmaster Firearms, Inc.

Based on these allegations, the plaintiffs brought civil tort claims not only against Muhammad and Malvo for their intentional acts of violence, but also against Bull's Eye and Bushmaster for their negligent distribution practices. In an order dated June 27, 2003, a Washington state trial judge refused a motion by Bull's Eye and Bushmaster to dismiss the claims against them.[2] As a result, the defendants agreed to settle the plaintiffs' claims for $2.5 million, the first time a gun manufacturer had ever agreed to pay damages for negligent behavior leading to criminal gun violence.[3] Bushmaster also agreed to provide educational training to its dealers regarding safer, more law-abiding business practices.

On October 26, 2005, President Bush signed into law a bill that would have required the judge to dismiss the plaintiffs' lawsuit both against Bushmaster, the rifle manufacturer, and quite probably also against Bull's Eye, the dealer with one of the most abysmal safety records in the entire country.[4] The law that would have required the dismissal of the sniper victims' claims—and that will hereafter apply to all similar claims against manufacturers and retailers of assault rifles, handguns, and other weapons—is known as the Protection of Lawful Commerce in Arms Act.[5] It reflects a growing effort by business interests to seek special grants of immunity from state tort law—the background set of principles regarding the duty to avoid wrongful injury that applies to all individuals and organizations. Not content with the kind of generally applicable alterations of state law that have previously characterized the tort "reform" agenda, these interests now seek industry-by-industry, product-by-product abrogation of the common law of tort as applied only to them and to their products.

Increasingly, the immunity-seeking industries find a receptive audience in Washington. In addition to granting broad-sweeping lawsuit immunity to gun manufacturers and retailers, the U.S. Congress now stands poised to do the same for food producers and sellers.[6] Meanwhile, firearms and obesity remain among the leading causes of preventable death in the United States. To simply assert that individual criminals and overeaters bear sole moral and legal responsibility for these tragedies—as proponents of lawsuit immunity generally do—is to beg one of the principal questions that both tort law and safety regulation are designed to address. After all, for decades lawmakers assumed that individuals bore sole responsibility for the decision to use tobacco products, yet we now understand that tobacco manufacturers engaged in an extensive and tightly orchestrated campaign to manipulate this "sovereign" consumer decision. Have aggressive marketing practices by food retailers played a similar role in the explosion of childhood obesity? Have gun manufacturers turned a blind eye to shady distribution practices by their dealers? If so, what governmental actors will stand ready to pick up the slack when the traditional role of common law courts in identifying and redressing harmful behavior is abandoned in favor of lawsuit immunity?

This report, part of the Center for Progressive Reform's *Truth About Torts* series, examines the frequently invoked argument that such immunity legislation is necessary as a defense against so-called "regulation by litigation," and finds the basis for this claim to be surprisingly thin. Purveyors of this phrase obviously hope to score rhetorical points by associating tort litigation with "regulation," a term they apparently imagine all right-thinking citizens regard as pejorative. But is there anything more to the "regulation by litigation" phrase than sloganeering? Are critics right to imply that any tort suit that is seemingly calculated to achieve broad public policy goals should be condemned for that reason?

The "regulation by litigation" phrase is generally traced to Robert Reich's 1999 article describing public-regarding lawsuits such as those brought by state attorneys general against the tobacco industry.[7] Reich speculated that the rising prominence of "courts [in] determining the regulatory responsibilities of U.S. industry" might be due to the fact that "politicians—more dependent than ever on industry for campaign contributions—can't be trusted to protect the rest of us from big business."[8] Just as courts in earlier eras had led the way toward civil rights protections for disfavored minorities, they now seemed to be furthering the health and safety interests of consumers, workers, children, small investors, and other groups that appeared to lack equal access to the deal rooms of the political branches. Inadvertently, however, Reich had coined the perfect slogan for opponents of tort liability, who quickly seized on his phrase to argue that suits by state officials against the tobacco, gun, pharmaceutical, and other industries constitute an usurpation of the exclusive authority of state legislatures and the U.S. Congress to "regulate" industry.[9]

When probed, it becomes clear that the "regulation by litigation" trope rests on little more than a conflation of the use of "regulation" to refer to specific legislation or administrative rules governing industry practices with the more general use of the word to refer to any kind of legal influence over private conduct. In the latter sense, "regulation" is what all branches—legislative, executive, and judicial—and all levels—municipal, state, and federal—of government are supposed to do. In fact, in this broader sense, the American people have been using tort law to "regulate" the activities of themselves and their organizations since before Congress began broadly deploying administrative agencies to implement statutes through the promulgation of "regulations" in the more narrow sense.[10] Thus, when Congress asserts a need to protect "lawful" commerce in weapons, it is either confused or disingenuous. By displacing the concurrent role of courts and juries in evaluating the conduct of the gun industry, the Protection of Lawful Commerce in Arms Act does not defend "lawful" commerce in weapons, but radically redefines and expands it.

The turn toward legislative immunity merits serious scrutiny, given the conceptual vacuity of the "regulation by litigation" phrase and the vital role that litigation by state attorneys general, municipalities, and private individuals has played in protecting the public from industry misconduct left unchecked by the political branches. The genius of the American system of government lies in the give-and-take between branches and levels of government. The brilliant hydraulics of the system are in danger of grinding to a halt when an overreaching Congress accedes to the immunizing demands of powerful industries.

The State Attorney General Tobacco Litigation and the 'Regulation by Litigation' Controversy

For most of the previous century, tobacco companies uniformly avoided responsibility in tort litigation through a combination of "scorched earth" procedural tactics that made cases prohibitively expensive for plaintiffs, and substantive defenses that attributed blame to smokers, cast doubt on the addictive nature of nicotine, and challenged the causal relationship between smoking and deadly diseases.[11] It was not until the 1990s that these seemingly impenetrable legal strategies began to break down. In the spring of 1994, Mississippi Attorney General Mike Moore filed the first state suit against the industry, alleging that the state was entitled to recover its Medicaid expenditures for treatment of diseases caused by tobacco use.[12] Other state attorneys general subsequently filed

similar suits arguing that their states had incurred damages in the form of healthcare costs as a result of the tobacco companies' wrongful conduct.[13] Together with a few key whistleblower accounts from industry insiders and a continuing stream of cases brought by private plaintiffs, the state attorneys general litigation eventually produced the release of troves of previously secret industry documents. Through these documents and insider accounts, a picture began to emerge of an industry whose top officials not only knew of the deadly, addictive nature of tobacco products, but also deliberately manipulated the design and nicotine content of cigarettes in order to enhance the product's addictiveness, and intentionally targeted children in advertising campaigns in order to continually "recruit" new smokers into the market.[14]

In 1996, after four decades of remarkable industry solidarity in managing litigation, lobbying, and publicity regarding the health risks of smoking, Liggett & Myers broke with the other four major tobacco companies by entering into settlement discussions with states and private plaintiffs.[15] Importantly, as part of the Liggett's eventual settlements, the company also broke the industry's long-standing "agreement" to deny the addictive, deadly nature of cigarettes by becoming the first manufacturer to acknowledge publicly that nicotine is addictive and that smoking is a cause of cancer, heart disease, and emphysema.[16] A mere two years before Liggett's admission, in 1994, seven executives of the major tobacco companies (including Liggett) had stood before Congress and the American public and testified that "nicotine is not addictive."[17] Liggett also agreed to provide the state attorneys general with internal company documents that would allow the states, as Massachusetts Attorney General Scott Harshbarger stated, "to go into court armed with the testimony of industry insiders and documented evidence about what 'big tobacco' knew and when it knew it."[18] Ultimately, in November 1998, the other four major tobacco companies—Philip Morris, R.J. Reynolds, Brown & Williamson, and Lorillard—settled the state attorney general cases by entering into what became known as the Master Settlement Agreement (MSA) with 46 states, the District of Columbia, and five U.S. territories.[19]

As part of the resolution, the attorneys general forced the companies to hand over millions of incriminating documents that demonstrated beyond dispute that the industry had engaged in a concerted effort to hide research information on the health effects and addictiveness of tobacco products. Simultaneously, the documents demonstrated, the companies sought to design their products to maximize the amount of nicotine delivered to users, and to enhance the products' attractiveness to children and young adults through expansive—and ingenious—marketing practices.[20] The Minnesota Attorney General's office was particularly successful in requiring tobacco companies to produce secret records through the discovery process in that state's litigation.[21] After Minnesota settled its case in 1998, Attorney General Hubert Humphrey "insisted [that] 'the truth be told'," and, for the first time, the tobacco companies were required to make their secret documents publicly available.[22] Later, the MSA required the companies to make available on the Internet all industry documents produced in the state and other health-related litigation and to add documents produced in future health-related suits.[23]

The importance of the attorney general tobacco suits rested not only in helping to uncover and publicize much of the documentary evidence now available regarding the tobacco industry's campaign to deceive the public. It also rested in demonstrating that state public officials could utilize the civil justice system to provide much-needed oversight of an industry responsible for a massive public health crisis.

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government oversight in the political branches, where the companies' resources and access to government representatives and officials proved to be a formidable weapon.[24] Four decades ago, the Surgeon General issued a report, based on thousands of medical articles already in existence, officially recognizing that cigarette smoking causes cancer and other life-threatening diseases.[25] Thus, the report concluded: "Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action."[26]

Since the Surgeon General's landmark 1964 report, the federal government has issued numerous additional reports finding that mounting scientific data had "conclusively established cigarette smoking as the largest single preventable cause of premature death and disability in the United States,"[27] and 12 million Americans have died of smoking-related diseases.[28] Nevertheless, despite this settled view of the massive public health dangers of smoking, the tobacco industry has remained largely unregulated at the state and federal levels.[29] Because it has long faced labeling requirements, advertising measures, and point of sale restrictions, the industry often argues that tobacco products carry a heavy regulatory burden compared to other lawful products. When compared to products of similar addictiveness and lethality, however, tobacco products seem to be remarkably free of oversight and control.

