

**National Food Policy Conference**  
*Courtrooms: The New Obesity Battleground?*  
9:00 am to 10:30 am, Thursday, May 8, 2003  
National Press Club Murrow Room  
14<sup>th</sup> and F Streets, NW  
Washington, DC 20045

Art Jaeger, CFA: Lawsuits are a new and controversial tactic in the battle over America's bulging waistline. Are they a serious threat or a passing fad? To debate this question we have one of the lawyers involved in the lawsuits and the head of the National Restaurant Association. To referee, we are especially pleased to have one of the most respected consumer advocates in Washington. Mark Silbergeld joined CFA as Senior Fellow and Director of International Issues last year. That was after 30 years with Consumers Union, where he was co-director of the Washington Office. He has experience in a wide range of policy areas, including, of course, food. Coincidentally, he is a lawyer. So with that I will turn things over to Mark.

Mark Silbergeld, CFA: Thank you Art. I appreciate the opportunity to chair this panel. It is a very interesting issue, and one that I think is very provocative. It is perhaps the most controversial and confrontational issue on the agenda of this conference and I hope that you all will have a lot of questions when we finish the panel portion of the discussion. What I am going to do is introduce the speakers, and ask each speaker then to take about five minutes to make some debating point summaries of their position rather than a full exposition because I hope we can get to the exposition with questions. I will start off with the questions, and I will have some questions for each of our speakers, and then give them an opportunity each to respond to what the other says, then have some questions for each other, and then we will save about 10 or 15 minutes to go to the floor for questions. And I would strongly urge you to make your presentation questions and not speeches.

As Art said, litigation is an important new issue in the public health issue of obesity and it is a very controversial one. We have two speakers today, one is a John Banzhaf, who is a professor of law at George Washington University, and for many years has run a law clinic there that teaches law students how to engage in public interest litigation. He has sued many commercial interests in what I can only call a number of very controversial lawsuits. Some of these have been very high profile, like tobacco lawsuits, and some of them have been lower profile. Perhaps his biggest project today is the obesity issue and, in addition to working with his students on potential litigation, he is a consultant in two obesity cases that are now pending in New York.

Steve Anderson is head of the National Restaurant Association. And what I will say is not only has he been in the food industry, the dining-out industry, for quite a while, but he has other experience as well. He worked for John Anderson, he tells me no relation, on the Hill. You may remember Congressman John Anderson, an independent candidate for the presidency about 20 years ago. And he was a candidate himself for Congress at one time. So, he has a political perspective on these issues as well as an industry perspective.

Professor Banzhaf will start and take 5 minutes and really succinctly summarize your positions. Then we will go to Mr. Anderson. Then we will have some questions.

John Banzhaf, GWU: I doubt that I can summarize my position much less go over the six so far fat lawsuits. Two we have won, two we are likely to win, two are pending. What I can do is provide a brief introduction, to say that basically what seems to be happening here is we have a new movement. The movement is to use a new and novel weapon against a public health problem, the public health problem being obesity. It certainly isn't unprecedented. The closest parallel, although there are differences, was the idea of using legal action as a weapon against the public health problem of smoking, which I helped to start in the mid-1960s by getting anti-smoking messages on the air, cigarette commercials off the air, smoking banned and so on. And who could have anticipated at that point how far we would go. In general, though, there have been many other movements which first started with litigation. If you think of the environmental protection movement, if you think of the nonsmokers' rights movement, the civil rights or black rights movements, to a large extent the women's right movement, the prisoners' rights movement, the movement for the disabled. Many of these started from litigation before there was a great deal of legislation, and indeed often the litigation helps to bring the public's attention to the problems and make them far more aware of the problem so that they can pass the legislation. Basically I think that's what we are doing there. The idea is that a group of public interest lawyers, public policy people and private interest lawyers are bringing already seven suits (I'll tell you about one later on that we just filed) against the basic problem of obesity. The issue here, I guess, is whether they are serious. My colleague says they are frivolous but *deja vu* all over again. I remember being here in Washington not too many years ago when I debated on television with two of the nation's leading experts on torts. Impartial and they both predicted that we would never get one of our smoker cases even to court, much less to verdict. Of course, today we are winning multi-million dollar, in some cases multi-billion dollar, verdicts. When I first proposed that nonsmokers could sue the tobacco industry, everyone thought that was crazy. Well, we got about \$400 million so far and the suits are really just beginning. And, ladies and gentleman, when we proposed that the states could sue because of the costs that smoking imposed on their treasury (exactly the same theory which could arguably be used here on fast food and obesity) not only did the general public think it was crazy, but lawyers in the movement thought it was crazy. The few who would take the cases, they called them lunatics. Does anyone know what we call them today? Multi-millionaires. Who could have thought it. Now, is this being taken seriously? Well, let's take a look. Two recent surveys say that, right now, today, the percentage of potential voters who would vote for a plaintiff in an obesity related lawsuit is within a few percentage points of the number who say they would vote for a plaintiff in a smoker suit against a tobacco company. This despite the fact that we've known about and hated the tobacco industry for many years, that the public is well aware of the tons of documents, (we

haven't yet gotten discovery from the fast food people, but we will) and of course that they all know that many verdicts have been brought down against the tobacco industry. Within two or three percentage points already. Who else is taking us seriously? Well, let's just take a few recent ones. Barron's just last week: "The liability lawyers are circling and the lawsuits are likely to keep coming. A legal campaign is about getting media attention in order to get a sympathetic jury somewhere down the line." About the same time, JP Morgan: "Litigation risks and their impact on the food sector sentiment should not be underestimated. One thing is certain. Well-capitalized law firms with a wealth of experience in tort action lawsuits and tobacco and asbestos will continue to target the deep pockets of the food industry." Just in the last couple of months, the Wall Street Journal, no great friend to my side of the issue, had a great article pointing out the need to require disclosure, pointing out that many of the more casual healthy dining restaurants are deceiving people into thinking that their meals are healthier, pointing out that in many cases you are safer eating a Big Mac than some of their things. This very conference, if you look at the agenda for last year and compare it with this year; last year almost nothing on obesity. Today obesity is a major topic. Who else is taking it seriously? Well, now let's see. McDonald's is warning people. Don't eat at McDonald's more than once a week. That's one of the things we're looking for in our lawsuits, is appropriate warnings. Now it's in France, only France so far, and the US McDonald's was absolutely outraged when I broke the story. But in France they're doing it. In the United Kingdom, McDonald's is beginning to provide information right on the package, about the fat, saturated fat and calories of their food. What's going on there is probably going to happen here. And as you all are probably well aware since this litigation has begun McDonald's has begun offering a wider choice of various kinds of healthier kinds of food.

