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Eat, Drink, and Sue: A New Mass Tort?

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When a federal jury in New Jersey awarded Antonio Cipollone, a retired cable splicer, $400,000 in damages against cigarette manufacturer Liggett Group Inc. for his wife's lung cancer death, skepticism regarding smokers' suits against the tobacco industry remained strong. After all, the verdict represented the first time a jury had awarded damages against the tobacco industry since smoker lawsuits first appeared in the 1950s.[1] Legal commentators predicted no increase in new cases following the verdict, believing it was simply unlikely that juries would ever sympathize with sick smokers given longstanding warnings about the risks of smoking.[2] Though the cigarette industry continues to prevail in most of the cases against it, and the number of those cases has fallen dramatically, those who predicted no surge in litigation following the Cipollone verdict were certainly proven wrong.

Of course, not every sudden uptick in litigation against a particular industry portends a new mass tort, and there are significant differences between the cigarette suits and claims against the food and beverage industry. Nevertheless, a number of new proposed class actions have recently been filed against fast-food companies and the same alliance of the public health community, consumer advocacy groups, academics, state attorneys general, and the plaintiffs bar that joined forces against other industries, including tobacco, appears to have also coalesced against the food and beverage industry.

Public Health Community Action

The list of public health community studies and reports on fast-food marketing practices, food labeling, and obesity related disease continues to grow, providing potential new evidence for food industry claims. In 2001, the Surgeon General issued a report finding that obesity had reached epidemic proportions in the United States and that there was about twice as many overweight children and almost three times as many overweight teenagers as there were in 1980.[3] In April 2005, the California Department of Health Services estimated that the total direct and indirect costs to California in 2000 from physical inactivity, obesity and overweight was $21.68 billion.[4]

Class Action Food Fights

In December 2005, the Institute of Medicine of the National Academy of Sciences issued a report on the food industry's marketing to children, which drew significant media attention and will likely be cited by public health officials, plaintiffs' attorneys and others in support of litigation and legislation to curtail certain marketing practices.[5] Among the report's findings were that the food, beverage and restaurant industry spent about $11 billion on advertising in 2004, including $5 billion just on television advertising,[6] that the preponderance of advertising targeted at children pertained to high-calorie and low-nutrient food products, and that there was "strong" statistical evidence that food and beverage advertising on television was associated with "adiposity" (body fat) in children ages 2 to 11 and teenagers ages 2 to 18.[7]

Tobacco Litigators Weigh In

Some of the leaders of the litigation efforts against the tobacco industry are now focusing on the food and beverage industry. Richard Daynard, a well-known proponent of litigation against the cigarette manufacturers, currently chairs the Obesity and Law Project at the Public Health Advocacy Institute at Northeastern University. Daynard has suggested lawsuits under state consumer protection statutes based on food and beverage marketing to children.[8]

George Washington University Professor John Banzhaf, another longtime proponent of tobacco litigation, has asserted in a CNN interview that fast food triggers an addictive response in the brain just like nicotine.[9] In addition, press reports have recently appeared discussing the work of food scientists in attempting to calibrate the taste and smell of food products to make them more enticing.[10]

Early Food Suits

In the late 1970s, a consortium of plaintiffs that included The Committee on Children's Television, Inc. and the California Society of Dentistry for Children, sued a number of food and advertising industry companies, including General Foods Corporation and Ogilvy & Mather International Inc. The plaintiffs alleged that the defendants improperly marketed and advertised certain breakfast cereals to children which should have been more accurately described as "sugar products" or "candy breakfasts."[11]

In the late 1980s, state attorneys general from several states pursued McDonald's for allegedly deceptive advertisements. The group included then New York Attorney General Robert Abrams, who asserted in 1987 that McDonald's made deceptive claims about the sodium and saturated fat content in certain food products, and the artificial ingredients and preservatives in its shakes.[12] State attorneys general and other

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government agencies have remained active in policing conduct in the food and beverage industry. The Federal Trade Commission sued Stouffer Food Corporation in 1991, asserting that Stouffer had engaged in deceptive advertising by falsely telling consumers that its Lean Cuisine products had a low sodium content.[13] In August 2005, California's Attorney General sued a number of fast-food companies, including Frito-Lay, Pepsico, H.J. Heinz and Wendy's International, asserting that they failed to warn consumers that certain of their processed potato products contained acrylamide, a carcinogen.[14]