Nor has the industry been content to exert its political influence only over the elected branches. As information about the industry's deceptive practices began to come to light and it became increasingly difficult for the companies to defeat plaintiffs in tort litigation, the industry began furtively to funnel money into a campaign for "reform" of the tort system. For instance, internal company documents disclosed as a result of the attorney general litigation revealed that the industry spent millions funding the American Tort Reform Association (ATRA), including over half of its 1995 budget of $5.5 million.[30] These documents also revealed that tobacco industry money made it possible for ATRA to establish, with the help of a large public relations firm, a network of local "Astroturf" organizations—organizations with names such as Citizens Against Lawsuit Abuse—designed to provide a patina of broad-based grassroots support that obscured its concentrated industry backing.[31] Neither the tobacco industry nor tort "reform" proponents have been particularly open about the role of the tobacco companies in the drive to restrict access to the civil justice system.[32]

As noted, "regulation" in the broad sense simply means governance through law, which, presumably, not even tort "reform" proponents would deny is the province of all branches of government, including the courts. Thus, for the "regulation by litigation" claim to have any content as a critique of the courts, "regulation" must be understood in the narrow, more technical sense, i.e., as referring to standards promulgated by legislatures and administrative agencies. Put differently, the "regulation by litigation" claim is essentially a structural one: In tort cases such as those against the tobacco industry, attorneys general have allegedly sought to subject companies to the sort of standards that are properly imposed only by the political branches in the form of legislation and administrative rules.[33] However, instead of backing up this claim with the necessary analysis of the complex constitutional doctrines of federalism (the power relationship between levels of government, primarily national and state) and separation of powers (the power relationships among the branches of a given level of government),[34] critics simply emphasize the novelty of the "regulation through litigation" phenomenon, characterizing it as an unprecedented abuse of the judicial power.[35]

Such charges are overly simplistic. The attorneys general based their cases against the tobacco industry on long-standing principles of tort liability that courts are well-equipped to adjudicate, including product liability, fraud, intentional misrepresentation, negligent and intentional entrustment, public nuisance, and conspiracy.[36] It is true that, given the magnitude and severity of the public health crisis resulting from tobacco use, courts proceeding on a case-by-case basis are ill-equipped to provide a comprehensive "solution" to the issues of public policy raised by tobacco. However, the fact that legislatures may be better situated to resolve a policy issue does not mean that they are the only governmental institutions empowered to address it.

Courts and legislatures are complementary, rather than exclusive, institutions. More importantly, courts are the one forum in the American system where the concerns of ordinary citizens must be heard and answered. In that sense, the "regulations" of judges and juries frequently can be viewed as an indication that the supposedly more populist-oriented branches of government have failed to address a problem of serious social concern. Each level or branch of government is capable of protecting society and addressing policy issues in different ways, and part of the genius of having such a system is the potential for overlapping protection and for the action of one governmental institution to spur protective measures by others in a "race to the top."

In fact, the "regulation by litigation" claim is not backed by serious constitutional analysis because the attorneys general were doing nothing more than their job: using the judicial system to enforce existing law in the name of the public interest.[37] States began expanding the role of their attorneys general to include such proactive protection of, for example, consumers, the environment, and civil rights, in the late 1950s,[38] primarily in response to dramatic expansions in the scope and influence of industrial activities over the social and natural environment. Around the same time, common-law courts began crafting tort doctrines to ensure that those who were thought to be disadvantaged and vulnerable in this new system, such as workers and consumers, could seek redress for injuries caused by corporate misconduct and force these large, profit-driven entities to consider in their decision-making unquantifiable societal values such as human life and well-being.[39] The attorneys general's use of the tort system to defend the public interest in the tobacco cases amounted to a powerful combination of these two governmental institutions that had evolved to protect the public in a post-industrial world.

Blanket Immunity from Tort Liability for Major Industries, No Governmental Protection for the Public

Ultimately, the "regulation by litigation" claim amounts to a call for immunizing certain market actors from tort liability in quasi-academic garb. Until recently, when Congress immunized industries from tort liability, it tended to do so as part of a comprehensive legislative scheme providing for a remedial and protective mechanism specific to a given danger (which often had come to light as a result of litigation).[40] After the events of 9/11, for instance, Congress created an expansive victim compensation program as part of its effort to shield the airline industry from prospective tort suits.[41] Whatever the wisdom of such past plans, no alternative mechanisms of compensation or deterrence are to be found in the bills recently enacted or currently under consideration to "protect" certain industries from becoming "the next tobacco."[42]

Immunity for the Gun Industry

Congress and the Bush administration last year provided the gun industry sweeping immunity from tort liability through passage of the Protection of Lawful Commerce in Arms Act (Arms Act or Act).[43] The legislation prohibits nearly all civil liability actions against manufacturers and sellers of firearms and their trade associations based on "the criminal or unlawful misuse" of guns.[44] According to the National Rifle Association (NRA), the industry's chief lobbying organization that for years has pressured Congress heavily for such legislation,[45] barring such suits is necessary to protect "lawful" commerce in guns. According to the NRA, the industry is threatened with bankruptcy as a result of "frivolous" claims that seek to hold gun manufacturers and dealers accountable for crimes committed by individuals with their products.[46] But, as Senator Edward M. Kennedy pointed out in the debate on the legislation: "The level of litigation against gun manufacturers and dealers is miniscule. In a 10-year period, only 57 suits were filed against gun industry defendants out of an estimated 10 million tort suits in America."[47] Although a little over a year ago, one gun manufacturer and two dealers agreed to pay damages to settle suits of the sort now banned by the Arms Act,[48] and some of the pending cases are alleging significant amounts in damages, no jury has yet awarded damages.[49]

The Arms Act excepts from its grant of immunity lawsuits that are based on a gun manufacturer's or a dealer's violation of federal firearms statutes or analogous state statutes.[50] As Senator Jack Reed

pointed out in the debate on the bill, however, "those circumstances do not seem to apply to the cases that have been filed."[51] That is because in most of those cases, state and local governments and individual victims of gun violence were seeking to use the civil justice system to hold the gun industry accountable for unreasonably dangerous distribution and marketing practices that contribute to the maintenance of a black market in guns in this country—misconduct that, because of the NRA's extraordinary political power, is practically unrestricted under federal legislation and regulation.

Current federal firearms law is largely based on the NRA-propagated assumption that most criminals steal guns from legitimate owners of the weapons, rather than buying them from illicit channels.[52] For example, as the Bureau of Alcohol, Tobacco Firearms, and Explosives (ATF) has explained, the principal federal firearms control statute—the Gun Control Act of 1968[53]—contains no provision "specifically devoted to punishing the diversion of firearms from lawful to unlawful channels."[54] This gap in federal firearms law remains, notwithstanding the emergence of information in the latter half of the 1990s on the origins of guns used in crimes making clear that keeping guns out of the hands of criminals is not merely a matter of theft prevention. Gun-tracing analyses conducted by or for the ATF in the late 1990s revealed that the majority of guns used in crimes and traced to their source—almost 60 percent—were originally purchased from a very small proportion—1.2 percent—of federally-licensed dealers.[55]

Shortly after publishing this information, the ATF released a report on the agency's firearms trafficking investigations from July 1996 to December 1998 finding that, although firearms theft is "an important source of trafficked firearms,"[56] the vast majority of the agency's investigations involved "retail transactions"—that is, "straw purchasing, unlicensed sellers, and corrupt FFLs (federal firearms licensees)."[57] The ATF emphasized that, even though licensed dealers were involved in the smallest percentage of ATF investigations, trafficking by dealers presents a disproportionately large public threat because of their ability to divert large numbers of firearms to illegal channels.[58] According to the ATF, licensed dealers "were associated with the largest number of diverted firearms—over 40,000 guns, nearly half of the total number of trafficked firearms documented during the two-year period."[59] In contrast, 11,452 guns were stolen from licensed dealers, residences, or common carriers during shipment.[60]

Before the emergence of information such as that contained in the ATF studies, cases brought against the industry based on the criminal misuse of guns were largely unsuccessful because courts assumed that manufacturers and dealers had little control over the ability of criminals to obtain guns.[61] However, as a scholar with the Violence Prevention Research Center at University of California-Davis told a *New York Times* reporter regarding the significance of the ATF report on crime gun traces, "This information shows it is just not a tenable argument for these [gun] manufacturers to say they are not aware of what happens to their guns."[62]

This conclusion was subsequently confirmed by the first gun industry insider to blow the whistle on how much manufacturers know about the diversion of weapons by irresponsible or corrupt dealers into the hands of criminals. In 1999, Robert Ricker, former head of the American Shooting Sports Council and assistant general counsel for the NRA,[63] testified in a case brought by 12 California cities and counties against various manufacturers, distributors, dealers, and trade associations, alleging that they had created a public nuisance by supplying an illegal market in firearms.[64] In his affidavit, Ricker noted that the firearm industry "has long known that the diversion of firearms from legal channels of commerce to the illegal black market . . . occurs principally at the distributor/dealer level."[65]

Ricker further stated:

> [I]t was widely known within the industry that straw purchases, often of large volumes of guns, were a primary avenue by which a relatively small number of federally licensed firearm dealers supplied the criminal market. . . . It has long been known in the industry that many straw purchases or other questionable sales could be stopped by dealers who are adequately trained and schooled in

> preventing illegal activity. . . . Instead of requiring dealers to be proactive and properly trained in an effort to stop questionable sales, it has been a common practice of gun manufacturers and distributors to adopt a "see-no-evil, hear-no-evil, speak-no-evil" approach.[66]

In light of such information, courts began to show more sympathy to the contention of plaintiffs that gun manufacturers and dealers could be held liable under long-standing tort theories.[67] Like the California case in which Ricker testified, most of these more recent cases against the industry—which the retroactive provision of the Arms Act requires to be dismissed[68]—have been brought by state and local officials alleging public nuisance and other tort theories of liability on behalf of communities plagued by gun violence.[69] In the California case, the dealers and distributors agreed to implement many of the reforms that Ricker claimed he had urged the industry to adopt while he was working within it.[70] Such reforms included: abandoning the practice of selling at gun shows, where weapons often are purchased without background checks; regularly training employees on how to recognize and stop straw purchases; and adopting a policy of going "beyond the law in verifying the actual purchaser of a firearms."[71] After this settlement was announced, a *San Francisco Chronicle* editorial concluded: "Far from frivolous, the lawsuit has forged accountability and a measure of public safety that would not have otherwise occurred."[72]

The *Chronicle* editorial hit the mark. By and large, lawmakers at the federal level have turned a blind eye to the industry's practice of turning a blind eye to the black market in weapons and the violence that it produces. As Ricker testified in his affidavit, "[f]irearm manufacturers and distributors have long known that the current firearm distribution system encourages and rewards illegal activity by a few corrupt dealers and distributors."[73] Moreover, "until faced with a serious threat of civil liability for past conduct, leaders in the industry have consistently resisted taking constructive voluntary action to prevent firearms from ending up in the illegal gun market and have sought to silence others within the industry who have advocated reform."[74] Thus, the courts—and the state and local officials and individual victims who have brought cases against the gun industry—became essentially the only government actors strongly policing the industry misconduct that permitted the illegal market in firearms to thrive. *This* is the kind of behavior that the Arms Act redefines as "lawful" and protects with tort immunity.

