



# Pelman v. McDonald's: An In-depth Case Study of a Fast Food & Obesity Lawsuit.

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Pelman v. McDonald's: An In-depth Case Study of a Fast Food – Obesity Lawsuit.

Jonathan Benloulou

Class of 2005

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This paper is submitted in satisfaction of both the course  
requirement & third year written work requirement.

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**Abstract:** This paper analyzes a lawsuit filed against McDonald’s by plaintiffs alleging that the restaurant chain bore liability for their obesity and health problems. The paper analyzes the plaintiffs’ novel tort and statutory consumer fraud claims, as well as their evolution through two rounds at the district court and one round at the appellate court level. Aside from tracking the development of the plaintiffs’ various claims, this paper also examines why the plaintiffs abandoned their tort claims and relied exclusively on their consumer fraud claims. In the concluding sections, the benefits and drawbacks of such an approach are evaluated and the necessary elements of a future viable claim are outlined. Finally, I offer an assessment of the plaintiffs chances in their currently pending remand before the district court.

## I.

### Introduction.

“The United States is experiencing substantial increases in overweight and obesity that cut across ages, racial and ethnic groups, and both genders, has been increasing in every State in the Nation [and] has reached epidemic proportions. . . left unabated, overweight and obesity may soon cause as much preventable disease and death as cigarette smoking.”<sup>1</sup>

The above is from the Surgeon General’s Call To Action To Prevent and Decrease Overweight and Obesity in 2001. Interestingly, this country’s first obesity lawsuits against the fast food industry began by citing this dire warning.<sup>2</sup> Generally speaking, these novel suits allege that fast food restaurants bear liability for their customers’ obesity and related health problems. This campaign against the fast food industry officially began on July 24, 2002, with the filing of a suit on behalf of Caesar Barber, a then obese fifty-six year-old

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<sup>2</sup>Id; See also Caesar Barber Complaint at 4 (subsequently voluntarily withdrawn) (available at [news.findlaw.com/hdocs/docs/McDonald's/barbermcds72302cmp.pdf](http://news.findlaw.com/hdocs/docs/McDonald's/barbermcds72302cmp.pdf)).

man, against McDonald's Corporation ("McDonald's"), Burger King Corporation, Kentucky Fried Chicken Corporation, and Wendy's International, Inc. In his complaint, filed by Samuel Hirsch, a New York based attorney, Mr. Barber claimed that these four fast food restaurant chains bore liability for his obesity and other health problems.<sup>3</sup> This suit was quickly withdrawn as Mr. Hirsch pursued a near identical suit on behalf of a larger set of plaintiffs.

**A.**

### **Pelman v. McDonald's: Factual and Procedural History.**

The second suit, *Pelman v. McDonald's*, was filed on August 22, 2002, on behalf of two obese teenagers and their parents. This case was removed to federal district court, where the judge, Judge Sweet, first dismissed the suit with leave to amend on January 22, 2003.<sup>4</sup> On September 3, 2003, the district court dismissed the suit again – this time with prejudice and without leave to amend. On January 25, 2005, the Second Circuit issued an opinion vacating part of the district court's dismissal and remanding the case back to the district court for a third time. The case's final disposition is unsettled to date.

This paper will analyze the various claims and theories asserted by the *Pelman* plaintiffs in an attempt to find a viable legal claim against McDonald's. Because of the novelty and uniqueness of this suit, the plaintiffs began their suit with a blunderbuss of arguments, hoping one or more of their theories would result in an actionable legal wrong. At the core of their claims, however, is a simple allegation: McDonald's bears liability

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<sup>3</sup>Caesar Barber Complaint at 10 – 13.

<sup>4</sup>*Pelman v. McDonald's*, 237 F. Supp. 2d 512, 543 (S.D.N.Y. 2003)(hereinafter "*Pelman I*")

for selling products that contributed to their adverse health conditions. This simple assertion, however, must be given form in some cognizable legal principle, be it common law tort, an implied contractual relationship, or a consumer fraud statutory basis.

Through three rounds of court decisions, two at the district court and one at the appellate court level, the plaintiffs' litany of arguments have been whittled down to a single consumer fraud claim. In Part II of this paper I will analyze the plaintiffs' original host of claims, the theories underlying these claims, and McDonald's defenses. In Part III, I will focus on the court's treatment of these different theories and the parties' respective claims. In Part IV, I will examine the plaintiffs' second attempt before the district court, the relative strengths and weaknesses of the claims they pursued, as well as McDonald's responses to these modified claims. Part V analyzes the district court's second opinion, which ultimately dismisses the plaintiffs' claims with prejudice. In Part VI, I discuss the Second Circuit's recent reinstatement of this case, its bases for reversal, and the current issues left unresolved. Finally, in Part VII, I conclude by outlining the evolution of the plaintiffs' original suit, what they must allege going forward, and the remaining obstacles to any recovery.

## **B.**

### **Preliminary Note: Differences Between the Pelman and Barber Suits.**

Before beginning an in depth examination of the Pelman v. McDonald's case, a short explanatory note of the differences between this case and the withdrawn Barber lawsuit is in order. In pursuing the Pelman suit

instead of the Barber suit, the attorney for both these suits gained several tactical and legal advantages.<sup>5</sup> First, the Pelman suit names two sets of plaintiffs, minors and their adult parents. Unlike the earlier suit, the Pelman case includes minors, which provides clear legal and factual benefits. For example, as discussed below, a statute of limitations that impedes an adult's claim is tolled if a minor brings the same claim. Additionally, minors are better able to rebut McDonald's assumption of the risk or common knowledge defenses. Finally, were this case to ever proceed before a jury, minors might make a more favorable set of plaintiffs.

There is another notable discrepancy between the short-lived Barber suit and this suit. In the former, Mr. Barber alleged that four large restaurant chains were responsible for his obesity and other health problems. In this suit, the plaintiffs only sue McDonald's. At first, one might assume the Pelman plaintiffs only regularly ate at McDonald's and could not sue the other fast food chains. In fact, however, McDonald's noted in its defense briefs that the Pelman plaintiffs had earlier filed suit against four fast food chains before withdrawing their complaint.<sup>6</sup> Why then do the plaintiffs only ultimately sue McDonald's?

Although the plaintiffs ignore this question in their briefs, they presumably saw a tactical advantage in filing against only one fast food chain. As is later discussed, the plaintiffs were required to show a causal link between their consumption of McDonald's products and their obesity, while discounting other potential causes of obesity. Had the plaintiffs pursued this case against four fast food chains, they would have had a harder time drawing the requisite causal relationship between any single fast food restaurant and their obesity. Additional restaurant defendants would make any proximate cause determination harder for at least two reasons.

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<sup>5</sup>I have no comment about whether these tactical advantages affect the attorney's decision to pursue one of the suits over the other. I merely point out the legal and tactical benefits that ensued.

<sup>6</sup>See e.g., McDonald's Appellee Brief, 2004 WL 1497855 at \*21 (hereinafter "Brief for Defendant-Appellee")



First, the more defendants a plaintiff sues, the less it appears any single defendant, rather than the plaintiff him or herself, caused the plaintiff's obesity. After all, if a single plaintiff accused dozens of restaurants or food manufacturers of causing his obesity, it would be apparent that none of the defendants were as responsible for the plaintiff's obesity as he was. Second, a plaintiff that accuses multiple defendants of causing an indefinite injury like obesity faces the difficult task of showing to what extent each defendant is culpable for the injury.<sup>7</sup> This requirement adds another layer of complexity to an already novel and complex suit.<sup>8</sup> For these reasons, it's possible the Pelman plaintiffs (or rather, their attorney) consciously chose to sue one fast food chain and avoid these additional complications.

## **II.**

### **The Pelman Original Complaint & McDonald's Defenses**

The Pelman's original Complaint listed five separate causes of action. The first two Counts were based on New York's statutory consumer fraud provisions. The last three causes of action were all based on common law tort doctrine. Specifically, the third Count was a novel application of products liability law. The last two causes of action were both premised on McDonald's failure to warn of its products' unhealthy characteristics.

## **A.**

### **The Consumer Fraud Protection Claims: Counts I and II.**

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<sup>7</sup>SEE GENERALLY EPSTEIN, RICHARD, CASES AND MATERIALS ON TORTS, 385 – 413 (7<sup>th</sup> ED. 2000).

<sup>8</sup>Id.

The plaintiffs' first cause of action stated that McDonald's engaged in unfair and deceptive acts in violation of New York's consumer fraud statutes, New York General Business Law §§349, 350. Section 349 prohibits deceptive acts and practices and §350 prohibits false advertising. The plaintiffs alleged McDonald's violated both consumer fraud statutes by:

    failing to adequately disclose the ingredients and/or health effects of ingestion of certain respective food products with high levels of fat, salt, sugar, and cholesterol content...by promoting, marketing, distributing their food as nutritious; by engaging in marketing practices which enticed the Plaintiff-Class members to consume their respective products in larger portions...by failing to adequately label and/or provide the nutritional contents of their respective food products...and by otherwise engaging in deceptive marketing practices and promotions of their respective food products.<sup>9</sup>

This first count alleges McDonald's committed affirmatively deceptive acts and deceptive acts of omission. McDonald's affirmatively promoted and marketed its food as nutritious, and enticed the plaintiffs to eat larger portions. As well, it deceived the plaintiffs by failing to disclose the unhealthy ingredients and health effects of its products, by failing to disclose the unhealthy effects of eating large portions, and by failing to provide nutritional information for its products. Generalizing from the specifics of these claims, the plaintiffs' first count can be characterized as follows: McDonald's violated New York's consumer fraud statute by misrepresenting – affirmatively and by omission – how healthy (or unhealthy) its products are. To factually support this claim, the plaintiffs attached over three-dozen ads or statements that they allege misrepresent, individually or collectively, the health attributes of McDonald's products.

McDonald's countered this claim with three defenses. First, McDonald's argued that the plaintiffs failed to show why its ads or statements, the majority of which are "product puffery," were false.<sup>10</sup> Next, McDonald's contended that the plaintiffs cannot claim the ads are deceptive since the health effects of consuming or over-consuming fast food are well known. Therefore, no reasonable consumer can be misled by either McDonald's product puffery or its omission of any information.<sup>11</sup> Lastly, McDonald's maintained claims of deceptive omissions (i.e., a failure to disclose material information) cannot be brought under New York's consumer fraud provisions except in rare circumstances, none of which apply to the case at hand.

The plaintiffs' second cause of action, another consumer fraud claim, was that McDonald's directed its marketing at children, falsely promoting its food as nutritious and failing to disclose the food's adverse health effects.<sup>12</sup> To bolster this claim, the plaintiffs listed several allegedly deceptive representations directed at children. The plaintiffs argued McDonald's enticed minors to consume its products with misleading promotional incentives.<sup>13</sup> For example, the plaintiffs alleged that McDonald's "Mighty Kids" ads were deceptive because they lacked any scientific support for the implied claims that eating these meals will make kids physically stronger or 'mightier.'<sup>14</sup> The plaintiffs also argued that the misleading nature of McDonald's regular ads and its child-directed ads should be judged from a child's point of view, not from the more discerning adult's vantage point. In other words, when a court evaluates whether or not the minor plaintiffs were deceived by all of McDonald's ads, it should adopt a reasonable child standard of common knowledge.<sup>15</sup>

In response, McDonald's asserted two points. First, it argued that a plaintiff's age is irrelevant to deter-

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<sup>10</sup>Defendant's Consolidated Opposition to Plaintiffs' Motion to Remand and Reply in Support of Defendants' Motion to Dismiss, 2002 WL 32595646, at \*16. (hereinafter "Defendant's Consolidated Opposition")

<sup>11</sup>Pelman I, at 18.

<sup>12</sup>Original Complaint at 8.

<sup>13</sup>Id.