Class Actions Emerge

The first proposed consumer class actions against the food and beverage industry emerged in 2002 in New York. Ashley Pelman and Jazlen Bradley, two minors, and their parents sued McDonald's. Pelman and Bradley asserted that they had consumed McDonald's products, had become overweight and developed certain obesity-related diseases, including diabetes, coronary heart disease, and high blood pressure. Following defendants' initial motions to dismiss, the plaintiffs amended their claims for violations of New York's Consumer Protection Act and for negligence and failure to warn.[15] Southern District of New York Judge Robert Sweet granted the defendants' subsequent motion to dismiss and denied plaintiffs leave to further amend their complaint. Judge Sweet found that plaintiffs failed adequately to allege that they witnessed certain McDonald's advertisements they claimed were false, that their consumption of McDonald's products caused their alleged injuries, or that certain advertisements plaintiffs cited were objectively misleading.[16] Plaintiffs appealed and the Second Circuit vacated and remanded Judge Sweet's dismissal of plaintiffs' Consumer Protection Act claims, finding that they sufficiently met the notice pleading requirements of the Federal Rules of Civil Procedure.[17]

The alcoholic beverage industry was hit with two proposed class action complaints in 2004. The proposed class members consisted of the parents and guardians of underage consumers of certain alcoholic beverages, who alleged deliberate and reckless targeting of such consumers in marketing campaigns.[18] Alleging violations of the Ohio Consumer Sales Practice Act (the "OCSPA") and certain common law claims, they sought recoupment of the funds their children spent on illegal purchases of alcoholic beverages, and an injunction to prevent defendants from continuing to market alcoholic beverages to underage drinkers.[19] In granting the defendants' motion to dismiss the complaints, the court held that plaintiffs failed to assert legally cognizable injuries, and did not provide sufficient notice to each defendant of the particular advertising and marketing practices they alleged were harmful.[20]

Seven proposed class actions against food and beverage industry defendants have been filed in multiple jurisdictions in the past year, six of them filed just in the past two months. Their timing and similar allegations in some of the complaints suggest coordination by a national consortium of plaintiffs' counsel. In *Hardee v. Del Mission Liquor*, plaintiff sued on her behalf and as a representative of a proposed class of consumers of certain breakfast cereals touted as "low sugar" that allegedly, unbeknownst to plaintiff, contained "other carbohydrates," making the defendants' representations that the cereals had nutritional value over their full sugar breakfast products false.[21] In February of this year, a proposed consumer fraud and false advertising class action was filed against Merisant Corporation, the maker of the artificial sweetner Equal Sugar Light. The complaint asserts that Merisant deceived consumers by declaring that Equal Sugar Light contains half the calories and carbohydrates as sugar when in fact the product was composed of about 90 percent sugar and thus contained the same amount of carbohydrates as sugar.[22]

McDonald's again found itself the target of class action lawsuits following announcements the company made last month regarding its french fries. On Feb. 8, McDonald's announced that the trans fat content in a large order of its fries was one-third higher than previously reported, total fat content was 20 percent higher and total calories were 570 instead of 520.[23] And on Feb. 13, the company revealed that wheat and dairy products were used to flavor its fries.[24] Within weeks of each announcement, McDonald's was named in proposed class actions in New York, Florida, Illinois and California. Invoking consumer fraud statutes in each jurisdiction, the complaints seek class certification on behalf of consumers who claim they would have "moderated" their intake of fries if they had known their true caloric and fat content,[25] those claiming they were injured because they purchased McDonald's fries believing they were free of gluten and milk or wheat allergens,[26] and individuals who assert they are vegans[27] who would not have consumed McDonald's fries if they had known they contained dairy products.[28]