The NRA and its supporters in Congress denounce such suits as constitutionally suspect "regulation by litigation."[75] In fact, the assertion is written into the Arms Act itself, which states that suits against the gun industry "attempt to use the judicial branch to circumvent the Legislative branch of government to regulate interstate and foreign commerce through judgments and judicial decrees thereby threatening the Separation of Powers doctrine and weakening and undermining important principles of federalism . . . ."[76] This argument fails for the reasons stated in the previous section, but one need not even look beyond the provisions of the original bill for the "regulation by litigation" justification to be revealed as pretext. Although proponents of the legislation consistently characterize it as addressing litigation, the Act grants the gun industry immunity not only from lawsuits, but also from any "administrative proceeding" based on the "criminal or unlawful misuse" of guns.[77]

The unprecedented immunizing provisions of the Arms Act have halted the gun litigation before the American public obtained a complete understanding of the industry's role in the maintenance of the illegal gun market.

The Arms Act's failure to define "administrative proceeding" leaves the scope of the ban unclear, but it appears that in the original bill, Congress not only granted the gun industry immunity from tort liability without providing an alternative protective mechanism, but also deprived the ATF of its already limited ability to stop the flow of guns into the illegal market by, for example, revoking the licenses of corrupt or reckless dealers in administrative proceedings.[78] Alarmed at this prospect, two former ATF directors wrote Congress a letter opposing the

immunity bill, stating their belief that the provision would prevent the agency from initiating administrative proceedings "to revoke a gun dealer's federal firearm license if the dealer supplies guns to criminals or other prohibited buyers" and "to prevent the importation of non-sporting firearms used frequently in crimes."[79] They further stated: "To handcuff ATF, as this bill does, will only serve to shield corrupt gun sellers, and facilitate criminals and terrorists who seek to wreak havoc with deadly weapons."[80] In short, the Arms Act and its immunity-seeking proponents seem to target not only so-called "regulation by litigation" for elimination, but even "regulation by regulation."

The history of the litigation against the gun industry has obvious parallels to the tobacco litigation. Both involved the efforts of state and local officials to use the courts to combat industry practices that had significantly contributed to public health crises, but that had remained largely unchecked by the federal government and state legislatures.[81] (Firearm-related injury is the second leading cause of injury death in the United States[82]; eight times as many people per capita in this country die from gun injuries than the pooled rate of 25 other high-income nations.[83] In 2001, almost 30,000 people died from firearm-related injury in the United States.[84]) Further, both sets of litigation belie the caricature of activist judges pursuing political agendas from the bench—"maverick judicial officer[s]" in the words of Congress.[85] Neither the tobacco cases nor the gun cases were deemed viable until evidence emerged linking the industries' practices to harms suffered by individuals and the general public. Finally, both sets of litigation brought to light previously unknown information about industry knowledge and behavior that made clear the possibility of improving the public welfare by encouraging more responsible conduct. The unprecedented immunizing provisions of the Arms Act, however, have halted the gun litigation before the American public obtained a complete understanding of the industry's role in the maintenance of the illegal gun market.

Immunity for the Food Industry

Industry groups and the politicians who back their immunity agenda clearly want the Arms Act to be precedent-setting.[86] A similar blanket-immunity bill already is in the legislative pipeline. Passed last year by the House, the Personal Responsibility in Food Consumption Act (PRCA) shields the food industry from tort liability based on health conditions associated with weight gain or obesity.[87] If enacted, the PRCA would cut off access to the courts even earlier than the Arms Act did, as only two cases of the sort prohibited by the PRCA to date have been filed against the food industry.[88] One was voluntarily withdrawn,[89] and the other has yet to go to trial.[90] Thus, as the Congressional Budget Office pointed out in its analysis of the costs and benefits of the legislation, given that "no such lawsuits have been resolved" and that "it is unlikely that there will be many new cases filed in the future," the estimated net value of the damages awards that the legislation would prevent is "negligible."[91] The question then naturally arises: If the problem that the PRCA is designed to address is at present "negligible," why has the bill attracted so much support in Congress?

In the one currently pending suit against a fast-food company based on obesity-related health claims—*Pelman v. McDonald's Corp.*—the opinions analyzing the plaintiffs' claims should reassure the industry that courts are not going to tolerate frivolous claims. According to proponents of legislative immunity for the food industry, suits based on obesity-related health claims are presumptively frivolous because they attempt to shift blame onto the industry for the consequences of freely-made lifestyle choices.[92] But in *Pelman*, federal district court Judge Robert Sweet did not need the assistance of Congress to hold that such claims are not viable. In dismissing the plaintiffs' claims in his first opinion in the case, Judge Sweet stated that he was "guided by the principle that legal consequences should not attach to the consumption of hamburgers and other fast food fare unless consumers are unaware of the dangers of eating such food."[93] Thus, because "[i]t is well-known that fast food in general, and McDonalds' products in particular, contain high levels of cholesterol, fat, salt, and sugar, and that such attributes are bad for one," Judge Sweet held that a bare allegation that the products are laden with these ingredients fails to state a claim cognizable under the law.[94]

Congress is well aware of this holding. In fact, in the report justifying the PRCA that the Judiciary Committee sent with the bill to the House floor, the Committee quotes Judge Sweet's admonition that "[i]f a person knows or should know that eating copious orders of supersized McDonald's products is unhealthy and may result in weight gain, it is not the place of the law to protect them from their own excesses."[95] Again, why the need for a federal law that displaces the traditional authority of state judges, when those judges seem to be upholding the very norms of "common sense" and "personal responsibility" that are said to be under threat?

The food industry is undoubtedly concerned about the kinds of claim that Judge Sweet went on to explain *would* be recognized under New York law if alleged with sufficient factual specificity; namely, those based on questionable marketing and disclosure policies, and on manipulation of production methods to yield hamburgers, fries, and other fast foods that are different in content and health effects from what would be expected by the ordinary consumer. These are precisely the areas the industry has persistently—and largely successfully—fought to keep free of legislative oversight and restrictions.[96] For at least three decades, the fast-food industry has successfully resisted efforts by lawmakers to require labels with nutritional information on food packaging.[97]

Perhaps most notably, the industry was able to secure an exception for its products from the Nutritional Labeling and Education Act of 1990's (NLEA) requirement that foods "intended for consumption and offered . . . for sale" be labeled with standardized nutrition information, including number of calories and amounts of saturated fat, cholesterol, and sugars.[98] Even though the federal government itself has recognized that "[t]he most important food-related lifestyle change of the past two decades is probably the increase in consumption of food prepared away from the home,"[99] restaurant food is exempt from the NLEA's disclosure requirements.[100] Coinciding with this trend has been an accelerating obesity epidemic in this country that the Surgeon General warned in 2001 "demands a national public health response."[101]

Two years ago, Rep. Rosa DeLauro highlighted these parallel increases in fast food consumption and obesity when she introduced a bill rescinding the NLEA's exemption for fast-food and other restaurants "that are part of a chain with 20 or more outlets," and requiring those establishments instead to place nutritional information for each food product on "menus, menu boards, and other signs."[102] The restaurant industry strongly opposed DeLauro's bill as well as similar state legislative initiatives.[103] As a result, the industry today remains essentially free of legislative obligations to provide people with basic information about the nutritional content of food that they purchase and consume away from home. Invoking accepted tort principles regarding disclosure obligations and the goal of informed choice, the *Pelman* plaintiffs have looked to the courts to impose such an obligation.[104] Whether or not they ultimately win their case, the litigants may be able to bring to light a great deal of information concerning the marketing practices of an industry that, like the tobacco and firearms industries, has remained remarkably free of health, safety, and consumer-protection regulation.