<sup>14</sup>Plaintiffs' Reply Memo in Support of Cross-Motion to Remand, 2002 WL 3249600, at \*5. (hereinafter "Plaintiffs' Reply Memo")

<sup>15</sup>Id. at 3.

mining whether a reasonable consumer would be misled by any alleged misrepresentations. If ads are mere puffery when directed at adults, they remain mere puffery when viewed by minors.<sup>16</sup> McDonald's likewise characterized the Mighty Meals and other child-directed advertisements as mere product puffery. Second, McDonald's asserted that many of the allegedly deceptive representations could not have misled the minor plaintiffs since most of the listed representations would be ignored by children. Specifically, McDonald's noted that "McDonald's website information, the brochures and advertisements discussing balanced diet, and the sixteen-year-old letter to the New York Attorney General obviously are not directed to children and would not, in anyone's imagination, be of interest to them."<sup>17</sup>

## **B.**

### **The Tort Claims: Counts III – V.**

The plaintiffs' three remaining counts alleged common law torts. In Count III, the plaintiffs claimed that McDonald's negligently or intentionally distributed foods high in fat, salt, sugar, and cholesterol content, which cause adverse health problems.<sup>18</sup> This is the plaintiffs' boldest claim and parts most from traditional tort precedent. In this Count, the plaintiffs argued that McDonald's is liable simply for serving products with characteristics that cause harmful health effects. Whether it acted intentionally or negligently, selling products high in fat, salt, sugar, and cholesterol content is a tort.

McDonald's did not specifically rebut this tort claim, but offered two general reasons why all three of the

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<sup>16</sup>Defendant's Consolidated Opposition at \*19.

<sup>17</sup>Id.

<sup>18</sup>Original Complaint at 8.

plaintiffs' tort claims failed. McDonald's contended that the plaintiffs failed to allege two of the necessary elements for any tort claim: (1) that the defendant has a duty towards the plaintiff, and (2) that there exists a proximate causal link between the defendant's act and the plaintiff's injury.<sup>19</sup> Summarizing the defects in the plaintiffs' claims, McDonald's noted that,

American tort law does not impose on restaurants a duty to warn customers of the universally understood fact that common foods contain fat, sugar, salt cholesterol and other basic ingredients. See Restatement (Second) Torts, §402A, cmt. j. It is commonly understood that [excessively eating] hamburgers and French fries. . . over a prolonged period may have consequences to one's waistline and potentially to one's health. . . The plaintiffs fare no better on causation. . . their physical conditions are inherently the result of a combination of so many factors and influences that attempting to attribute proximate cause to the consumption of certain of the products served at McDonald's is impossible as a matter of law.<sup>20</sup>

McDonald's owed no duty towards the plaintiffs because their injuries are a commonly known side effect of prolonged or over-consumption of fast food. Since it owed the plaintiffs no duty, it could not have breached any duty towards them and therefore didn't commit any tort. Second, the plaintiffs cannot prove that a complex, multifactor condition such as obesity (and related health problems) resulted because they consumed one restaurant's products.

The plaintiffs fourth count repeats the same Count III allegations that McDonald's products are unhealthy, but premises liability on its failure to warn consumers of its products ingredients, levels of fat, salt, sugar,

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<sup>19</sup>Defendant's Consolidated Opposition at \*3-5,13.

and cholesterol, and the dire health problems that can ensue.<sup>21</sup> In other words, this count is not premised on McDonald's sale of unhealthy food per se, but on its failure to adequately disclose the ingredients, nutritional content, and detrimental health effects of its products.

Finally, the plaintiffs allege, in their fifth and final count, that McDonald's "negligently, recklessly, carelessly and/or intentionally... [distributed]... food products that are physically or psychologically addictive."<sup>22</sup> This cause of action alleges that McDonald's caused its consumers to become physically or psychologically addicted to products that cause adverse health effects.

### **III.**

#### **First S.D.N.Y Court Opinion: January 22, 2003.**

In its first opinion, the district court separately addressed the consumer fraud and tort claims. In setting the context for the tort claims, the court stated,

[q]uestions of personal responsibility, common knowledge and public health are presented, and the role of society and the courts in addressing such issues. The issue of determining the breadth of personal responsibility underlies much of the law: where should the line be drawn between an individual's responsibility to take care of herself, and society's responsibility to ensure that others shield her?<sup>23</sup>

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<sup>21</sup>Original Complaint at 9.

<sup>22</sup>Id at 10.

Having laid out this general directive, the court focused on the case at hand and noted that one “necessary element of any potentially viable claim must be that McDonald’s products involve a danger that is not within the common knowledge of consumers.”<sup>24</sup> After generally describing the tort claim requirements, the court pointed out the more expansive reach of New York’s consumer fraud statutes, stating that these statutes were “intended to be broadly applicable, extending beyond the reach of common law fraud.”<sup>25</sup>

A.

### **Consumer Protection Act Claims.**

The court listed the requirements for a cause of action under either of New York’s consumer fraud statutes as follows: (1) that the act, practice or advertisement was consumer-oriented; (2) that the act, practice or advertisement was misleading in a material respect, and (3) that the plaintiff was injured as a result of the deceptive practice, act or advertisement.<sup>26</sup> Focusing in on the second requirement, the district court dismissed both Counts I and II. Ultimately, the court determined that none of the ads or statements were objectively misleading. In discussing McDonald’s allegedly deceptive representations, the court first noted that the plaintiffs’ “Complaint does not identify a single instance of deceptive acts.”<sup>27</sup> The court then stated that even in their opposition papers, the plaintiffs could only identify two alleged, affirmative misrepresentations.<sup>28</sup>

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<sup>24</sup>Id. at 517.

<sup>25</sup>Id. at 525.

<sup>26</sup>Id.

<sup>27</sup>Id. at 527.

<sup>28</sup>In discussing these alleged misrepresentations, the court ignored, for the moment, McDonald’s argument that these ads were not properly in the Complaint and thus should not be considered.

The first set of allegedly deceptive ads were a couple of McDonald's advertising campaigns ("McChicken Everyday!" and "Big N' Tasty Everyday") and the second was a statement on McDonald's website that "McDonald's can be part of any balanced diet and lifestyle."<sup>29</sup> The court noted that read together, these statements could be construed to imply that eating a McChicken or 'Big 'N Tasty' product everyday could be part of a balanced diet and lifestyle, but dismissed that implication, stating that "the advertisements encouraging persons to eat at McDonald's everyday! do not include any indication that doing so is part of a well-balanced diet."<sup>30</sup> The court likewise dismissed the plaintiffs' second contention, that the "McChicken Everyday!" and "Big N' Tasty Everyday" representations are deceptive in and of themselves. Absent any statements by McDonald's that eating either product everyday will result in a specific health effect, the court held such campaigns were mere puffery.

The second subset of claims under Count I, McDonald's deceptive omissions, was likewise dismissed. As listed in their Complaint, the allegedly deceptive omissions were McDonald's failure to disclose the ingredients, health effects, and nutritional content of its food products. The court dismissed these claims because the plaintiffs failed to give any reasons why such omissions were deceptive. Interpreting earlier case law on deceptive omissions under New York's consumer fraud provisions, the court held that for an omission to be deceptive, the plaintiffs must show either that the business alone possesses the information or that a consumer could not reasonably obtain it.<sup>31</sup> In so holding, the court agreed with McDonald's that it is not enough for the plaintiffs to allege the defendant did not provide relevant information.

The plaintiffs' other consumer fraud claim, Count II, alleged that McDonald's deceptively marketed its prod-

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<sup>29</sup>Id. at 528.

<sup>30</sup>Id.

<sup>31</sup>Id. at 529.



ucts to children, through both affirmative misrepresentations and deceptive omissions. To support this claim, the plaintiffs appended the same representations they claimed were deceptive in Count I. As with Count I, however, the court determined that none of these ads or statements were in fact materially deceptive.<sup>32</sup> The court also determined the child-directed ad campaigns were also non-misleading for two reasons. First, the court noted that McDonald's had not made any specific health claims regarding consumption of its 'Mighty Kids Meals.'<sup>33</sup> Second, if the plaintiffs were alleging that just the label "Mighty Kids Meal" was deceptive, the court dismissed that claim finding the name to be 'mere puffery.'<sup>34</sup> The court held that McDonald's was not deceptively representing that children who consumed these meals would become stronger or mighty because they marketed their meals as "Mighty Kids Meals."<sup>35</sup>

## **B.**

### **Common Law Tort Claims.**

The plaintiffs' remaining three counts alleged various negligent or intentional torts. As with any tort claim, the plaintiffs had to allege (1): the defendant had a duty towards them, (2) the defendant breached that duty, (3) the plaintiffs suffered an injury, and (4) the defendant's breach proximate caused the plaintiffs' injuries. In dismissing these tort claims, the district court focused on two of these four elements. The court held that the plaintiffs had failed to show McDonald's had any duty to warn the plaintiffs of the adverse

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<sup>32</sup>Id. at 530.

<sup>33</sup>Plaintiffs' Reply Memo at \*2.

<sup>34</sup>Pelman I. at 530.

<sup>35</sup>Id.

health effects of consuming its products. Additionally, the court held the plaintiffs failed to adequately plead that McDonald's proximately caused their injuries. Before discussing why McDonald's did not have any duty towards the plaintiffs or how the plaintiffs could adequately plead proximate causation, the court first addressed Count III, the plaintiffs' claim that McDonald's was liable simply for serving certain of its products.

1.

**Count III: Inherently Dangerous Product.**

In Count III the plaintiffs alleged that McDonald's served an inherently dangerous product. The plaintiffs contended that by serving "products that are high in fat, salt, sugar, and cholesterol which [cause adverse health effects]" McDonald's was liable for their resulting injuries.<sup>36</sup> There are two different possibilities for why McDonald's might be liable under an inherently dangerous product doctrine. Liability might attach if a product is dangerous to an extent not contemplated by a purchaser or if it's unreasonably dangerous for its intended use, regardless of the plaintiff's knowledge. While a warning would insulate a defendant from the first type of claim, it would not insulate the defendant from the latter type of argument. In its reply brief, McDonald's defended against this claim by pointing out that fast food's attributes are well known and therefore cannot create liability as an inherently dangerous product.<sup>37</sup> Citing from the Restatement (Second) of Torts, McDonald's also noted that the plaintiffs' injuries resulted from *excessive consumption* of these products, and as such, they faced an even greater burden in showing its products are unreasonably dangerous.<sup>38</sup> In addressing these two aspects of the inherently dangerous product arguments, the district

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<sup>36</sup>Original Complaint at 8.

<sup>37</sup>Defendant's Consolidated Opposition at \*5.

<sup>38</sup>Id.

court agreed with McDonald's, citing the Restatement (Second) of Torts, which states

Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. . . Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks.<sup>39</sup>

As such, because the plaintiffs' injuries resulted from the over-consumption of McDonald's products, they faced an even higher bar in alleging the products are unreasonably dangerous for their intended use. The court then held that the plaintiffs' bare allegation that McDonald's products were high in fat, salt, sugar, and cholesterol, standing alone, was not an allegation that McDonald's products were so extraordinarily unhealthy as to be unreasonably dangerous for their intended use.<sup>40</sup>

As to the second reason a product might be deemed inherently dangerous, that it is dangerous to an extent outside the reasonable contemplation of the consuming public, the district court likewise dismissed that claim. The court noted that it is well known that fast food, particularly McDonald's products, contains high levels of salt, sugar, fat and cholesterol. Again citing to the Restatement (Second) of Torts, the court held that "a seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized."<sup>41</sup>

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<sup>40</sup>Id. at 532.

<sup>41</sup>Id. (citing Restatement (Second) of Torts, §420A, cmt. j)

C.

### **Allegations Outside the Complaint.**

After addressing and dismissing the arguments within the Complaint, the district court turned to four additional arguments the plaintiffs made outside the Complaint. The court made clear that these arguments, only made in opposition papers, were not properly before the court. Nevertheless, it addressed these arguments to guide the plaintiffs in drafting an amended complaint, since they were granted leave to amend. The court also discussed these arguments before moving on to the final two tort-based Counts in the Complaint because these four arguments related to all three of the plaintiffs' tort-based Counts. Therefore, after dismissing Count III based solely on the allegations in the Complaint, the court addressed whether any of these four arguments, if further elaborated in an amended complaint, could revive this count.

First, the plaintiffs argued that McDonald's products have been so processed or altered that they are completely different and more dangerous than the typical products they resembled and which a reasonable consumer might expect.<sup>42</sup> Additionally, they claimed McDonald's owed the plaintiffs a duty to warn of possible allergic reactions to its products. Specifically, the plaintiffs' asserted that "the Defendants know that the Plaintiffs and consumers develop physical reactions (obesity/ diabetes/ hypertension) to the presence of fat, sodium and cholesterol in their foods, yet have failed to warn of the known risks of consumption of their foods."<sup>43</sup> Next, the plaintiffs alleged that McDonald's knew and had a duty to warn against the plaintiffs' misuse of its products, by prolonged and excessive consumption.<sup>44</sup> Finally, the plaintiffs put forth several public policy oriented arguments based upon the Nutrition Labeling and Education Act.<sup>45</sup> The court

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<sup>42</sup>Plaintiffs' Reply Memo at \*5.

