Legal Backgrounder

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IMPENDING LEGAL ATTACKS ON FOOD ADS SHOULD NOT BE WELCOME IN COURT

By

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Many commentators and politicians are quick to label judges who render unpopular or controversial decisions as "judicial activists," who supposedly create or change, rather than apply, the law. Whether or not one agrees with the label, there is no doubt that under our system of government, legislatures – and *not* courts – are supposed to pass laws. And civil lawsuits are supposed to compensate those who have been injured by wrongful conduct. But if a forthcoming lawsuit in Massachusetts against Kellogg and Viacom is any indication, plaintiffs' attorneys and certain groups allegedly acting in the public interest do not see it that way. Instead of lobbying for laws to be generated through legislation, these groups are attempting to force policy decisions on the public – which foods children should eat, which foods should be advertised on television and in other media – using litigation under Massachusetts' consumer protection statute. This suit reflects "legislation through litigation" in its purest form, and it highlights the potential for abuse of the protections provided under Massachusetts' consumer protection statute if plaintiffs who have no injury in any traditional sense are nevertheless permitted to pursue a lawsuit.

CSPI, et al. v. Viacom, Inc. and Kellogg Co. On January 18, 2006 the Center for Science in the Public Interest and other individual potential plaintiffs gave Viacom and Kellogg the requisite 30-day notice of intent to file litigation alleging violations of Massachusetts consumer protection law for advertising "food of poor nutritional quality" on children's television programs and other child-oriented media. The CSPI plaintiffs, according to their notice letter, intend to allege that "the injury occurs each time a child is subjected to each marketing effort for a food of poor nutritional quality." This marketing in turn "imprints" children with a desire to consume foods and beverages that "undermine their diet and health." *CSPI Notice Letter*, p. 8, ¶¶3-7. Then these imprinted desires manifest in a diet that contributes to poor health, including obesity. *Id.* While the allegations of the CSPI notice letter are of interest, the allegations omitted from that letter are perhaps more so. There is *no* allegation in the CSPI notice letter that the consumption of "food of poor nutritional quality" manufactured by Kellogg made the plaintiffs obese, or even overweight. In fact, there is *no* allegation that the named plaintiffs or putative class members are obese or overweight at all.

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It appears that the CSPI plaintiffs will file suit on behalf of themselves and as representatives of a putative class of people composed of parents or guardians of children under the age of 8 in Massachusetts whose children have "(1) seen an advertisement for nutritionally poor food on Nickelodeon or in another Viacom medium, (2) seen an advertisement for a nutritionally poor Kellogg product during children's programming in any other media, or (3) seen or purchased a nutritionally poor Kellogg or other product emblazoned with a Nickelodeon character." *CSPI Notice Letter*, pp. 1-2, ¶2. The CSPI notice letter identifies a class of persons whose alleged injury is merely purchasing "nutritionally poor food." *CSPI Notice Letter*, pp. 1-2, ¶2; p. 4, ¶3. The CSPI plaintiffs assert that "the injury occurs each time a child is subjected to each marketing effort for a food of poor nutritional quality." *CSPI Notice Letter*, p. 4, ¶3. This "injury" is actually independent of any act as a consumer. In other words, the injury supposedly occurs whether or not the marketed food product is actually purchased. According to the notice letter, compensable injury occurs when children view a Kellogg's advertisement because they are encouraged and eventually imprinted with the desire to eat foods that "contribute to poor health." *CSPI Notice Letter*, p. 4, ¶5. In asserting these sorts of claims, the CSPI plaintiffs are attempting to circumvent the tort requirement of actual injury by taking advantage of a non-tort law that severely circumscribes the injury requirement.

Aspinall v. Philip Morris Co. The CSPI plaintiffs are seeking to expand the Massachusetts Supreme Judicial Court's decision in *Aspinall v. Philip Morris Co.*, 442 Mass. 381, 813 N.E.2d 476 (2004). In *Aspinall*, the plaintiffs alleged that the defendant cigarette manufacturer misled the public into believing that its light cigarettes would deliver lower levels of tar and nicotine when defendant knew the opposite to be true. 442 Mass. at 382. The plaintiffs further alleged that the defendant intentionally manufactured its light cigarettes so that during FTC testing, the products would register low levels of tar and nicotine, but during actual use, smokers would receive as much or more tar and nicotine as in a regular cigarette. *Id.* at 387-88. The defendant manufacturer in turn asserted that there was no injury, and therefore that the plaintiffs were not entitled to damages, actual or statutory. In the defendant's view, the plaintiffs were not alleging a physical injury, like cancer, *id.* at 397 n.19, nor were they able to establish an economic injury, because the price for light cigarettes and regular cigarettes had always been the same. *Id.* at 399-400. In the absence of any injury, the defendant argued, the plaintiffs' claims for damages must fail.

The Massachusetts Supreme Judicial Court disagreed with the defendant's position, stating, "[w]e reject the proposition that the purchase of an intentionally falsely misrepresented product cannot be, *by itself, an ascertainable injury under our consumer protection statute*." *Id.* at 394 (emphasis added). Elaborating further, the court noted that "consumers of Marlboro Lights were injured when they purchased a product that, when used as directed, exposed them to substantial and inherent health risks that were not (as a reasonable consumer likely could have been misled into believing) minimized by their choice of the defendant's 'light' cigarettes." *Id.* at 397.

