Legal Backgrounder

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STATE CONSUMER PROTECTION LAWS ELEVATE FOOD COMPANY LIABILITY RISKS

by

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The practice of filing a product liability suit as a claim under state consumer protection and warranty laws rather than as a traditional strict liability or negligence action is an increasingly common tactic of plaintiffs' attorneys. Following the U.S. Court of Appeals for the Second Circuit's decision in *Pelman v. McDonald's*, 396 F.3d 508 (2d Cir. 2005), such claims are likely to be the preferred causes of action in obesity litigation and have, in fact, already surfaced in a recent case filed against cereal manufacturers in California. Whether such claims will gain significant traction in the courts remains to be seen. What is clear is that consumer-protection obesity lawsuits seek to avoid the scientifically flawed premise of more traditional litigation, *i.e.*, that obesity has a specific cause legally attributable to a particular defendant or group of defendants. Obesity is a complex social and medical problem that cannot be solved through litigation. Unfortunately, as the recent complaint against cereal manufacturers demonstrates, litigation will only obscure these important scientific and social issues. Recognizing the downside of regulation by litigation, a number of states have passed statutes aimed at preventing or at least limiting obesity lawsuits. The "no injury" suits that will likely serve as the model for obesity litigation underscore the need for policy makers to consider all options in addressing this growing problem, including possible legislation.

The Rise of "No Injury" Actions. A new breed of product liability claims is being filed: proposed class actions on behalf of individuals who purchased a product that is allegedly defective because it causes some physical harm, but who themselves have not suffered any physical injury. The complaint typically alleges that the defendant engaged in a deceptive or unfair trade practice under state consumer protection laws and that the plaintiffs purchased the product only as a result of the defendant's deception. As damages, the class members seek a return of the product's purchase price. Because the plaintiffs have not suffered physical injury, defense attorneys often refer to such claims as "no injury" suits.

"No injury" suits seek to avoid two major hurdles for plaintiffs in traditional product liability actions. The first hurdle is class certification. If the plaintiffs' principal claim is framed as whether a particular product caused physical injury in a group of individuals, then individual medical issues will

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likely predominate over any class-wide issues. The second hurdle is medical causation. By defining the "injury" as the economic harm of being deceived into purchasing a product that would not have otherwise been purchased, plaintiffs seek to avoid having to prove that the product is capable of causing the underlying physical injury. Alternatively, plaintiffs seek to lessen their causation burden by arguing that it is sufficient to prove that the defendant did not disclose certain risks of using the product without proving that the product has, in fact, injured any particular individual. Importantly, these "no injury" suits are not medical monitoring or fear of disease claims in which plaintiffs seek to recover for the expense of future medical tests or for the injury of being placed at increased risk of contracting a disease. The claimed injuries are limited to the purchase price of the product and to any statutory damages available under state statutes.

Plaintiffs have filed several "no injury" cases against pharmaceutical companies on behalf of proposed classes of persons who purchased and took a drug but who did not suffer an adverse physical reaction. For example, in *Heindel v. Pfizer, Inc.*, No. Civ. A. 02-3348, 2004 WL 1398024 (D.N.J. June 7, 2004), plaintiffs brought suit on behalf of a class of persons who had purchased the pain relievers Vioxx and Celebrex. They alleged that the defendant's failure to disclose potential cardiovascular risks associated with the drugs caused the plaintiffs to pay increased prices for the medications. As the court observed, "[p]laintiffs admit[ted] that they [were] not pursuing any claims for physical injury, either for themselves or for the two sub-classes they seek to represent. Rather, their claims [were] based on the economic injury that Defendants' marketing practices [had] allegedly caused them." *Id.* at * 4. Plaintiffs asserted claims for breach of implied warranty and consumer fraud but "because they were not physically harmed by ingesting Celebrex and Vioxx and [were] not seeking damages for physical injury, Plaintiffs agreed . . . to withdraw their individual products liability claims." *Id.* at * 2 n. 3. The court granted summary judgment to the defendants because, among other reasons, the plaintiffs did not suffer actionable harm. *Id.* at * 14.