<sup>43</sup>Id.

<sup>44</sup>Id. at \*6.

<sup>45</sup>Id.

assessed these arguments and how any of them might lead to viable claims.

1.

### **Overly Processed or Altered Foods.**

The first, and most promising, of the plaintiffs' additional claims was that McDonald's products were somehow different in kind and more dangerous than the ordinary fast food fare it resembled. With this allegation, the plaintiffs could sidestep McDonald's defense that the fat, salt, sugar and cholesterol content of its products were "common knowledge." In fact, the plaintiffs asserted that while the Restatement of Torts (3d) referred to users' common knowledge of saturated fats and its effects, "said principle does not apply where these Defendants are selling "altered" common foods with additives and preservatives that morphs their original composition."<sup>46</sup> Therefore, while McDonald's might not be liable for serving ordinary fast food, with known attributes, it might be liable for serving products that resembled fast food, but was in fact much more dangerous. As the district court analogized,

[t]he argument is akin to one that might be used in a products liability case regarding genetically engineered food, should any injuries result from the excessive consumption thereof. The genetically modified [crops] look exactly like the organically grown [crops]. Yet those plants have been substantively, if subtly, modified into something else. Any dangers from eating a genetically modified plant are latent—and thus not commonly well known—in the absence of a label. (footnotes omitted)<sup>47</sup>

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<sup>46</sup>Id. at \*5.

Following this reasoning, the court held that the plaintiffs could present a viable claim if they properly alleged that while McDonald's products resembled common fast foods, they were somehow different and posed latent dangers.

A similar yet subtly different claim based on this argument could be that McDonald's processing made its food unhealthier than contemplated by the average consumer.<sup>48</sup> In such a case, consumers may well know they are consuming 'unhealthy' products such as burgers, French fries and fried chicken, but may not be aware that McDonald's processes its products to be even unhealthier than originally contemplated. If that was the case, the plaintiffs' presumed knowledge of fast food attributes would not include the additional, latent dangers of McDonald's fare. In such a case, McDonald's would have a duty to warn consumers about the effects of this additional processing. In either variation of this claim, the plaintiffs argue that McDonald's has a duty to warn consumers of the latent dangers of its processed products. That danger might arise from either the additives and preservatives in the products, or from the substantially unhealthier composition of these altered foods (i.e., they are processed to make them have *more* salt, fat, cholesterol, and sugar than the non-altered fast foods they resemble).

McDonald's presented three defenses to this argument. First, McDonald's contended that the presence or absence of additives is irrelevant to the plaintiffs' arguments, since their "entire Complaint is premised on the assertion that they did not know that common foods such as hamburgers, French fries, and apple pie have fat, salt, and cholesterol."<sup>49</sup> If they disclaimed knowledge that these products could cause their obesity, the presence or absence of other additives and preservatives is irrelevant. Next, McDonald's argued that its use of approved additives or preservatives is not an "alteration" of its products that makes them different from other

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<sup>48</sup>*Id.* at 535.

<sup>49</sup>Defendant's Consolidated Opposition at \*10.

manufactured foods. Indeed, McDonald's contended that "[i]f the addition of preservatives, salt, or sugar to raw food is product alteration, then virtually all food is altered."<sup>50</sup> Simply, McDonald's asserted that there is nothing different about its processing than is done with virtually all foods manufactured outside the home kitchen. Finally, McDonald's maintained that even if restaurant food could be legitimately labeled 'altered' by the addition of additives and preservatives, it still had no duty to warn the public of this "alteration" because it is common knowledge that restaurants put additives and preservatives in their products and that such alteration renders their food less healthy.<sup>51</sup>

Notably, the court reserved judgment on the merits of this last argument and stated that if the plaintiffs fleshed out their food alteration argument in an amended complaint, they may "establish that the dangers of McDonald's products were not commonly well known and thus McDonald's had a duty towards its customers."<sup>52</sup> While the court did not spell out what additional factual allegations would be required to flesh out this argument, it presumably expected the plaintiffs to factually support one or both of these claims. The plaintiffs could attempt to provide data that certain additives or preservatives make McDonald's products unhealthier than common fast foods. Alternatively, the plaintiffs might factually support their claim that McDonald's processed its products to include more salt, fat, sugar, and cholesterol than a consumer would reasonably expect. By inviting the plaintiffs to include either of these arguments, the court implicitly rejected McDonald's defense that it is common knowledge that McDonald's processes its products and that any processing renders food less healthy.

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<sup>50</sup>Id.

<sup>51</sup>Id.

<sup>52</sup>Pelman I. at 536.

2.

**Plaintiffs' Remaining Arguments: Allergic Reaction, Foreseeable Misuse, NLEA Policy Points.**

The other grounds for sustaining the common law tort claims were less well received by the district court, which summarily dismissed them all as unviable. One of the plaintiffs' arguments, that they were allergic to the ingredients in McDonald's products, was easily dismissed. Although the plaintiffs did not elaborate on this claim, the basis of this claim seems to be that they suffered 'physical reactions' from consuming McDonald's products because they were allergic to the salt, sugar, fat and cholesterol in McDonald's products. The physical, allergy-like reactions the plaintiffs experienced included obesity and hypertension.<sup>53</sup> In essence, the plaintiffs asserted they experienced a physical reaction comparable to a typical allergic reaction and McDonald's should be liable for failing to warn of these 'allergens.' Rather than discuss the hypothetical similarity of traditional food allergen liability law and this novel comparison to physical reactions from fat, salt, sugar and cholesterol, the court pointed out an obvious deficiency in the plaintiffs' allegations. Citing to the Restatement (Third) Torts, Product Liability, §2, the court held that to state a claim for allergic sensitivity,

the ingredient that causes the allergic reaction must be one whose danger or whose presence in the product is not generally known to consumers. When both the presence of an allergenic ingredient in the product and the risks presented by such an ingredient are widely known, instructions and warnings about that danger are unnecessary.<sup>54</sup>

As such, even assuming arguendo that one can be 'allergic' to or suffer a physical reaction from the above

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<sup>53</sup>Plaintiffs' Reply Memo at \*5.



ingredients, this argument still failed because the presence of such ingredients in McDonald's products is commonly known. Furthermore, the court also noted that the plaintiffs failed to adequately allege that these ingredients were in fact allergens or similar to allergens.

Next, the plaintiffs asserted that McDonald's had a duty to warn them and other consumers against prolonged and unreasonable uses of its products. The plaintiffs alleged that McDonald's should have expected that some consumers would misuse its products by eating them on a prolonged or excessive basis. Since McDonald's should have expected this foreseeable misuse of its products, it had a duty to warn consumers of the dangers resulting from this misuse.<sup>55</sup> The court quickly dispatched this claim, noting that the plaintiffs failed to allege that "what is at issue is a misuse in the sense that it was outside the scope of the apparent purpose for which the [products] were manufactured."<sup>56</sup> The court noted that McDonald's products are intended to be eaten and the plaintiffs cited no case law that over-consumption of a food product can be considered a misuse.

Finally, the court dismissed the plaintiffs' policy arguments based on the Nutrition Labeling and Education Act ("NLEA") as irrelevant to the statutory and common law causes of action they were asserting. Whether or not the federal government could institute enforcement proceedings against McDonald's under the NLEA was irrelevant to plaintiffs' claims that McDonald's violated tort law principles or New York's consumer fraud provisions. Moreover, the court noted that restaurants were specifically exempted from the NLEA,

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<sup>55</sup>Plaintiffs' Reply Memo at \*6.

<sup>56</sup>Pelman I. at 537. (citing Trivino v. Jamesway Corp., 148 A.D.2d 851 (3rd Dep't 1989)).

which requires nutritional labeling for food manufacturers.<sup>57</sup>

## D.

### **Proximate Cause.**

After dispensing with the plaintiffs' various arguments for why McDonald's had (and consequently breached) a duty towards its consumers, the court turned to the second contested element in all the plaintiffs' claims; proximate causation. Before outlining some of the deficiencies in the plaintiffs' proximate cause allegation, the court laid out its understanding of proximate cause and how proximate cause differs from simple or 'but for' causation. The court began by noting that to show proximate cause "a plaintiff must establish that the defendant's conduct was a substantial cause in bringing about the harm."<sup>58</sup> The court also listed several relevant factors, including the aggregate number of actors contributing to the injury, whether some forces contributing to the injury were beyond the defendant's control, and whether the injury would have occurred without the defendant's conduct.<sup>59</sup> Additionally, the court approvingly cited the Restatement (Second) of Torts §431, which states that proximate cause is used

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<sup>57</sup>Id.

<sup>58</sup>Id. at 537-38.

<sup>59</sup>Id. at 538.

to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable [persons] to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called 'philosophic sense,' which includes every one of the great number of events without which any happening would not have occurred.<sup>60</sup>

This particular explanation of proximate cause, emphasizing a notion of responsibility rather than simple causation is especially relevant in this case. As the court noted to begin its opinion, "[t]he issue of determining the breadth of personal responsibility underlies much of the law: where should the line be drawn between an individual's own responsibility to take care of herself, and society's responsibility to ensure that others shield her?"<sup>61</sup> For McDonald's to have proximately caused the plaintiffs' injuries, its conduct must somehow make it responsible for the plaintiffs' injuries. Having thus described proximate cause, the district court then held that the plaintiffs had not adequately alleged that McDonald's proximately caused their injuries.

To properly allege this causal relationship, the plaintiffs needed to make additional factual allegations. For example, the court noted that the Complaint did not specify how often the plaintiffs ate at McDonald's. Without that factual information, the court had no way of deciding whether McDonald's could have possibly been a substantial cause of the plaintiffs' injuries, as a matter of law. Presumably, if the plaintiffs only ate at McDonald's a few times a year, their entire Complaint would be dismissed for lack of proximate cause, regardless of any breached duties by McDonald's.<sup>62</sup> This initial deficiency in the Complaint was subsequently rectified in the Amended Complaint, which alleged that the plaintiffs ate at McDonald's on a fairly substantial daily or weekly basis.<sup>63</sup> Additionally, to properly allege proximate cause, the court held that the plaintiffs

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<sup>61</sup>Id. at 516.

<sup>62</sup>Id. at 538-39

<sup>63</sup>Plaintiffs Amended Verified Complaint, 2003 WL 234873 at \*5-7 (hereinafter "Amended Complaint").

must address whether other factors were significant causes of their obesity and related health problems.

In other words, to adequately allege that McDonald's caused their health problems, the plaintiffs needed to assert that other variables, outside of McDonald's control, had not caused their obesity. This proximate cause showing is actually a two-part requirement. First, the court required that the plaintiffs' show that their obesity is the result of their diet, as opposed to non-dietary factors. In fact, the court specifically noted that the Complaint stated "[o]besity is a complex multifactoral chronic disease developing from interactive influences of numerous factors – social behavioral, physiological, metabolic, cellular, and molecular in addition to cultural and genetic factors."<sup>64</sup> As such, the plaintiffs could not allege McDonald's proximately caused their injuries if they had not yet adequately alleged that their diet, not non-diet factors, was the primary cause of their obesity and health problems.<sup>65</sup> Moreover, the court also required that the plaintiffs adequately show that it was McDonald's products, not the rest of their diet, that caused their obesity and related health problems.

The court therefore dismissed the plaintiffs' tort claims for two independent reasons. As noted above, the court held that the plaintiffs had failed to explain why McDonald's owed them any duty to warn about its products. Aside from the summarily stated food alteration argument, the plaintiffs had failed to explain why these products' unhealthy attributes were not commonly known. Additionally, the court held that the plaintiffs also failed to allege McDonald's proximately caused their injuries. Given the complex interaction of non-diet factors that can cause obesity and other health problems, the plaintiffs had not adequately alleged that their diet was the proximate or substantial cause of their obesity. Moreover, even assuming that diet was the primary cause of their obesity, the plaintiffs had also failed to show that McDonald's was the primary

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<sup>64</sup>Pelman I. at 539.