In their original complaint, the *Pelman* plaintiffs also claimed that McDonald's deceptively marketed toward children in violation of New York's Consumer Protection Act.[105] Although Judge Sweet dismissed this claim for lack of specificity, and the plaintiffs did not include it in their amended complaint,[106] it raised for the industry a specter of accountability in another area in which it has remained largely unfettered. In addition to the proportion of food consumed outside the home, another phenomenon associated with the rise of weight-related health problems is the fast-food industry's aggressive marketing toward children.[107] Although excess weight and obesity are on the rise across all segments of the U.S. population, the Surgeon General reports that children are experiencing particularly steep increases.[108] Specifically, the percentage of overweight young children (ages 6 to 11) has nearly doubled over the past two decades, and the percentage of overweight adolescents (ages 12 to 19) nearly tripled.[109]

According to Dr. David Ludwig, the director of the obesity program at Children's Hospital Boston, the public health implications of the obesity epidemic

among children are extremely grave. As he stated to the *New York Times*, "[o]besity is such that this generation of children could be the first basically in the history of the United States to live less healthful and shorter lives than their parents."[110] "Once obese children enter adulthood," he explained, "then all of the previous relationships that have been observed may no longer apply because they'll be carrying those extra pounds for so many more years."[111]

The food industry spends billions each year attempting to reach young consumers using multiple marketing methods, including television commercials; product appearances in shows and online games; product packaging featuring figures beloved by children such as cartoon characters and sports stars; and even making the food products available in schools.[112] In 1978, concerned about the increasing number of television ads aimed at young children, the Federal Trade Commission (FTC) proposed to ban all ads directed at children seven years old and under.[113] But pressure from trade associations for broadcasters, advertisers, and toy manufacturers killed the initiative.[114] The current childhood obesity crisis has spurred renewed efforts to rein in marketing toward children through television ads as well as more recent media such as the Internet and school grounds. In its 2004 report on childhood obesity, the Institute of Medicine urged the FTC and the Department of Health and Human Services (HHS) to convene a national conference to develop guidelines for the advertising and marketing of food and beverages directed at children" and further recommended that the FTC "have the authority and resources to monitor compliance with food and beverage advertising practices."[115] Not long before the FTC/HHS conference was to take place, the food industry's chief lobbying organization, the Grocery Manufacturers Association, proposed to strengthen the industry's voluntary guidelines on ads aimed at children in an effort to ward off more direct government oversight.[116] The industry need not have been overly concerned, however, since in announcing the conference plans, FTC Chair Deborah Majoras assured the industry that "this is not the first step toward new government regulations to ban or restrict children's food advertising and marketing."[117]

"Personal responsibility" is obviously essential to establishing healthy eating habits and to weight control, and Judge Sweet made clear that litigants are not going to be able to use the courts to maintain otherwise. But a requisite condition for the ability to exercise "personal responsibility" meaningfully is a marketplace context that is appropriately structured and regulated to ensure that consumers have the ability to make informed, voluntary decisions. Michael Pertschuk, the FTC head who promoted the advertising ban in 1978, based the proposal on studies finding that young children usually cannot differentiate between commercials and programs and tend to perceive claims in ads as truthful.[118] In explaining the need for the ban, he stated that children "cannot protect themselves against adults who exploit their present-mindedness."[119] Similarly, consumers of all ages find themselves negotiating a gauntlet of economic and situational factors that make responsible diet and exercise profoundly difficult to achieve, including most significantly a food industry that benefits tremendously from our daily struggles and therefore has an interest in perpetuating them.

As made clear by the failure of Representative DeLauro's menu-labeling bill and other legislative initiatives to combat the obesity epidemic, the PRCA is not, as its introductory section claims, concerned with 'prevent[ing] legislative and regulatory functions from being usurped by civil liability actions.' Rather, the PRCA is centrally concerned with preempting public efforts to enforce corporate responsibility.

The PRCA is not in fact concerned with fostering "personal responsibility." As made clear by the failure of Representative DeLauro's menu-labeling bill and other legislative initiatives to combat the obesity epidemic, the PRCA is also not, as its introductory section claims, concerned with "prevent[ing] legislative and regulatory functions from being usurped by civil liability actions."[120] Rather, the PRCA is centrally concerned with preempting public efforts to enforce corporate responsibility. Indeed,

in the end, the PRCA's appeal to principles of separation of powers and personal responsibility amounts to little more than an effort to distract Americans from what is really at work: a bald-faced effort by the industry to escape even the prospect of liability for the ways in which its behavior might have contributed to Americans' health problems. The battle is not about the Constitution, nor is it about personal responsibility. It is about money, pure and simple.

Conclusion

The tobacco litigation demonstrated that the civil justice system can provide an important public safety net in cases where the political branches have been unwilling or unable to restrict an industry that profits from the dissemination of products posing major public-health threats by using deceptive marketing tactics and suppressing information. Since the tobacco litigation, state attorneys general, other local officials, and individuals have taken the lead in protecting public health and safety by using the civil justice system to hold other major product industries accountable for similar misconduct, including the gun and fast-food industries. In cutting off this long-standing means of securing vital public protections that are inadequate or non-existent at the federal level with blanket-immunity legislation like the Arms Act and the PRCA, Congress is not safeguarding its own power to protect the public, but rather preventing civil courts, attorneys general, and other litigants from exercising their power to do so.

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Notes

[1] *See* Johnson v. Bull's Eye Shooter Supply, 2003 WL 21639244, *5 (Wash. Super. June 27, 2003).

[2] *Id.* at *1.

[3] *See* Press Release, Brady Ctr. to Prevent Gun Violence, Current Cases: Johnson v. Bull's Eye Shooter Supply, http://www.gunlawsuits.org/docket/casestatus.php?RecordNo=79 (last visited June 21, 2006).

[4] The bill would have blocked the suit against Bushmaster because it provides that "negligent entrustment" suits can be brought only against weapons "sellers," not manufacturers. *See infra* note 73. The suit against Bull's Eye would likely also have been blocked because plaintiffs would have been required to demonstrate that Bull's Eye knew or should have known that Malvo and Muhammad were "likely" to use the weapon in a violent manner. Under previously existing law, on the other hand, the plaintiffs only needed to show that Bull's Eye ignored a substantial risk of such violence.

[5] Pub. L. No. 109-92, 119 Stat. 2095 (2005) (to be codified at 15 U.S.C. §§ 7901-03, 18 U.S.C. §§ 922, 944) (immunizing gun manufacturers and sellers and their trade associations from liability for most civil actions based on the "criminal or unlawful misuse" of firearms).

[6] *See* Personal Responsibility in Food Consumption Act of 2005, H.R. 554, 109th Cong. §§ 3-4 (2005) (passed in the House by a vote of 306 to 120 on October 19, 2005 and referred to the Senate) (immunizing food manufacturers and sellers and their trade associations from civil liability actions based on health claims related to obesity or weight gain); Commonsense Consumption Act of 2005, S. 908, 109th Cong. §§ 3-4 (2005) (introduced on April 26, 2005 and referred to the Committee on the Judiciary, where it remains) (same immunity provisions as House bill). These bills and their implications are discussed in further detail *infra* in *Immunity for the Food Industry*, pp. 9-12. Legislators also have included immunizing language for the pharmaceutical industry in currently pending medical malpractice legislation. *See* Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2005, H.R. 534, 109th Cong. § 7 (2005) (immunizing manufacturers of drugs and medical devices approved by the Food and Drug Administration from punitive-damages liability).

[7] *See* Robert B. Reich, *Regulation Is Out, Litigation Is In*, Am. Prospect Online, Feb. 11, 1999, http://www.prospect.org/webfeatures/1999/02/reich-r-02-11.html.

[8] *Id*.

[9] *See, e.g.*, W. Kip Viscusi, *Overview*, *in* Regulation through Litigation 1, 7 (W. Kip Viscusi, ed., 2002), *available at* http://www.aei-brookings.org/publications/abstract.php?pid=253 ("By far the most noteworthy example of regulation through litigation is litigation against the tobacco industry. The most salient example consists of the suits by the state governments that sought to recover Medicaid expenses that they attributed to cigarettes."); Victor E. Schwartz, *Pushing Regulation Through Litigation to the Edge: The Gaming Industry, Fast Food, and Alcoholic Beverages*, 2002 Am. Leg. Exchange Pol'y Forum 54, 54 ("The modern era of 'regulation through litigation' began with tobacco. . . . The core of the case was an attempt by states to recover state Medicaid costs allegedly caused by smoking."); *cf.* Ctr. for Reg. Effectiveness, Regulation through Private Litigation: The *Smithfield Hams* Lawsuit as an Escalation of an Existing Trend, *at* http://www.thecre.com/regbylit/private_20011220.html#start (last visited May 22, 2006) (arguing that a lawsuit against a company operating hog factories for water and ground contamination "represents a dangerous new development in the trend of 'regulation through litigation' " in which "private groups are usurping the policy-making authority that is supposed to be vested in and share [sic] by all of the American people acting through normal legislative and rulemaking processes").

[10] As Eric Posner pointed out in his review of W. Kip Viscusi's book criticizing the state attorney general tobacco litigation as "regulation by litigation": "This claim that there is a special class of troubling "regulation by litigation" cases will strike lawyers as odd. Tort law is a form of regulation, and always has been. Manufacturers know that when they design products they will be held liable under tort law if they choose an unreasonably dangerous design. Judicial decisions *ex post* will often have the effect of creating regulation-like commands—for instance, do not design a car that explodes if rear-ended at low speeds—but the policy here is to give manufacturers an *ex ante* incentive to invest in safety." Eric A. Posner, *Tobacco Regulation or Litigation?*, 70 U. Chi. L. Rev. 1141, 1155 (2003).

[11] *See* William Haltom & Michael McCann, Distorting the Law: Politics, Media, and the Litigation Crisis 230 & note 6, 233-36 (2004); Graham E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 Stan. L. & Pol'y Rev. 63, 71 (1997).

[12] *See* Kelder & Daynard, *supra* note 11, at 73. A copy of Moore's complaint is available at http://www.stic.neu.edu/Ms/2moore.htm.

[13] *See* Kelder & Daynard, *supra* note 11, at 73.

[14] *See* Haltom & McCann, *supra* note 11, at 237-39; Kelder & Daynard, *supra* note 11, at 76-80.

[15] Maria Shao, *A Clear Landmark in a Widening Legal Battle*, Bos. Globe, Mar. 16, 1996, *available in* 1996 WLNR 2238920.

[16] Linda Beecham, *U.S. Tobacco Company Admits Smoking Is Addictive*, Brit. Med. J., Mar. 29, 1997, *available at* http://bmj.bmjjournals.com/cgi/content/full/314/7085/919.

[17] *Inside the Tobacco Deal: The Criminal Case*, Frontline Online, *at* http://www.pbs.org/wgbh/pages/frontline/shows/settlement/timelines/criminal.html (last visited Aug. 17, 2005). The section of the hearing transcript containing the executives' testimony denying that nicotine is addictive is available at http://www.pbs.org/wgbh/pages/frontline/shows/settlement/timelines/april942.html#nope.

[18] Beechum, *supra* note 16.

