

CONSUMER NEWS

By Jeremy LaMarche*

Court Turns Lights Out on “Light” Cigarette Packaging

In a recent decision, Judge Gladys Kessler of the U.S. District Court for the District of Columbia recognized the “immeasurable amount of human suffering” that the deceptive labeling practices of the tobacco industry have caused.¹ Judge Kessler found that several tobacco companies had misled consumers by designating certain products as “light,” “ultra light,” and “low tar.”² Judge Kessler ordered these companies to buy newspaper ads describing the negative effects of smoking as well as to stop using labels such as “light,” “ultra light,” or “low tar” or any other label that implies that one type of cigarette is healthier than another.³ Despite the judicial scolding, tobacco companies, as well as analysts on Wall Street, were claiming a victory for the tobacco industry due to the court’s failure to award financial damages.⁴ However, the tobacco industry’s celebration may have come too soon, as the decision has sent tobacco companies scrambling to maintain the ability to sell cigarettes labeled “light.”

Despite the tobacco industry’s violation of the federal racketeering law known as RICO, Judge Kessler held that she was legally unable to impose large financial damages against the tobacco industry.⁵ Judge Kessler cited a decision from February of 2005 where a

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¹ Shenon, Philip, *Judge Rips Tobacco Firms, Bans ‘Light’ Brands*, N.Y. Times, Aug. 18, 2006.

² *Id.*

³ *Judge Finds Tobacco Racketeering*, CNN, <http://edition.cnn.com/2006/BUSINESS/08/17/tobacco.ruling/> (last visited on October 23, 2006).

⁴ Shenon, *supra* note 2.

⁵ *Id.*

federal appellate court held that the U.S. government could not seek disgorgement in the Department of Justice's suit against the tobacco industry.⁶ That court noted that the goal of RICO is to prevent or restrain future violations whereas disgorgement "is a quintessentially backward-looking remedy focused on remedying the effects of past conduct to restore the status quo."⁷ As a result, Judge Kessler noted that the \$289 billion in disgorgement sought by the Department of Justice was unavailable as a remedy against the tobacco companies.⁸ Consequently, Kessler could only take remedial action with respect to the future prevention of potentially misleading labeling on cigarette packaging.

Accordingly, financial experts did not believe that the decision would have much of an economic effect on the industry in general.⁹ In fact, several financial analysts stated the ruling would have little to no effect on the major companies due to the lack of a court ordered financial payout.¹⁰ Even the Department of Justice was skeptical about Judge Kessler's decision stating, "[W]e are pleased with the court's findings of liability on the part of the defendants, but disappointed that the court did not impose all of the remedies sought by the government."¹¹

However, despite the sense of optimism from financial analysts, some tobacco industry members moved to minimize the damage caused by Judge Kessler's ruling on "light" cigarette packaging.¹² The tobacco companies immediately filed a motion to stay the final judgment and remedial order pending an appeal.¹³ The companies wanted the opportunity to sell cigarettes with the "light" labels until their appeal was settled.¹⁴ Among other things, the tobacco companies claimed that they would suffer irreparable harm if the stay was

⁶ U.S. v. Philip Morris USA, Inc., 396 F.3d 1190, 1200 (D.C. Cir. 2005) (*noting* that Congress has expressly stated its intended civil remedies under RICO. Under the provision that allows for government action, there is no mention of disgorgement, only a remedy to prevent and restrain future violations).

⁷ *Id.* at 1198.

⁸ U.S. v. Philip Morris USA, Inc., 2006 WL 2380622 (D.D.C.).

⁹ Shenon, *supra* note 2.

¹⁰ *Id.* (*noting* David Adelman, an analyst at Morgan Stanley stated, "[T]here's nothing in this rule that is going to hurt the profitability of the businesses.")

¹¹ *Judge Finds Tobacco Racketeering*, *supra* note 4.

¹² U.S. v. Philip Morris USA, Inc., 2006 WL 2793174, *1 (D.D.C.).