Are we making progress already? Yes, we are already making progress. These suits are very serious suits. People are taking them seriously. As I said, there are six suits that I am aware of, the seventh was just filed and we'll talk about that later. Suit number one, which was referred to earlier, was put together by my law students as an academic exercise. Yeah, they got an A for it. They argued that McDonald's failed to disclose that its french fries contained beef fat. Now, notice that this is not an obesity case; indeed this is one of the problems. We couldn't prove that anyone got fat or even that anybody got sick. All we could say is there were minute amounts of beef fat in there. Also, it's not a misrepresentation case, so we didn't say that McDonald's lied or said something wrong. We simply said that they didn't tell the public something the public might be interested in knowing, even though the public who really cared are a very small minority of very strict vegans, Hindus and Muslims. That was hailed as frivolous by McDonald's and some of the commentators and so on. But if you go to McDonald's website when you get out of here, you will find a big apology issued to us and a \$12.5 million settlement. Lawsuit number 2: down in Florida, Big Daddy Ice Cream, under-reported, under-represented the calories and fat in their so-called diet ice cream by 300 percent. People thought they were getting a nice 200-calorie snack. Boom! 600 calories. They admitted that they made the mistake (it was just an innocent mistake, of course) but the important thing is that the judge has certified the case as a class action, which means the judge is allowing not just a handful of plaintiffs to sue for a couple hundred dollars but literally millions of plaintiffs to sue for tens or hundreds. I think that suit is likely to settle. Third suit, New York City, brought interestingly by a journalist. How many of

you out in the audience have eaten Pirate's Booty? Anybody familiar with Pirate's Booty? Dietetic food, right? Well, *Good Housekeeping*, I think it was, or *Ladies Home Journal*, one of them, got a hold of it and analyzed it. They reported that they were under-reporting the calories and fat, I believe it was 450 percent. So this woman was having a nice 200-calorie snack in the afternoon, actually about 850 calories, almost half of what she should be getting. We won that suit. It is settled. It came out several million dollars. Fourth lawsuit, is one brought in the state of Washington, Seattle, Washington, brought by exactly the same lawyer who brought the lawsuit my students put together. Indeed, it's exactly the same theory, exactly the same lawyer, exactly the same court, so I think we have a good chance of winning that one. This one is against Pizza Hut. It alleges that they do not disclose that their veggie delight pizza has beef fat in it. The fifth suit was one brought on behalf of a 270-pound obese guy in New York City. It is pretty clear at this point that jurors and judges are not ready for a lawsuit brought by adults. Of course, they argued the same thing with the smoking suits and we eventually won those. But this one has pretty much been put on the back burner by both sides. The sixth lawsuit, the one that most of you are aware of, charges McDonald's with contributing to the obesity of minors in New York City. Notice it does not say that they are solely responsible. It does not say they are primarily responsible. It simply says they bear *some* of the responsibility. Now, people say "you can't sue here. Everybody knows that things are fattening or not good for you," although I'm not sure the Restaurant Association admits that. But when you go home tonight, or you leave the conference, go look at one of the stepladders in you garage. You're going to see that it has a big warning on it. "Do not stand on the top step of the stepladder," although the danger, that is falling off, is pretty obvious. Look at your TV set. There are big warnings on the back "do not stick your hands in the back of the TV set." The danger is pretty obvious. Still, lawsuits if there are no warnings. Third example would be your hair dryer. Look at your hair dryers tonight. You will probably find stamped right in it a warning, "do not use around grounds or water." The new ones are saying, "do not use while you are in the shower." You'd think that would be a pretty obvious thing, at least as obvious as eating fattening foods. And, of course, one of the most famous ones, I'm sure you'll all remember, is when McDonald's got sued over serving hot coffee. Now, five-year-old children know you can get burned over hot coffee. So we all knew that suit could never succeed, and would never go anywhere. People also say well, it's the responsibility of the parents. Well, probably it is, although one of the plaintiffs here was a welfare mother, living on the street at the time. I'm not sure how much responsibility one can expect her to exert. But fortunately, in our society we do not blame the children for the negligence or carelessness of the parents. And indeed, that's why, when you go to McDonald's and get one of those tiny little toys, there's a big warning on it. Because if they didn't put that warning on it and they sold it to parents and they gave it to children under one or two...toddlers... there's a real danger of choking, which should be pretty obvious to everyone. And yet McDonald's knows if they do not provide clear and conspicuous warnings, they can and will be held liable. So far, the judge has ruled on this case, we can get into it in more detail, but what he has done, fortunately for us, he didn't treat it frivolously. It is a 63-page opinion. He gave us what our opponents call a roadmap or guide as to how to fix it up and provided us with some interesting examples. So we have done exactly that. We fixed it up and it's back before the judge.

In many of the articles I am now reading, many of the attorneys, even those who oppose these suits, more and more of them are saying they're afraid they're going to succeed. Somewhere

there is going to be a sympathetic plaintiff, a sympathetic judge, and a sympathetic jury, and then these suits are going to succeed. Even before they succeed, if we get by the initial motion stage, we will get discovery, which means we get to dig out all the documents the way we did with the tobacco industry. So, when my colleague says that “these suits are all frivolous, don’t worry about them,” it sounds a little like whistling past the graveyard. I guess a more modern example would be, remember Baghdad Bob? “Don’t worry colleagues, the Americans will never get into Baghdad.” Well, Fast Food Steve, tell them why they have nothing to worry about.

Silbergeld: Thank you very much. Mr. Anderson, 10 minutes to state your position on this.

Steve Anderson: Thank you Mark. For those of you who are still with us, these are the 5-minute introductory comments. I’m not a lawyer, I’ll be the first to admit that. I don’t work by the hour, so I’ll try to stay within my time here. I do want to thank the Consumer Federation of America for hosting this. I think they do an absolutely terrific job. I really do want to commend CFA. We work very closely with Carol Tucker Foreman through our National Restaurant Association Educational Foundation and our International Food Safety Council to ensure that we have the safest food in the world. I do appreciate this opportunity to be on the panel with John. I’ve never met him, I’ve seen him on TV quite a bit, but it is nice to be on the stage with him to discuss this issue. And hopefully we will live up to Art’s comments that we will treat each other with respect and understanding as we work through these issues.