[19] C. Stephen Redhead, Cong. Research Serv., *Tobacco Master Settlement Agreement (1998): Overview, Implementation by States, and Congressional Issues* 9 & n.1, (updated Nov. 5, 1999, code RL30058), *available at* http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL30058.pdf. Liggett & Myers signed the MSA after it had been negotiated by the other four tobacco companies, agreeing to replace the earlier individual state agreements with the terms of the MSA. *Id.* at 9 n.1.

[20] For a review of such practices, see Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 Harv. L. Rev. 1420 (1999), and Jon D. Hanson & Douglas A. Kysar, *The Joint Failure of Economic Theory and Legal Regulation*, in Smoking: Risk, Perception, & Policy (Paul Slovic, ed. 2001). Based primarily on the industry documents that the state suits brought to light, the U.S. Department of Justice (DOJ) brought suit against the tobacco industry approximately one year after the signing of the MSA. Redhead, *supra* note 19, at 10. DOJ alleged, *inter alia*, that the companies were unjustly enriched as a result of their decades-long conspiracy to defraud and deceive the public, in violation of the Racketeer Influenced and Corrupt Organizations Act. *Id.*

[21] Brit. Am. Tobacco Documents Archive, *Project History*, http://bat.library.ucsf.edu/history.html (last visited Aug. 17, 2005).

[22] *Id.*

[23] *See* Master Settlement Agreement, Nov. 23, 1998, sec. IV, *available at* http://www.library.ucsf.edu/tobacco/litigation/msa.pdf. Links to the document websites maintained by the industry pursuant to the MSA are available at http://www.tobaccoarchives.com/.

[24] *See* Haltom & McCann, *supra* note 11, at 228.

[25] *See* Ctrs. for Disease Control and Prevention, History of the 1964 Surgeon General's Report on Smoking and Health (Jan. 2004), http://www.cdc.gov/tobacco/30yrsgen.htm. More specifically, the Surgeon General's 1964 report determined that existing studies established a causal link between cigarette smoking and lung cancer, laryngeal cancer, and chronic bronchitis. *See* U.S. Dep't of Health, Educ. and Welfare, Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service 37 (Pub. Health Serv. Publ'n No. 1103, 1964), *available at* http://www.cdc.gov/tobacco/sgr/sgr_1964/sgr64.htm [hereinafter Surgeon General's 1964 Report on Smoking and Health]. The report further concluded that there was an association between cigarette smoking and other cancers, emphysema, and heart disease. *See id.* at 37-39.

[26] Surgeon General's 1964 Report on Smoking and Health, *supra* note 25, at 33.

[27] U.S. Dep't of Health and Hum. Servs., The Health Consequences of Involuntary Smoking: A Report of the Surgeon General vii (1986), *available at* http://www.cdc.gov/tobacco/sgr/sgr_1986/index.htm. For example, since 1964, the Surgeon General has issued 27 reports on the health threats of smoking. They are available on the Centers for Disease Control and Prevention's website, at http://www.cdc.gov/tobacco/sgr/index.htm.

[28] U.S. Dep't of Health and Hum. Servs., The Health Consequences of Smoking: What It Means to You 1 (2004), *available at* http://www.cdc.gov/tobacco/sgr/sgr_2004/consumerpiece/SGR2004_Whatitmeanstoyou.pdf. According to the World Health Organization, tobacco "is currently responsible for the death of one in ten adults worldwide (about 5 million deaths a year)." World Health Org., *Why Is Tobacco a Public Health Priority?*, http://www.who.int/tobacco/health_priority/en/index.html (last visited Oct. 6, 2005).

[29] As Jon Hanson and Kyle Logue observed in a 1998 *Yale Law Journal* article, "[c]onsidering the staggering social costs imposed by cigarette smoking, an outside observer might find it odd that cigarette production and consumption in this country are, to a remarkable extent, unregulated." Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex-Post Incentive-Based Regulation*, 107 Yale L. J. 1163, 1167 (1998).

[30] Carl Deal & Joanne Doroshow, *Corporate Astroturf and Civil Justice: The Corporations Behind "Citizens Against Lawsuit Abuse"*, Multinat'l Monitor, Mar. 2003, at 18.

[31] *See id.* at 18-19. Had it not been for the litigation, the public would have remained in the dark about tobacco companies' financial backing of these groups, which provide "public interest" facades for the corporate drive for immunity from lawsuits because, as non-profit entities, they are not required to disclose their funding sources to the public. *See id.* at 18, 22. As Neil Cohen, an executive with the public relations firm retained by ATRA, stated in explaining the need for "citizen" front groups "in a tort reform battle" at a 1994 meeting of corporate public affairs executives: "If State Farm . . . is the leader of the coalition, you're not going to pass the bill. It's not credible, O.K., because it's so self-serving. Everybody knows the insurance companies would be one beneficiary of this." *Id.* at 19.

[32] *See* Haltom & McCann, *supra* note 11, at 228.

[33] *See, e.g.*, W. Kip Viscusi, *Tobacco: Regulation and Taxation through Litigation*, *in* Regulation through Litigation, *supra* note 9 at 51, 51; Schwartz, *supra* note 9, at 54; William H. Pryor, *Comment*, *State Attorney General Litigation: Regulation through Litigation and the Separation of Powers*, 31 Seton Hall L. Rev. 604, 605-08 (2001).

[34] This aspect of the "regulation by litigation" claim involves particularly complicated analytical terrain, as "[s]eparation of powers at the state level . . . does not cleanly track the federal arrangement." Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 Harv. L. Rev. 1833, 1904 (2001).

[35] *See, e.g.*, Michael S. Greve, Am. Enterprise Inst., *Government by Indictment: Attorneys General and their False Federalism* 37 (AEI Working Paper # 110, May 24, 2005), *available at* http://www.aei.org/publications/pubID.22565/pub_detail.asp (calling for and setting out recommendations for achieving a "return to the constitutional order" allegedly disrupted by attorney general suits); *Regulation by Litigation: The New Wave of Government-Sponsored Litigation*, 1 Manhattan Inst. Conference Series 2 (June 1999) (statement of Attorney General Bill Pryor) (characterizing the attorney general suits against the tobacco and other industries as a "new wave of lawsuit abuse"); Charles H. Moellenberg, Jr., *Regulation by Litigation and the Limits of Government Power* 3 (Wash. Legal Found. Working Paper Series No. 119, Oct. 2003) ("In recent years . . . a number of state and local governments apparently have felt too restricted by the well-established rules governing products liability and negligence."); Schwartz, *supra* note 9, at 54 (stating that, with so-called "regulation by litigation," [l]iability is turned upside-down from its true purpose—compensation—into a purpose that is assigned to the legislative branch under the Constitution of the United States and state constitutions").

[36] *See, e.g.*, Second Amended Complaint, Minnesota v. Philip Morris, Inc. (Ramsey County, Minn. Ct., filed Jan. 6, 1998 (No. C1-94-8565), *available at* http://www.stic.neu.edu/MN/Tob140198.html; Complaint, New York v. Philip Morris, Inc. (N.Y. Sup. Ct., filed Jan. 27, 1997), *available at* http://www.stic.neu.edu/Ny/nycompaint.html#CAUSES; Civil Action Complaint, Pennsylvania v. Philip Morris, Inc. (filed Apr. 22, 1997), *available at* http://www.stic.neu.edu/Pa/pacomplaint.htm; Complaint, Massachusetts v. Philip Morris, Inc. (Mass. Super. Ct., filed Dec. 19, 1995) (No. 95-7378), *available at http://www.stic.neu.edu/Ma/8macomplaint.htm*; Complaint, Moore v. American Tobacco Co. (Jackson County, Miss. Ch. Ct., filed May 23, 1994), *available at* http://www.stic.neu.edu/MS/2moore.htm. The states also alleged that the tobacco companies violated various consumer protection, antitrust, and state statutes.

[37] As New York Attorney General Eliot Spitzer pointed out in characteristically provocative language: "Individuals, companies, and entities of all sorts must comply with their legal obligations. They may not hide information from government. I don't tolerate this with drug dealers; I don't tolerate this with tobacco companies." *Regulation by Litigation: The New Wave of Government-Sponsored Litigation*, *supra* note 35, at 6-7.

[38] *See* Philip Weinberg, *Office of N.Y. Attorney General Sets Pace for Others Nationwide*, N.Y. STATE BAR J., June 2004. Before "[t]he vast expansion of the role of attorneys general in protecting consumers, investors, and the environment began," attorneys general "represented their state government and its agencies in court, nearly always in defense of suits brought by others." *Id.*

[39] *See* Daphne Eviatar, *Is Litigation a Blight, or Built In?*, N.Y. TIMES, Nov. 23, 2002, at B1 ("Modern tort law actually developed because the American government wasn't passing laws to protect people from the hazards of the industrial revolution . . . The courts stepped in to mandate safety measures, some of them life saving, when the legislatures refused to." (summarizing the explanation of Roger Williams University law professor Carl T. Bogus in his book *Why Lawsuits Are Good for America*)).

[40] As pointed out by two law school professors in an article analyzing the constitutionality of the recent bills granting an industry blanket immunity from tort liability, such bills "represent a new breed of legislation" because they "take[] without giving back." Anthony J. Sebok & John C. P. Goldberg, *The Coming Tort Reform Juggernaut: Are There Constitutional Limits on How Much the President and Congress Can Do in this Area?*, FINDLAW WRIT, May 19, 2003, *at* http://writ.news.findlaw.com/sebok/20030519.html. In contrast, Professors Sebok and Goldberg point out:

> Twentieth Century legislation created federal rights of action for railroad workers, harbor workers, and victims of certain civil rights violations. But these laws were either limited in scope, or aimed to clean up—not supplant—huge pieces of the states' own tort regimes.
>
> Likewise, Congress has occasionally directly interfered with small parts of state tort law—for example, in the context of litigation over Black Lung disease or against vaccine manufacturers. In these instances, Congress always provided an alternative compensation system in exchange for its limitation on plaintiffs' rights to sue in tort.

Id.

