



## PRODUCT LIABILITY

# ATTACKS ON FOOD INDUSTRY ESCALATE: AN UPDATE

Massachusetts, a state with liberal consumer protection laws, will likely be the newest battleground in the rapidly escalating childhood obesity wars. Consumer advocates plan to attack Kellogg, Viacom, Coca-Cola, and PepsiCo in two Massachusetts-based lawsuits, both of which reportedly will claim that their marketing and advertising have contributed to the rise in childhood obesity.

Plaintiffs have chosen Massachusetts for two principal reasons. First, unlike most state consumer protection laws, a Massachusetts statute—General Law Chapter 93A, Regulation of Business Practices for Consumers Protection (Chapter 93A)—appears to permit plaintiffs to bring a claim as a class action without first establishing several of the requirements of a traditional Rule 23 class. Second, Chapter 93A does not appear to

require proof of reliance on the alleged deceptive conduct in order to recover damages.<sup>1</sup>

### KELLOGG/VIACOM THREATENED LAWSUIT

The class action lawsuit planned against Kellogg and Viacom reportedly will be brought by a coalition of individuals and consumer advocacy groups, including the Center for Science in the Public Interest (CSPI), an organization founded by Ralph Nader. The purported class of plaintiffs will include all Massachusetts parents or guardians of children under eight who have: (1) seen an advertisement for “nutritionally poor food” on Nickelodeon or another Viacom outlet; (2) seen an advertisement for a “nutritionally poor” Kellogg product during any children’s programming; or (3) seen

<sup>1</sup> See *Aspinall v. Philip Morris Companies, Inc.*, 813 N.E.2d 476, 486 (Mass. 2004).

or purchased a “nutritionally poor” Kellogg or other product advertising a Nickelodeon character (such as SpongeBob SquarePants).

Plaintiffs plan to claim that Kellogg and Viacom advertise “nutritionally poor” food to children and that the ads cause parents to buy—and children to eat—unhealthy food. Children, according to plaintiffs, do not recognize food marketing as advertising and are vulnerable because they do not understand the persuasive intent of commercials. Plaintiffs apparently will allege that children who view these ads are intrinsically deceived and abused by commercials that encourage consumption of unhealthy food. The stated goal of the litigation is to enjoin Kellogg and Viacom from marketing high-fat and/or high-sugar foods to children under eight years old and to recover statutory damages. Plaintiffs estimate their statutory damages to be more than \$1 billion per defendant but claim to be unable to provide a reliable estimate until after discovery of defendants’ documents, including marketing, sales, and demographic data. The CSPI’s executive director, Michael F. Jacobson, states that this lawsuit has “national implications.”<sup>2</sup>

## COCA-COLA/PEPSICO THREATENED LAWSUIT

The CSPI is also involved in a threatened lawsuit against Coca-Cola, PepsiCo, and their bottlers. The gist of this lawsuit, which will be brought by consumer advocates and tobacco war veterans, is that soft drink companies use the caffeine in colas to addict children to sugar-laden beverages and then sell colas to addicted children through school vending machines. Although plaintiffs have not apparently settled on the legal theories they will assert, they are reportedly considering deceptive advertising and public nuisance.

Public nuisance has been the theory of choice of plaintiffs in industry attacks such as those on the lead-based paint, tobacco, and firearms industries. Plaintiffs reportedly plan to file suit first in Massachusetts and then use that case as a model in other states.

## CLASS CERTIFICATION UNDER CHAPTER 93A

In Massachusetts, class certification under Chapter 93A, in contrast to traditional Rule 23 certification, does not appear to require a finding that common issues of law and fact predominate, or that class certification is superior to other available litigation methods. This creates the possibility that the necessity of individual proof concerning, for example, plaintiffs’ purchasing and eating behavior, would not foreclose class certification.<sup>3</sup> Alternatively, the traditional requirements of class certification (*i.e.*, numerosity, commonality, typicality, and adequacy) may be disputed by defendants. In the end, however, Massachusetts appears to have been selected because it is viewed as a plaintiff-friendly forum for these types of lawsuits.

It will be plaintiffs’ position that, under Chapter 93A, purchase of a falsely represented product can be, by itself, an ascertainable injury.<sup>4</sup> The Massachusetts consumer statute has been construed as not requiring inquiry into consumer behavior of individual class members because the deceptive advertising, if proved, effects a *per se* injury on consumers who purchased the product represented to be something it was not. To succeed, therefore, plaintiffs seemingly do not have to prove that they relied on the alleged deceptive advertisement. Class members will likely contend that they can establish injury by simply pleading that they purchased the product and were exposed to inherent health risks.

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<sup>2</sup> In the Kellogg/Viacom lawsuit, plaintiffs sent a demand letter as required by Chapter 93A. A copy of the demand letter can be found at [www.cspinet.org](http://www.cspinet.org).

<sup>3</sup> *Aspinall*, 813 N.E.2d at 495 n.8.

<sup>4</sup> *Id.* at 486.