Whether courts will determine that any of these food class actions satisfy such basic class action requirements as commonality, predominance and manageability will depend in part upon the contours of the different consumer fraud statutes they invoke and whether those statutes require proof of such individualized elements as reliance and actual deception. A recent New York Appellate Division decision illustrates the hurdles confronting a proposed consumer fraud action against a food manufacturer in New York. In *Klein v. Robert's American Gourmet Food, Inc.*,[29] plaintiffs sued the maker of the snack food "Pirate's Booty" after it was revealed that it and related products had a fat and caloric content substantially higher than advertised.[30] The Appellate Division reversed the trial court's certification order, finding that because some of plaintiffs' New York consumer fraud and common law claims required a showing that class members relied on the defendants' allegedly misleading fat and calorie statements and were deceived, the class was overbroad, as some consumers may have purchased the snacks regardless of their fat and caloric content.[31]

By contrast, it is no surprise that parents and advocacy groups have recently announced their intention to file proposed class action law suits in Massachusetts under the state's liberal consumer protection law, Massachusetts General Law ch. 93A, targeting Viacom's and Kellogg's marketing of junk food to children,[32] and the sale and marketing of soft-drinks in schools by soft-drink companies and their bottlers.[33] Plaintiffs who claim they have been injured by an unfair or deceptive act or practice may seek class certification directly under Chapter 93A "'if the use or employment of the unfair or deceptive practice has caused similar injury to numerous other persons.'"[34] Courts considering class certification motions under Chapter 93A need not adhere to each of the certification elements required under Rule 23.[35] In addition, the statute requires neither proof that a plaintiff relied on a representation nor evidence that a defendant intended to deceive the plaintiff.[36] An advertisement may be deceptive under Chapter 93A if it merely has the capacity or tendency to mislead reasonable consumers.[37]

Even under Massachusetts' liberal consumer protection statute, however, the basic requirements of causation and injury for there to be a justiciable controversy must be satisfied.[38] Apart from questions of reliance or damages, whether any of the recently filed proposed class actions will gain traction may turn on these threshold elements to maintain a claim. For instance, the plaintiffs in the

proposed Massachusetts action against Viacom and Kellogg appear to claim that each child they represent was injured simply when they witnessed one of the allegedly improper Kellogg's advertisements because they are subsequently hardwired to want foods that "contribute to poor health."[39] There is no allegation that any of the children actually consumed the food products of "poor nutritional quality" at issue and suffered any adverse health consequences, such as diabetes or obesity, because of the products.[40] If they never actually consumed the products or have not suffered any diet-related harm from them, or their parents purchased them for reasons wholly unrelated to the allegedly improper advertisements, where is the injury and why should these suits attempting to use the courts for social engineering be permitted to take up scarce judicial resources? Such issues are the domain of legislatures and regulators. At an even more basic level, they are the responsibility of parents and consumers old enough to understand that advertising is designed to sell a product and that certain foods and beverages should be consumed in moderation as part of a balanced diet.

Assuming any of the pending food suits get past the threshold pleading stage and into document and deposition discovery, it is conceivable that consumers may learn that certain fast foods and beverages do indeed reflect years of research and design efforts by food company scientists and marketing executives, and that yet more products are revealed to contain unexpected ingredients or a higher fat and calorie content. Individual plaintiffs who can demonstrate physical or economic injury from purchasing such products in reliance on misleading manufacturer statements may have a consumer fraud claim. In the class action context, however, just as certification has been denied or reversed in virtually every class action proposed against the cigarette manufacturers,[41] the individualized inquiry inherent in a consumer food or beverage transaction should preclude litigating such claims on a class-wide basis, given such consumer-specific questions as why a product was purchased, whether a company statement or advertisement was objectively deceptive, and whether a consumer's alleged physical injuries were caused by the product or multiple alternative risk factors.

Conclusion

The recent increase in proposed class actions against the fast-food and beverage industry will likely continue given the varying requirements among state consumer fraud statutes, ongoing public health community research and advocacy, and the likelihood that one or more of the pending suits will eventually reach document discovery, revealing additional information about food and beverage industry research, design and marketing practices. In view of the multiple individual issues necessarily raised by the elements of the consumer protection and products liability claims asserted in these cases, class certification will be difficult to justify. Beyond that, obvious questions regarding parental and consumer responsibility for food and beverage choices should create significant hurdles for consumers and advocacy groups should any of these cases ever reach a jury.