<sup>65</sup>Id.

or substantial cause of their obesity. After thoroughly analyzing (and dismissing) the plaintiffs' arguments for why McDonald's had a duty towards them or proximately caused their obesity, the court applied these legal conclusions to the plaintiffs' remaining tort claims.

**E.**

#### **Count IV: Failure to Warn of Unhealthy Attributes.**

The plaintiffs' fourth cause of action alleged that McDonald's failed to warn of its products' unhealthy attributes and failed to label those products. Specifically, the plaintiffs claimed that McDonald's failed to warn about the ingredients and nutritional contents of its products, and the adverse health effects of consuming such products. The court noted that under New York law, a manufacturer has a duty to warn of a product's latent dangers resulting from a product's foreseeable uses or misuses.<sup>66</sup> New York law, however, recognizes two situations in which a failure to warn would not result in liability: (1) where the danger is "open and obvious" or (2) where a knowledgeable user already knows of the danger.<sup>67</sup>

Applying these principles to the case at hand, the court held McDonald's did not have a duty to warn the plaintiffs, as any harmful results from consumption of its products were open and obvious. As noted above, the court held that the plaintiffs failed to allege that McDonald's products were dangerous in any way other than those which were open and obvious.<sup>68</sup> The court hinted, however, that if the plaintiffs developed their food alteration argument, they might successfully allege that McDonald's did have a duty to warn regarding

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<sup>66</sup>Id. at 540 (citing Liriano v. Hobart Corp. 700 N.E. 2d 303 (1998)).

<sup>67</sup>Id. at 541.

<sup>68</sup>Id.

a danger that was not open and obvious.

As with the other tort claims, the court also held that the plaintiffs had not sufficiently pled that McDonald's proximately caused their injuries. Again, as described above, the plaintiffs would need to show that their diet was the primary cause of their obesity and that McDonald's products, and not other food, was the leading dietary factor causing their obesity.

## **F.**

### **Count V: Sale of Addictive Products.**

Finally, the court addressed the plaintiffs' last cause of action – a cursorily stated claim that McDonald's served physically and/or psychologically addictive foods.<sup>69</sup> The court noted the vagueness of this claim and treated it as either another products' liability claim or a failure to warn claim. In other words, the court interpreted the claim to state that McDonald's products are inherently dangerous because they are addictive, or that McDonald's has a duty to warn that its products are addictive.<sup>70</sup> Unlike earlier allegations of general unhealthiness, this allegation is not “open and obvious” and McDonald's would surely have a duty to warn consumers if its products were addictive. Nevertheless, the court dismissed this claim as overly vague. The court held that simply claiming McDonald's products were addictive, without any specific, supporting factual allegations was inadequate.

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<sup>69</sup>Original Complaint at 10.

<sup>70</sup>Pelman I. at 542.

It was unclear from the Complaint whether the plaintiffs were asserting that McDonald's intentionally used an additive that made its food addictive or whether the combination of fats and sugars in its products are naturally addictive. More importantly, the plaintiffs did not list any ways in which this addiction could be observed, why they believed they were addicted, how long it took for such an addiction to take hold, and other basic questions.<sup>71</sup>

## G.

### **Summary of Complaint's Deficiencies.**

Having dismissed every count in the Complaint, the court granted the plaintiffs leave to amend their Complaint. While the court noted "leave to amend shall be freely given when justice so requires," it cautioned the plaintiffs to address the deficiencies in its Complaint.<sup>72</sup> Specifically, the court emphasized two glaring weaknesses in their tort claims. First, the plaintiffs had failed to show why McDonald's had any duty to warn its customers of the unhealthy attributes of its products. The court held that any such duty would arise only if some of the products' unhealthy attributes were not common knowledge. Additionally, the court emphasized that the plaintiffs' proximate cause allegations were woefully inadequate. To sufficiently plead that McDonald's had proximately caused their obesity and related health problems, the plaintiffs had to address two knotty causation issues.

First, the plaintiffs had to make enough factual allegations in their Complaint to make clear that their diet,

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<sup>71</sup>Id.

<sup>72</sup>Pelman I. at 543.

and not other non-dietary factors, caused their obesity and related diseases. Additionally, the court held that the plaintiffs must describe the rest of their diet in sufficient detail that a question of fact arises as to whether it was McDonald's products, and not the rest of their diet, that caused their obesity. In other words, even if they discounted the effect of non-dietary factors in causing their obesity, they still had to show that McDonald's products were the primary cause of their obesity.

With respect to the plaintiffs' two consumer fraud claims, the court dismissed those for different reasons. While the plaintiffs still needed to allege proximate cause, the court recognized that statutory consumer fraud claims had an easier proximate cause standard. Rather than discuss whether the plaintiffs met that relaxed standard, the court dismissed the consumer fraud claims for a different reason; the Complaint did not identify a single instance of deceptive acts.<sup>73</sup> Simply put, the plaintiffs had not listed any objectively deceptive acts, practices, or representations. Moreover, to the extent the plaintiffs alleged deceptive omissions of relevant information, they failed to show why any omissions were deceptive. For an omission to be actionable under New York consumer fraud law, the plaintiffs had to show that only the defendant possessed the relevant information or that no reasonable consumer could attain it, a requirement the plaintiffs failed to fulfill.<sup>74</sup>

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<sup>73</sup>Id. at 527.

<sup>74</sup>Id. at 529.



## **IV.**

### **On Remand: Plaintiffs' Claims and McDonald's Defenses.**

#### **A.**

##### **Plaintiffs' Amended Complaint.**

In their Amended Complaint, the plaintiffs brought four causes of action. The first three counts were for deceptive acts and advertisements in violation of N.Y. Gen. Bus. Laws §§349 and 350, New York's consumer fraud statutes. The last cause of action, a tort claim alleging both products liability and failure to warn, was voluntarily abandoned prior to oral arguments. As such, the court deemed that claim waived and never addressed it. Before addressing the plaintiffs' consumer fraud claims, I analyze their withdrawn tort claim below.

#### **1.**

##### **Abandoned Tort Claim.**

The plaintiffs' abandoned tort claim alleged that McDonald's had negligently (or intentionally) sold products, "which were so processed with additives and other ingredients and preservatives, as to create a danger and hazard unknown to the Plaintiff purchasers and consumers."<sup>75</sup> Seizing on the court's suggestion that food

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<sup>75</sup>Amended Complaint at \*46

might be so altered or processed as to create a duty to warn of its processed and unhealthy attributes, the plaintiffs put forth two arguments. First, the plaintiffs alleged McDonald's had a duty to warn about these products because they were so processed and filled with additives that they created an unknown danger.

Additionally, after exhaustively listing the ingredients, calories and fat content of the Fish Filet, French fries, and Chicken McNuggets, the plaintiffs made another argument. They alleged that McDonald's processing of these products made the products more fatty and caloric than a reasonable consumer would ever expect. Specifically, they claimed that the products'

reformulated attributes were hazardous or detrimental to an extent beyond which was contemplated or understood by the reasonable and ordinary Plaintiff. . . relying on the ordinary and customary knowledge of the community regarding the accepted characteristics and composition of Chicken, Fish, Potatoes and seasonings.<sup>76</sup>

They asserted that McDonald's products appeared like normal chicken sandwiches, fish sandwiches, and French fries, but because of how they were prepared, these products contain much more fat and calories than the ordinary foods they resembled. They then alleged that if McDonald's had properly disclosed these characteristics they would not have eaten these products as voluminously and incurred their health problems.

Ultimately, it appears that the plaintiffs dropped this separate cause of action for at least two reasons. First, in that this tort claim repeated the same allegations underlying one of their consumer fraud claims, it was duplicative. As discussed below, the plaintiffs base a consumer fraud claim on the allegation that McDonald's processed its products in a way that makes them healthier. Additionally, and more importantly, the plaintiffs sought to avoid the difficult proximate cause requirement for tort claims that the district court laid

out in its first opinion. As noted above, for the plaintiffs to assert a valid tort claim, they would have to allege a proximate causal link between McDonald's breached duty and their injuries. This burden included specifying whether non-dietary factors contributed to the plaintiffs' obesity and outlining the rest of their diets. The plaintiffs sought to avoid these knotty proximate cause issues by only pleading consumer fraud claims, which have a less daunting proximate cause requirement than tort claims. Since the plaintiffs may have believed these tort claims added little to their overall claims, they presumably decided to avoid having to litigate this stricter proximate cause requirement.

## 2.

### **Consumer Fraud Causes of Action.**

In their Amended Complaint, the plaintiffs set forth three distinct claims of deceptive practices and advertisements that proximately caused their injuries. First, they claimed McDonald's engaged in an extensive and widespread advertising campaign to promote its products as healthier than in fact. Specifically, they alleged that McDonald's advertisements suggested that its products "were nutritious, of a beneficial nutritional nature/effect, and/or easily part of a healthy lifestyle if consumed on a daily basis."<sup>77</sup> The plaintiffs alleged they relied on these characterizations and as a result, consumed McDonald's products in larger quantities and with greater frequency than they would have otherwise and consequently incurred significant health problems.

As discussed in greater detail below, the plaintiffs contended that in assessing an ad's deceptiveness, the

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<sup>77</sup>Amended Complaint at \*40.

court should not only consider whether the ad is deceptive in and of itself. Rather, the appropriate approach would be to assess whether the overall effect of these ads, viewed cumulatively, created a long-term deceptive impression that McDonald's products were healthier than in fact.<sup>78</sup> The plaintiffs claimed that whether or not specific ads were deceptive, the overall effect of McDonald's advertising campaign over the last fifteen years was to falsely promote its products as healthy, nutritious, and easily part of a balanced diet.

Next, the plaintiffs alleged McDonald's falsely advertised its products as healthier than in fact by failing to disclose the additional processing, preservatives, and additives in its products.<sup>79</sup> As in their voluntarily withdrawn tort claim, the plaintiffs alleged that McDonald's food is unhealthier than regular hamburgers, chicken nuggets, and French fries because of their additional processing and additives. Therefore, McDonald's falsely promoted its products in widespread advertising campaigns, promotions, and other statements by implying their foods are as healthy as the unprocessed foods they resemble.<sup>80</sup> As in their first claim, the plaintiffs asserted that had McDonald's disclosed the processing, preservatives and additives of its products, they would not have eaten as much and incurred their health problems.

Finally, the plaintiffs claimed that McDonald's violated New York's consumer fraud statutes "by specifically representing to the New York State Attorney General and New York State Consumers... that it provides nutritional brochures and information at all of stores, when in fact, such information was/is not adequately available as represented by the Defendant to the Plaintiff consumers."<sup>81</sup> In other words, McDonald's violated the consumer fraud statutes by promising to provide nutritional information in their stores and failing to do so. The plaintiffs again alleged that this failure to provide nutritional information caused them to

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<sup>78</sup>Plaintiffs' Memorandum of Law in Support of Partial Summary Judgment, and in Opposition to Defendant's Motion to Dismiss Complaint, 2003 WL 23474949 at \*13 (hereinafter "Plaintiffs' Memorandum of Law").

<sup>79</sup>Amended Complaint at \*27-28.

<sup>80</sup>Id. at \*13-14, \*27-28.

<sup>81</sup>Id at \*28-29.

purchased more of these products than they would have otherwise.

## **B.**

### **McDonald's Defenses.**

McDonald's defended against the plaintiffs' consumer fraud claims with four arguments. First, McDonald's argued that all the alleged misrepresentations fell outside the relevant statutes of limitations for any consumer fraud claims. Next, it argued that the plaintiffs had not alleged seeing, and therefore could not have been injured by, the supposedly deceptive ads and statements they list. In fact, McDonald's pointed out, some of the allegedly deceptive ads dated back to before the minor plaintiffs' births. McDonald's also asserted that contested representations were not objectively misleading or deceptive. Likewise, they asserted that the proper frame of reference in analyzing these representations was to view each one individually. If the ads were each non-deceptive individually, they could not create a deceptive or misleading impression when viewed collectively. Finally, McDonald's characterized a large portion of these representations as non-actionable puffery.<sup>82</sup> The details and merits of these arguments are discussed below, along with the district court's ultimate findings.

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<sup>82</sup>2003 WL 22052778 (S.D.N.Y.) at \*7. (hereinafter Pelman II.)