## SELECTED OBESITY-LITIGATION-RELATED DEVELOPMENTS

In the January 2006 issue of the *American Journal of Preventive Medicine*, Jess Alderman, M.D., J.D., and Richard A. Daynard, Ph.D., J.D., both associated with Northeastern University School of Law, review the history of tobacco litigation and suggest ways that public health officials and consumer-protection authorities can use the approaches honed in that litigation to “urge” food companies to provide better products. The authors discuss how tobacco companies successfully fought litigation for decades, only to have that strategy purportedly collapse in the face of internal industry documents showing allegedly deceptive practices. (Interestingly, the demand letter sent in connection with the threatened Kellogg/Viacom lawsuit claims that document discovery is imperative.) Alderman and Daynard state, “The goal of litigation can be to change public perception of an industry. . . .” The authors conclude that litigation will likely be as “necessary to address the obesity problem as it was to address the dangers of tobacco.”<sup>5</sup>

In January 2006, *The New York Times* ran a series of four articles focusing on the prevalence of obesity and Type 2 diabetes in the Greater New York City area, particularly in poorer sections of the city. The series, entitled “Bad Blood,” detailed factors leading to obesity in the New York City population, the rise of Type 2 diabetes in that population, and the personal and governmental costs of Type 2 diabetes. These articles coincided with an announcement by the New York City Department of Health and Mental Hygiene that it will electronically collect A1C hemoglobin blood sugar levels from 127 laboratories in the city, develop a registry of diabetic patients, and maintain that information in a central database. Since New York City has been an activist in industry-wide litigation against various industries (including firearms and electric utilities), these developments may portend litigation by New York City against segments of the food industry.

In December 2005, the Institute of Medicine issued a report entitled *Food Marketing to Children and Youth: Threat or Opportunity?* The report, which can be found at <http://darwin.nap.edu/books/0309097134/html>, reviewed the influence of food marketing on young children and concluded that the current pattern of food and beverage marketing is a threat to their health. In addition, it determined that television food and beverage advertising influences consumption patterns, contributes to a less healthy diet, and puts the health of children, especially poor children, at risk.<sup>6</sup>

On September 15, 2005, California Governor Arnold Schwarzenegger signed legislation establishing rigorous nutrition standards for food and beverages sold on public school campuses in grades K-12. SB 965 defined school beverage standards for high schools and eliminated the sale of soda and other sweetened beverages on high school campuses in California. (Similar standards had already been established for elementary and middle schools.) SB 12 established the most rigorous nutrition standards in the country for food sold anywhere on school campuses K-12 outside the school meal program.

In 2005, David Chenoweth, Ph.D., issued a report entitled *The Economic Costs of Physical Inactivity, Obesity, and Overweight in California Adults During 2000: A Technical Analysis*. Following a chronic disease risk-factor analysis, the report concluded that the total direct and indirect costs for physical inactivity, obesity, and overweight in California adults for the year 2000 amounted to \$21.68 billion. This study may portend lawsuits by third parties against the food and beverage industry to recover alleged obesity-related expenditures.

## JONES DAY’S DEFENSE EXPERIENCE IN INDUSTRY-WIDE LITIGATION

Jones Day has worked for many years defending industries subject to similar broad-scale attacks, including those based

<sup>5</sup> Daynard is the chair of the Obesity and Law Project at the Public Health Advocacy Institute.

<sup>6</sup> Plaintiffs in the Kellogg/Viacom lawsuit will apparently rely on the IOM study. In a related development, AdAge.com reported on January 31, 2006, that European soft drink marketers have agreed to stop marketing to children under 12 and to limit soft drink sales in schools.

on novel legal theories like public nuisance. Our experience includes defending clients against litigation assaults on lead-based paint and pigments, tobacco, firearms, and alcohol.

For example, Jones Day represents U.S. and international brewer-defendants in federal class action lawsuits brought in Ohio against several importers and manufacturers of alcoholic beverages. *Steven Eisenberg, et. al. v. Anheiser-Busch, Inc. et. al.*, Case No. 1:04 CV 1081 (N.D. Ohio). Plaintiffs, the parents and guardians of underage consumers of alcoholic beverages, sought relief based on the alleged targeting of underage consumers by defendants. On February 2, 2006, United States District Judge Donald Nugent issued an opinion dismissing plaintiffs' claims, stating at page 8:

This Court is aware of no legal authority that would support restriction of a private party's freedom of speech and expression under the theory that the expressed ideas interfere with a parent's right to make decisions regarding their children's upbringing. Parents have a right to make fundamental decisions about a child's upbringing, but they have no legal right to prevent other private parties from attempting to influence their children.

Jones Day lawyers have not only litigated but also have written extensively on topics expected to be involved in this area, three of which are listed below. These articles can be found on the publications page of Jones Day's web site, [www.jonesday.com](http://www.jonesday.com).

- Charles H. Moellenberg, Jr., "[Heavyweight Litigation: Will Public Nuisance Theories Tackle the Food Industry?](#)" *Andrews Food Health & Safety Litigation Reporter*, Vol. 1, Issue 3, November 2004.

- Thomas E. Fennell and Deborah Storey Simmons, "[Attempts to Expand Public Nuisance Laws to Reach Products](#)," *Texas Lawyer*, October 13, 2003.
- Mark R. Herrmann and Pearson N. Bownas, "[The Likely Impact of the Class Action Fairness Act](#)," *For The Defense*, April 2005.

In late 2004, Jones Day was the principal sponsor of a seminar explaining how members of the food industry can use the experience gained in defending these other industries to fend off similar attacks. Additionally, in January 2004, Jones Day was selected by *The American Lawyer* as Product Liability Department of the Year; in January 2006, we were one of two finalists in that competition.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General e-mail messages may be sent using our "Contact Us" form, which can be found at [www.jonesday.com](http://www.jonesday.com).

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