

SECOND CIRCUIT REINSTATES OBESITY CLASS ACTION AGAINST McDONALD'S CORP., REJECTS APPLICATION OF HEIGHTENED PLEADING STANDARD FOR CONSUMER FRAUD CLAIMS

The Second Circuit Court of Appeals has reversed a decision of a New York district judge that had dismissed class action claims alleging that McDonald's Corp. deceived its customers into consuming "certain of its foods [that were] substantially less healthy than represented." The decision—*Pelman v.*

*McDonald's Corp.*¹—may revive obesity class actions against a variety of defendants that some have dubbed the latest incarnation of "lifestyle litigation."

The plaintiffs in *Pelman* had alleged violations of the New York Consumer Protection Act in a five-count class-action complaint. The plaintiffs first alleged that the "combined effect" of McDonald's advertising over a 15-year period "was to create the false impression that its food products were nutritionally beneficial and part of a healthy lifestyle if consumed daily." The plaintiffs' second count alleged that McDonald's had failed to disclose that its use of certain additives and its method of food processing rendered certain foods "substantially less healthy than represented." Next, the plaintiffs alleged that McDonald's had failed to make good on promises to provide nutritional information to its customers. The plaintiffs further alleged that, but for McDonald's alleged nutritional and health representations, they would not have eaten at McDonald's restaurants three to five times per week. Finally, the plaintiffs alleged that their frequent consumption of McDonald's food over a period of years caused a variety of health problems, including obesity, diabetes, cancer, and high blood pressure.

The district court dismissed the plaintiffs' claims,

which were brought under N.Y. Gen. Bus. Law §§ 349 and 350. The court held that the plaintiffs' failure specifically to allege that they had relied to their detriment on the alleged

McDonald's representations was fatal to their claims based on N.Y. Gen. Bus. Law Section 350. While claims under Section 349 do not require proof of reliance, the district court nonetheless dismissed the plaintiffs' claims under that provision for failure to allege an adequate causal connection between their consumption of McDonald's food and their alleged injuries. In granting dismissal, the district court found it critical that the plaintiffs' complaint failed to answer such questions as: "What else did the plaintiffs eat? How much did they exercise? Is there a family history of the diseases which are alleged to have been caused by McDonald's products?"

The Second Circuit reversed the district court's dismissal of the plaintiffs' claims under Section 349, holding that the district court had effectively imposed a heightened pleading standard that is incompatible with the notice pleading standard of Fed. R. Civ. P. 8. Although the plaintiffs' claims under Section 349 were based on alleged misrepresentations and omissions, the court nonetheless held that the heightened pleading standard of Fed. R. Civ. P. 9(b) does not apply to statutory consumer fraud claims because "[Section] 349 extends well beyond common-law fraud to cover a broad range of deceptive practices . . . and because a private action under [Section] 349 does not require proof of the same essential elements (such as reliance) as common-law fraud."

The Second Circuit's ruling is significant in two respects. First, the revival of obesity litigation by an appellate court likely will spur further litigation against other industry participants, including restaurant chains, soft drink producers and distributors, snack food makers, and others. Second, and equally important, the Second Circuit's decision conflicts with decisions of numerous other courts that have held Rule 9(b)'s heightened pleading standard to apply to statutory consumer fraud claims.² The latter ruling likely will create further incentives for plaintiffs to bring statutory consumer protection claims because of the lax requirements necessary to sustain such claims relative to more traditional tort and contract claims.

Footnotes

¹ 396 F.3d 508 (2d Cir. 2005).

² See, e.g., *Naporano Iron & Metal Co. v. American Crane Corp.*, 79 F. Supp. 2d 494, 510-11 (D.N.J. 1999) (citing cases and stating that "[a]pplying Rule 9(b) does not transform [statutory consumer fraud] claims into common law fraud – it merely requires [the plaintiff] to detail its fraud allegations to put defendants on notice, which is a principal rationale behind the 9(b) requirement.").