¹³ *Id.*

¹⁴ *Id.*

not granted because of lost business to smaller tobacco companies not affected by the suit.¹⁵ Judge Kessler stated that the public interest is best served by disallowing the companies to market “light” cigarettes while the appeal is pending and therefore denied the motion.¹⁶ Kessler noted that the potential harm to the public, including impressionable youth, outweighed the tobacco companies’ purely economic concerns.¹⁷ The tobacco industry will now have to await the appeal of Judge Kessler’s earlier decision regarding “light” labeling on cigarette packages, although the tobacco companies still have the option of asking an appeals court to put the ruling on hold.

Due to Kessler’s ruling, the tobacco industry is feeling pressure from other ends of the political spectrum as well.¹⁸ Notably, Senator Frank R. Lautenberg, a Democrat from New Jersey, recently introduced legislation which would ban the use of deceiving labels in cigarette packaging.¹⁹ The newly introduced legislation known as The Truth in Cigarette Labeling Act would provide Judge Kessler’s decision with statutory backing.²⁰ Senator Lautenberg introduced this legislation in case Judge Kessler’s ruling is overturned on appeal.²¹ However, the legislation has yet to attract any Republican co-sponsors and will likely have a difficult time doing so.²²

Although the Department of Justice’s action was successful under Justice Kessler, an avalanche of individual lawsuits seems unlikely. Under RICO, any individual who wanted to sue the tobacco industry for defrauding and deceiving him or her could only recover for economic injuries.²³ Therefore, without being afforded the right to recover for personal injury, there would not be much of an incentive for an individual to sue under RICO despite being a lifetime “light” cigarette smoker.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *U.S. v. Philip Morris USA, Inc.*, 2006 WL 2793174, *3 (D.D.C.).

¹⁸ *Lautenberg Urges Laws on Cigarette Mislabeling*, North Jersey Media Group, <http://www.northjersey.com/page.php?qstr=eXJpenk3ZjcxN2Y3dnFIZUVFeXkyJmZnYmVsN2Y3dnFIZUVFeXk2OTg5NDU0> (Sep. 8, 2006)

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USCA § 1964(c) (West 2006).

In the future, the biggest financial threat to the tobacco industry might actually come from a possible class action suit involving “light” cigarette smokers.²⁴ After Judge Kessler’s decision regarding light cigarettes came down, U.S. District Court Judge Jack Weinstein certified a class action lawsuit for “light” cigarette smokers against the tobacco companies in the U.S. District Court in New York.²⁵ The crux of the class action alleges that the tobacco industry intentionally misled consumers into believing that light cigarettes were actually healthier and safer than regular cigarettes.²⁶ The class includes anyone who has purchased “light” cigarettes since 1970, the date “light” cigarettes were first sold.²⁷

However, Judge Weinstein’s decision to certify a class against the tobacco industry might be called into question on appeal.²⁸ Under RICO, a potential plaintiff must prove, among other things that he relied on the defendant’s deceitful misrepresentation.²⁹ In a large class action tobacco lawsuit, it may be difficult to prove that each individual class member relied on the fact that the companies were marketing the product as light when he or she chose to purchase it over a regular cigarette.³⁰ The U.S. Court of Appeals has been split as to whether a class as a whole can demonstrate reliance or whether it has to be proven on an individual level.³¹ The Fifth Circuit held that reliance can never be proven for a class in a class action lawsuit.³² The Seventh Circuit has held that a RICO class may be certified and reliance accepted on a class-wide basis.³³ However, when calculating damages the Seventh Circuit held that the issue of each individual

²⁴ Jansen, Jaime, *Federal Judge Certifies class of ‘Light’ Cigarette Consumers in Tobacco Suit*, Jurist Legal News & Research, <http://jurist.law.pitt.edu/paperchase/2006/09/federal-judge-certifies-class-of-light.php> (September 25, 2006).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Sebok, Anthony, *A New York Federal Judge Certifies a Nationwide RICO Class Action Against Big Tobacco: An Aggressive Decision that Pushed Legal Limits*, Findlaw for Legal Professionals, <http://writ.lp.findlaw.com/sebok/20060927.html> (Sept. 27, 2006).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Supra* note 28.

class members' reliance had to be litigated separately.³⁴

Ultimately, the tobacco industry may have cause to celebrate despite the ruling on "light" cigarettes. With the federal courts powerless to impose a large financial remedy and the threat of class action tempered due to the difficulties in certifying a class, tobacco companies may not be in danger of losing future profits. However, Judge Kessler's decision regarding the labeling of cigarette packaging will likely be at issue for years to come.

