No McJustice for the Fat Kids

Christopher M Fairman
Late last month, federal Judge Robert Sweet dismissed the fast-food lawsuit that’s been fodder for both talk show ridicule and public outcry. The thought of chubby kids, their parents and lawyers in tow, suing Ronald McDonald because a diet of Happy Meals made them fat seems like a poster child for what’s wrong with our litigious world. You can hear the collective relief—common sense prevails.

Or has it? Before you join in, think about this. If you get fired because of your gender, defrauded by lying corporate executives, or victimized by a deceptive trade practice, your case could get tossed out the same way. That’s because the court dismissed the case using “heightened pleading”: a pro-defendant rule requiring plaintiffs to plead with factual detail or have their case dismissed. Used for years to discourage civil rights and securities fraud plaintiffs, now it’s aimed at consumers.

Just last March, the Supreme Court slapped down heightened pleading in an employment discrimination case called Swierkiewicz v. Sorema. The reason is simple. The Federal Rules of Civil Procedure require only notice pleading. If a complaint provides sufficient notice to be answered, it shouldn’t be dismissed. For more detail, we use
discovery. Does this “see now, discover later” approach allow meritless claims to be filed? Yes, but that’s OK. There are other procedural tools—chiefly summary judgment—designed to weed out frivolous cases quickly. Although not quickly enough for some.

BILLIONS SOLD, MILLIONS SUING?

Why would Judge Sweet impose heightened pleading? He fears “McLawsuits.” Given the “billions and billions sold,” the specter of copycat litigation looms. What’s wrong with nipping this in the bud? Simple: No court should be able to classify an entire type of litigation as presumptively frivolous. Yet that’s precisely what happened here. Rather than allow the kids their day in court, the judge took a peek at the merits and concluded the plaintiffs ultimately wouldn’t win. Better to dismiss it now.

Unfortunately, that’s not how the procedural system is supposed to work. Federal procedure favors decisions on the merits, not on the pleadings. It didn’t use to be that way. Old common-law and code pleading demanded litigants lay their case out in court because of technicalities, like using the wrong writ or pleading an “evidentiary fact” instead of an “ultimate fact.” The Federal Rules of Civil Procedure trash these hypertechnical distinctions, remove the procedural booby traps, and establish merits determinative of the merits. Notice pleading is the centerpiece of this reform effort. Consequently, the only question Judge Sweet should have been asking is, “Does McDonald’s have notice of why it’s being sued?” Of course it did.

The complaint alleged violation of the New York state Consumer Protection Act. The deceptive conduct included: failing to disclose the ingredients and health effects of the high-fat food, describing its food as nutritious, encouraging consumers to buy “value meals,” selling McFood was deceptive and that its food could lead to health problems, and marketing to children. The plaintiffs also alleged that McDonald’s acted negligently by selling dangerous products, failing to warn that its food could lead to health problems, and marketing an addictive product. Yet the complaint did not include the specific facts to support these allegations, such as describing the “McChicken Everyday!” or “McDonald’s can be part of any balanced diet” promotions. It didn’t have to. The complaint properly put McDonald’s on notice of the claims against it. That’s all—according to the rules—it had to do.

That may be a practical solution in this case, but it raises the question of where he came up with all this stuff. Easy—the plaintiffs pointed it out, not in the complaint itself. Here’s what happened. The kids filed their initial complaint putting McDonald’s on notice of their claim that McDonald’s knew was unhealthy. The PSLRA ratchets up the pleading standard so high it deters lawsuits—frivolous or not. This high threshold probably contributes to an atmosphere of insulation that bred recent corporate scandals such as Enron and WorldCom. The PSLRA isn’t the only congressional overuse of heightened pleading. Remember Y2K? Congress feared a tidal wave of frivolous Y2K suits and turned it into a drop of less than a drop. Still, the Y2K Act has heightened pleading in it. So does the so-called Class Action Fairness Act passed by the House late last term. Congress, heightened pleading is invidious. Whether imposed by the courts or by Congress, heightened pleading is invidious. Now consumers are apparently the targets. This isn’t fair. Plaintiffs get tossed out of court without the chance for discovery or trial, simply because their papers don’t include the level of detail a court unilaterally imposes. This disregard for a system purposefully designed to encourage decisions on the merits is troublesome. If a court can toss out the McDonald’s suit on heightened pleading, what’s next? Maybe consumers deserve a break today.

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