Similarly, Dennis Henigan, a lawyer with the Brady Center to Prevent Gun Violence who represented eight of the victims of the 2002 sniper shootings in Washington, D.C. in their suit against the manufacturer of the gun and the dealer who sold it, said the recently enacted statute immunizing the gun industry from civil liability "is literally unprecedented in American history because it is the first time that the federal government will be stepping in and retroactively depriving injured people of their vested legal rights under state law, without providing them any alternative." Sheryl Gay Stolberg, *Congress Passes New Legal Shield for Gun Industry*, N.Y. TIMES, Oct. 21, 2005.

[41] *See* Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 403, 115 Stat. 230, 237-40 (2001) (codified at 49 U.S.C. § 40101).

[42] *See, e.g.*, Sally Satel, *Fast Food "Addiction" Feeds Only Lawyers*, USA TODAY, Mar. 11, 2003 (op-ed by a psychiatrist and fellow of the American Enterprise Institute) (fast-food industry); Schwartz, *supra* note 9 (fast-food, pharmaceutical, and gun industries).

[43] Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005) (to be codified at 15 U.S.C. §§ 7901-03, 18 U.S.C. §§ 922, 944) [hereinafter "Arms Act"]. President Bush signed the bill into law on October 26, 2005. Press Release, White House Office of Press Secretary, Statement on S. 397, the "Protection of Lawful Commerce in Arms Act (Oct. 26, 2004), *at* http://www.whitehouse.gov/news/releases/2005/10/20051026-1.html. The National Rifle Association applauded the administration as "a vital ally during debate on Capitol Hill." Press Release, Nat'l Rifle Ass'n, President Bush Signs "Protection of Lawful Commerce in Arms Act," Landmark NRA Victory Now Law (Oct. 26, 2005), http://www.nraila.org/News/Read/Releases.aspx?ID=6719 [hereinafter "NRA Press Release on Signing of Immunity Legislation"].

[44] *See* Arms Act, *supra* note 43, §§ 3-4. Furthermore, the Arms Act requires courts to dismiss any such action that is pending on the date of enactment. *Id.* § 3(b).

[45] Stolberg, *supra* note 40.

[46] *See* Amy Goldstein, *House Passes Ban on Gun Industry Lawsuits*, WASH. POST, Oct. 21, 2005, at A7; NRA Press Release on Signing of Immunity Legislation, *supra* note

43. The gun industry's leading trade association, the National Shooting Sports Foundation, has made similar claims in support of federal immunity legislation. *See* Press Release, Nat'l Shooting Sports Found., Senate Passes Protection of Lawful Commerce in Arms Act (July 29, 2005), http://www.nssf.org/news/PR_idx.cfm?PRloc=common/PR/&PR=072905.cfm.

[47] 151 Cong. Rec. S9380 (daily ed. July 29, 2005).

[48] *See* Fox Butterfield, *Sniper Victims in Settlement with Gun Maker and Dealer*, N.Y. Times, Sept. 10, 2004, at A14; Press Release, Legal Action Project of the Brady Ctr. to Prevent Gun Violence, Gun Dealer, Manufacturer to Pay $2.5 Million to Sniper Victims to Settle Lawsuit (Sept. 9, 2004), http://www.bradycampaign.org/press/release.php?release=583; Fox Butterfield, *Gun Dealer Settles Case Over Sale to Straw Buyer*, N.Y. Times, June 23, 2004, at A14.

[49] Shailagh Murray, *Liability Shield for Gunmakers Nears Passage*, Wash. Post, July 29, 2005, at A1.

[50] *See* Arms Act, *supra* note 43, § 4(5)(A)(i), (iii).

[51] 151 Cong. Rec. S9091 (daily ed. July 27, 2005).

[52] *See* Daniel Feldman, *Legislating or Litigating Public Policy Change: Gunmaker Tort Liability*, 12 Va. J. Soc. Pol'y & L. 140, 146 (2004).

[53] 18 U.S.C. §§ 921-30 (2000).

[54] Bureau of Alcohol, Tobacco and Firearms, Following the Gun: Enforcing Federal Laws Against Firearms Traffickers 5 (June 2000), *available at* http://www.atf.treas.gov/pub/fire-explo_pub/pdf/followingthegun_internet.pdf [hereinafter ATF, Following the Gun]. Consequently, the ATF noted that "persons who traffick in firearms are often not being prosecuted for that conduct; rather, they are instead being prosecuted for other related conduct." *Id.* Current federal firearms law prohibits the sale of firearms to certain persons prohibited from possessing guns, including convicted felons, "knowing or having reasonable cause to believe" that the person is in one of the prohibited categories. 18 U.S.C. § 922(d). However, reports by the ATF and the facts of many of the cases brought against the gun industry indicate that practices like selling to straw purchasers are a more significant problem. *See infra* note 57 and accompanying text; text accompanying note 66; note 67 and accompanying text. ("Straw purchases" are purchases by someone legally permitted to purchase a gun on behalf of someone prohibited from doing so.)

[55] *See* Press Release, Dep't of the Treasury, Treasury, ATF Release Firearms Report, Gun Trafficking Actions (Feb. 4, 2000), http://www.treas.gov/press/releases/ls373.htm ("1.2 percent of current dealers (1,020 dealers) account for 57 percent of crime gun traces to active dealers. Each of these dealers had 10 or more crime guns traced to them. Just 0.2% of dealers (132 dealers) had 50 or more crime guns traced to them, accounting for 27% of crime gun traces."); Fox Butterfield, *Gun Flow to Criminals Laid to Tiny Fraction of Dealers*, N.Y. Times, July 1, 1999, at A14 (reporting on study performed for the ATF by academics at Northeastern University finding that "a mere 389 federally-licensed dealers, of 104,855 dealers around the country, had sold half of all guns used in crimes in 1996 and 1997 that could be traced by law enforcement to their initial sale") [hereinafter Butterfield, *Gun Flow to Criminals*].

[56] ATF, Following the Gun, *supra* note 54, at xi.

[57] *Id.* at 10. The agency found that "[t]he most frequent type of trafficking channel identified in ATF investigations is straw purchasing from federally licensed firearms dealers." *Id.* Unlike the ATF's analyses of crime gun tracing, not all the guns diverted from the legal to illegal market were recovered in crimes. According to the ATF, 50.4 percent of its investigations involved at least one diverted firearm that was recovered in a crime. *Id.* at 21. However, as the agency pointed out, the reason trafficking investigations are so important is that "[m]any criminals obtain their guns from the illegal market supplied by a variety of sources: unlicensed sellers who buy guns with the purpose of reselling them; fences; corrupt Federal firearms licensees (FFLs); and straw purchasers who buy guns for other unlicensed sellers, criminal, and juveniles." *Id.* at 1.

[58] *See id.* at x, 12.

[59] *Id.* at x; *see also id.* at 12 ("Although FFL traffickers were involved in the smallest proportion of ATF trafficking investigations, under 10 percent, FFL traffickers were associated with by far the highest mean number of illegally diverted firearms per investigation, over 350, and the largest total number of illegal diverted firearms, as compared to the other trafficking channels.").

[60] *See id.* at 13 tbl. 3.

[61] *See* Feldman, *supra* note 52 at 151-54.

[62] Butterfield, *Gun Flow to Criminals*, *supra* note 55.

[63] Declaration of Robert A. Ricker in Support of Plaintiffs' Opposition to Defendant Manufacturers' Motion for Summary Judgment, at 1, People v. Arcadia Machine & Tool, Inc., No. 4095 (Cal. Super. Ct. 1999), *available at* http://www.cbc.ca/disclosure/archives/030218_guns/documents/ricker_affadavit.pdf [hereinafter Declaration of Ricker]. The American Shooting Sports Council was the industry's leading trade association until it was folded into the National Shooting Sports Foundation in 1999. *See id.* at 2-3, ¶ 5. In his affidavit, Ricker cites internal documents and actions by officials associated with the trade associations indicating that the NRA pushed for the merger in order to silence Ricker and preempt his attempts to institute reforms that would squelch the black market. *See id.* at 15-16, ¶ 21.

[64] People v. Arcadia Machine & Tool, Inc., No. 4095 (Cal. Super. Ct. 1999). The cities and counties also alleged that the gun industry defendants had violated California's deceptive business practices statute. *See* Legal Action Project of the Brady Ctr. to Prevent Gun Violence, *Reforming the Gun Industry:* People of the State of California v. Arcadia Machine & Tool, Inc., http://www.gunlawsuits.org/docket/cities/cityview.php?RecordNo=13 (last visited Nov. 3, 2005) [hereinafter Brady Ctr., *California Gun Industry Case*].

[65] Declaration of Ricker, *supra* note 63, at 4.

[66] *Id.* at 4-5.

[67] *See, e.g.*, Johnson v. Bryco Arms, 304 F. Supp. 2d 383, 391 (E.D.N.Y. 2004) ("Under New York law, a claim for public nuisance may lie against members of the gun industry whose marketing and sales practices lead to the diversion of large numbers of firearms into the illegal secondary gun market."); *see generally* Feldman, *supra* note 52, at 154-56 (discussing specific cases showing that "in light of the revelations at the end of the 1990s that gun manufacturers, not burglaries from honest citizens, appeared to supply most of the 'crime gun market,' courts became more open to the possibility of imposing tort liability on gun manufacturers for negligent distribution of their product").

[68] *See* Arms Act, *supra* note 43, § 3(b).

[69] *See* Shailagh Murray, *Senate Passes Bill Barring Gun Suits*, WASH. POST, July 20, 2005, at A8 (noting that 33 of the cases against the gun industry in recent years have been brought by government entities); *supra* text accompanying note 47 (noting that the total number of cases against the gun industry in a 10-year period is 57).

[70] Brady Ctr., *California Gun Industry Case*, *supra* note 64; *see* Declaration of Ricker, *supra* note 63, at 12. The actions against the manufacturers and trade associations were dismissed. Brady Ctr., *California Gun Industry Case*, *supra* note 64.

[71] Brady Ctr., *California Gun Industry Case*, *supra* note 64.

