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Joan Claybrook, President

Dear Senator:

We are opposed to S. 908, the Commonsense Consumption Act, because it gives an unjustified, super-sized protection to special interests. The bill will prevent consumers and states from holding the food and dietary supplement industries liable for negligent and reckless conduct.

There is no justification for giving such special protection to these industries. This bill is being pushed in response to media attention about a lawsuit against McDonald's on behalf of two children who argued that the fast food chain had legal responsibility for their obesity.¹ While proponents of the bill portray a looming legal crisis, the fact is that suits like the Mc Donald's "obesity" case do not exist. Public policy in reaction to a single lawsuit rarely produces thoughtful legislation and here unnecessarily jeopardizes the public's health and safety

The problems the bill creates are very real. The bill would result in a weakening of state law, threatening the safety of America's food supply. The legislation pre-empts state consumer protection laws and strips enforcement authority from state attorneys general in an area where the states have taken the lead for over a century to respond to dangerous products and unscrupulous advertising. By long-standing tradition in our constitutional system, the states have asserted primary authority in this area. The record is clear -- state attorneys general have diligently exercised that primary authority, and no evidence exists warranting such a drastic usurpation of state power. To fill the critical void created, the bill simply gives the already overburdened Food and Drug Administration and Federal Trade Commission discretionary authority to police all 50 states for federal violations concerning adulterated or misbranded foods and false and deceptive advertising. Also distressing, S. 908 changes fundamental civil procedure rules on pleadings and discovery and creates an unreasonably high standard for showing false and deceptive advertising.

S. 908 further creates the potential to harm the safety of consumers because the scope of S. 908 is exceedingly broad. The definition of "food" in S. 908 is so broad that it covers much more than "Big Mac" hamburgers. Dietary supplements are also included.² Indeed, under the

¹ The District Court dismissed the suit. *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512 (2003). The claim surviving appeal solely concerns deceptive advertising. *Pelman v. McDonald's Corp.*, 396 F. Supp. 2d 439 (2005).

² Section 4(4) of S. 908 defines a covered product ("qualified product") by resort to the broad definition of "food", as defined in Section 201(f) of the Federal Food, Drug, and Cosmetic Act, which, as later amended in Section 201(ff), defines "food" to include a dietary supplement.

bill, potentially dangerous food additives and virtually unregulated dietary supplements would seem immune from liability if they caused serious injury or death entirely unrelated to a person's weight gain.

While there is no real legal threat to the food and dietary supplement industries from "frivolous obesity" lawsuits, there exists a real threat to our nation's health and economy – the rising rate of obesity. The problem is especially alarming among our nation's children. Every week a new study is published about the increasing incidence of obesity and its impact on the public health and the related costs to our economy. For example, a 2001 report by the Surgeon General estimates that the total cost of obesity is \$117 billion each year.³ Meanwhile, the response of the fast food industry is to push for consumers to assume more risks, like S. 908, and to fight reasonable efforts to inform consumers through honest labeling about the contents of their food. Congress's energy is much better spent supporting Senator Harkin's bill, S. 2529 – The Child Nutrition Promotion and School Lunch Act.

We urge you not to waste Congress's time and resources on a legislative solution to a phantom problem. We urge you in the strongest terms to reject this bill.

For questions, please contact Michael Jacobson at 202-777-8328, Richard Woodruff at 202-822-6070, or Linda Andros at Public Citizen, 202-454-5135.

Sincerely,

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³ U.S. Department of Health and Human Services. The Surgeon General's call to action to prevent and decrease overweight and obesity. [Rockville, MD]; U.S. Department of Health and Human Services, Public Health Service, Office of the Surgeon General; [2001]. Available from: U.S. GPO, Washington.