McDonald's Ordered to Respond to 'Fat' Complaint

On September 16, 2006, McDonald's motion to dismiss a class action lawsuit alleging obesity as a result of deceptive advertising failed.³⁵ The plaintiffs claim that McDonald's, by promoting its food products as nutritionally beneficial and part of a healthy lifestyle if consumed daily, violated New York General Business Law § 349.³⁶ Furthermore, the plaintiffs allege that McDonald's failed to adequately disclose its use of additives and that McDonald's food processing rendered some of its food less healthy than represented.³⁷ Finally, the plaintiffs allege that McDonald's falsely claimed that it would make available nutritional information to its New York customers while failing to provide such information at the majority of its store locations.³⁸

The lawsuit was originally filed in 2002 by the parents of two teenage girls on behalf of their daughters.³⁹ Ashley Pelman and Jazlyn Bradley were teenagers who claimed to be "regular McDonald's customers."⁴⁰ Parents of the two girls filed suit against McDon-

³⁴ *Id.*

³⁵ *Pelman v. McDonald's Corp.*, 2006 WL 2663214, *17 (S.D.N.Y. 2006)

³⁶ *Pelman*, 2006 WL 2663214 at *4.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at *2.

⁴⁰ Weiser, Benjamin, *Big Macs Can Make You Fat? No Kidding, a Judge Rules*, N. Y. Times, <http://query.nytimes.com/gst/fullpage.html?sec=health&res=9E0DE7DA1E30F930A15752C0A9659C8B63> (Jan. 23, 2003).

ald's and the two particular McDonald's franchisees that they frequented in the Bronx for damages caused by their obesity.⁴¹

On January 22, 2003, Judge Sweet of the Southern District of New York dismissed the complaint because it was not plead with the requisite specificity under New York General Business Law § 349 and § 350.⁴² According to Judge Sweet, the complaint did not allege a single specific deceptive act on the part of McDonald's.⁴³ With respect to the plaintiff's claim that McDonald's failed to adequately label or post the nutritional content of its food, Judge Sweet ruled that the plaintiff's had adequately demonstrated a specific instance of purported deceit.⁴⁴ However, Judge Sweet held that it was not McDonald's legal obligation to display all of its food's nutritional content and that McDonald's did not withhold any of the facts regarding the nutritional value of its food.⁴⁵ Judge Sweet further held that the plaintiffs could have reasonably obtained such information.⁴⁶ As to the plaintiffs claim that McDonald's was deceitful in promoting its products to children, Judge Sweet held that the plaintiff's failed to cite any specific examples of such advertisements.⁴⁷ Finally, Judge Sweet addressed the claim that McDonald's was negligent in failing to warn consumers about the potential hazards associated with its food.⁴⁸ Judge Sweet held that the public was well aware of the high amount of fat, sugar, cholesterol and salt associated with McDonald's products and thus there was no need to warn the public of such hazards.⁴⁹ Subsequent to the motion to dismiss, the plaintiffs filed an

⁴¹ *Id.*

⁴² *Pelman v. McDonald's Corp.*, 237 F.Supp.2d 512, 526-27, 29 (S.D.N.Y., 2003).

⁴³ *Pelman*, 237 F.Supp.2d at 526 -27, 29.

⁴⁴ *Id.* at 529.

⁴⁵ *Id.* (noting that "the plaintiffs clearly have outlined the allegedly deceptive practice: the fact that McDonald's failed to post nutritional labeling on the products and at points of purchase. However, because this is a purportedly deceptive act based on an omission, it is not sufficient for the plaintiffs to point to the omission alone. They must also show why the omission was deceptive--a duty they have shunned.")