I really do want to commend CFA putting this issue of obesity on the program for discussion today. Let me make it absolutely very clear where the National Restaurant Association is on this issue. And I might add that the National Restaurant Association represents 870,000 restaurants and food service outlets in the country. There are 11.7 million employees which makes us the largest private sector employer in the country. We’ve been working on this issue of nutrition for many, many years. It’s very important to this industry, it’s very important to the American people, and I might add there is probably no industry that has its finger on the pulse as to what American consumers want to eat more than the restaurant industry. I think the industry has been very proactive on this issue. As you know, we have at least three pieces of legislation on Capitol Hill: the Obesity Prevention Act, that has been introduced by Congressman Mike Castle, the Improved Nutrition and Physical Activity Act, which has been introduced by Senator Bill Frist, our cardiologist in the Senate, and Chris Dodd and Jeff Bingaman, and then introduced on the House side by Congresswomen Mary Bono and Kay Granger. We think these are very constructive pieces of legislation that get to the root of the problem. We’ve met with major regulatory officials on this issue, we’ve had meetings with the Secretary of Health and Human Services, Tommy Thompson, Anne Veneman, we are strong supporters of the VERB program, which as you know is a 75 million dollar program to encourage kids to get out and get exercise. We support President Bush’s Healthy US initiative. I think we have taken a very constructive approach on this entire issue.

There are things that I think you have to keep in mind. I think those who would like to sue the restaurant industry on this issue really are swallowing a simplistic notion. I would like to point out that 76 percent of all meals in this country are eaten at home and not in restaurants. The problem that I have with the lawsuits...I really want to commend CFA for putting on this conference and putting this issue right up front, early on in the agenda. I think these lawsuits get

to be a distraction, as many lawsuits do. I think all of us want to work on developing, concrete and substantive programs that really get to the heart of the issue of why we have people in this country including children who do have issues with food, food eating disorders, other items that really play into this issue. By filing lawsuits, they've really taken away the focus of all of us who are stakeholders on this issue. And by stakeholders I do mean the food industry, I mean government officials, I mean the medical community, I mean educators, state legislatures, regulators at the state level ...I think we all have an important stake in making sure our food supply is one, safe, and that we do stress, I want to stress this very much, that the National Restaurant Association strongly believes we need moderation and balance in diet and good physical education programs and it is a much more complex issue than attempting to file lawsuits that really don't solve the problem.

I do want to commend CFA for having this and I hope we have a good honest discussion, and we will all have a chance to say our piece in the hour that we have remaining. I think we do all have a stake in this issue. I do want to thank CFA for putting this on, and I look forward to our discussion today.

Silbergeld: Thank you very much. You have both given excellent presentations that have set the table for what I hope will be a productive discussion up here, and then some questions from the audience. I am going to ask you, Steve Anderson, my first question, and each time I ask a question and get an answer, again I would like the other panelist to respond if they would like. We have not yet discussed the issue of portion size and if you look at the advertisements on television, in the newspaper, on billboards for restaurants, especially, I think, sit-down, economy family restaurants, you see a huge emphasis on how much food you get for your money. Obviously, exercise is important, but no amount of exercise is going to deal with problems of doubling or tripling your daily calorie intake recommendations. Is this responsible marketing? Can we really deal with the issue if companies chose to do this kind of marketing that not only increases the portion size that people eat when they eat out, but probably, let me toss this out, affects what they expect when they cook meals at home?

Anderson: Very good question. There's been quite a bit of emphasis and publicity on portion sizes. I think it is one of the most interesting developments that has happened just in the last several of months. There was an interesting study in the Journal of the American Medical Association out of the University of North Carolina at Chapel Hill that looked at portion sizes. It was fascinating because if you read the press accounts, the press automatically translated the fact that because portions are bigger people are automatically eating more. That's the way the media construed it. The University of North Carolina was very quick in their response back to the media. There was a rebuttal or response in the *Washington Post* in a similar vein. They said even though portions have increased in their mind...all the way from beer to candy bars to snack food to anything else that we might be consuming...that the amount of calories we're consuming as Americans hasn't changed in the last 20 years, which I found absolutely fascinating. They also translated this, and I know that John is probably going to bring this issue up a little later, as it relates to marketing to kids. The University of North Carolina also came back with this same data.

If C. Everett Koop is right, who I have great respect for, that this whole issue is about energy in and energy out, and if we're not consuming any more calories and if you look at what's happened to our society for the last 20 years, it's really a function of our more sedentary lifestyle, particularly as it relates to children. By the time a child reaches the age of 17, he or she has watched somewhere between 15 and 17 thousand hours of television. There is one state in the country that requires a daily physical education program. That's Illinois. We do not have any nutrition education program in most of the schools in the country. Look at how our neighborhoods are established in most areas. There are no sidewalks, we can't let our kids out to play as we once did because we are concerned, I think justifiably, about their safety. I will be the first to admit that I have two boys, eight and seven. Every time I talk about this issue they say "dad, make sure you say something about too much homework." I've got a first and a third grader who come home and have to spend an hour and a half doing their homework. I think we want to make sure they are well educated but when I was a kid I was out playing baseball. I rode my bike by myself to the little league field and did other things. I think we have to put these things in context. John mentioned we might be whistling past the graveyard, and maybe we look at research in isolation and then all of a sudden we focus on it, and really kind of miss the entire point. I think it is important to keep things in context, but once again it goes back to the lawsuits. I think we can have a healthy discussion, I've really want to commend Secretary Thompson and Secretary Veneman for picking up the ball, trying to get all the stakeholders involved in this issue. But I think we need to look at this in a very constructive approach. Filing lawsuits really doesn't get to the issue.

Silbergeld: John, a couple of quick responses...

Banzhaf: First of all, I've seen a lot of the studies and most of the studies identify two major reasons for our sudden epidemic of obesity. Remember it is a sudden epidemic, so it's not that our genes have changed, that we've become stupider, that we've somehow lost our personal responsibility or individual responsibility. The two major causes, WHO study and half a dozen others, are number one, the one you identified, lack of physical activity and exercise but number two, the growing proliferation of fast food restaurants with their super sized portions and their ubiquitous advertising. Now you quoted a figure on how many meals are eaten in and out of homes. There is a very nice economic study...entirely independent. It's up on my website. It looks at the entire issue and says fast food restaurants are responsible for 65 percent of our current obesity epidemic.

Now, Mark, in his question has raised a very interesting point, which we can't get into in any great detail. Basically what he's suggesting is that you can have products which by themselves are not necessarily dangerous but if they are over-promoted, if they are promoted to people who lack the skill or willpower or responsibility to deal with them, then under legal theories we call negligent or wrongful promotion, there can be liability. And believe me those are some of the theories we are looking into in terms of our actions here. And the finally, I don't think I can sue people to make them get more exercise. I don't even think the government can require them by legislation. And with all the speakers, the one before and this one, who talk about exercise and so on, I haven't heard a concrete way to get people to do it. We can't just wave a magic wand and say, "Okay, we hope you will all exercise." We can do something about fast foods. I don't think I

can sue to get them to have smaller portions. I don't think I'd want to. But if think that underlines one of the two criteria we are looking for. One again is warnings; the second is clear and conspicuous disclosure. There are already three bills which would require that. What we are saying is that when you step up to McDonald's, just like when you go into a food store, and you can look at the two packages and compare them, you ought to be able to look up there and see triple bacon cheeseburger vs. salad, and one is 128 percent of the calories you should have in one meal and one has 528 percent, when you look at meal number 1 and meal number 8. Then if people want to choose the super size portion they can probably do so. But they will at least have the information. You don't have to go to McDonald's website, download it in 4 point type and carry it in to McDonald's when you buy it. You don't have to go searching around, looking for some kind of pamphlet, which they claim, is there. It would be a clear and conspicuous disclosure. These are the kinds of things which can be done by legislation. They can also be done by voluntary industry cooperation. We are just pushing them by litigation, because if legislatures won't legislate, litigators will litigate.