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1. John Riley and David Henry, "Tobacco Firms Fire Back, Countering Jury Award of $400G," Newsday (June 15, 1988), at 7.
2. Geoffrey Cowley, Karen Brailsford and Linda Burke, "A Split Decision on Smoking—but a Jury Breaks the Industry's Winning Streak," Newsweek (June 27, 1988), at 48.
3. "The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity" (2001), Foreword, at xiii, U.S. Dep't of Health and Human Services, Public Health Service, Office of the Surgeon General.
4. "The Economic Costs of Physical Inactivity, Obesity, and Overweight in California Adults During the Year 2000" (April 2005), Cancer Prevention and Nutrition Section, California Center for Physical Activity, California Dep't of Health Services., Executive Summary, at v.
5. "Food Marketing to Children and Youth: Threat or Opportunity?" (Dec. 2005), available at http://darwin.nap.edu/books/0309097134/html.
6. Id., Executive Summary, at ES-3.
7. Id., Executive Summary, at ES-7.
8. Kate Zernike, "Lawyers Shift Focus From Big Tobacco to Big Food," The N.Y. Times (Apr. 9, 2004).
9. CNN Live (June 22, 2003), transcript available at http://banzhaf.net/docs/cnn.html.
10. Patricia Callahan, Jeremy Manier and Delroy Alexander, "Where there's smoke, there might be food research, too," Chicago Tribune (Jan. 29, 2006), available at http://www.chicago tribune.com/business/chi-06012905jan29,1,3082179.story?coll=chi-health-utl.
11. *Committee on Children's Television, Inc. v. General Foods Corp.*, 673 P.2d 660, 664 (Cal. Sup. Ct. 1983).
12. See *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 528-29 (S.D.N.Y. 2003) (discussing an April 24, 1987 letter by Abrams asserting allegedly deceptive claims by McDonald's).
13. *In the Matter of Stouffer Foods Corp.*, Dock. No. 9250 (Aug. 6, 1993), 1993 FTC LEXIS 196. See generally Felix H. Kent, "The FTC Flexes Its Muscle," N.Y.L.J. (Dec. 17, 1993), at 3.
14. *State of California v. Frito-Lay, Inc. et al.*, Complaint, Case No. BC338956 (filed Aug. 26, 2005 Superior Ct. Los Angeles Cty.).
15. *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003).
16. *Pelman v. McDonald's Corp.*, 02 Civ. 7821, 2003 U.S. Dist. LEXIS 15202, at *22-*23, *26-*34, *38-*39 (S.D.N.Y. Sept. 3, 2003).
17. *Pelman v. McDonald's Corp.*, 396 F.3d 508 (2d Cir. 2005). Following the Second Circuit's suggestion, upon remand, defendants filed a motion for a more definite statement of plaintiffs' claims in their amended complaint, which Judge Sweet granted in part, directing plaintiffs to provide additional details regarding the particular McDonald's advertisements on which they based their claims, why those advertisements were materially deceptive to an objective consumer, how plaintiffs became aware of the acts alleged to be misleading, and their alleged injuries. *Pelman v. McDonald's Corp.*, 396 F. Supp. 439, 446 (S.D.N.Y. 2005).
18. *Eisenberg v. DeGross*, Case No. 1:04 CV 1081, 2006 U.S. Dist. LEXIS 4058, at *11-*13 (N.D. Ohio Feb. 1, 2006).
19. Id. at *12-*13.
20. Id. at *13-*17.
21. *Hardee v. Del Mission Liquor et al.*, Complaint, Case No. GIC 844745 (filed March 24, 2005 Cal. Superior Ct. San Diego Cty.).
22. *Markowitch v. Merisant Corp.*, Complaint, Case No. 06 CV 846 (filed Feb. 15, 2006 N.D. Ill.).
23. John Schmeltzer, "New fat stats for fries? Not lovin' it—Self-testing reveals McDonald's nutritional data was wrong," Chicago Tribune (Feb. 9, 2006), at Zone C, pg. 1; "McDonald's Updates Info. on Fries," The Wall Street Journal (Feb. 9, 2006), at pg. D6.
24. David P. Hamilton, "McDonald's French Fries Contain Possible Allergens Wheat, Milk," The Wall Street Journal (Feb. 13, 2006), at pg. B4.
25. *Raingevirtz v. McDonald's Corp.*, Complaint, No. 06 CV 00605 (filed Feb. 9, 2006 E.D.N.Y.); *Reyes v. McDonald's Corp.*, Complaint, No. 06 CH 02745 (filed Feb. 9, 2006).