[72] *Don't Shield Gun Industry*, S.F. CHRON., Aug. 21, 2003.

[73] Declaration of Ricker, *supra* note 63, at 5. Because manufacturers and distributors are the ones with the power to make the distribution system safer, the Arms Act's negligent-entrustment exception for *sellers* is not sufficient for plaintiffs to effectively seek redress for and prevent harm perpetrated by guns obtained through illicit channels. *See* Arms Act, *supra* note 43, § 4(5)(A)(ii). Further, a bill introduced in the House in March of this year would effectively eliminate many suits against sellers by prohibiting the use of gun crime trace data as evidence in civil actions. *See* Firearms Corrections and Improvement Act, H.R. 5005, 109th Cong. § 9 (2006). This is no accident. As Ricker stated in his affidavit in the California case, "Firearms manufacturers have long been aware that the number of ATF crime gun traces associated with a particular dealer can be an important indicator that illegal gun trafficking is occurring. Declaration of Ricker, *supra* note 63, at 9, ¶ 14. Ricker made this statement by way of explaining that manufacturers could easily implement a system based on ATF gun trace data that would allow them to eliminate suspect dealers from their consumer base: "Despite claims to the contrary, most gun manufacturers also have been aware that ATF will provide manufacturers with tracing information about each manufacturer's guns and how often they have been traced." *Id.* If enacted, H.R. 5005 also would prohibit the ATF from providing manufacturers with this important data, not only preventing responsible manufacturers from using it to keep their guns out of the illegal market, but also preventing local officials and individual plaintiffs from asserting in lawsuits that manufacturers are liable for failing to use the gun trace data in the manner suggested by Ricker in the California case. *See* Firearms Corrections and Improvement Act, *supra*, § 9.

[74] Declaration of Ricker, *supra* note 63, at 4.

[75] *See, e.g.,* Press Release, Nat'l Rifle Ass'n, U.S. Senate Majority Leader Bill Frist's Floor Statement on S. 397, at 1 (July 27, 2005), http://www.nraila.org/media/pdfs/friststatement.pdf (publicizing Senator Bill Frist's statement on the Senate floor in support of the bill immunizing the gun industry from tort liability) ("Anti-gun crusaders . . . believe that it's okay to use lawsuits to circumvent the democratic process and legislate from the bench.").

[76] Arms Act, *supra* note 43, § 2(a)(8).

[77] *Id.* § 4(5)(A).

[78] *See* Mark Benjamin, *Tough on Terror, Weak on Guns*, SALON.COM, Mar. 28, 2005 (discussing the implications of the bar on administrative proceedings according to industry experts).

[79] Press Release, Office of Sen. Carl Levin, More Opposition to the Gun Industry Immunity Bill (May 11, 2005), http://www.senate.gov/~levin/newsroom/release.cfm?id=238038.

[80] *Id.*; *see also* 151 CONG. REC. S9239 (daily ed. July 28, 2005) (statement of Sen. DeWine) (stating that the bill's prohibition of administrative proceedings "goes well beyond barring civil suits by private citizens who have been wronged" and that according to two former ATF Directors, "this . . . language would likely prohibit the ATF from initiating proceedings to revoke a gun dealer's license, even when that dealer supplies guns to criminals"). The Senate did approve an amendment when it passed the bill that appears to except ATF-initiated proceedings from the ban. *See* Arms Act, *supra* note 43, § 4(5)(A)(vi) (excepting from "qualified civil liability action" (which is defined as "a civil action or proceeding or an administrative proceeding") "an action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of title 18 or chapter 53 of title 26, United States Code"); Henry Cohen, Cong. Research Serv., *Limiting Tort Liability of Gun Manufacturers and Gun Sellers: Legal Analysis of P.L. 109-92*, at 2 (updated Nov. 8, 2005, code RS22074) (noting that this exception "was added when the Senate passed the bill" and "include[s] proceedings of the Bureau of Alcohol, Tobacco, Firearms, and Explosives"). However, subsequent legislation introduced in the House indicates that Congress is pursuing other ways to shield irresponsible gun dealers from the ATF. A bill introduced in May of this year entitled the "Bureau of Alcohol, Tobacco, Firearms, and Explosives Modernization and Reform Act of 2006" would require the ATF to prove that a dealer specifically intended "to act in violation of a known legal duty" in order to revoke the dealer's license or take other enforcement measures. Bureau of Alcohol, Tobacco, Firearms, and Explosives Modernization and Reform Act of 2006, H.R. 5092, 109th Cong. § 4 (2006). Under current law, a showing of a specific intent to violate the law is not necessary; it is sufficient if the government demonstrates that a dealer acted "with knowledge that the conduct is unlawful." Strong v. United States, 422 F. Supp. 2d 712, 721(N.D. Tex. 2006) (citing Bryan v. United States, 524 U.S. 184, 197098 (1998)). In a letter to Congress opposing the bill, Dennis Henigan, Legal Director of the Brady Center to Prevent Gun Violence, explained that the bill's intent requirement "present[s] a nearly insurmountable burden" of proof that "would cripple ATF's ability to enforce federal gun laws." Letter from Dennis Henigan, Legal Director of the Brady Center to Prevent Gun Violence, to Rep. F. James Sensenbrenner, Jr. & Rep. John Conyers, Jr., at 4 (May 1, 2006), *available at* http://www.bradycenter.org/pdf/front/HR-5092-letter.pdf. The bill also "largely replace[s] ATF's revocation powers with minimal fines and temporary license suspensions." *Id.*

[81] Notwithstanding the well-known threats that tobacco and guns present to public health and safety, they are the only two products exempt from regulation by the Consumer Product Safety Commission that are not closely regulated by another agency. *See* Consumer Product Safety Act, 15 U.S.C. § 2052(a)(1)(B), (E) (2004).

[82] *See* Robert A. Hahn, et al., Ctrs. for Disease Control and Prevention, *Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws*, 52 MORBIDITY & MORTALITY WKLY. 11 (Oct. 3, 2003), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5214a2.htm. Homicide by firearm is the leading cause of injury death for black males. *See* Ctrs. for Disease Control, *10 Leading Causes of Injury Deaths, United States: 2002, Black, Males* (2002), http://webappa.cdc.gov/sasweb/ncipc/leadcaus10.html.

[83] *See* E.G. Krug et al., *Firearm-related Deaths in the United States and 35 Other High- and Upper-middle-income Countries*, 27 INT'L J. OF EPIDEMIOLOGY 214, 215, 218 (1998), *available at* http://ije.oxfordjournals.org/cgi/reprint/27/2/214.pdf. The U.S. firearm-related death rate is 1.5 times higher than the pooled rate for the 10 upper-middle-income countries that participated in the study. *See id.*; *see also* William J. Cromie, *System Tracks Gun Deaths: Details Are Being Collected on*

Murders, Suicides in the U.S., HARV. U. GAZETTE, Sept. 28, 2000 ("The U.S. leads the industrial world in gun suicides, murders, and accidents . . . No other developed country comes close to our death rates, and that should not be." (quoting David Hemenway, Director, Harvard Injury Research and Control Center)). The number of children under 15 years old who die as a result of firearm-related injury is almost 12 times higher in the United States than in the 25 other high-income nations *combined.* Ctrs. for Disease Control and Prevention, *Rates of Homicide, Suicide and Firearm-Related Death Among Children—26 Industrialized Countries*, 46 MORBIDITY & MORTALITY WKLY. 101 (Feb. 7, 1997), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/00046149.htm.

[84] *See* Elizabeth Arias, Ctrs. for Disease Control and Prevention, *Deaths: Final Data for 2001*, 52 NAT'L VITAL STATISTICS REPS. 91, *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_03.pdf.

[85] *See* Protection of Lawful Commerce in Arms Act, H.R. 800, Feb. 15, 2005 § 2(a)(7).

[86] *See, e.g.*, Stolberg, *supra* note 40 (noting that Representative Tom Delay considered Congress's passing the Arms Act to be "an important step toward revamping the nation's tort law system"). Significantly, the gun industry was not the only business interest pushing for enactment of the Arms Act. As the NRA points out on its website, "the 'Protection of Lawful Commerce in Arms Act' enjoys support from a number of organizations, including the U.S. Chamber of Commerce, the National Association of Manufacturers, and the National Association of Wholesalers." Press Release, Nat'l Rifle Ass'n, Reckless Lawsuit Preemption Bills Introduced in U.S. House and Senate (Feb. 19, 2005), http://www.nraila.org/CurrentLegislation/Read.aspx?ID=1387.

[87] Personal Responsibility in Food Consumption Act of 2005, H.R. 554, 109th Cong. §§ 3-4 (2005) (passed in the House by a vote of 306 to 120 on October 19, 2005 and referred to the Senate) [hereinafter PRCA]. Senator Mitch McConnell introduced a similar bill with essentially the same language in the Senate on April 26, 2005. *See* Commonsense Consumption Act of 2005, S. 908, 109th Cong. §§ 3-4 (2005).

[88] *See* Cong. Budget Office, *Cost Estimate for H.R. 339: Personal Responsibility in Consumption Act* (Feb. 10, 2004), *available at* http://www.cbo.gov/ftpdocs/50xx/doc5037/hr339.pdf (estimating the costs of the bill that the House passed in 2004 and that later died in the Senate, and noting that "[a]ccording to academic and government sources," "individuals have filed two lawsuits claiming that certain food products caused their obesity").

[89] *See* Complaint, Barber v. McDonald's Corp. et al., No. 23145 (N.Y. Sup. Ct., filed July 24, 2002) *available at* http://news.findlaw.com/hdocs/docs/mcdonalds/barbermcds72302cmp.pdf (last visited Nov. 7, 2005); Michelle M. Mello et al., *The McLawsuit: The Fast-Food Industry and Legal Accountability for Obesity*, 22 HEALTH AFFAIRS 207 (Nov. 1, 2003), *available in* 2003 WL 10010865 (noting that the plaintiff's attorney withdrew the case).