Silbergeld: A rebuttal Steve?

Anderson: Yes, if I could. I think John mentioned the word "it was an overnight epidemic." Now, I don't want to hang my hat too much on this. And I don't want to minimize that we have people overweight, and yes, some Americans are obese. But I have to draw your attention to the Body Mass Index that the government uses to determine who is overweight and who is obese. I think it is fascinating that in 1998, the government actually changed their BMI standards, and as a result 25 million became obese overnight...went from being government-approved to overweight and obese. So, I have to say, John, in preparation for this discussion, I tried to lose two pounds so I would get down to a government approved label, you know, level. I have to say, I actually made it. And if I had kept those two pounds on, the government would have technically labeled me as overweight, but not obese. But I probably would have been in good company, because according to the Body Mass Index, the following people are considered obese or overweight. Overweight people are Michael Jordan, Cal Ripken Jr., and I find absolutely fascinating, Britney Spears (which I never thought she really was). I was discussing this issue with some of my staff members, I won't tell you who, but their husband came back from their physical and they said, according to the Body Mass Index, my husband was technically obese. I said, "Go back and tell him that he has a lot in common with Tom Cruise," because according to the government standards, both Tom Cruise and Russell Crowe are obese. I don't want to minimize the fact, but we do have to look at the issue.

Just very quickly, to go to John's other point, Bill Dietz, who I have great respect for and is at the Centers for Disease Control and Prevention in Atlanta and is an expert on obesity and childhood obesity, recently said at a conference that fast food restaurants are not to blame for this issue. I also have well documented this Department of Health and Human Services program and they quote Adrianna Smith, who is with the VERB African American Outreach program, and she says right here that "fast foods are not to blame for obesity." And the government once again focuses on our sedentary life style.



Banzhaf: Steve, you can have a lot of fun with the BMI index, but the incidence of Type II diabetes has increased 10 fold over the last 10 years in children. And Steve, we have not changed the definition of Type II diabetes. Got another question, Mark?

Silbergeld: One second, yes, it will be for you. Steve?

Anderson: Well, I think it could be a function of our sedentary society. There are children that have Type II diabetes. I will be the first to recognize that. The question is where is the problem. Once again, getting back to this issue of lawsuits, I think we can solve this problem. Once again the premise of this discussion is the lawsuits, which I think totally crowd the issue. And I've even talked to trial lawyers, for goodness sake, who think that these lawsuits give the term frivolous a bad name. And we really need to focus on the concrete issues.

Silbergeld: Question now for you, John Banzhaf. If these suits are successful, and if they set a legal standard, a legal precedent, my question is who is next? It seems to me that would put snack food manufacturers at risk, it may put food retailers at risk for putting the least healthy foods at eye level, and there undoubtedly is a war chest that pays for that, and I am wondering if it would go so far to allowing children to sue their parents when they become adults for negligent supervision of their diet.

Banzhaf: Mark, as a lawyer, one of the things we both know is that when you bring lawsuits, you can't always predict how far they will go. Who would have predicted that from *Brown v. Board of Education* that we would be talking right now about affirmative action, whether it is constitutional? Who could have dreamed back in 1969, when I first asked for separate sections for smokers and nonsmokers on airplanes, that we would have dozens of jurisdictions which ban smoking virtually everywhere including bars, in many cases outdoors, 15 states where you can lose custody of the child if you smoke in its presence. No, we can't predict how far these lawsuits can go. I can tell you some of the other targets. If you are looking at other foods, bear in mind that PepsiCo has announced that they are going to be providing warnings, they call them informational notices, on their foods. So, they presumably think number 1, that these are necessary, that at least there are some people that don't know you aren't supposed to eat Frito Lays everyday, and that they are appropriate for a company to do. We are targeting also school boards, over the so-called pouring rights contracts, where they take bribes to allow fast food companies or soft drink companies to come in, sell their products to students, and take a bribe for every soft drink and fat burger that they sell.

We are looking at a lot of different kinds of lawsuits, as I said before we won't be able to get into all of them, but speaking of that I want to serve on my colleague here a letter which is in the form of a legal notice, and he might want to comment on it. While he is, I'll tell you all what it is and I have extra copies if people would like them. It puts the National Restaurant Association and its members on notice of some new research which appeared in a recent issue of the very respected *New Scientist* magazine and the *New Scientist* magazine, based upon this research, concluded that least some fast foods can act on the brain the same way as nicotine and heroin, and suggested therefore the need for an appropriate warning. The letter points out a very interesting thing in the tobacco litigation. In the tobacco litigation, many judges, not all of them, but many of them took the same view that the some litigators here are taking. "Everybody knows

the dangers of smoking, therefore you can't sue because the tobacco companies didn't tell you." But in many cases, those judges said, "But...aha! The dangers of becoming addicted, the dangers of having addictive type reactions from using the product, that's not within the public knowledge, that's not well known. Failure to provide those warnings can create liability." So, I am bringing this to the attention of the National Restaurant Association. I assume they're aware of the studies, but just in case they're not, with the suggestion that they may want to go back and look in view this evidence, whether or not it might be appropriate at this point to consider putting out some kind of warning, notice or advisory to people based upon this evidence, bearing in mind, as Mark knows, that the requirements for a warning do not include absolutely conclusive proof positive evidence. As long as there is significant evidence that a reasonable person might find appropriate in learning about a product, then there can be liability for putting it on. So, maybe you'd like to comment on whether or not you have any view, the Restaurant Association has a view, as to whether or not fast food can produce addictive-like effects, as a study has shown withdrawal symptoms in lab animals, for example.

Silbergeld: Steve?

Anderson: Sure, thank you for giving me the opportunity to respond. It's nice to know that our legal system is going to be further clogged by lawsuits against school boards who are attempting to volunteer in our local communities to provide better education. There are a couple of people who John left out. He might want to sue the couch manufacturers for creating couch potatoes. We probably have the remote control industry that we can go after. And then I know, John, I caught his appearance on that show Crossfire, where he actually did one thing I've never seen before. He actually had the great liberal Paul Begala and the great conservative Bob Novak agree against John, and on that show John said he was going to go after the coffee industry next, which I found rather interesting (I've got the tape if you want to see it. You said, "Why not?" when Mr. Novak asked the question). I am really not Karnac, I can't really look at this and tell you what is in it, well, yes I can I guess, why don't we do that.