⁴⁶ *Id.* (noting that it cannot be assumed that the nutritional information regarding McDonald's food was solely in the possession of McDonald's).

⁴⁷ *Id.* at 530.

⁴⁸ *Pelman*, 237 F.Supp.2d at 530.

⁴⁹ *Id.* at 531-32 (noting "[i]f a person knows or should know that eating copious orders of supersized McDonald's' products is unhealthy and may result in weight gain (and its concomitant problems) because of the high levels of cholest-

amended lawsuit which was also dismissed by Judge Sweet.⁵⁰

On appeal, the U.S. Court of Appeals for the Second Circuit vacated Judge Sweet's decision and remanded the case back to the district court.⁵¹ The U.S. Court of Appeals held that proving deception under New York General Business Law § 349 does not require that a plaintiff show actual reliance.⁵² Therefore, the court reasoned that a plaintiff is not required to plead with particularity.⁵³ Thus, it was likely irrelevant that the plaintiffs did not demonstrate specific injuries and acts of deceit on the part of McDonald's.⁵⁴

On remand in district court, McDonald's moved for a more definite statement of the plaintiff's claim.⁵⁵ Judge Sweet held that the plaintiffs must specifically identify those McDonald's advertisements that were deceptive.⁵⁶ Although plaintiffs were not required to demonstrate how each advertisement specifically injured him or her, each plaintiff did have to show what injuries resulted from McDonald's deceptive practices.⁵⁷ Judge Sweet also required that the plaintiffs provide a brief description as to why the advertisements were deceptive as well as a brief description of how the plaintiffs were aware of the acts alleged to be misleading.⁵⁸

In response to Judge Sweet's decision, the plaintiffs filed a

terol, fat, salt and sugar, it is not the place of the law to protect them from their own excesses. Nobody is forced to eat at McDonald's."). *Id.* at 533.

⁵⁰ Hamblett, Mark, *Court Allows McDonald's Food Fight*, New York Law Journal, <http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1158743124483> (Sep. 21, 2006).

⁵¹ *Pelman ex rel. Pelman v. McDonald's Corp.*, 396 F.3d 508 (2d Cir. 2005).

⁵² *Pelman ex rel. Pelman*, 396 F.3d at 511.

⁵³ *Id.*

⁵⁴ *Id.* at 511-12. (*noting* "the district court found it fatal that the complaint did not 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? Without this additional information, McDonald's does not have sufficient information to determine if its foods are the cause of plaintiffs' obesity, or if instead McDonald's foods are only a contributing factor. This, however, is the sort of information that is appropriately the subject of discovery, rather than what is required to satisfy the limited pleading requirements of Rule 8(a), Fed.R.Civ.P.")

⁵⁵ *Pelman ex rel. Pelman v. McDonald's Corp.*, 396 F.Supp.2d 439 (S.D.N.Y., 2005).

⁵⁶ *Pelman ex rel. Pelman*, 396 F.Supp.2d at 446.

⁵⁷ *Id.* at 446.

⁵⁸ *Id.*

second amended complaint on December 12, 2005.⁵⁹ Subsequently, McDonald's moved to strike and dismiss the second amended complaint on grounds that it did not meet the requisite specificity previously ordered by the district court.⁶⁰ Judge Sweet held that the plaintiffs sufficiently described their awareness of nutritional schemes alleged to be deceptive.⁶¹ Furthermore, Judge Sweet held that the plaintiffs had sufficiently described the injuries each of them allegedly suffered.⁶² The judgment was limited to the 40 deceptive ads that the plaintiffs identified specifically in their second amended complaint.⁶³ Concluding that McDonald's now had enough information to answer the complaint, Judge Sweet ordered that they do so within 30 days.⁶⁴