26. *Levy v. McDonald's Corp.*, Complaint, No. 06-60236-CIV-Lenard (filed Feb. 24, 2006); *Moffatt v. McDonald's Corp.*, Complaint, No. 06 CH 03305 (filed Feb. 17, 2006 Chancery Ct. Cook Cty. Ill.). The same day the *Moffatt* complaint was filed in state court in Illinois, the parents of a five year old girl with food allergies sued McDonald's in Florida state court, asserting she had fallen ill from undisclosed gluten in the company's french fries. *Chimiak v. McDonald's Corp.*, Complaint, No. 2006-1597 (filed Feb. 17, 2006 Palm Beach Cty. Fl.).
27. Vegans do not eat animal products or by products, such as dairy foods.
28. *Sugich v. McDonald's Corp.*, Complaint, No. BC347519 (filed Feb. 15, 2006 Ca. Superior Ct. Los Angeles Cty.). The *Sugich* proposed class also includes consumers who would not have purchased McDonald's fries if they had known they were not wheat or gluten free.
29. 808 N.Y.S.2d 766 (2d Dep't 2006).
30. Id. at 769.
31. Id. at 773. Proof of actual deception and injury is required under the consumer fraud statutes of other states as well, including Illinois and California, where some of the recent McDonald's actions were filed. See *Price v. Philip Morris, Inc.*, Dock. No. 96236, 2005 Ill. LEXIS 2071, at *140 (Dec. 15, 2005 Sup. Ct. Ill.) ("[T]o meet the causation element of a Consumer Fraud Act claim…, the members of the class must have actually been deceived in some manner by the defendant's alleged misrepresentations of fact.") (citation omitted); *United Investors Life Insur. Co. v. Waddell & Reed, Inc.*, 23 Cal. Rptr. 3d 387, 388-89 (Jan. 20, 2005 Cal. Ct. of Appeal) (discussing the 2004 adoption of Proposition 64, which amended California's unfair competition statute, California Business and Professions Code Section 17200 et seq., to prohibit a private action under the statute unless the plaintiff has suffered injury in fact and has lost money or property).
32. See Jan. 18, 2006 pre-suit notice letter of the Center for Science in the Public Interest ("CSPI") to the CEOs of Viacom and Kellogg, available at http://www.cspinet.org/new/200601181. html; "Parents and Advocates Will Sue Viacom & Kellogg," CSPI Press Release (Jan. 18, 2006), available at http://www.cspinet.org/new/2006 01181.html.
33. See Feb. 17, 2006 Banzhaf e-mail notice to school boards, school board associations, and their counsel, "Imminent Class Action Law Suits Over Soft Drink Sales in School," available at http://banzhaf.net/docs/sodawarn.
34. *Aspinall v. Philip Morris Companies, Inc.*, 813 N.E.2d 476, 481 (Mass. Sup. Judicial Ct. 2004).
35. Id. at 485.
36. Id. at 486.
37. Id. at 487-89.
38. *Hershenow v. Enterprise Rent-A-Car Co.*, 840 N.E.2d 526, 533-35 (Mass. Sup. Judicial Ct. 2006) (confirming that although consumers are not required to prove reliance on deceptive conduct to invoke Chapter 93A, they must be able to demonstrate causation, that is, that the alleged deceptive act injured them or caused them to suffer a loss). At least two bills are currently pending before the Massachusetts Legislature to curtail the ability of plaintiffs to seek class certification of consumer fraud claims under Chapter 93A. Noah Schaffer, "Lawyers split on 93A reform bills," Massachusetts Lawyers Weekly (March 20, 2006), at 11.
39. Jan. 18, 2006 pre-suit notice letter of the Center for Science in the Public Interest ("CSPI") to the CEOs of Viacom and Kellogg, at 4, available at http://www.cspinet.org/new/2006 01181.html.
40. Id.
41. E.g., *Barnes v. American Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998), cert. denied, 526 U.S. 1114 (1999); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *Small v. Lorillard Tobacco Co.*, 679 N.Y.S.2d 593 (1st Dep't 1998), aff'd, 94 N.Y.2d 43 (1999).