I'm aware of the study that John is mentioning in this letter. It comes out of the United Kingdom. He mentioned McDonald's in France and I thought I was in a cone-head commercial all of a sudden. Basically what the study purports to say is it really muddles the definition of addiction. I think we ought to throw this on the table with all the other research and let people look at it and come to their own conclusions. I think from the outset anything that connects food with heroin on its face seems absurd. And once you get into the actual research I think you will find that. I think the study does not draw the conclusion that John states it does. I think really he is making an incorrect assumption.

Basically, what this means, it confuses the definition of addiction and what I guess you could call pleasure. You could listen to beautiful music and watch the sunset and according to this definition of addiction you could actually be addicted because of certain things that happen in your brain as a result. I know John has said in the past, and I am not sure he has said it today, but they're really focusing on sugar and whether it is actually a chemically addicting drug, and they would like to put warning labels on these products. But I might point out if you look at some of the other products that would require labeling according to John's arguments, you would

probably have carrots, you would have to have watermelon, which I might add my friend Michael Jacobson says it is actually the absolute perfect food and does contain sugar, I might add, grapes. I think this really does a disservice to this argument. I've been on the board of directors of the Produce for Better Health Foundation, where we are actually encouraging Americans to eat five servings a day to guard against cancer and other chronic diseases. Also, I think it does a disservice to those people who are chemically dependent on drugs and alcohol. I've talked to psychiatrists and I've seen articles that have challenged John in the issue, and I would agree. I think it does do a disservice and I think that equating food to heroin on the face of it is absurd, but once you get into research I think you'll see that it is not justified as well.

Banzhaf: Just in case anybody doubts, there are about a dozen studies, and you can look at them for yourself. It's all up on my website, [banzhaf.net](http://banzhaf.net). You can look at the studies for yourself, draw your own conclusions.

Anderson: And I'm sure you wouldn't have any studies on the other side on your website as well.

Banzhaf: That's right.

Silbergeld: Can I ask how many people from the audience are going to have questions once we get to the question section? There is a brave soul right there, get the ball rolling. I am going to ask another question then. I didn't see a huge number of hands and we have some time left. Which one should I ask? Mr. Banzhaf, you talked about discovering the lawsuits, and you made reference to all of the things that came out in the tobacco suits. You can decline to answer this question on the grounds that you do not discuss litigation strategy if you want, but I am wondering what do you really think is in those files, in the way of research and answers to the question what did they know and when did they know it, that you will discover if your discovery requests are approved by the judges?

Banzhaf: Of course we didn't anticipate most of the great stuff we found when we did when we did the tobacco discovery. But I'll tell you some of the things we think we might find, and at this point let me emphasize that they are all based upon rumors. I do not know them to be true. I am told that at least one major fast food company altered the temperature at which they cooked their french fries in order to get more fat into them. This to me is eerily reminiscent of the discoveries of how the tobacco industry was spiking the nicotine into their cigarettes. I have been told that some fast food companies add sugar to products where you wouldn't ordinarily expect it, like french fries. I'd like to see that. I think almost certainly we are going to find a lot of surveys and discussion groups and perhaps even these things where you have people on one side and you are sitting on the other side of this glass, the focus groups, where they're talking about how to get people to keep coming back to a restaurant. I think the fast food restaurants know that they get a disproportionate amount of their business from people who are heavy. I think they call them heavy hitters, or some similar term in the industry. If there is any kind of study trying to figure out how to get these heavy hitters, particularly heavy obese children, into their restaurants, I think this could tremendously cloud the image that the fast food companies have. This is one of the key differences, I think, between the tobacco litigation and the fast food litigation. Tobacco always had a lousy reputation, no one ever trusted them, they were always the bad guys, and so

when we came out with a lot of stuff, so what, these are the bad guys. I think today the fast food restaurants tend to have a reasonably good reputation with the public, and therefore this could be far more damaging. The other big difference, by the way, is also very crucial to our discussion. It is this: once the tobacco industry starting getting sued or started losing the suits, they could very well say “well, okay, we give up, we see the light, we are going to start making a safe cigarette.” They can’t do that. The fast food industry can. The fast food industry by doing, again, what we have already pointed out they are beginning to do, provide reasonable notice or warnings, clear and conspicuous disclosure of the fat and calorie content of their foods, can largely immunize themselves from these lawsuits, which again are based on the idea that people go in there and they are not aware of what is going on. As Judge Sweet said in his opinion, “we can succeed if we can show that there is any thing in this case about McDonald’s which the average person might not know.” And he actually gave us an example. He said, “Take Chicken McNuggets.” He said, “They are a McFrankenstein creation. Most people think, ‘chicken healthy, beef unhealthy.’” He said, “these McFrankenstein McNuggets have twice the fat of the beef,” and that is exactly what is in the new complaint. So, the fast food industry can, if it really wants to make progress, not just put out ads and, you know, have fancy programs, but wants to give people the information which I think they are entitled to and which eventually I think legislation will require, can start providing information for fat, calories, maybe saturated fat when you are standing in line to buy your fast food.

Silbergeld: Steve?

Anderson: The one thing I will agree with John on: the restaurant industry is respected among the American people. The Gallup survey did a survey last August and they asked the American people on a telephone survey to rate 24 different business sectors as to their very favorable, favorable, neutral, negative, or very negative attitudes towards particular industries and no surprise to me, the restaurant industry is the most respected organization and business sector in the country. Interestingly enough, the trial lawyers were almost dead last, not quite, there was another industry...

Banzhaf: Just above Congress...

Anderson: No, actually, you were a little below that, I’m sorry to say that. You know, one thing I think we do need to focus on is that, you know I said in my remarks that there are 870,000 restaurants and food service outlets in the country, which means there are many, many types of restaurants that people can go into. And then once you go into a restaurant, there are numerous options that would meet the dietary needs of every American. Now, we may not all vote in every presidential or every congressional election, but what we do is all 261 million Americans vote every day in the marketplace. Now, nobody forces people to go into restaurants to eat; nobody forces people to eat certain foods at home. Actually, there are some restaurants that fall into the definition of fast food that are in the free-enterprise system marking their products because they think that it will bring people into the restaurants and they are making a connection as it relates to the nutrition of the product. That is a fast food restaurant. I also have some concerns, and you know John, I think you have made quite a reputation on the tobacco issue, and I know there are many probably in this room that salute you on that, but I get a little concerned when I hear suing

restaurants and trying to compare their food to heroin, to the great strides we have made with civil rights litigation and women's rights, to somehow translate that into fast food I think is really a rather a twisted and torturous maze, and I think is really a disservice to this whole discussion. I think we don't have to necessarily make that translation to the great strides we have made in this society, and then all of a sudden try to make that connection as it relates to the fast food industry.