The Pelman claim was the first obesity related lawsuit to be litigated against a fast food company. Many analysts have compared the subsequent onslaught of obesity related lawsuits to the increase in tobacco related lawsuits in the 1990's.⁶⁵ However, others note the likely failure of the obesity related lawsuits because of the general public's belief that individuals know what is healthy and what is not.⁶⁶ In response, analysts note that the first big class action lawsuits against tobacco companies also failed and were not looked at favorably by the general public.⁶⁷ Despite the lack of public support, lawsuits are still popping up around the country accusing McDonald's of deceiving consumers concerning the health effects of its food.⁶⁸

Recently, a guardian for an autistic boy, Roman Brown, filed

⁵⁹ *Pelman v. McDonald's Corp.*, 2006 WL 2663214, *3 (S.D.N.Y. 2006).

⁶⁰ *Pelman*, 2006 WL 2663214 at *3.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *U.S. Food Industry Dodging Big, Fat Lawsuits*, Red Orbit, http://www.redorbit.com/news/display?id=168438&source=r_science (July, 8, 2005).

⁶⁶ *Id.*

⁶⁷ Kish, Matthew, *Banning 'Mclawsuits'; State Bill Outlawing Fast-food Litigation Nears Passage*, Citizens for Judicial Accountability, <http://www.judicialaccountability.org/articles/mcdonaldscasedismissed.htm> (Feb. 27, 2006).

⁶⁸ Sweetingham, Lisa, *Suit: McDonald's Lied About Ingredients in French Fries that are Harmful to Autistic Children*, Court TV News, http://www.courtTV.com/news/2006/1011/mcdonalds_ctv.html (Oct. 121, 2006).

a lawsuit claiming that McDonald's french fries caused the boy to suffer from tantrums and digestive problems. The suit points to the fact that McDonald's fries contain gluten and casein, which are ingredients found in milk and wheat products. The lawsuit states that, "In most cases, elimination of gluten and casein from an autistic child's (diet) results in dramatic improvements in the child's condition, often enabling the child to attend mainstream educational programs in a matter of months."⁶⁹ The complaint alleges fraud, false advertising, and negligent misrepresentation on the part of McDonald's due to the fact that the restaurant had claimed for years that its french fries were "allergen-free."⁷⁰ The plaintiffs seek compensation for Roman Brown's medical bills as well as a share of the profits McDonald's obtained through the use of the allegedly fraudulent advertisements.⁷¹ Furthermore, the plaintiffs are seeking to certify a class of other autistic children similarly harmed by McDonald's misrepresentation.⁷² It is doubtful whether the plaintiffs will have much success litigating the lawsuit, however, because the theory that gluten and casein negatively affect children with autism lacks significant scientific backing.⁷³

It seems unlikely that the floodgates will open for similar types of lawsuits. In the 2002 and 2004 election cycles, the restaurant industry donated approximately \$5.5 million to politicians in 20 states that have passed "common-sense consumption" laws.⁷⁴ These "common-sense consumption" laws protect restaurants from obesity-related lawsuits.⁷⁵ Ultimately, despite the fact that 61 percent of Americans are now classified as overweight,⁷⁶ 89 percent of Americans do not think that restaurants should be held liable for causing

⁶⁹ *Lawsuit Filed Against McDonald's Over French Fries*, CBS 2 KCAL 9, http://cbs2.com/topstories/local_story_282161525.html (Oct. 9, 2006).

⁷⁰ Sweetingham, *supra* note 69.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* (noting Dr. Ami Klin, an autism expert, stated, "[n]o scientific research has consistently shown a connection... It's a popular hypothesis, and something that is circulated among a group of individuals that have a grip on parents as to the importance of those things. But the reviews of that subject have not turned up any solid evidence.")

⁷⁴ *U.S. Food Industry Dodging Big, Fat Lawsuits*, *supra* note 66.

⁷⁵ *Id.*

⁷⁶ Santora, Marc, *Teenagers' Suit Says McDonald's Made Them Obese*, N.Y. Times, <http://www.freerepublic.com/focus/f-news/793026/posts> (Nov. 21, 2002).

obesity.⁷⁷

⁷⁷ Kish, *supra* note 68.