Obesity Litigation: **Pelman and Hardee**. In an editorial promoting litigation as a solution to America's obesity problem, the Chair of the Law and Obesity Project of the Public Health Advocacy Institute (PHAI) advocated "no injury" litigation over traditional product liability suits:

> Seeking damages for harm already done may be a worthwhile goal, but it faces daunting causal problems and is easily misunderstood. Seeking injunctions to stop unfair and deceptive practices, and restitution for their victims, is immediately understandable and simpler to prove.[1]

The decisions to date in *Pelman v. McDonald's Corp.* reflect this theory in practice. As it currently stands, *Pelman* is something of a hybrid between a traditional product liability action and a "no injury" claim. The only allegations in the current complaint are based on alleged violations of New York's Consumer Protection Act, but the *Pelman* plaintiffs continue to allege that an increased likelihood of developing obesity, heart disease, diabetes and other physical maladies are the injuries they suffer.

The plaintiffs in *Pelman* are the parents of overweight children who originally alleged violations of state consumer protection laws as well as both negligence and failure to warn. The court dismissed plaintiffs' initial complaint in its entirety based in part on the fact that the defendant did not have a duty to warn of the dangers of eating food that is high in cholesterol, sugar, and salt. The court, however, granted leave to amend. 237 F. Supp. 2d 512, 543 (S.D.N.Y. 2003).

[1]Richard A. Daynard, *Obesity Litigation: Who's to Blame?*, HEALTH LAW NEWS at 5.

In the amended complaint, the plaintiffs relied exclusively[2] on alleged violations of New York's consumer protection statute. Specifically, plaintiffs alleged that the defendant deceptively advertised its food as nutritious, failed to disclose that processing rendered its food less healthy than advertised, and falsely represented to the public that it provides nutritional information at all of its stores when it does not. *Id.* at * 2. The plaintiffs relied on two sections of the New York General Business Law, § 350, which prohibits false advertising, and § 349, which prohibits "deceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service."

The district court again dismissed the amended complaint. *Id.* at *14. The district court relied on two principal conclusions. First, plaintiffs' failed to plead an adequate causal connection between the consumption of the defendant's food and their alleged injuries. The court reached this conclusion despite holding that "it would . . . be inappropriate to apply the [causation] standard from plaintiffs' voluntarily dismissed negligence action to the statutory claims. The plaintiffs need not "establish that the defendant's conduct was a *substantial* cause in bringing about the harm." *Id.* at *9 (emphasis in original). Nevertheless, the court dismissed the claims because the plaintiffs did not address "the role that a number of other factors other than diet may come to play in obesity and the health problems of which the plaintiffs complain." *Id.* at *11. Second, the court held that certain alleged misrepresentations in advertisements regarding the defendant's french fries and hash browns were objectively non-deceptive and therefore not actionable. *Id.* at *13.

The Second Circuit reversed the district court and reinstated the *Pelman* complaint. 396 F.3d 508 (2d Cir. 2005). The plaintiffs did not pursue their appeal of the dismissal of their § 350 claims for false advertising, so the Second Circuit addressed only the dismissal of the § 349 claims regarding deceptive acts or practices, which rested entirely on the district court's conclusion that plaintiffs failed to properly allege causation. The Second Circuit held that the district court's requirement that the plaintiffs' pleadings address the causal link between consumption of McDonald's products and obesity improperly imposed a heightened pleading standard inconsistent with the notice pleading of Federal Rule of Civil Procedure 8(a).[3] Information such as the amount plaintiffs exercised, family medical history, and the other components of plaintiffs' diets could be obtained by the defendants in discovery, and was not required for plaintiffs to state a claim. *Id.* at 511-12.

Although the *Pelman* plaintiffs are left with a single claim of deceptive and unfair trade practices, it is not a classic "no injury" product liability suit because the damages continue to be based on personal injury or the potential for personal injury. Consequently, as noted by the Second Circuit, the difficult causation issues facing the plaintiffs will be the subject of discovery and, in all likelihood, a motion for summary judgment. However, the classic "no injury" suit was not far behind the Second Circuit's decision in *Pelman*.

In March 2005, a plaintiff in California filed a proposed class action against several cereal manufacturers alleging only breach of warranty and violations of California's consumer protection statutes relating to unfair trade practices and advertising. *Hardee v. Del Mission Liquor*, No. 844745 (Cal. Super. Ct. filed Mar. 24, 2005). The basic claim in *Hardee v. Del Mission Liquor* is that the defendants deceptively induced the plaintiffs to purchase certain cereals by advertising them as "low sugar," when in fact the sugar was replaced by other carbohydrates allegedly eliminating the implied nutritional benefit of the low sugar alternative. In an effort to avoid the causation hurdles discussed

[2]The amended complaint originally contained a negligent failure to warn claim, but the plaintiffs dropped that claim prior to oral argument. No. 02 Civ. 7821, 2003 WL 22052778, at * 2 (S.D.N.Y. Sept. 3, 2003).