Banzhaf: Well, let me read you what the *Wall Street Journal*, again no friend to our side, recently said about some of these restaurants. They said, "the truth is that these and other wraps, salads, and sandwiches, being hyped as a healthy alternative to fast food are loaded with calories and fats. They give the consumer the impression that they are offering healthy food, and consumers are being fooled." Now, this is the *Wall Street Journal* and they started with this question, you try to answer it yourself: "Which has the least calories a McDonald's quarter-pounder with cheese, Panera's smoked ham and Swiss sandwich, or Baja Fresh's grilled chicken salad?" Grilled chicken salad, that sounds very healthy. *Wall Street Journal* says, "People are being fooled by restaurant associations." You had that front page cover story in *U.S News and World Report*, a mainstream publication, "Super Sizing America: How we are Killing Ourselves." I think one of the things which is happening here, is that these lawsuits and all the publicity that they are getting is beginning to change people's perception, particularly the fast food industry, and people are beginning to ask as those surveys I mentioned before suggest, "don't they have something to do, don't they have some responsibility for this sudden increase in obesity?" This \$117 billion a year cost most of which is paid by people who are not obese in the form of higher taxes and higher health insurance, \$1,500 dollars a year extra for every obese person in terms of health insurance. Should they bear some responsibility, particularly if they don't give us the information to make choices? You talk about voting, but when I go into McDonald's or most other places, I don't get the information I need to intelligently exercise my vote, and I think a lot of people feel they should have it.

Anderson: But it is nice to know you go into McDonald's. I think there needs to be a distinction made. We get a lot of articles written on this subject. There is a difference between the *Wall Street Journal* editorializing what their point of view is and somebody writing a story about an issue that is involved in our society. There is an article, I am not sure which one you're talking to, but I will call it to your attention. There is an article today in the *Wall Street Journal*; I think it is the one you are talking about, that appeared this morning. I ask you to take a look at it. The lead quote is from the group called Physicians for Responsible Medicine. Now, Neal Barnard is a great guy. I've talked to him about this issue; he founded this organization, but I think he'll admit that it is very closely aligned with PETA. You know, I told Neal, you know, it's fine. They want everybody to be a vegetarian. And you know, that's fine. But you know what almost every creditable registered dietician I have met says...you can have a healthy lifestyle without being a vegetarian. Those people that chose that lifestyle, that's absolutely fine. But, you know, just because someone writes an article about something doesn't mean that it is getting the endorsement of a publication, particularly the *Wall Street Journal*, who I might guess would be particularly interested in the flood of litigation that seems to be coming out of this media today and their position on tort reform. These lawsuits really aren't a productive use of the time and talents of the people of America. So, my guess is just because you hear that the *Wall Street*

*Journal* is no a friend of this type of litigation, my guess is that they probably are, but it is just a story that some reporter wrote.

Banzhaf: And you can also look on today's Drudge Report you'll find a link to this article today in Reuters. It's all around the country already. I got a 100 pieces of e-mail already when I got up on it.

Anderson: Can I comment on that? This is the Reuters article he mentioned, and it says "Lawyers plan new assault on fast food and obesity," and it is about John's presentation here, and they do quote me, and they talk about this letter he was going to give me so I kind of knew something about it. But it says "lawyers plan." It doesn't say public health officials. It doesn't say congressmen. It doesn't say experts in the area of nutrition. It doesn't say registered dieticians. It says "lawyers plan new assault on fast food and obesity." And I have to say, I'd rather have the public policy of this country based on sound science, based on public health officials making determinations rather than lawyers. So, check it out. It's on the website.

Banzhaf: If we did that with tobacco, we still would have a major tobacco epidemic. We sued because Congress did not act, and until the legislators legislate, we are going to litigate.

Silbergeld: Well, the first hand I saw was this hand in front of me, that's why I saw it first. Your question. Questions please not policy statements.

Question: Do you think that appetite stimulants should be banned from the food supply?

Banzhaf: I haven't thought about it, but please see me immediately after the meeting. (Laughter) I'm very serious. That's one of the best things I've heard so far, and guess what we are going to do with it if it pans out?

Anderson: To tell you the truth, I don't really know what that is and I am not sure John knows, but I am sure we have some experts. I know a lot of people get bogged down and looking at technical names but there are a lot of healthy items out there that really have some technical names that to the average lay person might scare them away from them. I've got a list here. I mean, low fat fruit yogurt has potassium sorbate, you've got pectin in yogurt. You have got 15 grain bread that has something deoxital cathorathic acid. You know there are all these interesting things that have rather technical names. I think the important thing we have to remember through this entire discussion is moderation and balance in diet. And almost every credible registered dietician will tell you that virtually all foods can be part of a healthy diet, that there really are no good foods or bad foods. There may be good or bad diets, but I think we do have to stress moderation.

John mentioned all the warning labels that we have on ladders. I mean, when was the last time you opened a bottle of aspirin and read the warning label that we have in there? I think we have totally, totally confused the American people as to what we are doing with our food and what is an appropriate balance. And I think we do need to focus on moderation and balance and exercise.

Banzhaf: In the meantime, it is okay to slip appetite stimulants into food.

Silbergeld: I think I saw a hand back here. Ken?

Question: I have a question for Steve Anderson. I guess it has to do with moderation and balance. Certainly in the fast food industry all foods come with wrappers and packaging of some kind. I would think it would be of no cost to provide nutritional information on the wrappers for the food that would give disclosure and help the consumer in terms of both moderation and balance. I'm wondering why the fast food industry has not done that, and I'm wondering if that is something they would be willing to consider, not on the website but on the packaging for the product itself.

Silbergeld: Steve...

Anderson: That's an interesting question. It's been around for quite some time. Some of us worked on the Nutrition Labeling and Education Act back in 1990. I played a big role in the enactment of that piece of legislation. Congress has looked at putting nutrition information on restaurant packages. They decided it wasn't practical at that point, and actually it is even less practical now. 70 percent of the people who go into restaurants in this country customize their order. Let me give you a few numbers. If you think about it, you know, think about that chain that's out there with the spokesperson about how this guy lost 90 pounds eating two meals a day at their fast food restaurant. You know, you go in there, and say you have one item to pick from. You have one possible combination to label. Let's say you have 10 different items. Say you go into that restaurant. You have 10 different choices of bread and cheese and meat. All of a sudden, you have 3,628,800 different possible combinations that you would have to label. If you have 15 different items that would be an option for that menu, all of a sudden 1.3 trillion combinations you have to label. I don't know any restaurant that would store that many labels.