## V.

### **Second S.D.N.Y Court Opinion: September 3, 2003.**

In its second opinion, the district court again dismissed the plaintiffs' claims, this time with prejudice and without leave to amend. Rather than discuss each of the plaintiffs' claims serially, the court outlined common deficiencies to all three consumer fraud counts. Furthermore, the court discussed the proximate causation burden the plaintiffs bore in bringing their consumer fraud claims. Before outlining the requirements and deficiencies of the plaintiffs' claims, the court first addressed how the relevant statutes of limitations affected the adult and minor plaintiffs.

## A.

### **Statute of Limitations.**

To begin its opinion, the court assessed whether either the adult or infant plaintiffs were time barred from bringing their statutory consumer fraud claims. In agreement with McDonald's first argument, the district court noted that both §§349 and 350 had three-year statutes of limitations. Under those statutes of limitations, the court barred all the guardian parents' consumer fraud claims.<sup>83</sup> The court found that all the alleged misrepresentations were time barred because they had occurred more than three years before the adult plaintiffs' filed suit. The court then held that the statute of limitations was tolled for the infant

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<sup>83</sup>Pelman II, at \*7.

plaintiffs, and that their consumer fraud claims were admissible.<sup>84</sup>

Having eliminated all but the infant plaintiffs' consumer fraud claims, the court then proceeded to analyze which of the listed representations were actionable. This inquiry was a two-step process. First the court analyzed whether the plaintiffs needed to allege seeing the representations to bring a claim under either of the two consumer fraud statutes. After considerably narrowing the universe of representations it would consider, the court then evaluated these remaining ads to determine whether they were objectively misleading.

## B.

### **Which Ads Will the Court Consider: Must the Plaintiffs Allege Having Seen the Deceptive Ads.**

Before analyzing the merits of the plaintiffs' claims, that McDonald's falsely advertised the health content of its products, the court discussed whether a plaintiff needs to have seen a representation to bring a consumer fraud claim based on that representation. As mentioned above, among its several defenses, McDonald's pointed out that many of the allegedly deceptive ads dated to a time before the infant plaintiffs could read and, in some cases, before they were even born. Since the adult plaintiffs' claims were effectively time-barred by the statute of limitations, whether they had seen the ads was irrelevant. McDonald's argued, therefore, that if the minor plaintiffs did not see a representation, that representation could not have caused their injuries. McDonald's urged the court to disregard these representations, therefore, absent any possible cause-effect relationship between that representation and the minor plaintiffs' injuries.

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<sup>84</sup>Id. at \*6.

In response, the plaintiffs asserted that McDonald's focus on whether or not the plaintiffs viewed a specific ad or statement was misguided for several reasons. First, the plaintiffs argued,

the dispositive question for this Court to ask is not whether Ashley Pelman or any other named Plaintiff of Class member, viewed and specifically relied on [any individual ad]. The inquiry is whether the Plaintiff's reasonably believed the Defendants foods (hamburgers, fries, McNuggets, fish) were healthier than-in-fact, and whether said beliefs were due to a long-term deceptive campaign by Defendant of misrepresenting the nutritional benefits of their foods over the last approximate fifteen (15) years.<sup>85</sup>

In the plaintiffs' view, the issue of causation did not turn on the narrow question of whether each plaintiff saw each of the allegedly deceptive ads. Rather, the plaintiffs contended that all the deceptive ads, taken as a whole, created the necessary causal relationship between McDonald's false advertising and the plaintiffs' injuries. Because of all those ads, over the last fifteen years, the plaintiffs developed and held false ideas as to the health value of McDonald's products. Asking each plaintiff to verify when and where they had seen each of the more than three dozen allegedly deceptive ads would be both cumbersome and beside the point, since it was all these ads, cumulatively, that formed the plaintiffs' false opinions of McDonald's products.<sup>86</sup>

The plaintiffs also asserted another interesting argument for why they did not need to allege specifically seeing the false ads. They argued that §349 does not require that a plaintiff have directly seen a defendant's misrepresentations to allege it caused his injuries.<sup>87</sup> Rather, a misrepresentation made to the public at large may give rise to a claim so long as the plaintiff was part of the intended audience of that misrepresentation. To bolster this conception of §349's requirements, the plaintiffs cited to the Restatement (Second) of Torts §533,

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<sup>86</sup>Id. at \*21.

<sup>87</sup>Id. at \*24. They did not, however, make the same argument for §350, which they acknowledged had a more stringent 'reliance' requirement.



which states “[the] maker of a fraudulent misrepresentation is subject to liability... if the misrepresentation, although not made directly to the [plaintiff], is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct.”<sup>88</sup>

In other words, the plaintiffs contended that McDonald’s would still be liable to them, even if they had not personally seen the false ads, by making the misrepresentations to the public at large. By making those public misrepresentations, McDonald’s reasonably expected that third parties would repeat those misrepresentations and the plaintiffs’ conduct would thus be influenced. Finally, the plaintiffs also argued that they didn’t need to show these ads were objectively misleading. Rather, they only needed to allege that McDonald’s engaged in a deceptive scheme and describe that scheme. In arguing as much, the plaintiffs relied extensively on a California decision stating that California’s consumer fraud statute did not require objectively misleading advertisements to base a claim.<sup>89</sup>

In sorting out these different arguments about whether the plaintiffs needed to have seen the ads, the court reached similar conclusions for both consumer fraud statutes. The court recognized that under §349, prohibiting deceptive acts and practices, the plaintiffs did not need to allege ‘reliance’ on the alleged misrepresentations. Whether that meant they didn’t need to allege seeing the ads as well is discussed below. To press claims under §350, prohibiting false advertising, however, the court held that the plaintiffs needed to allege having seen and having relied on the advertisements. Having thus laid out the slightly different requirements for §349 and §350 claims, the court then analyzed which of the plaintiffs’ claims survived under either statute.

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<sup>88</sup>Plaintiffs’ Memorandum of Law at \*24 (citing *Varwig v. Anderson-Behel Porsche/Audi, inc.*, 74 Cal.App.3d 578, 581; *Committee On Children’s Television, inc. v. General Foods Corp., et al.*, 35 Cal. 3d 197 (1983)).

<sup>89</sup>*Id.* (citing *Committee On Children’s Television*, 35 Cal. 3d 197 (1983)).

C.

### **New York General Business Law §350: False Advertising.**

Of the more than three dozen allegedly false statements or advertisements the plaintiff listed in their Amended Complaint and exhibits, the court found that they only alleged being aware of a single allegedly false advertising campaign. Because they had not alleged being aware of any of the other listed ads, they could not allege having relied on those ads and therefore, those other ads could not be the basis of a §350 claim. As such, the court would not consider the deceptiveness of those other ads for purposes of §350. The single instance of allegedly false advertising of which the plaintiffs alleged being aware were McDonald's announcements that it was switching to 100% vegetable oil to cook its French fries and hash browns.<sup>90</sup> As such, the court analyzed whether the plaintiffs could bring a viable §350 claim based on this alleged misrepresentation.

Ultimately the court found two problems with this even this limited §350 claim. First, the court held that the plaintiffs had not sufficiently shown that McDonald's proximately caused their injuries.<sup>91</sup> Second, and specific to the 100% vegetable oil representations, the court held, as a factual matter, that McDonald's representations about its French fries and hash browns were not objectively misleading.<sup>92</sup> In so holding, the court rejected the plaintiffs various arguments as to why this campaign was false or misleading.

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<sup>90</sup>Pelman II. at \*9.

<sup>91</sup>This deficiency, common to the plaintiffs' §349 claims as well, is more fully addressed in subsection (e) below.

<sup>92</sup>Pelman II. at \*12.

1.

**French Fries and Hash Brown Campaign Objectively Non-Misleading.**

The plaintiffs alleged McDonald's 100% vegetable oil advertising campaign was deceptive for two reasons. First, by falsely claiming a switch to 100% vegetable oil McDonald's falsely implied there was no cholesterol in the fries. The plaintiffs argued that undisclosed beef flavoring and tallow in the French fries contain some cholesterol, and therefore the 100% vegetable oil claim was misleading. The court disagreed, however, noting that the referenced advertisements stated that McDonald's lowered the French fries' cholesterol content to 9 mg, not that it had eliminated it all. Furthermore, the plaintiffs made no allegations that McDonald's fries contained any more cholesterol than that properly disclosed amount.

The plaintiffs made a second, more interesting argument about the deceptiveness of this advertising campaign. The plaintiffs argued that the 100% vegetable oil claim falsely concealed another ingredient, which has the effect of raising consumers' blood cholesterol levels. Specifically, the plaintiffs claimed,

Defendant's [French fries representations] are also deceptive because they are cooked and processed with partially hydrogenated [oils], all found to significantly increase detrimental cholesterol, and a major contributor to coronary heart disease.<sup>93</sup>

In explaining how this constituted false advertising, the plaintiffs rhetorically asked, "Where is the accuracy in advertising healthy and cholesterol-free French fries when such products are highly processed with partially hydrogenated oils likely increasing heart disease?"<sup>94</sup> The plaintiffs essentially argued that McDonald's engaged in false advertising by stating that its French fries were now lower in saturated fat and choles-

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<sup>94</sup>Id.

terol without also revealing that they are cooked in partially hydrogenated oil, which causes other health problems. Furthermore, although McDonald's touted the lower cholesterol content of its fries, it omitted disclosing that partially hydrogenated oils lower a person's 'good cholesterol' levels and therefore adversely affect one's blood cholesterol levels. Without this essential disclosure, touting the French fries' lower cholesterol content amounted to false advertising.

The court dismissed this allegation by sharply differentiating between a food's contents or ingredients and its effects on a person's body. The court reasoned that McDonald's made claims about the contents of its French fries; it did not make any claims as to the fries' effects on a person's cholesterol levels. Listing other common food representations, the court stated, "[a] person can become 'fat' from eating 'fat-free' foods, and a person's blood sugar level can increase from eating 'sugar-free' foods."<sup>95</sup> Accurately representing a food's nutritional content did not require further disclosure as to that food's effect on the human body. Therefore, McDonald's representations regarding the cholesterol levels of its French fries were objectively non-misleading and non-actionable under §350. The court then analyzed the plaintiffs' claims under New York's other consumer fraud statute, §349.

**D.**

### **New York General Business Law §349: Deceptive Business Practices.**

In evaluating the plaintiffs' §349 claims, the court again needed to decide which ads or statements it would consider. Unlike §350, a §349 claim did not require that a plaintiff allege reliance upon the contested representation. McDonald's argued that the plaintiffs' §349 claims should still be limited to only ads the

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<sup>95</sup>Pelman II, at \*13.

plaintiffs alleged seeing. The plaintiffs, in response, argued that since reliance was not a requirement for §349, as it was under §350, they did not need to allege seeing the ads in question. The court agreed with the plaintiffs that a claim under §349 did not require that they allege reliance on the contested representations. This legal conclusion, however, did not help the plaintiffs because the court further noted,

[t]he absence of a reliance requirement does not, however, dispense with the need to allege some kind of connection between the allegedly deceptive practice and the plaintiffs' injuries... Excusing the reliance requirement only allows the plaintiff to forgo the heightened pleading burden that is necessary for common law fraud claims. It cannot, however, create a causal connection between a deceptive practice and a plaintiff's injury where none has been alleged.<sup>96</sup>

In other words, while the court agreed that the plaintiffs did not need to plead reliance, it held they needed to show some causal link between McDonald's deceptive acts and their injuries. Without alleging that they were aware of McDonald's deceptive practices, they could not claim those practices caused their injuries. It is worthwhile to note the subtle differences between reliance and causation requirements. Where a consumer claims a business committed a deceptive practice (such as making a misleading statement) that injured him, the consumer is spared the burden of proving he *relied* on that specific deceptive statement. He is not required to show that absent that specific misrepresentation he would have acted otherwise. But, he must nevertheless still show a causal link between the deceptive statement and his injury. He can show that causal link by alleging that he heard or was aware of that deceptive statement. Once he makes that allegation, the court will not inquire into his state of mind to decide whether he also relied on the statement he admittedly heard.

