

Novel Theory of Liability Against Food and Beverage Manufacturers For Plastics Pollution Fails First Test

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In November 2023, the State of New York filed a lawsuit alleging that PepsiCo endangered public health and polluted the Buffalo River in upstate New York related to single use plastic packaging from its products. New York sought to hold PepsiCo liable for the independent actions of third parties under a novel theory of liability. The City of Baltimore, MD, and the County of Los Angeles, CA, subsequently filed their own plastics pollution lawsuits against PepsiCo under the same theory of liability. In October 2024, the State of New York's complaint was dismissed, with the court forcefully rejecting this theory of liability. It remains to be seen whether plaintiffs advancing similar arguments in other jurisdictions will fare any better.

PEOPLE OF THE STATE OF NEW YORK V. PEPSICO LAWSUIT

New York Attorney General Letitia James filed the complaint against PepsiCo in November 2023.^[1] PepsiCo is headquartered in Purchase, New York, and its brands include Cheetos, Doritos, Fritos, Gatorade, Lay's, Lipton, Mountain Dew, Ocean Spray, Quaker, Ruffles, and Tostitos. The complaint alleged that PepsiCo had created a public nuisance, failed to warn consumers of the risks associated with single use plastics, misled the public regarding the effectiveness of its efforts to combat plastic pollution, and failed to warn the public of the risks related to plastic pollution.^[2]

The complaint charged that PepsiCo was the biggest producer of plastic waste collected by Buffalo, NY community cleanup groups from 2013 to 2022 and was allegedly responsible for 17% of the cumulative plastic waste.^[3] The complaint also referenced a national study conducted by Break Free From Plastic, which identified PepsiCo as the No. 1 or No. 2 producer of "branded plastic trash" across the United States from 2018 to 2022.^[4] The complaint did not declare that PepsiCo itself polluted the Buffalo River, but that PepsiCo's "manufacturing, production, marketing, distribution, and sale" ^[5] of its products contributed to the activity proximately causing the alleged nuisance, "plastic packaging [being] discarded" by independent third parties.^[6]

The State asked the court to require PepsiCo to adopt alternatives to single-use packaging, cease contributing to the public nuisance it allegedly caused in the Buffalo region, and to remediate the Buffalo River. The State further asked the court to require PepsiCo to add product labels warning consumers about its packaging's potential contribution to plastic pollution and the resulting risks to human health and the environment.^[7] According to the complaint, New York state was optimistic that "if PepsiCo's products carried a warning about the packaging's

potential contribution to plastic pollution and the risk of harms to human health and the environment that could result, the warning would affect consumer choices in a manner that would reduce those harms.”^[8] The lawsuit also sought disgorgement, civil penalties, and restitution.

PepsiCo moved to dismiss the case on February 16, 2024, arguing that under well-settled tort law, PepsiCo (1) is not liable for any harm it did not proximately cause, (2) has no duty to control the behavior of independent third parties who choose to break the law, and (3) has no duty to warn of open and obvious risks related to plastic pollution.^[9] PepsiCo also contended the lawsuit’s novel theory of liability would “disrupt and confuse the commercial marketplace and contravene well-settled tort law.”^[10]

On October 31, 2024, the New York State Supreme Court in Erie County issued an Order granting PepsiCo’s motion to dismiss.^[11] The Court was forceful in its reasoning, stating that “[i]mposing civil liability on a manufacturer for the acts of a third party seems contrary to every norm of established jurisprudence,” and “[a]bsent the Legislature passing a law or the executive branch issuing an order establishing such a theory of liability or imposing restrictions on what type and amount of plastic can be used, this lawsuit is simply policy idealism.”^[12] Without a remaining theory of liability, the Court dismissed the complaint in its entirety.

POTENTIAL INDUSTRY IMPLICATIONS

Other jurisdictions have followed New York’s lead in advancing litigation seeking to place the liability of littering on product manufacturers. The City of Baltimore, Maryland filed a similar lawsuit in June 2024 against PepsiCo and other major companies to recoup costs associated with the cleanup of plastic pollution within city limits. The lawsuit accuses the companies of making false claims, creating a public nuisance, failing to warn, selling products with design defects, and violating state and local laws.^[13] The County of Los Angeles, California meanwhile filed a lawsuit against PepsiCo and other companies in October 2024 using the same theories of liability advanced by the City of Baltimore and State of New York.^[14] The lawsuit accuses the companies of creating a public nuisance and violating unfair competition and false advertising laws. The County of Los Angeles seeks injunctive relief, nuisance abatement, restitution, and civil penalties.

The recent decision in the New York case suggests that the new theory of liability now being advanced by the City of Baltimore and County of Los Angeles may not be viable, but because these claims are based in tort law that varies from state to state, they can still move forward and may have more success. In the meantime, the New York decision could cause other governments to hesitate to file similar lawsuits, as they may wait and see how the Maryland and California cases fare before committing resources to their own lawsuits.

Additionally, as noted by the court in the New York case, state legislatures can create new causes of action to more squarely address liability related to single use plastics. Several states have already passed extended producer responsibility laws related to single use plastics, although these are generally forward-looking laws that seek to reduce the production of single use plastics and shift toward recycling or composting single use packaging rather than backward-looking laws seeking to assign responsibility for existing plastic pollution to manufacturers. If the new theory of liability from the New York case is similarly rejected in Maryland and California, we could see states move to pass laws holding manufacturers responsible for cleaning up plastic pollution.

[1] Compl., *State of New York v. PepsiCo, Inc., et al*, No. 814682 (N.Y., Nov. 15, 2023), available at <https://ag.ny.gov/sites/default/files/court-filings/pepsico-complaint.pdf>.

[2] *Id.*, ¶ 85.

[3] *Id.*, ¶ 49.

[4] *Id.*, ¶ 54.

[5] *Id.*, ¶ 10.

[6] *Id.*, ¶ 55.

[7] *Id.*, ¶ 100.

[8] *Id.*, ¶ 99.

[9] *Memorandum of Law in Support of Defendants’ Motion to Dismiss* (Feb. 16, 2024), available at https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=XH6L_PLUS_wlj2cb7Mfykblbjlw==.

[10] *Id.*, at 2.

[11] Memorandum Decision, *State of New York v. PepsiCo, Inc., et al*, No. 814682 (N.Y., Oct. 31, 2024), available at <https://www.law360.com/articles/2255142/attachments/0>.

[12] *Id.*, at 12, 17.

[13] City of Baltimore Announces Lawsuit Filed Against Plastic Manufacturing Companies for Role in Pollution, <https://mayor.baltimorecity.gov/news/press-releases/2024-06-20-city-baltimore-announces-lawsuit-filed-against-plastic-manufacturing>.

[14] Compl., *The People of the State of California v. PepsiCo, Inc., et al*, No. 24STCV28450 (C.A., Oct. 29, 2024), available at https://file.lacounty.gov/SDSInter/lac/1169727_FiledPlasticsComplaintAgainstPepsiCoandCoke.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

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