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A Daffy Milk Suit Goes Sour

Warning: If milk troubles your gut, don't drink it. And don't go crying to the courts.

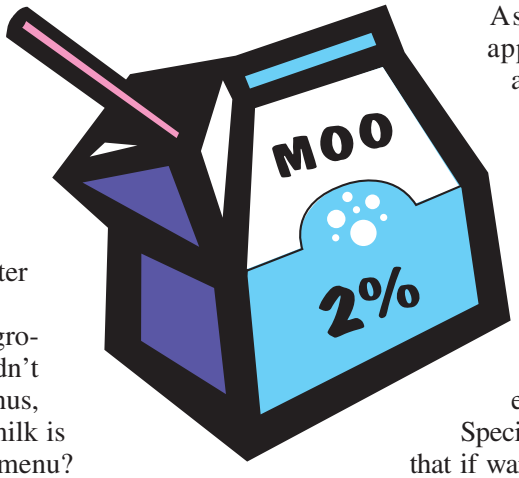
BY ROBERT N. WEINER

The U.S. Court of Appeals for the D.C. Circuit spends much of its time on critical national issues such as the rights of enemy combatants and the constitutionality of federal election laws.

But its dairy docket is particularly momentous. Just last month, the court confronted the momentous question whether milk producers and grocery stores should be liable for damages because their milk cartons did not carry necessary warnings.

What, perforce, should the warnings have said? According to the plaintiffs, the companies should have alerted them that "*If you experience diarrhea or stomach cramps after consuming milk, you may be lactose intolerant. Check with your physician.*"

The plaintiffs in *Mills v. Giant of Maryland* were lactose intolerant people who claimed that they and others like them had suffered temporary "flatulence, bloating, cramps, and diarrhea" from drinking milk.



The case raises many questions. Why didn't spouses and others in the plaintiffs' households join the suit? After all, they suffered, too.

And why were milk producers and grocery stores the only defendants? Shouldn't restaurants put the warning on their menus, or perhaps etch it on glasses in which milk is served, in case customers miss it on the menu?

Why should cookie companies escape liability for their shameless promotion of dunking? And those celebrities with the milk mustaches in the advertisements, like Marilyn Manson, Garfield, and Larry King—aren't they foisting milk upon the lacticly challenged?

And why stop with milk? Millions of people are allergic to eggs. On the theory behind this lawsuit, shouldn't warnings appear on egg cartons, or perhaps in a sticker on each egg? (Although stickers might make cracking eggs more difficult, that would provide extra opportunity to contemplate the risks.) Shouldn't pet stores warn about allergies to kittens—prominently, so no one can miss it, perhaps on a tag at the end of the kitten's tail?

DELUGED WITH WARNINGS

Beneath all this silliness lurk some serious points. The plaintiffs in *Mills* alleged that the milk sellers had breached their duty of reasonable care. The sellers, the suit claimed, were aware of the effects of milk on consumers who did not know of their lactose intolerance, but failed to warn about those effects. The plaintiffs therefore sought damages—which for the putative class of lactose intolerant people in Maryland and the District were potentially enormous—and an injunction requiring a warning.

As far-fetched as these allegations appear, however, plaintiffs lawyers by and large are rational economic beings. The lawyers brought this case because it offered a potential return to them and their clients. That is, previous lawsuits challenging warnings on other products have succeeded in producing settlements or favorable rulings.

The consequences of this free market in lawsuits, however, extend beyond the immediate parties. Specifically, the law has sometimes supposed that if warnings are good—and, indeed, appropriate warnings do save lives—more warnings are better. But as Mr. Bumble said in *Oliver Twist*, "If the law supposes that . . ., the law is an ass." This supposition that more warnings are always better, and the fear of liability that it engenders, have let loose a deluge of obvious warnings—warnings, for example, that pepper spray may irritate the eyes, warnings not to use microwaves for drying cell phones, warnings that a smoke detector will not extinguish a fire.

The result is that, just as we cease to hear white noise, we often do not notice warnings. When we do notice, our attention may be fleeting. The longer the warning, the more likely we are to miss the information we really need. Substantial evidence exists that, as the 8th Circuit found, overwarning takes "attention away from [hazards] that present confirmed, higher risks." Further, in the words of the California Supreme Court, overwarning also can "scare consumers into foregoing use of a product that in most cases will be to their benefit."

AN OBVIOUS RISK

Confronted with the inane claims in the milk case, the district court held that the Federal Nutrition Labeling and Education Act barred state law from imposing any labeling requirement not identical to the applicable federal requirement. Because federal law did not require a warning about lactose intolerance, the court found that the plaintiffs' claim was pre-empted. The district court also held that lactose intolerance is an obvious risk of milk, and milk producers and grocery stores have no duty to warn of obvious risks.

On appeal, the D.C. Circuit did not reach the pre-emption argument, but it agreed that there was no duty to warn. With wry finesse, the court noted, "A bout of gas or indigestion does not justify a race to the courthouse. Indeed, were the rule otherwise, a variety of food manufacturers as well as stadiums, bars, restaurants, convenience stories, and hot dog stands throughout the country would be liable to millions of would-be plaintiffs every day."

On either ground, dismissal was the right result. But the resolution came only after this suit occupied the time of a district judge, three appellate judges, and lawyers for nine defendants.

All of this raises the question of who should decide the proper level of warnings. At least with regard to regulated products, federal agencies hold a comparative advantage over judges and juries who lack the agencies' expertise and fact-finding ability, and over private lawyers who must zealously pursue clients' interests without regard for the overall public good.

Moreover, administrative agencies are accountable. As Justice Stephen Breyer has written in his book *Breaking the Vicious Circle* (1993), administrative agencies "are politically responsive institutions, with boards, commissioners or administrators appointed by the President, confirmed by the Senate, written about by the press, and, from time to time, summoned by Congressional committees to give public testimony." When we do not like the approach of an executive branch agency, we can vote against the president, or we can vote for legislators who can mandate change. But federal judges, quite properly, are not answerable to the electorate. Nor are state judges in California or Wyoming accountable to citizens in other states, even when their rulings affect warnings nationwide. If we do not like such judicial conclusions, we have far less recourse through the democratic process.

TO THE REGULATORS

Yet relying on federal administrative agencies to ensure product safety is by no means a perfect solution. Agencies are frequently understaffed and underfunded, perhaps more so now than in many years. Their job, moreover, is to regulate industry, not, like that of the tort system, to compensate individuals injured by unsafe products.

But the better response to the lack of resources is to increase them, not to delegate regulation to unelected judges. As for compensating injured consumers, it is a fair question whether imposing damages on companies that have obeyed regulatory mandates is the best way to achieve this goal. One key step toward providing such compensation would be universal health insurance to defray medical and other expenses irrespective of the outcomes of tort suits.

The lesson of the *Mills* case is that "imaginative" is a better review for a screenplay than for a legal claim. As the D.C. Circuit recognized, litigation is not the preferred response to every gastric rumble, nor to other comparable woes. No one should be suing over unspilled milk.

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