

California Class Action Lawsuit Charges McDonald's with Deceptive Advertising for Using Toys to Market to Children

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On December 15, 2010, Monet Parham, a parent residing in Sacramento, California, filed a class action against McDonald's in a California state court on her own behalf and on behalf of Maya, her six-year-old daughter. The primary charge is that McDonald's advertising of its Happy Meals with toys to children is inherently misleading and contributes to the children's health crisis in California. The other primary charge is that McDonald's advertising Happy Meals with toys induces children to pester their parents to take them to McDonald's so they can get a toy, which is accompanied by an unhealthy Happy Meal.

Two classes are alleged: the first, on behalf of Maya and all California children under the age of eight who have seen marketing for Happy Meals with toys (Children Class); and the second, on behalf of Monet Parham and all California residents who are parents of members of the Children Class and purchased Happy Meals (Parent Class).

This complaint raises a number of class action issues, particularly with respect to whether common questions of fact and law "predominate" over questions affecting only individual class members. Accordingly, plaintiffs allege that predominant common questions include "the extent to which members of the Parent Class have been injured as a result of these practices" and "the extent to which members of the Children Class have suffered injury as a result of these practices." Plaintiffs' difficulty in establishing predominance is demonstrated by the fact that nowhere does the complaint allege: (1) that all members of the Children Class have seen marketing for Happy Meals with toys; or (2) that all members of the Parent Class have been induced by their young children to purchase Happy Meals with toys. It seems likely that the plaintiffs will attempt to overcome this problem by the use of expert testimony, as set forth in the complaint, and McDonald's own documents, which, for example, assert that "McDonald's has strong appeal among children because of Happy Meals, including fun toys, games and prizes."

Another attempt by plaintiffs to overcome the predominance problem is the specific assertion that the class action is brought "for injunctive relief but not for restitution, penalties, or damages" (emphasis added). This assertion may be helpful to plaintiffs in establishing predominance of common issues, but it also raises the question of why a class action was alleged rather than filing the case only on behalf of Monet Parham and

her daughter and seeking injunctive relief. The confused state of California law relating to class certification in state consumer deceptive advertising cases is still another factor in making this case an interesting one to watch.

To add to the drama, plaintiffs' attorneys have advised McDonald's that its deceptive practice of advertising and including toys with purchases of Happy Meals also violates consumer protection laws of a number of other states.

This is not the first, nor is it the last, challenge to food advertising aimed at children in which it is claimed that such advertising is inherently misleading. For example, in 2006, Kellogg Company entered into a settlement agreement with the Center for Science in the Public Interest wherein Kellogg committed to stop advertising unhealthy foods to children. Thereafter, more than a dozen other companies adopted their own voluntary nutrition standards with respect to food advertising to children. Moreover, the concern about the advertising of unhealthy foods to children has become worldwide in scope. In 2008, the International Obesity Task Force called for a ban in Europe and elsewhere on "toys or collectable items, which appeal to children to promote unhealthy foods." While not adopted as yet on a broad basis, a number of jurisdictions have adopted similar bans, including Santa Clara County, California, which recently banned the inclusion of toys in unhealthy restaurant meals for children.

Finally, the Federal Trade Commission (FTC) has been on the alert to challenge advertising to children, where the FTC is of the view that such advertising is false and misleading. Most recently, a group of marketers that sold children's vitamins under the names of Disney and Marvel Comics characters agreed to stop making certain ingredient claims and to pay \$2.1 million in refunds. Undoubtedly, such challenges by the FTC, other enforcement agencies and consumers will continue.