[90] *See* Pelman v. McDonald's Corp., 396 F. Supp. 2d 439 (S.D.N.Y. 2005) (ruling on the most recent motion filed in the case, in which the plaintiffs allege that McDonald's violated New York's deceptive business practices statute, and providing a brief summary of the prior proceedings) [hereinafter *Pelman III*].

[91] H.R. REP. NO. 109-130, at 22 (2005).

[92] *See, e.g.*, *id.* at 10-13 ("Unfortunately, blame-shifting lawsuits continue to erode the traditional American value of personal responsibility by fomenting a culture of blame.").

[93] Pelman v. McDonald's Corp., 237 F. Supp. 2d 512, 517 (S.D.N.Y. 2003) [hereinafter *Pelman I*].

[94] *Id.* at 532; *see also id.* at 533.

[95] H.R. REP. NO. 109-130, at 10 (2005). The Judiciary Committee took the quote from a *USA Today* editorial rather than the opinion. *See id.* at 10 n.37. The full statement reads: "If a person knows or should know that eating copious orders of supersized McDonalds' products is unhealthy and may result in weight gain (and its concomitant problems) because of high levels of cholesterol, fat, salt and sugar, it is not the place of the law to protect them from their own excesses." *Pelman I*, 237 F. Supp. 2d at 532.

[96] *See Pelman I*, 237 F. Supp. 2d at 520.

[97] *See* Michele Simon, *McDonald's Labeling Scheme: Not Lovin' It*, ALTERNET, Nov. 5, 2005.

[98] 21 U.S.C. § 343(q)(1).

[99] Joanne F. Guthrie, et al., U.S. Dep't of Agric., *Understanding Economic and Behavioral Influences on Fruit and Vegetable Choices*, 3 AMBER WAVES 36, 39

(Apr. 2005), *available at* http://www.ers.usda.gov/AmberWaves/April05/Features/FruitAndVegChoices.htm. According to the USDA, information collected in 1994 to 1996 and 1998 "indicate[s] that Americans consume about a third of calories from food prepared away from home, up from less than a fifth in 1977-78." *Id.*

[100] *See* 21 U.S.C. § 343(q)(5)(a)(i)-(ii).

[101] *See* U.S. Dep't of Health and Hum. Servs., The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity XIII, 15 (2001), *available at* http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf [hereinafter Surgeon General's Report on Overweight and Obesity].

[102] Menu Education and Labeling Act, H.R. 3444, 108th Cong. § 2(a), (b) (2003). In a press release on the bill, Representative DeLauro noted that "[o]besity is one of our nation's most pressing health issues" and that "people spend more money and time eating out each year." Press Release, Office of Congresswoman Rosa L. DeLauro, DeLauro Introduces Menu Education and Labeling Act (MEAL) to Help Curb Obesity (Nov. 5, 2003), http://www.house.gov/delauro/press/2003/MEAL_act_11_05_03.html. Consequently, she explained, "[t]his bill will provide people with a way to combat this life-threatening trend [by] giv[ing] consumers the necessary nutritional information to make health choices for themselves." *Id.*

[103] *See* Press Release, Nat'l Restaurant Ass'n, National Restaurant Association Opposes One-Size-Fits-All Labeling Law for Restaurant Menus (Nov. 5, 2003), http://www.restaurant.org/pressroom/pressrelease.cfm?ID=758 (opposing the federal legislation); Margaret Webb Pressler, *McDonald's Plans to Print Nutrition Data on Food Boxes*, Wash. Post, Oct. 26, 2005, at D1 (noting the restaurant industry's opposition to legislation "pending in some places, including Washington and New York, that would make on-menu nutritional information mandatory").

[104] *See Pelman III*, 396 F. Supp. 2d at 442 (summarizing the three causes of actions that the plaintiffs alleged in their amended complaint, including that (1) "McDonald's failed adequately to disclose that its use of certain additives and the manner of its food processing rendered certain of its foods substantially less healthy than represented," and (2) "McDonald's deceptively represented to its New York customers that it would provide nutritional information when in reality such information was not readily available at a significant number of McDonald's outlets in New York").

[105] *See Pelman I*, 237 F. Supp. 2d at 524.

[106] *See id.* at 530; *supra* note 104.

[107] From 1992 to 2002, the amount that the fast- and junk-food industry spent on advertising aimed at children increased from $6.9 billion to $15 billion. Patricia Lynn, *Want Some Education with those Fries?*, TomPaine.com, Sept. 12, 2005; *cf.* Eric Schlosser, Fast Food Nation 42-46 (2002) (discussing "[t]he explosion in children's advertising [that] occurred in the 1980s" by many types of companies).

[108] *See* Surgeon General's Report on Overweight and Obesity, *supra* note 101, at 10-11.

[109] *Id.* at 11. The recent debate surrounding CDC's findings related to overweight and obesity was about the agency's methods for determining the mortality impacts of being obese and overweight—not about the agency's conclusions regarding the prevalence of overweight or obesity or the dangerous health risks associated with excess weight (such as hypertension, diabetes, cardiovascular disease, certain cancers, and renal failure). *See* Ctrs. for Disease Control, *Overweight and Obesity: Clearing the Confusion* (telebriefing transcript, June 2, 2005), http://www.cdc.gov/od/oc/media/transcripts/t050602.htm. In March 2004, CDC published a paper in the *Journal of the American Medical Asssociation* (*JAMA*) containing the agency's determination that poor diet and physical inactivity caused 400,000 deaths in 2000 and its prediction that obesity would surpass smoking as the leading cause of preventable death in 2005. Rob Stein, *CDC Study Overestimated Deaths from Obesity*, Wash. Post, Nov. 24, 2004, at A11. In response to criticisms of its method of calculating obesity-related deaths, CDC reviewed its approach and published another study in *JAMA* the following year in which different statistical methodology yielded a much lower annual death estimate of 112,000. *See id.*; Alex Barnum, *U.S. Scales Back on Obesity Deaths*, S.F. Chron., Apr. 20, 2005. The second study also found that people who are moderately overweight (not obese) have a lower risk of death than people of normal weight. Barnum, *supra*. The Center for Consumer Freedom, an organization funded by the tobacco and restaurant industries, seized on CDC's second study as evidence that the public has "been force-fed a steady diet of obesity myths by the 'food police,' trial lawyers, and even our own government." Caroline E. Mayer & Amy Joyce, *The*

Escalating Obesity Wars, WASH. POST, Apr. 27, 2005, at E1. Initially, it bears mention that 112,000, although much less than 400,000, is still an exorbitant annual number of preventable deaths. Furthermore, both findings of the second study were immediately disputed by experts at Harvard's School of Public Health and the American Cancer Society, who argued that CDC "seriously underestimated mortality from obesity and overweight" by, *inter alia*, failing to take cancers related to excess weight into account and including in the study thin people who smoked or may have already been ill. Daniel DeNoon, *Panel: CDC Study Wrong on Obesity Risk*, WEBMD MED. NEWS, http://www.webmd.com/content/article/106/108246.htm, May 26, 2005.

[110] Pam Belluck, *Children's Life Expectancy Being Cut Short by Obesity*, N.Y. TIMES, Mar. 17, 2005.

[111] Melanie Warner, *Striking Back at the Food Police*, N.Y. TIMES, June 12, 2005.

[112] *See* SCHLOSSER, *supra* note 107, at 47-49; Adam Benforado, Jon Hanson, & David Yosifon, *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1700-07 (2004); Sarah Ellison, *Food Makers Propose Tougher Guidelines for Children's Ads*, WALL ST. J., July 13, 2005, at B1; Patricia Callahan, et al., *As Fat Fears Grow, Oreo Tries New Twist*, CHIC. TRIB., Aug. 22, 2005; Michele Simon, *Junk Food's Health Crusade*, 26 MULTNAT'L MONITOR (Mar./Apr. 2005) [hereinafter Simon, *Junk Food's Crusade*]. Most of the $1 billion that the food industry spends each year on advertising directed at children goes to television advertising, which, as Adam Benforado, Jon Hanson, and David Yosifon point out in a recent law journal article, "is not surprising" given that "[w]atching television is . . . 'the dominant pastime of youth throughout the industrialized world.' " Benforado, Hanson, & Yosifon, *supra*, at 1700-01 (quoting David S. Ludwig & Steven L. Gortmaker, *Programming Obesity in Children*, 364 LANCET 226 (2004)). The authors further note that "[f]or decades, scientists have been documenting the relationship between watching television and weight gain in children, and there is a growing consensus that a major source of the problem is that television advertising by the food industry alters children's diets by inducing them to eat more junk food, drink more soft drinks, and nag their parents to take them out for more fast food." *Id.* at 1701.

[113] SCHLOSSER, *supra* note 107, at 46.

[114] *Id.*

[115] Michele Simon, *Government Abandons Children to Big Food*, ALTERNET, July 22, 2005. A summary of the Institute of Medicine's report, *Preventing Childhood Obesity: Health in the Balance*, is available at http://www.iom.edu/Object.File/Master/25/858/0.pdf.

[116] Ellison, *supra* note 112.

[117] Simon, *Junk Food's Crusade*, *supra* note 112.

[118] SCHLOSSER, *supra* note 107, at 46.

[119] *Id.*

[120] PRCA, *supra* note 87.

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Founded in 2002, the Center for Progressive Reform is a 501(c)(3) nonprofit research and educational organization dedicated to protecting health, safety, and the environment through analysis and commentary. CPR believes sensible safeguards in these areas serve important shared values, including doing the best we can to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR rejects the view that the economic efficiency of private markets should be the only value used to guide government action. Rather, CPR supports thoughtful government action and reform to advance the well-being of human life and the environment. Additionally, CPR believes people play a crucial role in ensuring both private and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation and improved public access to information. Direct media inquiries to Matthew Freeman at mfreeman@progressivereform.org. For general information, email info@progressivereform.org. Visit CPR's website at www.progressivereform.org. The Center for Progressive Reform is grateful to the Beldon Fund and the Deer Creek Foundation for their generous support of this project and CPR's work in general.

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The Truth about Torts: Lawyers, Guns, and Money

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