Applying these concepts to the case at hand, the court made the following legal determinations. The court held that if the plaintiffs alleged being aware of McDonald's misrepresentations, it would not inquire into their states of mind, but would assume they had relied on those representations in making their consumption choices. McDonald's could not defend against the plaintiffs' claims by arguing that the plaintiffs would have nevertheless purchased its products in the absence of those misrepresentations. If, however, the plaintiffs were simply unaware of McDonald's misrepresentations at the time they incurred their injuries, McDonald's could fully defend against any misrepresentation claims by pointing out the absence of any causal link between the plaintiffs' injuries and its representations. This latter argument is not an argument that the plaintiffs did not rely on misrepresentations of which they were aware; it is an argument that the misrepresentations could not have *caused* the injury because they were unaware of them.

As such, the court still limited the plaintiffs' §349 claims to the 100% vegetable oil French fries and hash brown misrepresentations. The court ignored the other allegedly false ads because the plaintiffs did not allege seeing them, and as such, there was no way those ads could have caused their injuries. In making this legal determination, the court rejected the plaintiffs' 'cumulative effect' argument. As noted above, the plaintiffs argued that all these false advertisements shaped the public's perception of McDonald's products and as a result, they falsely believed these products to be healthier whether or not they saw the representations in question.<sup>97</sup> In this way, the plaintiffs argued there existed a causal relationship between the allegedly deceptive representations and their injuries. The court however implicitly rejected the sufficiency of this causal link, stating, "[i]f a plaintiff had never seen a particular advertisement, she could obviously not allege that her injuries were suffered 'as a result' of that advertisement."<sup>98</sup>

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<sup>97</sup>Plaintiffs' Memorandum of Law at \*24.

<sup>98</sup>Pelman II, at \*10.

**E.**

**Proximate Causation.**

Since the court concluded that none of the alleged misrepresentations it would consider were misleading, it could have bypassed any inquiry into the plaintiffs' proximate cause requirement. Nevertheless, it undertook this inquiry and determined that the plaintiffs failed to carry their burden of proof. The court first noted that the proximate cause burden for consumer fraud claims was looser and less demanding than the comparable standard for tort claims. In a statutory consumer fraud claim, the court stated "[c]ausation is thus more broadly construed to carry out the state policy against fraud on consumers."<sup>99</sup>

Applying this less demanding standard of proximate cause, the court held that the plaintiffs failed to draw an adequate causal relationship between their consumption of McDonald's products and their injuries.<sup>100</sup> In making this finding, the court assumed, for the sake of argument, that McDonald's French fries and hash brown representations were misleading and that the plaintiffs would not have eaten as much otherwise. Despite these assumptions, the court held that the plaintiffs had not adequately alleged that eating those products proximately caused their obesity and related injuries. To meet their proximate cause burden, the plaintiffs needed to do more than allege they had eaten the misrepresented products. Instead, the court laid

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<sup>99</sup>*Id.* at \*9.

<sup>100</sup>*Id.* at \*11.

out several interconnected issues they should have addressed, and held that without addressing these issues, they could not adequately plead that McDonald's proximately caused their injuries.

First, the court required that the plaintiffs allege they had eaten at McDonald's with enough frequency to raise a question of fact over whether McDonald's could have caused their obesity. The plaintiffs addressed that issue by pleading that both teenage plaintiffs had eaten at McDonald's at least several times per week over a period of years.<sup>101</sup> Apart from that allegation, however, the plaintiffs failed to address other issues the court deemed necessary to any determination that McDonald's could have proximately caused their injuries.

Chief among those unaddressed issues was whether a number of other factors besides McDonald's products could have caused or significantly contributed to their obesity. The court stated "the Complaint *must* address these other variables and, if possible, eliminate them or show that a McDiet is a substantial factor despite these other variables."<sup>102</sup> As listed by the court, some of these other variables included "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?"<sup>103</sup> Without addressing these other factors, the plaintiffs could not adequately allege that McDonald's proximately caused their injuries. Since the plaintiff did not address, let alone dismiss or discount these factors, the court determined they had not adequately alleged McDonald's proximately caused their injuries. The court emphasized that without this additional information, McDonald's had no way of determining whether its products were a significant factor in causing the plaintiffs' obesity.<sup>104</sup>

The plaintiffs attempted to avoid these extensive pleading requirements by alleging a modified form of the 'thin skull' doctrine. The 'thin skull' doctrine is a widely accepted tort concept that states that if a defendant

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<sup>101</sup> Amended Complaint at \*5-8.

<sup>102</sup> Pelman II, at \*10.

<sup>103</sup> Id. at \*11.

<sup>104</sup> Id.



injures a plaintiff, he is liable for the full extent of the injuries he causes, even if the extent of the plaintiff's injury is partly (or mostly) attributable to that plaintiff's unique susceptibilities. If a defendant happens to lightly assault a plaintiff with a 'thin skull,' he is liable for the massive injury that occurs, despite the fact that only a lesser injury (or none at all) would occur to a normal plaintiff.<sup>105</sup> The plaintiffs in this case sought to avoid questions about what else they ate, how much they exercised, their family history of obesity and the like, by asserting that McDonald's had to accept its consumers as they found them, even with a 'thin skull.' By that, the plaintiffs meant that McDonald's remains liable for a plaintiff's obesity and other health problems, even where that plaintiff is particularly susceptible to obesity or those related health problems.

The court rejected this application of the 'thin skull' doctrine, noting that the doctrine is meant to make defendants liable for the full extent of injuries they cause, not to create liability for injuries they may not have caused. In other words, the 'thin skull' doctrine only comes into play where a defendant had caused the injury, but alleges that the scope or extent of the injury caused is due to the plaintiff's particular susceptibility. In this case, however, the central issue is whether McDonald's caused the plaintiffs' injuries, not to what extent it should be liable for injuries it caused, but whose scope it could not have foreseen.<sup>106</sup> Rejecting this 'thin skull' argument, the court held that the plaintiffs had not adequately pled McDonald's proximately caused their injuries because the Amended Complaint failed to address other factors that could have caused their obesity. Without any factual allegations discounting the effect of these other factors, the court held the plaintiffs inadequately alleged proximate causation.

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<sup>105</sup> See generally W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* §43, at 292 (5th ed. 1984 & Supp.1988)

<sup>106</sup> Pelman II, at \*12.

**F.**

**Pelman II: Summary of Legal Holdings.**

Having thus dismissed all the plaintiffs' claims for both lack of proximate cause and because the allegedly deceptive ads were not misleading, the court then denied the plaintiffs leave to amend their complaint a second time. The court noted it had already laid out the specific allegations a viable complaint would need and refused to give the plaintiffs yet another chance to amend their complaint. Moreover, since the plaintiffs' complaint had two fairly large deficiencies, the court determined that another leave to amend would be futile. First, the court held that the only representations that the plaintiffs alleged being aware of were objectively non-misleading. The court refused to consider many other representations because the plaintiffs had not alleged seeing those representations. Additionally, the court held that the plaintiffs failed to adequately allege proximate causation because they did not address and discount the many other factors that could have led to their obesity. Without addressing those other factors, they could not assert that McDonald's proximately caused their obesity and related health problems. After this final dismissal, the plaintiffs appealed to the Second Circuit.

## VI.

### On Appeal: Appellate Briefs and the Second Circuit Ruling's.

#### A.

##### Plaintiffs' Appellate Brief.

On appeal, the plaintiff-appellants highlighted five issues it asserted were wrongly decided by the district court. Before addressing those specific points, a preliminary note is in order. Starting with the Preliminary Statement of their Appellate Brief and throughout the brief, the plaintiffs pursued an interest shift in strategy. While their earlier Complaint, Amended Complaint, and several opposition briefs and memos argued that McDonald's was liable for products liability, failure to warn, and several consumer fraud violations, their Appellate Brief focused almost exclusively on a much narrower consumer fraud allegation. In fact, the appellate-plaintiffs began their brief by stating,

the Appellant's action is not based upon the products of the Defendant, but rather, is premised upon the deceptive manner in which the Appellee marketed and advertised its products to New York State consumers in misleading nutritional schemes.<sup>107</sup>

In their brief, the plaintiffs refine this false advertising claim further, stating that McDonald's violated §349 because it "chose to engage in nutritional campaigns and afford nutritional advice to its consumers" and therefore "must do so in a truthful manner."<sup>108</sup> Unlike earlier tort or consumer fraud-based arguments that

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<sup>108</sup>Id at \*13; See also at \*20 (plaintiffs stating "because this Defendant chose to highlight supposed "pros" of its foods it assumed the duty to advise of the "cons" of said foods).

McDonald's had a duty to warn of its products' processed and unhealthy nutritional content and ingredients, the plaintiffs now argued that McDonald's assumed that duty by voluntarily deciding to advertise about its products' health value or ingredients. A prime example of this assumed duty, the plaintiffs argued, was McDonald's selective disclosure of its switch to vegetable oil for its French fries but its omission of material information regarding those fries.<sup>109</sup> The plaintiffs therefore presented a more narrowly crafted consumer fraud claim on appeal than in the district court. Apart from narrowing their consumer fraud claim, they also appealed five of the district court's separate rulings.

1.

#### **Reliance Requirement for §349 Claims.**

To begin, the plaintiffs argued that the district court improperly required them to plead reliance on an ad before considering that ad for purposes of §349. They argued that, unlike a §350 claim, a §349 claim did not require any allegations of reliance.<sup>110</sup> As such, the district wrongly required a showing of reliance and improperly ignored the other allegedly deceptive ads the plaintiffs had listed. Rather than only consider the 100% vegetable oil French fries representations, the district court should have considered the more than three-dozen other representations they listed.<sup>111</sup> The plaintiffs reiterated that under §349, the dispositive question is “whether a reasonable consumer plaintiff would have been misled” by a defendant's misrepresentations, not whether the plaintiff actually relied on the misrepresentation.<sup>112</sup>

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<sup>109</sup>Id at \*27. (stating “these [French fries related] statements are misleading because they failed, while stressing illusory benefits, to advise that such fries other content: beef, hydrogenated oils and sodium likely increase the risk of [various diseases]”)

<sup>110</sup>Id at \*14-16.

<sup>111</sup>Id. at \*16.

<sup>112</sup>Id. at \*15-16.

2.

**Heightened Pleading Requirement for §349 Claims.**

Next, the plaintiffs argued the district court improperly subjected their claims to a “heightened” pleading standard by refusing to consider two additional potentially misleading ad campaigns. The plaintiffs argued that the district court wrongly ignored the deceptiveness of two ad campaigns simply because the words “upon information and belief” preceded their allegation that they were aware of the ads.<sup>113</sup> As discussed above, the district court determined that to pursue either a §349 or §350 claim, the plaintiffs’ needed to allege being aware of the misrepresentations. Since the plaintiffs only alleged being aware of these two advertisements “upon information and belief,” the court refused to consider those ads for the plaintiffs’ §349 or §350 claims. The court stated that because the details of the plaintiffs’ awareness of McDonald’s misrepresentations were uniquely within their knowledge, allegations made upon information and belief were insufficient to support a claim under either consumer fraud statute.<sup>114</sup> The plaintiffs argued that “upon information and belief” was mere verbiage and the district court should have considered these additional representations since the plaintiffs did allege seeing them.<sup>115</sup>

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<sup>113</sup>Id.

<sup>114</sup>Pelman II, at \*8.

<sup>115</sup>Brief for Plaintiff-Appellants at \*17.

3.

**Heightened Pleading Requirement for Proximate Cause Allegations for §349 Claims.**

Likewise, the plaintiffs argued that the district court imposed a “heightened” pleading standard as to their proximate cause burden. The plaintiffs contended that the proximate causation standard was met by alleging they ate at McDonald’s with significant frequency and would not have eaten as there as frequently or voluminously had McDonald’s fairly represented its products. Whether their obesity and other health problem were the result of non-McDonald’s factors (such as other restaurants or a lack of exercise) should await full discovery and should be McDonald’s burden to prove.<sup>116</sup> Analogizing this suit to lead poisoning, smoking, asthma, silicosis, and asbestosis suits, the plaintiffs argued that once they have alleged and identified the source of their injuries, it is the defendant’s burden to rebut that source by pointing to mitigating or superceding causes.<sup>117</sup> In any case, this inquiry into proximate cause should await fuller discovery.

4.