Now let me tell you what has happened to a couple of restaurants that I am aware of. Now, you go in with your kids and you want a vanilla ice cream cone. You know, it's a soft-serve thing. And all of a sudden, the kid behind the counter thinks he is doing you a favor so he gives you a couple extra twirls on your ice cream cone. There have been consumer groups who have gone out and challenged the nutritional content that is posted on a volunteer basis in that restaurant as to the nutrition properties of that food. All of a sudden, they're interested in once again filing lawsuits. So, you know, because of the customization of these products, it really almost is impractical to do that.

Banzhaf: Steve, you know and I know the only reason you are not required to do it is that your industry lobbied very vigorously to be exempted from the act. McDonald's is already doing, or is about to do in the United Kingdom, exactly what you say is impossible.

Question: This is addressed to Mr. Anderson. I was wondering if you would make any distinction, because you emphasize choice, in situations where people are relatively captive in certain environments. I am speaking of schools with closed campuses, I am speaking of air travelers who travel during meal hours, of movie theaters that restrict bringing in healthy

alternatives. Would you suggest that there is a stronger duty within these closed environments than in more general environments to disclose or to provide healthy alternatives?

Anderson: I guess it all falls on the definition of what is a healthy alternative. I fly a lot; I think John probably flies a lot. I can remember flying 20 or 30 years ago, and the only thing I really had to pick from was the hot dog stand over in the corner. I think there is a wide variety of types of restaurants that you are seeing in airports. I know there has been an emphasis on schools, and the lawyers are going to be suing the school boards and the school districts for the food that they may be having in the schools. As far as I am concerned, that's up to the local jurisdiction of how they handle those kind of issues. Those are autonomous organizations. I think the important thing to remember, you talk about a captive audience, unless we are locking down kids in school 24 hours a day, seven days a week, eventually we're going to have to get to the point that we are going to have to educate people as to what proper nutrition is. And that is what this legislation that I have talked about, all three of these bills, actually do. We have to give Americans, and particularly our young people, the tools to make decisions for them to lead healthy lifestyles in the future. I think those options are out there, some people may think that they are not. I notice that I always hang out at the yogurt stand over there at National Airport and it is always pretty well occupied. I think what we really need to do for those areas that you're talking about is really give people the tools to make their proper decisions.

Banzhaf: Alright, I'm going to just add that was exactly one of the bases on which we planned to go after the school board and the school board members. But number one, the kids are a captive audience during the day. They can't step across the street and get something healthier. Secondly, most of the articles I read about the schools basically said "yes, we know this stuff is unhealthy, we should be giving them other stuff, but you know, gosh darn it, we need the money." And we have a name for people who do things they know are wrong because they get money. We call it prostituting oneself. In law, we also have a term called a fiduciary duty. When you go into McDonald's, they deal with you at an arm's length basis. They owe you no special duty. When you go to your doctor, your lawyer, your banker, your investment adviser, they owe you a fiduciary duty because you have less knowledge than they do and you are trusting them. When you are talking about children and parents, they trust the school. When the school says, "do something," whether that's engage in an exercise, or do an athletic event, or eat a food, then they have made an independent judgment that it is in their interest. When they find out that the school is feeding them fat burgers rather than something else because they are getting a kickback or bribe, our theory is that they are violating that fiduciary trust and they literally are a captive audience, and if they are captive during the entire day, they're going to eat a lot of those fat burgers, and no matter what they eat when they get home, there is going to be a problem, and again the more evidence again suggests that it may ultimately affect their metabolism in such a way that it makes it more difficult for them to stay lean.

Anderson: And I've been in some of those schools, and you know you can actually get a chicken sandwich and you can get it without the mayonnaise or the mustard on it, which is another alternative. There are numerous options out there.



Question: You had mentioned before, sir, that there were some rumors about the food industry having certain studies or files and you are looking for this smoking gun. I'm wondering if this just alarms consumers worrisome about what may really be going on, and just conditions them against the industry if eventually the files were called forward.

Banzhaf: Well, I would suggest that if the food industry is doing things, we should do something about it. And when they get to this jury box, they have these things in mind as any juror does in any case, that's the nature of it. Even today, if you go out and ask people "would you vote in a tobacco industry case, against the tobacco industry?" most of them will say "no, it's the smoker's own fault." But when we get them in that jury box, and we show them document after document after document, we get their executives on the stand and cross examine them, we change their minds. I think much of the changing of minds is going to occur not before, but after, but if this information is there we are certainly going to make it available. I think the public should be outraged and demand that something be done.

Anderson: There is a lot of polling data out there, and John told you some of his. I've got some, the National Restaurant Association, and I've got some that you would probably classify as being a little more objective than either coming from just John and I.

Banzhaf: Not my data.

Anderson: But according to our data, that 95 percent of Americans, in the most recent study and this was born out on a CNN poll, feel like they ought to making their own decisions when it comes to the food that they eat. They don't want anyone sitting at the table, whether it is the government, whether it is trial lawyers, telling them what they can and cannot eat. 70 percent of them are tired of the so called "food police" telling them what to eat. More than 70 percent of Americans say the portion sizes are appropriate and those are the type of surveys that we are seeing. In his opening comments, John mentioned the lawsuits. You know the first one, as he pointed out, was filed by Mr. Samuel Hirsch in New York. It was filed in the Bronx on behalf of Caesar Barber. That actually met with such ridicule that they had to withdraw it, and then they re-filed on behalf of children, which is always a good tactic. I don't want to minimize the health problems that these kids have, but there is one child who weighs 400 pounds, and another who weighs 280 pounds. And I have to say that I think there are more issues here as it relates than just food, and I think that we really need to give these kids help, because when you blow through 200 and 300 pounds, there's other issues that come into play here, and I think that we really, really, really need to get to the heart of this issue and help solve the problem.

Silbergeld: Unless I see Art giving me the gag sign, no, I see another question all the way in the back of the room. Speak loudly.

Question: Professor Banzhaf, my question is when are trial lawyers going to accept responsibility for the ill they've caused people, such as telling women to tear out their breast implants, as many did, and later learned that those breast implants were not the danger that was trumped up in court, quite false and fraudulent in many cases put out by trial lawyers.

Banzhaf: I don't know enough about the issue to comment on it, so I'll pass.

Silbergeld: Is there another question about food?

Banzhaf: Is there another intelligent question out there?

Silbergeld: Yes, right here.

Question: You talked earlier about the sudden epidemic of diabetes. I also think there has been an increase in sugar use in this country. If the food industry puts sugar in french fries, do I have some recourse since they put sugar in the french fries?

Banzhaf: Well, certainly that's my view. It is also the view of...

