

September 12, 2006

The Honorable Bill Frist
Majority Leader
United States Senate
Washington, D.C. 20510

The Honorable Harry Reid
Democratic Leader
United States Senate
Washington, D.C. 20510

Re: S. 908, The Commonsense Consumption Act of 2005

Dear Senators Frist and Reid:

On behalf of a coalition of consumer and public health organizations, we urge you to oppose the Commonsense Consumption Act of 2005.

Public discussion about this legislation has centered around one notorious lawsuit against McDonald's by some overweight teens – a case that is still pending. That is not all that S. 908 is about.

S. 908 is so broad that it could lead defendants to make the baseless claim that it bars legal action in a vast array of important health-related cases, especially those aimed at protecting children's health. These include false advertising claims against food purveyors, lawsuits seeking to address aggressive marketing of junk food to children, and lawsuits concerning serious, sometimes fatal, side effects of certain supplements, like ephedra, marketed as weight-controlling substances.¹ (The Food and Drug Administration banned ephedra in 2004).

Moreover, this legislation contains a retroactivity provision, and covers cases even where the defendant is grossly negligent or reckless.² This bill would even restrict lawsuits by Attorney Generals brought to protect the citizens of their states.³

A recent Institute of Medicine report accuses food marketers of using billions of dollars to sway children away from making good food choices and knowingly puts these children's health at risk.⁴ It could be argued that S. 908 would remove a significant incentive for food marketers to act responsibly towards children and others.

¹ Section 4(5) of S. 908 says that the bill applies to “a civil action brought by any person against a manufacturer, marketer, distributor, advertiser, or seller of a qualified product...arising out of, or related to a person's accumulated acts of consumption of a qualified product and weight gain, obesity, or a health condition that is associated with a person's weight gain or obesity,” and section 4(4) defines a “qualified product” as a “food” as defined in section 201(f) of the Federal Food, Drug, and Cosmetic Act (“FFDCA”). Sections 4(5)(A) and 4(4) of H.R. 554 have identical language. However, section 201(ff) of the FFDCA says, in pertinent part, that “a dietary supplement shall be deemed to be a food within the meaning of this Act.”

² See section 3(b) of S. 908 and H.R. 554.

³ Section 4(3) of S. 908 defines “person” to include “any governmental entity.” Section 4(5)(B)(iii) of S. 908 permits suits by the Federal Trade Commission and the United States Food and Drug Administration. See also sections 4(3) and 5(B)(iii) of H.R. 554.

⁴ “Food Marketing to Children and Youth: Threat or Opportunity?” Institute of Medicine, Dec. 6, 2005.

Instead of S. 908, Congress should be debating what it could do to combat the major public health problem of obesity – such as supporting Senator Harkin’s bills, S. 2592, the Child Nutrition Promotion and School Lunch Act, which authorizes the USDA to define foods of “minimal nutritional value;” and S.3484, the Menu Education and Labeling Act, which requires chain restaurants to properly label their menus.

Given the number of problems facing this country today, we urge you not to waste precious time on a faulty legislative solution in search of a problem. We urge you to oppose efforts to enact S. 908 and to support legislation that will actually help combat obesity.

Sincerely,

Richard Woodruff
Alliance for Justice

Harold Goldstein
California Center for Public Health
Advocacy

Josh Golin
Campaign for a Commercial-Free Childhood

Michele Simon
Center for Informed Food Choices

Joanne Doroshov
Center for Justice & Democracy

Michael Jacobson
Center for Science in the Public Interest

Chris Waldrop
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The Action Coalition for Media Education

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The Paxis Project

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