**Economic Injury and French Fries Claims.**

After listing these three significant issues, the plaintiffs added two smaller objections to the district court’s rulings. First, the plaintiffs argued that the district court should have addressed their “economic and statutory injuries” even if they failed to meet the proximate cause standard for their “physical” injuries. By this, the plaintiffs meant that even if they could not show McDonald’s caused their physical injuries, they

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<sup>116</sup>Id. at \*21

<sup>117</sup>Id at \*22.

had still clearly alleged that they spent money on McDonald's products. Since McDonald's misrepresented those products, they were entitled to reimbursement for monies spent. As such, the district court erred in only considering their physical injuries because the consumer fraud statutes protect consumers from strictly economic harms as well.<sup>118</sup> Finally, they argued that the district court's factual finding that McDonald's French fries ads were objectively non-misleading was erroneous. The plaintiffs asserted these ads were misleading for failing to disclose the fries' beef flavoring and tallow content and because they omitted material facts about the fries, such as the use of partially hydrogenated oils.<sup>119</sup>

## **B.**

### **McDonald's Appellate Brief.**

McDonald's responded to the plaintiffs appeal with several counterarguments. First, McDonald's rejected the notion that the district court imposed any heightened pleading requirements on the plaintiffs. Instead the district court required the plaintiffs to allege the basic elements of any consumer fraud claim, including causation and injury. McDonald's also emphasized that the plaintiffs failed to allege being aware of almost all the alleged misrepresentations, a requirement under both §349 and §350.<sup>120</sup> Additionally, McDonald's dismissed the plaintiffs' argument that ads could create an overall false or misleading impression if the ads were not deceptive in and of themselves.<sup>121</sup> McDonald's emphasized that the district court rightly rejected such a view of §349 and §350 stating "[b]oth [statutes] focus on individual misrepresentations, not on amor-

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<sup>118</sup>Id at \*23.

<sup>119</sup>Id at \*24-26.

<sup>120</sup>Brief for Defendant-Appellee at \*15.

<sup>121</sup>Id at \*14.

phous schemes.”<sup>122</sup>

1.

**Plaintiffs’ Reliance Argument Is Inapposite.**

McDonald’s then countered the plaintiffs’ two separate causation arguments. Basically, the plaintiffs argued that the district court erred on two different causation points. First, they claimed the district court improperly required them to show reliance before allowing their §349 claims. By this, the plaintiffs mean they should not have been required to allege that they both saw the representations *and relied on them* to allege valid §349 claims. McDonald’s countered this argument by noting that, in fact, the plaintiffs’ §349 claims were not rejected for failure to allege reliance, but for failure to allege awareness of the ads. Specifically, McDonald’s argued “the District Court did not ask whether the plaintiffs relied on any statements or ads, or whether they believed or were actually misled by them.”<sup>123</sup> Rather, the district court required that the plaintiffs allege being aware of the ads to show “some kind of connection between the allegedly deceptive practice and the plaintiffs’ injuries.”<sup>124</sup> Without seeing the ads, the plaintiffs cannot allege those ads caused their injuries, notwithstanding the absence of any reliance requirement.

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<sup>122</sup>Id.

<sup>123</sup>Id at \*28.

<sup>124</sup>Pelman II, at \*10.



2.

**Plaintiffs Bear a Duty to Show Adequate Proximate Cause.**

McDonald's also addressed the plaintiffs' second causation argument, regarding the district court's proximate causation determinations. As noted above, the plaintiffs argued that McDonald's bore the burden of proving non-McDonald's factors caused their obesity. At the very least, they also contended that such a determination should await a fuller discovery stage. McDonald's responded with several counterarguments. First, it argued that under New York law's long-standing conception of proximate cause the plaintiffs were required to allege enough information to raise a question as to whether McDonald's was a substantial factor in their injuries. Citing Professor Prosser and several New York decisions, McDonald's argued that the plaintiffs could not show proximate cause if their injuries might have occurred regardless of McDonald's actions.<sup>125</sup> Since both the plaintiffs and the district court recognized that obesity is a complex, multi-factor condition, the plaintiffs had to address and minimize those other factors before it could accuse McDonald's. The plaintiffs shirked that responsibility and could not appeal the district court's dismissal given the ample warning they had received. Furthermore, McDonald's meticulously dissected all the different assumptions and factors the plaintiffs needed to address to connect their obesity to McDonald's products. Succinctly, McDonald's laid out all those necessary steps and stated,

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<sup>125</sup>Id at \*20.

McDonald's food is only one component of any person's diet, overall diet is only one of the many factors that influence weight, and weight is only one of many potential risk factors associated with some diseases. Even if a person chose to eat half her weekly meals at McDonald's, the many other factors within the person's control, those left up to the parents, and those inherent in his or her makeup play too significant and interrelated a role in a person's weight and susceptibility to disease to allow a court to conclude that the food eaten at one restaurant was the proximate cause of the person's obesity.<sup>126</sup>

McDonald's therefore argued that the plaintiffs could not, as a matter of law, show proximate cause. As McDonald's put it, "the waters of causation are irretrievably muddied by the multifactorial nature of obesity."<sup>127</sup>

In making these proximate cause arguments, McDonald's also emphasized the notions of personal responsibility associated with obesity. For example, McDonald's pointed out that, unlike other injuries, obesity is not an overnight occurrence that strikes with no warning. Unlike an ordinary tort victim, an obese person is confronted with a series of choices everyday to combat obesity. Given each plaintiff's extensive personal control over many of these factors, McDonald's concluded "[t]hese are issues of personal responsibility, not corporate liability."<sup>128</sup> To underscore these proximate cause arguments, McDonald's also questioned how the plaintiffs could have decide that only it was responsible for their obesity, when months before filing their Complaint in this case, they had filed (but not served) a similar suit against McDonald's, Wendy's, Kentucky Fried Chicken, and Burger King.<sup>129</sup>

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<sup>127</sup>Id.

<sup>128</sup>Id at \*22.

<sup>129</sup>Id at \*21.

### 3.

#### **Economic Injury and French Fries Claims.**

After devoting much of its brief to the above three issues, McDonald's summarily countered the plaintiffs' smaller contested issues on appeal. One of these final issues was the plaintiffs' argument that the district court erroneously denied their economic or 'out of pocket' loss under the consumer fraud statutes, regardless of the merits of their physical injury claims. In countering, McDonald's stressed that one of the reasons the district court dismissed the plaintiffs claims was that they had "never seen the alleged misrepresentations at issue and therefore were not injured "by reason of" any violation of §349."<sup>130</sup> Without seeing the alleged misrepresentations, they could not have incurred any injury, physical or monetary. As such, the district court did not ignore the possibility of economic losses, but determined the plaintiffs had suffered no injury at all, physical or economic.

Finally, McDonald's defended against the plaintiffs' appeal to reinstate the French fries and hash brown claims. First, McDonald's repeated the district court's finding that the ads were not objectively misleading. As the district court found, McDonald's cholesterol disclosures were regulated by the FDA and were entirely accurate and appropriate under the FDA's regulations.<sup>131</sup> Second, McDonald's rejected the plaintiffs' other argument that omitting information about the trans fatty acids in McDonald's fries was deceptive because of the effect of such trans fatty acids on a person's blood cholesterol level. Reiterating the district court's legal conclusion, McDonald's maintained that "[t]he contents of food and the effects of food are entirely different things," and McDonald's made no claims as to the effect of its fries on a person's blood cholesterol levels.<sup>132</sup>

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<sup>130</sup>Id at \*28.

<sup>131</sup>Id at \*18.

<sup>132</sup>Id.

C.

### Second Circuit Ruling.

On January 25, 2005, the Second Circuit issued an opinion reinstating some of the Pelman plaintiffs' claims.<sup>133</sup> The circuit court's short opinion is interesting less for its explicit holdings than for the contested issues it sidesteps. As evidenced from the appellate briefs, the parties vigorously contested three general issues. First, the parties contested whether §349 required that the plaintiffs allege having viewed the representations at issue. Next, the parties argued lengthily about the appropriate proximate causation standard. What must the plaintiffs allege? Who bears the burden of discounting the effects of other factors on the plaintiffs' obesity and other injuries? At what stage in the proceedings should these factual issues relating to proximate cause question be litigated? Finally, the parties argued the partly factual, partly legal question of whether McDonald's representations about their cholesterol content of its French fries were accurate. The essential legal question within this issue was whether McDonald's needed to disclose the trans fatty acids in their French fries. Demarcating the line between a food's contents and its effect on the human body, the district court answered the above question negatively.

Before discussing the district court's holdings, the Second Circuit outlined which of the plaintiffs' claims were on appeal. Because the plaintiffs had not appealed the district court's dismissal of their §350 claims, the Second Circuit considered any challenges to that dismissal abandoned.<sup>134</sup> As such, the Second Circuit considered three claims on appeal, each alleging a cause of action under §349. Those claims were as follows: Count I alleged that "the combined effect of McDonald's various promotional representations. . . was to create the false impression that its food products were nutritionally beneficial and part of a healthy lifestyle if

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<sup>133</sup>Pelman v. McDonald's 396 F. 3d 508 (2<sup>nd</sup> Cir. 2005) (hereinafter "Pelman III.")

<sup>134</sup>Id. at 511.

consumed daily.”<sup>135</sup> Count II alleged McDonald’s failed to disclose its use of additives and how it processes its products. Count III alleged that McDonald’s falsely promoted the availability of nutritional information in its store when such information was not readily available.<sup>136</sup>

1.

**Appropriate Pleading Standard for §349 Claims.**

After listing these three claims, the Second Circuit laid out the pleading standard for §349 claims. The circuit court held that since a §349 claim does not require proof of the same elements as a common-law fraud claim, it has a lower pleading standard. Specifically, while a common-law fraud claim is subject to Federal Rules of Civil Procedure Rule 9(b)’s pleading-with-particularity requirements, a §349 claim need only meet the bare-bones notice-pleading requirements of Rule 8(a).<sup>137</sup> Under that less demanding pleading standard, the Second Circuit held that information about the rest of the plaintiffs’ diet, exercise habits, family history of obesity and the like,

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<sup>135</sup>Id. at 510.

<sup>136</sup>Id.

<sup>137</sup>Id. at 511.

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). . . This simplified notice pleading standard [of Rule 8(a)] relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. . . So far as the §349 claims are concerned, the amended complaint more than meets the requirements of Rule 8(a).<sup>138</sup> (internal citations omitted)

Holding that §349 claims only require a bare-bones notice-pleading standard under Rule 8(a), the Second Circuit determined that the plaintiffs' Amended Complaint met that standard. According to the Second Circuit, the plaintiffs' Amended Complaint alleged the following: (1) McDonald's misrepresented its products' health value and the plaintiffs were led to believe those products were healthier than in fact, (2) the plaintiffs ate at McDonald's with significant weekly frequency, and (3) as a result, they suffered obesity and other injuries.<sup>139</sup> The circuit court held that such allegations met the simple pleading requirements of Rule 8(a). The Second Circuit concluded, therefore, that the factual issues surrounding the proximate cause determination should be examined at a later stage. This ruling is the exclusive basis for vacating the district court's dismissal of the §349 claims.

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<sup>139</sup>Id. at 510.

2.

### **Unaddressed Questions in the Second Circuit's Ruling.**

Interestingly, the Second Circuit never addressed the district court's second grounds for dismissing the §349 claims; that the plaintiffs only saw one representation (the French fries campaign), and that this representation was objectively non-misleading. The district court did not consider the other allegedly deceptive ads because the plaintiffs failed to allege ever seeing them.<sup>140</sup> The Second Circuit, however, avoided any discussion of that district court holding. Instead, in a final footnote to its opinion, the Second Circuit wrote,

[a]s for the district court's finding that McDonald's representations regarding its French fries and hash browns were objectively non-misleading, the §349 claims are not subject to dismissal on that basis given that the amended complaint alleges the deceptiveness of many other representations.<sup>141</sup>

The district court, however, never addressed those other representations because it ruled they were immaterial, since the plaintiffs did not allege ever seeing them.