Finding that the plaintiffs had alleged an injury, the court moved on to discuss the plaintiffs' alleged actual damages based on economic injury. The plaintiffs' theory was that although the price of light cigarettes and regular cigarettes was the same, smokers of light cigarettes would not have paid as much as they did for the product had they known that it would not deliver the promised lower levels of tar and nicotine. *Id.* at 399. The Court agreed that this was an economic injury with actual damages characterized as the difference in market value between the cigarettes actually purchased and the value of the cigarettes as advertised, *id.* at 393 n.17, although it noted that "whether the plaintiffs can establish

proof of any difference [between value paid and value received] at trial is another matter." *Id.* at 399 n.23.

The Court then turned to the issue of the statutory damages available for violations of the Massachusetts consumer protection statute. The defendant argued that proof of monetary loss was necessary before an award of statutory damages could be made; if the plaintiffs could not prove their economic damages, they could not be awarded statutory damages. Disagreeing, the Court observed that if the plaintiffs proved an injury under the statute and proved that the injury caused damages, they would be entitled to statutory damages even if they were unable to prove the extent of their economic damages. *Id.* at 402. The key, the Court emphasized, was causation; "in the absence of a causal relationship between the alleged unfair acts and the claimed loss, there can be no recovery." *Id.* at 401 (citations omitted).

Some of its language would seem to suggest *Aspinall* pushes the limits of consumer protection law. In reality, however, the Court still recognized that *injury*, *causation*, and *damages* are fundamental to a successful lawsuit of any type, even one brought under a consumer protection statute. The CSPI plaintiffs are clearly attempting to fit under the auspices of *Aspinall*, but they have thus far failed because they have not articulated an *injury* that is *causally-related* to their *damages*.

Hershenow v. Enterprise Rent-A-Car Co. of Boston, Inc. With the increasing interest in and use of consumer protection laws, it is not surprising that the Massachusetts Supreme Judicial Court found itself handing down a ruling on *Aspinall*'s successor little more than a year later. In *Hershenow v. Enterprise Rent-A-Car Co. of Boston, Inc.*, 445 Mass. 790, 840 N.E.2d 526 (2006), the plaintiffs alleged that when they leased cars from the defendant, the defendant placed illegal exclusions on the collision damage waiver part of the contract, in violation of Massachusetts consumer protection statute. There was no dispute that the two plaintiffs paid $14.99 and $47.97 for the collision damage waiver, in addition to the regular cost of the rental. 445 Mass. at 792. There was no dispute that the restrictions the defendant placed on the collision damage waiver were violative of Massachusetts law. *Id.* at 792-93. And, as the defendant pointed out to the court, there was no dispute that the plaintiffs had not damaged the cars they leased, and they had not been subjected to the improper restrictions of the collision damage waiver. *Id.* at 793.

The plaintiffs maintained that they had been "injured" under the terms of the consumer protection statute because either a contractual restriction in violation of law is a violation of the consumer protection statute per se, or that the placement of the illegal exclusions here was deceptive or misleading. *Id.* at 797. The trial court found otherwise, and granted judgment on the pleadings in favor of the defendant. Addressing the issue of injury, the Massachusetts Court observed that it had always contended that in order to maintain an action under the consumer protection statute, a "*causal* connection between the seller's deception and the buyer's loss" must be established. *Id.* (emphasis added). Although a "misrepresentation of legal rights in a consumer contract may indeed be per se 'unfair' or 'deceptive' under [the consumer protection statute]. . . .a plaintiff seeking remedy under [that statute] *must demonstrate that even a per se deception caused a loss*." *Id.* at 798-99. According to the Court, despite the fact that the plaintiffs paid for the collision damage waiver, the presence of the illegal terms made neither plaintiff worse off than had they purchased the collision damage waiver without the illegal terms because neither plaintiff sought to rely on the insurance. *Id.* at 801.

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This lack of causation, the Court explained, is what differentiated *Hershenow* from *Aspinall*. The causation in *Aspinall* was established because the deceptive advertising that informed consumers that the light cigarettes were lower in tar and nicotine than regular cigarettes "could reasonably be found to have caused a person to act differently from the way he [or she] otherwise would have acted." *Id.* at 801 (quoting *Aspinall*, 442 Mass. at 394). In *Hershenow*, however, the collision damage waiver "made neither rental customer worse off during the rental period than he or she would have been had the [collision damage waiver] complied in full with the requirements [of the relevant statute]." *Id.* at 800-801. Therefore, the court opined, even if the defendant conceded that the collision damage waiver was per se deceptive for its noncompliance with statute, the plaintiffs had failed to establish a causal link between the deceptive language and any loss. *Id.* at 801.

If *Aspinall* was perceived as pushing the limits of consumer protection law, then *Hershenow* marked a return of some reasonableness to those limits. *Hershenow* did not attack *Aspinall*, however; in fact, it explicitly defended at least a portion of the earlier case's rationale. Because *Aspinall* is far from dead, and because injurious conduct – the traditional starting point for litigation – is only weakly present in it, we are likely to see continued efforts at legislation through litigation.

Conclusion. CSPI's anticipated suit against Kellogg and Viacom is precisely the type of claim invited by decisions such as *Aspinall* that weaken fundamental requirements for stating a claim in court, such as having suffered an actual injury. Without these requirements, courts become tools for advancing political and social agendas rather than places for resolving disputes among private parties. Whether or to what extent food of "poor nutritional quality" should be advertised on television is a question worthy of public debate, and that debate should include all of the relevant constituencies, including parents, industry, the public health community and, of course, our elected officials. The law has well established concepts that, if applied consistently, should prevent courtrooms from becoming alternative means of pursing legislation. In addition, in order for legislation by litigation to fall back into disuse and to ensure that law is not made in courts, legislatures must take back their legislative function. Part of the legislative function is clarifying that actual injury is necessary to state a claim under a consumer protection statute.

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