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An Analysis of Consumer Fraud Class Actions Relating to Food

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On our drives home from work each day, we both pass the same independent organic market. You know the kind of place we're talking about. You probably have one in your neighborhood. Everything is "locally grown" or "gluten free" or "vegan friendly." They sell all manner of whole grains in bulk, and the cashiers give you a thumbs-up when you bring your own grocery bag.

That store has tripled in size in the last few years. Its owners are capitalizing on the broader cultural move toward healthier lifestyles. As a country, we are more sensitive than ever to the quality and safety of the food that we eat. We are bombarded with messages about the adverse health consequences of this and that. Who knew so many things were toxic?

Unsurprisingly, we see a manifestation of this cultural phenomenon in the legal world. If you follow the daily trade press, you have seen the explosion in cases attacking the use and presence of various substances—trans fats, sugar, sodium—in our food. Each of these substances is linked with an adverse health effect—heart disease, obesity, high blood pressure. Each case is at its heart a toxic exposure case. A class of individuals claims to have been wrongfully exposed to a harmful substance. Indeed, the toxic exposure aspect of these cases is what makes them emotionally appealing.

What is interesting is not so much that these cases exist, but how they are being pursued. In the past, these cases might have been cast as latent injury torts seeking medical monitoring as relief or claiming damages for increased risk. But medical monitoring as a form of relief has fallen into disfavor, and increased risk claims standing alone are virtual unicorns. Moreover, a toxic tort injury claim comes with all sorts of traps (e.g., causation) for plaintiffs. The suits we see today are instead cast as consumer fraud class actions, and plaintiffs are enjoying considerable success.

Trans Fat Suit Analyzed

Take for example the series of cases brought against fast food chains regarding trans fat in French fries. In one such case, *Yoo v. Wendy's Int'l Inc.*, No. 2:07-cv-4515 (C.D. Cal.), a California woman sued Wendy's on behalf of herself and a putative class of Californians, alleging that the food chain misrepresented the trans fat content in its French fries. Responding to calls to eliminate trans fats in prepared foods, Wendy's in 2006 announced that it was eliminating trans fat from its fries. But studies by watch dog groups found that the average trans fat content in Wendy's fries was higher than advertised.

The plaintiff sued under California statutory fraud provisions, claiming that she would not have purchased Wendy's fries if she knew the fries had trans fat in them. The claims survived a motion to dismiss, and the parties settled during briefing on class certification. The settlement cost Wendy's over $5 million—$2.2 million to eliminate trans fats from its products, $1.8 million in a *cy pres* donation to various health organizations, and $1.09 million in fees for class counsel.

This result is astonishing on a couple of levels. At the threshold, the case itself rests on a premise that seems somewhat implausible. Is there really a significant number of people who were induced to purchase Wendy's French fries in any meaningful way because of a claim about trans fat content? Ten years ago, the answer obviously would have been no. But given the growing cultural obsession with healthful food, the claim is at least plausible.

Scientific Review Lacking

But more interesting is how the scientific claim that motivated the suit in the first place was never subjected to the kind of scientific review that would be required if it were raised as a personal injury claim. In that more traditional setting, plaintiffs would face tough proof problems, such as individualized evidence of medical causation. The science would be challenged, and the result of the case—whether through settlement or judgment—would relate in some way to the validity of the core scientific claim.

In *Yoo*, by contrast, even if the case had gone to trial, the medical evidence on trans fat likely never would have been subjected to a rigorous review. After all, it was not a personal injury case. It was an economic injury case. It was arguably irrelevant to the statutory fraud claims whether the health evidence on trans fats is valid or not. Under this view, all that matters is that there was enough publicity over trans fats that consumers would be receptive to Wendy's promise.

But even that showing may not be required. The consumer fraud laws in most states relax the materiality and reliance requirements to such a degree that even the most questionable of claims can survive a motion to dismiss. This creates an inviting opening for health advocates and opportunists.

Consider the lawsuit recently filed against PepsiCo over its marketing of Cap'n Crunch® with Crunchberries cereal, *Werbel v. PepsiCo Inc.*, No. 09-cv-4456 (N.D. Cal.). The "consumer fraud" in that case is PepsiCo's use of the word "berry," which allegedly connotes something healthful, when in fact the cereal is high in sugar and starch. The "fraud" claim is highly implausible. Common sense aside, one look at the ingredients and nutritional information on the box would tell a reasonable consumer that there is no fruit in the cereal.

Claims Never Tested

But the case is not really about fraud. It is about human health and the publicized link between sugary cereals and childhood obesity. That link may well be valid, but that case will likely be resolved without the medical evidence being tested at all. And without requirements of reliance and materiality to serve as proxies for traditional tort defenses of lack of duty, assumption of risk

and contributory fault, there is the distinct possibility of a result like the settlement in *Yoo*—a multi-million dollar hit for the defendant and a nice payday for plaintiff's counsel—all in a case about sugary cereal.

If sugar and trans fat are as toxic as these cases suggest, it seems we should want our courts to make some assessment of toxicity or risk evaluation before allowing this type of result. Will Daubert challenges to the underlying health claim be allowed in this new world of proto toxic torts? Should consumer reliance be beefed up to serve as a stand-in for causation and other requirements of traditional tort claims as part of the process? Judges will have to grapple with these issues as the food fight in our courtrooms looms larger.

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