The Second Circuit indirectly addressed this seeming conflict in another ruling. In this same footnote, the Second Circuit stated that the plaintiffs should be given a chance to cure deficiencies in their §349 allegations. As noted above, the parties contested whether McDonald's could be liable under §349 for a long-term scheme to misrepresent its products, even if individual representations did not arise to level of deceptiveness. The district court sided with McDonald's, holding that consumer fraud allegations under either provision must point to specific deceptive representations, and an amorphous long-term deceptive

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<sup>140</sup>Pelman II, at \*10.

scheme is not actionable absent specific deceptive representations.<sup>142</sup> Unlike California’s consumer fraud statute, New York’s consumer fraud statute utilized an objective standard of deceptiveness, requiring the plaintiffs to list specific, deceptive representations.<sup>143</sup> The district court therefore refused to consider whether the general impression created by individually non-deceptive ads was nevertheless deceptive. In reviewing this district court ruling, the Second Circuit stated the following:

[a]lthough the district court also dismissed the §349 claims on the ground that plaintiffs’ allegations of a generalized campaign to create a false impression were vague and conclusory (citations omitted), the cure for such deficiencies, in a claim not required to be plead with particularity, is a motion for a more definite statement under Rule 12(e), rather than dismissal.<sup>144</sup>

In other words, the Second Circuit held that the plaintiffs could not allege a “generalized campaign to create a false impression,” but held that, under the bare-bones pleading standard, such deficiency should be cured rather than dismissing the Complaint. Since the Second Circuit allowed the plaintiffs to cure their Complaint of one deficiency, it seems likely the Second Circuit anticipates that the plaintiffs will also properly allege seeing any representations they contest. Once the plaintiffs are given leave to cure one deficiency, they can also cure another deficiency: failing to allege seeing contested representations.

This conclusion is buttressed by the Second Circuit’s ruling regarding the 100% vegetable oil French fries representations. The Second Circuit does not overrule the district court’s determination that the French fries and hash brown representations were objectively non-misleading. That plaintiffs’ appellate claim is rejected.

As such, the Second Circuit implicitly allows the plaintiffs to amend their Complaint to allege seeing the

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<sup>142</sup>Pelman I. at 527.  
<sup>143</sup>Pelman II. at \*10.



other representations at issue. If the plaintiffs do not allege seeing those representations, the district court will again dismiss their Complaint. As the district court held in its second opinion – a ruling the Second Circuit leaves undisturbed – the plaintiffs cannot bring a §349 claim if they have not seen the representation at issue.<sup>145</sup>

### 3.

#### **Pelman Future Complaint.**

Given the Second Circuit’s rulings, the plaintiffs’ next complaint can be expected to have at least the following features. First, the plaintiffs will allege seeing any of the representations they claim are deceptive. Therefore, rather than simply listing dozens of alleged misrepresentations over the last fifteen years, only representations which the minor plaintiffs were aware of will be listed. To adequately allege being aware of these representations, the plaintiffs do not need to specify exactly when they saw each representation, rather they need only “allege in general terms that [they] were aware of the false advertisement.”<sup>146</sup> This requirement will clearly shorten the list of representations that allegedly violate Section 349. For example, the New York Attorney General letters in which McDonald’s agrees to provide nutritional information at its stores will be excluded, given the near certainty that the minor plaintiffs were not aware of those letters. Likewise, representations that predate a time before the minors could read will also be excluded. Additionally, any representations made in a medium or geographical area inaccessible to the minor plaintiffs, such as on the internet or in a foreign country, will also be excluded.

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<sup>145</sup>Pelman II, at \*10.

<sup>146</sup>Pelman II, at \*8.

Moreover, the Pelman Complaint will also ignore the additional proximate cause factors the district court had originally required. Because of the Second Circuit's ruling that they need only meet a bare-bones pleading standard, the plaintiffs will postpone any proximate cause determinations to later discovery stages. Since the Second Circuit did not rule that such a fact-specific proximate cause determination is unnecessary, however, the plaintiffs will need to meet this proximate cause standard at a later stage. Finally, since the plaintiffs' waived any arguments to the dismissal of their §350 claims or the dismissal of the adult plaintiffs, those claims will be barred. As such, the plaintiffs' Complaint will only pursue a §349 cause of action for the minor plaintiffs, based only on the much number of representations they minors have seen.

## **VII.**

### **Evolution (Diminution) of Plaintiffs' Claims.**

The Pelman plaintiffs, currently in front of the Southern District of New York for the third time, are now alleging a much more modest claim than they did in their original Complaint. Because they were pursuing a novel lawsuit, the Pelman's initial Complaint alleged a wide variety of common-law tort and statutory consumer fraud claims. Moreover, both the consumer fraud and tort claims alleged that McDonald's misrepresented its products affirmatively, by omission, and by creating an amorphous, long-term misconception of the healthiness of its food. Additionally, the tort claims were premised on several theories including products liability, failure to warn of latent defects, inherently dangerous product doctrine, food allergy doctrine, and an interesting food alteration / processing argument. Moreover, both the adult and minor plaintiffs pressed all these claims.

In contrast, the plaintiffs are currently pursuing only their consumer fraud claims. Since these are the only claims now being alleged, the adult plaintiffs have been dismissed entirely from this suit because their consumer fraud statutes of limitations have elapsed.<sup>147</sup> In abandoning all their tort claims, however, the Pelman plaintiffs lost more than just the presence of adult plaintiffs. Rather, they abandoned one of the claims that the district court considered promising and which could have provided the necessary duty to warn customers for McDonald's. This abandoned claim was that McDonald's processed its foods to such an extent as to create a more dangerous product or latent dangers and that McDonald's had an ensuing duty to warn its consumers of this more dangerous product.

## A.

### **Abandoned Tort Claim Revisited.**

Unlike the other tort claims, which failed because liability could not attach where a product's dangers were common knowledge, this food alteration claim pointed to a latent danger that was not within the public's common knowledge (i.e., that McDonald's processing rendered its products substantially less healthy than similar unprocessed foods).<sup>148</sup> The plaintiffs, however, abandoned this claim, presumably for two reasons. First, since this was a tort, not a consumer fraud claim, they faced a higher proximate cause standard. The plaintiffs sought to avoid an inquiry into their eating habits, family history of obesity and the like, by only alleging consumer fraud violations, which they claimed didn't require such inquiries to satisfy its proximate cause standard. Second, the plaintiffs still pursued this food alteration argument by co-opting it as an

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<sup>147</sup>Pelman II, at \*7.

<sup>148</sup>Pelman I, at 535.

additional premise for why McDonald's violated the consumer fraud statute. In other words, rather than pursue this claim as a stand alone tort, they alleged that McDonald's excessive processing or 'alteration' of its foods was another reason McDonald's violated the consumer fraud statutes.

For the plaintiffs to premise a consumer fraud claim on this food alteration argument, however, they will need to point to specific statements in which McDonald's represents that their foods are less processed than in reality. In fact, the plaintiffs offered several such representations in their Amended Complaint and opposition papers. For example, the plaintiffs cited ads in which McDonald's claimed, "We cook the way you do at home," "Good, basic nutritious food." and "Food that's been the foundation of well-balanced diets for generations."<sup>149</sup> To base a §349 claim on these statements, however, they must be objectively misleading and not mere 'product puffery.'<sup>150</sup> While the district court has yet to decide whether these particular statements are objectively misleading, it has already dismissed similar generalities by McDonald's as mere puffery and it seems likely that the above statements will likewise be dismissed as non-misleading product puffery.

As such, it appears that the plaintiffs' arguments that McDonald's misrepresented its overly processed products will not be a viable §349 claim. Had they pursued this argument in a tort claim, the mere absence of any information about these 'overly-processed' foods may have led to liability. By presenting this argument exclusively as a consumer fraud claim, however, the plaintiffs must now point to affirmative representations by McDonald's that misleads consumers about the processing and alteration of its products. Absent any such representations, silence about its processed foods will not expose McDonald's to consumer fraud liability. To date, the plaintiffs have failed to point to any such representations except for the general puffery statements listed above.

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<sup>149</sup>See e.g., Amended Complaint at \*12-13, Brief for Plaintiff-Appellants at \*7, and Plaintiffs' Reply Memo at \*4.

<sup>150</sup>Pelman I. at 528, 530.

## B.

### **Plaintiffs' Burdens In Pursuing Their Consumer Fraud Claims.**

The above discussion of the plaintiffs' abandoned tort claim highlights a strategic choice the plaintiffs made in pursuing their claims against McDonald's. To avoid the higher proximate cause requirement of tort claims, the plaintiffs voluntarily abandoned those claims and only followed up on their consumer fraud claims. While consumer protection claims may require a lesser proximate cause showing, they too have weighty requirements. As evidenced by the district court's treatment of the plaintiffs' consumer fraud claims, the plaintiffs will need to overcome several obstacles to state a viable consumer fraud claim. First, only ads they can allege having seen or being aware of will be considered for consumer fraud purposes.<sup>151</sup> Next, the plaintiffs will need to show that McDonald's ads were objectively misleading. As shown from the district court's treatment of French fries and hash brown claims, simply pointing to some material information omitted from an ad is not enough to create a §349 claim unless the omitted information renders the ad misleading. Finally, since the court rejected the plaintiffs' theory about a generalized campaign to create a false impression, they will have to point to specific ads and explain why those ads are misleading. The plaintiffs cannot state a claim based on the overall misimpression consumers get from McDonald's ads, if none of the ads are misleading themselves.

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<sup>151</sup>Pelman II. at \*10.

C.

### **Conclusion.**

Ultimately, this lawsuit was premised on a simple notion: McDonald's bore some kind of liability for selling products that contributed to the plaintiffs' obesity and health problems. The possible sources or reasons for such liability were less clear and the original Complaint laid out several common law tort and statutory consumer fraud theories. After the district court's first decision, the plaintiffs' opted to pursue only their consumer fraud claims, presumably because the tort claims required difficult proximate cause and duty showings. While these consumer fraud claims require a lesser proximate cause showing, they present their own set of difficulties.

First, the plaintiffs must point to specific, individual misrepresentations. The district court rejected the plaintiffs' theory that consumer fraud liability could attach based on a "generalized campaign to create a false impression" even if individual ads were not misleading.<sup>152</sup> Additionally, the district court made clear that an ad is not misleading if it relates to a food's content or ingredients but omits information about the product's effect on a person's body. If a representation is solely about a food's content or ingredients, it will not be deemed misleading because it omits information about that food's effect on the human body.<sup>153</sup>

Third, the plaintiffs can only base their consumer fraud allegations on representations they personally saw or were aware of. Older representations, representations made in foreign countries, or nonpublic materials (such as state attorney general settlement letters) are unlikely to have reached the minor plaintiffs and cannot be the basis of a §349 consumer fraud claim. Finally, despite the Second Circuit's ruling, the plaintiffs will still

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<sup>152</sup>Pelman I. at 528 (court stating "[b]ecause such statements are necessarily 'consumer-oriented' and thus in the public domain, plaintiffs should be able. . . to point to the specific statements that form the basis of their claims pursuant to §§ 349 and 350")

<sup>153</sup>See Section V.(C)(1) above regarding the 100% vegetable oil French fries representations.

have to show that McDonald's misrepresentations proximately caused their injuries. While they do not need to make this showing at the pleading stage, the district court held that the plaintiffs ultimately bore this burden of proof, and the Second Circuit did not overrule that holding. Before the plaintiffs can recover any award, therefore, they will need to answer the same fact-specific questions the district court laid out in its second opinion.<sup>154</sup>

These hurdles make it unlikely that the plaintiffs can state a viable claim before the district court on this third visit. Given the dearth of objectively misleading representations, as that term has been defined by the district court, and the additional requirement that the minors have viewed these representations, it seems their Complaint will be dismissed again. Interestingly, despite this likely dismissal, it appears much of the plaintiffs' desired remedies have already been fulfilled. Indeed, the plaintiffs argued as much before the district court in asking for attorney's fees and monetary damages. Specifically, the plaintiffs noted,

the Defendant has made substantial changes to its products and cooking oils, completely modified its website with nutritional tools and information, now offers local educational programs on obesity, instituted fruits/vegetables yogurts, McVeggie Burger, vegetables and Premium Salads on its menus, and actually changed the composition of its Chicken McNuggets to New York state consumers, all in the last seven months.

In essence, the Defendant has constructively settled this case by affording all equitable and remedial remedies  
(underscore added)

Given these changes by McDonald's, which the plaintiffs attribute to their lawsuit, they have achieved many of their desired reforms despite the little success they had in the courtroom to date. Ultimately, then, while

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<sup>154</sup>See Section V.(E) above.

the plaintiffs could not overcome the different legal barriers to recovery for either their consumer fraud or tort claims, they may have succeeded in achieving their larger litigation objectives.