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Technology & Game Developers: The Next Targets for the Plaintiffs' Product Liability Bar?

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Hughes Hubbard & Reed LLP • A New York Limited Liability Partnership
One Battery Park Plaza • New York, New York 10004-1482 • +1 (212) 837-6000

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May 22, 2017 - Technological advances sometimes create opportunities for crafty plaintiffs' attorneys. The 1990s saw two significant developments: "internet addiction" was identified as a possible "behavioral addiction," and access to the internet, video games, and social media became widely available. In the ensuing years, scientists have conducted a substantial amount of research on the effects technology may have on its users, including on a possible association with the onset of behavioral addictions. At the same time, technology-based behavioral addiction issues have increasingly crept into modern litigation, featuring prominently in criminal prosecutions, claims for employee accommodation under the Americans with Disabilities Act (ADA), and family-law custody disputes. That said, somewhat surprisingly, new technology developers and manufacturers have, thus far, largely avoided being the target of product liability actions.

That may change. Earlier this year, Dr. Adam Alter, Associate Professor of Marketing at New York University's Stern School of Business, published a book titled, *Irresistible: The Rise of Addictive Technology and the Business of Keeping Us Hooked*, which may fuel future product litigation against technology manufacturers and developers. Dr. Alter's basic premise is two-fold: (i) anyone can fall prey to a behavioral addiction under the right circumstances; and (ii) therefore, technology-based behavioral addiction has, in fact, become a large, ever-growing societal problem, given that technological devices, programs and social media platforms are both ubiquitous in everyday life and may be designed to provide specific types of feedback, similar to those allegedly used by slot machines, to "hook" their users. Dr. Alter believes that behavioral addictions have the same effect on brain chemistry as do substance addictions and argues that large numbers of technology users have technology-based behavioral addictions, with a smaller, yet significant, percentage severely affected by symptoms such as sleep deprivation, the inability to care for themselves, social dysfunction, and compulsive spending. Dr. Alter reviews a number of technology products or programs in his book, including video games and social media, as well as smart phones and tablets, which can function both as platforms for games and social media, as well as being allegedly addictive in their own right. The book further describes in detail the possible damage that can be caused by these behavioral addictions and, pointing to the development of virtual reality headsets, hypothesizes

that the damage will only increase as technology becomes more immersive over time.

Perhaps most significantly, Dr. Alter asserts in *Irresistible* that video-game developers are aware that their products are addictive. He claims that these games are able to "hook" their users with specifically designed feedback provided by the game. In doing so, he details discussions with a prominent video-game developer who describes "juice" (*i.e.*, "the layer of surface feedback that sits above the game's rules...without juice, the same game loses its charm"), which Dr. Alter compares to slot machine-technology allegedly designed to keep players from leaving by distracting them from their losses.

Additionally, *Irresistible* includes a lengthy discussion of the direct connection between behavioral and substance addictions to context and environment, as well as smartphones and tablets' ubiquitous presence in everyday life, thereby impeding behavioral addicts' ability to overcome their addictions.

Possible Future Litigation

Importantly, Dr. Alter does not himself directly call for regulation of, or litigation against, technology developers and manufacturers for their role in designing allegedly addictive technology. Indeed, he argues that technology-based behavioral addiction is a social issue that should principally be addressed by, among other things, confining the use of the relevant product or program to specific contexts, such as in the workplace or during particular times in the day. Nonetheless, we believe that Dr. Alter's likening of technology-based behavioral addictions to substance addiction could unintentionally spur plaintiffs' attorneys to launch product liability lawsuits against the technology companies on the argument (lifted verbatim from smoking and health cases) that developers who knowingly design a product to be addictive should be held accountable for their conduct.

We note here that there are several legal issues that have not yet been litigated and which might affect the viability of suits brought against developers of software or social media platforms and other types of intangible technology, including whether those technologies are even cognizable as "products." Additional, open legal questions include the possible immunization granted to certain social media platforms by the Communications Decency Act, possible First Amendment protections that might, in some instances, prevent liability in tort, and whether a reasonable person would be aware of any danger of technology-based behavioral addictions.

While actions in tort against video-game developers have previously been dismissed based on the lack of proximate cause and on First Amendment grounds, those cases generally addressed allegations that the ideas contained within the relevant video game inspired children to commit violence. However, few courts have addressed whether video game-based behavioral addictions can result in developer liability.

For example, in *Smallwood v. NCSOFT Corp.*, brought in the United States District Court in Hawaii, the plaintiff sought damages for, *inter alia*, his psychological addiction to a video game, which allegedly led to his hospitalization and need for continued clinical care. While dismissing the plaintiff's claims of fraud, negligent misrepresentation, and intentional infliction of emotional distress, the District Court nevertheless ruled that the plaintiff had successfully pled claims for negligence, gross negligence, and negligent infliction of emotional distress. His complaint alleged that the defendants had failed to adequately warn him of the addictive quality of the relevant game, which, when played persistently, provided him with feelings of euphoria that ultimately led to his addiction. While the mechanism of the plaintiff's alleged addiction does not seem to have been publicly litigated in *Smallwood*, *Irresistible* discusses the issue of video-game addiction in great detail.

Given the increasing attention brought to behavioral addictions by Dr. Alter's book, legal actions similar to *Smallwood* against technology manufacturers and developers are likely to be considered by the plaintiffs' bar, with the added danger that recent scientific studies will be available to plaintiffs seeking to link alleged technology-based behavioral addiction, especially as any such addiction might affect children.

We also anticipate that consumer fraud class actions may be on the horizon, with plaintiffs arguing that they would not have purchased the product if they had been adequately warned of the dangers of addiction. However, as *Irresistible* notes, technology-based behavioral addictions serve to alleviate personal psychological anxieties and affect each individual differently, and those allegedly affected by any such addictions, face a considerable hurdle of obtaining class certification, given the risk for individual factors to predominate over any common legal claims shared by the potential class members.

Proposed Ameliorative Steps

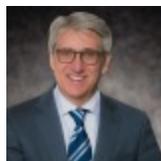
Hughes Hubbard's long experience in defending tobacco and other product manufacturers against similar addiction claims suggests that companies in the technology manufacturing and developing industries should consider at least the following five strategic measures:

- Consider whether it is feasible to provide end users with built-in mechanisms to prevent addiction formation, such as:
 - Alerting users when their use exceeds certain amounts of time (or allowing them to set up personalized alerts); and
 - Developing robust parental education pamphlets and built-in controls and alerts to monitor their children's use of the relevant product.
- Audit product design, with a focus on determining whether feedback provided to users is likely to cause or reinforce behavioral addictions.
- Revisit product warnings. A product manufacturer generally has a duty to warn of hazards associated with the intended use, and foreseeable misuse, of the product. Review carefully product labeling and company websites regarding references to any alleged dangers associated with misuse, including overuse. Consider, for example, whether a general warning or instruction against multiple hour use is warranted.
- Identify present and former employees responsible for developing the relevant products and programs who might be able to provide context for the thinking behind product design and who may otherwise be able to assist with defending against claims that these products were designed to be addictive.
- Identify potential experts whose expertise might be used to challenge: (i) behavioral addiction (both as a disorder and as something that can affect such large portions of a population); (ii) alleged links between relevant products and behavioral addiction. If litigation is filed, there will be a rush on both sides to retain such experts, and it is better to get a head start in that race.

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