Audience: Could you repeat the question?

Banzhaf: The gentleman asked whether or not there might be legal action if people put foreign substances into foods, using the example sugar into french fries. My answer is not only do I think so, but Judge Sweet who was handling the case in New York thought so. That's exactly the basis of it. If people are putting things into food which other people would not expect, yes, you expect there to be salt in french fries, maybe some standard preservatives, maybe a little bit of flavoring, but you wouldn't ordinarily expect sugar, then you are adulterating a product. You are putting something in it that people do not expect, would not reasonably know about, it seems to me that you at least have a duty and an obligation to let them know. Again, the bottom line is not food police telling people what to eat, what they can eat, telling them what the hell they are eating! Let them have a choice! If somebody wants to put sugar in their french fries, fine. Put a notice up there. If somebody wants to serve you meal, which has more in that one meal, more fat for example as one of these products does, than all the fat that you should consume in one day, let them tell you on a sign, and then if you buy it, then I think they are off the hook. But let them tell you about it.

Anderson: I'm not sure I would put sugar in the category of foreign substance, because sugar is naturally occurring in many of the products that I pointed out earlier, fruits and vegetables, that are actually good for you. I think everybody knows in this room that there is a list called the "Generally Recognized as Safe", and the government has gone through these, and they determine whether foods are safe or unsafe. Now, if someone thinks a food is unsafe, there is a regulatory process you can go through. You don't need to talk to lawyers, who may or may not to that earlier point, know anything about nutrition and try to appeal to a jury on this. We have a process that we go through. If you are concerned about the safety of the food supply, you can obviously file petitions with the FDA and put it on their review, take it to your member of Congress, and go through it that way. Once again, it doesn't get to the heart of the issue by filing lawsuits. Now, granted, you might be looking for a way to seek remedy on this to yourself, but we do have a process, and the government does. We do have the safest food supply in the world, and I think we ought to focus on that, and if you don't like it then there are processes to go through. And you don't have to eat it!

Banzhaf: The issue isn't safety. It is putting an unknown ingredient or an ingredient people don't expect. That is exactly the basis on which we won \$12.5 million from McDonalds in our first suit. Not that beef extract was dangerous, or is or isn't on the GRAS list. It's that people didn't expect to find it there. So they are putting things in a food which an ordinary person would not expect. You do expect sugar in fruit; you expect sugar in, for example, bakery goods. If they're putting it in places where you wouldn't expect it, then you may have a good cause of action.

Silbergeld: We have time for another question over here. Speak loudly.

Audience: I'm wondering if there is any data or information that shows consumers that pay attention to existing food labels or signs in fast food restaurants that show content use these to make purchasing decisions.

Banzhaf: Yeah, there are a number of studies which show, and I think the food industry is probably well aware of these, that many consumers are in fact looking at these labels, particularly the new revised labels which are now available on virtually all the foods that they buy in stores, that they are exercising their responsibility, that they are making choices. We may not agree with the choices. Some people for example, that follow the Adkins diet, may want to buy something because it has fat in it, but at least we know they look at them and make the choices on that behalf. I don't know of any studies on fast food restaurants where they are making the disclosure, because I don't know of any restaurants that are now providing that information for people. I do know of one or two studies where they did provide the information externally, that is through advertising, and then it did have a measurable impact on consumption.

Anderson: Yeah, I think the American people have a pretty good idea. The American people are pretty smart. I think when they go into any restaurant they have a pretty good idea of what foods have fat in them and which don't. I don't think we necessarily have to scare people when they go into eat. But I think that there are organizations and companies that voluntarily label, but John pointed out the fact of going into grocery stores. The Nutrition Labeling and Education Act that I made reference to changed the complexion of the label when you go into a retail grocery store. When you go into a retail grocery store and you pick up a can of peas, chances are you are going to have about the same amount of peas in that can, which means that the label is correct. If you go into a restaurant or say you go into the deli, you probably have a lunch going on here, but go into your local deli restaurant. Tell them that you want a sandwich, a turkey breast sandwich. You would have the option to put cheese on that. You could put condiments it, different types of bread which changes the nutritional component of the product. And, I'll tell you what, if they ever did label, the lawyers would be right there right behind you taking it to the lab suing the restaurant, because it wasn't meeting the nutritional properties of how it was labeled.

Silbergeld: We have time for another question. Yes, back table.

Audience: Is there any data comparing the number of obese people who do frequently eat at fast food restaurants as opposed to those who would not, such as orthodox Jews?

Banzhaf: Why don't you go first on that. You are the expert.

Anderson: Well, I've never seen any data on that, and as I've pointed out 76 percent of all meals are eaten at home. I know John likes to look at portion sizes and serving sizes, but I have to say that when you talk to these restaurant companies, the number of people that are going in and ordering these larger portions are really a low percentage of their sales. So really it is hard to tell, and that is the problem with these lawsuits. You don't have any idea. If a child weighs 400 pounds, you have no idea of the complex issues that are involved in that issue. So, once again, I think we really need to bring reason into this argument and stress moderation and balance in diet.

Banzhaf: So you got a non-answer. My simple answer is I would check people like Eric Schlosser and Marion Nestle's book. They have some very good figures on exactly the points you are raising.

Anderson: Sorry if you missed my answer. It's no.

Question: Mr. Banzhaf, you spoke in court about people who do things they know are wrong for money. As a person who would rather be ruled by the first hundred names in the Washington phone book than by trial lawyers, I was wondering if you can tell me is the mere point that you might be able to pull this off mean that it is the right thing to do? Is it right just because you can pull it off?

Banzhaf: No, I think it's right because legal action has for hundreds of years been a very important component of many major movements which have brought major reforms in this country. And at this point, with all the discussions we've had so far, all these platitudes about people should eat less, responsibility, all this crap, nobody has come in with something specific which is going to make a change. If you are perfectly willing to be ruled by the first hundred people in the phone book, sir, that's what you are going to get because that is basically where we get our juries from, and a jury sits down, and under the tutelage of an independent judge gets to hear from both sides. The lawyers for the other side are at least as good and at least as expensive as ours are, and they are going to make their decisions. And I can virtually guarantee you, we have already won two of the suits, two of them I think we are close to winning, and by the way there is a seventh one we won't get to today, but you will probably read about it in a day or two.

Anderson: I have to say, you know, one last shot he gave me, so we'll come back. I think it really is intriguing that we will have people who sit in their ivory colored ivory towers really trying to find a way to enrich the trial bar at the expense of what I think are hardest working people in this country, which are the restaurant operators and their hourly employees. I think the American people will side with those people who are trying to achieve the American dream over the trial lawyers.

Silbergeld: I want to thank very much both of our panelists, Professor John Banzhaf and Steve Anderson, for a very vigorous discussion.