[3]"[A]n action under § 349 is not subject to the pleading-with-particularity requirements of Rule 9(b), FED. R. CIV. P., but need only meet the bare-bones notice-pleading requirements of Rule 8(a), FED. R. CIV. P." 396 F.3d at 511.

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above, the plaintiffs are not claiming that eating cereal caused them to become obese or to suffer any other adverse health effects. In fact, on the face of the complaint, there appears to be no dispute that the cereal was purchased and consumed without physical injury of any type. Instead, the plaintiffs' damages are based entirely on the purchase price of the cereals.[4]

The Complex Nature of Obesity. Suits such as *Hardee* strain to avoid alleging that a particular food actually caused physical harm because the scientific evidence does not support the overly simplistic claim that obesity has an isolated, identifiable cause. In other words, the "daunting causal problems" recognized by even the most ardent supporters of obesity litigation are not simply legal hurdles, they are grounded in science. According to the United States Surgeon General, for example, "[o]verweight and obesity are caused by many factors. For each individual, body weight is determined by a combination of genetic, metabolic, behavioral, environmental, cultural, and socioeconomic influences."[5] As the Institute of Medicine has explained, obesity is determined by the "energy balance," or the calories we take in versus those we burn. "Although the 'energy intake = energy expenditure' looks like a fairly basic equation, in reality it is extraordinarily complex when considering the multitude of genetic, biological, psychological, sociocultural, and environmental factors that affect both sides of the equation and the inter-relationships between these factors."[6]

If plaintiffs' strategy succeeds, "obesity" litigation will have virtually nothing to do with these complex issues. In *Hardee*, for example, plaintiffs will no doubt claim that the issue of whether a high sugar diet actually causes obesity is irrelevant. Nor will plaintiffs be eager to wade into the more fundamental issue of whose responsibility it is to insure that children receive a healthy diet or why, if they were concerned about sugar in cereal, the plaintiffs did not purchase one of many cereals without any sugar instead of the low sugar varieties of "Fruity Pebbles," "Cocoa Puffs," and "Frosted Flakes." *Hardee*, No. 844745 at ¶ 6-8. What will the plaintiffs say about what their children eat the rest of the day, and will they argue that diet is irrelevant to a claim for deceptive advertising? And what about television and computer games? Will the suits examine whether parents allow their children to spend too much time in sedentary activities or whether our schools offer adequate physical education? The answer, of course, is a resounding "no" if the plaintiffs have their way.

A Legislative Solution? America needs to address its obesity problem, but litigation is not the answer. At least 18 states have already enacted legislation aimed at limiting obesity litigation, and efforts are underway to pass similar legislation in Congress. Critics of such legislation no doubt claim that such measures are simply efforts to shield corporate America from its responsibility for obesity. But those same critics apparently see no contradiction in crafting a lawsuit that attempts to sidestep any responsibility that individuals — whether in their role as consumers or parents — have for their own diet and overall health. As Judge Sweet bluntly observed in his original *Pelman* opinion, "it is not the place of the law to protect [people] from their own excesses. Nobody is forced to eat [fast food]." 237 F. Supp. 2d 512, 533 (S.D.N.Y. 2003). Yet supporters of obesity litigation are content to plead around Judge Sweet's holdings and demand their money back as compensation for defendants' "deceptive" behavior without any examination of their own behavior. As these suits demonstrate, obesity litigation offers little or no promise to even examine the factors that contribute to obesity in our society, and it certainly offers nothing in the form of productive solutions. Legislation that takes the obesity debate out of our courts and sends it back into homes, legislatures, school boards, parent-teacher organizations, and public health organizations could benefit both corporations and the public by keeping everyone focused on solutions rather than blame.

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[4]"[T]he damage to each plaintiff is generally less than $10.00." Complaint, ¶ 3.

[5]Dep't of Health and Human Services, The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity 1 (2001), available at http://www.surgeongeneral.gov/topics/obesity/calltoaction/toc.htm.

[6]J. Koplan et al., PREVENTING CHILDHOOD OBESITY: HEALTH IN THE BALANCE 2 (2004).

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