Lawsuits Without Injury: The Rise of Consumer Protection Claims

by James P. Muehlberger and Cary Silverman

About the Authors

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Americans have become accustomed to being bombarded with lawyer advertising on billboards, in newspapers and on the internet asking, "Have you been injured by [name the prescription drug]? Find out if you have a case." In recent years, however, personal injury lawyers have uncovered a way to avoid the need to produce scientific evidence and expert testimony proving that a prescription drug caused an individual's injury. They have also found a way to bring class action claims against pharmaceutical companies when such claims are typically not certified due to the highly fact-specific nature of personal injury suits. That strategy is to allege a violation of a state consumer protection act (CPA).

The Appeal of Consumer Protection Laws

Consumer protection laws were once reserved for the use of government regulators to attack truly deceptive practices and for consumers to bring small claims to get reimbursement for being duped at the cash register. They were meant to protect the "little guy," but in recent years, personal injury lawyers have discovered the nearly unlimited potential of such claims.

Before the adoption of consumer protection laws, those who were misled when purchasing a product or service relied on common law fraud or contract claims. Neither type of claim, however, provided an effective means to stop deceptive conduct before it resulted in harm or when the injury was small. To provide a more effective remedy for deceptive practices, Congress established the Federal Trade Commission (FTC) in 1914 and expanded its authority to regulate consumer transactions in 1938. At that time, Congress considered including a private right of action, but there was unease that the vagueness of the terms "unfair" and "deceptive" could lead to limitless lawsuits by lawyers who made their vocation by "hunting up and working up such suits."[1] Members of Congress also expressed concern that, given the broad wording of the statute, manufacturers would have no way of knowing whether an advertisement or a business practice was illegal until hit with a lawsuit. In a bipartisan vote, Congress firmly rejected inclusion of a private right of action under the FTC law.[2] Fears of the vague nature of prohibited conduct were further alleviated by the knowledge that a five-person nonpartisan commission, with expertise in the business environment, would determine whether conduct was unfair or deceptive.

States later adopted similar, broad laws, but, unlike the federal government, allowed private lawsuits. The failure to adequately differentiate between enforcement actions by state regulators and what are often profit-driven or agenda-oriented private claims created the opportunity for lawsuit abuse. Since these laws allow lawsuits for any conduct that can be characterized as "unfair" or "deceptive," they allow personal injury lawyers to utilize their creative and entrepreneurial spirit.

Although private actions under state consumer protection laws have been available in most states for over 25 years, plaintiffs' lawyers and interest groups have only recently discovered their extraordinary potential. Today, attorneys use consumer protection laws to bring massive lawsuits where no one was actu-

ally injured in the hopes of receiving "statutory damages," minimum awards set by statute in the absence of proof of injury, treble (triple) damages and awards of attorneys' fees. Interest groups use the laws to attempt to achieve regulatory objectives that they could not obtain through the legitimate democratic political process — through legislatures and government agencies. These suits seek to regulate entire industries, where the government explicitly approved of the practices attacked or opted to provide consumers with a choice. The lawsuits often state claims that are sound in product liability or contract law, but are not constrained by the reasonable and rational requirements imposed on such claims, such as proof that the consumer's purchase decision was caused by the practice complained of. Consumer protection claims are particularly susceptible to class action abuse because some courts have shown a willingness to aggregate the cases of all consumers in one or more states that purchased a product or service, regardless of whether they saw or heard the advertisement at issue and even when the individuals had substantially different motivations for purchasing the product or endured no or different financial losses.

The broad scope of these statutes and their interpretation by some courts has placed small and large businesses alike in fear of uncertain and unpredictable liability. In California, they were used to extort settlements from small businesses. The situation was so unfair that voters intervened by ballot initiative and in 2004, approved Proposition 64, which requires plaintiffs to show that the alleged wrongful act resulted in a loss of money or property to the plaintiff, as well as requiring application of ordinary class action safeguards.

Other states have not been so fortunate. In Florida, Illinois and Massachusetts, lawsuits have targeted unpopular or profitable industries seeking extraordinarily large awards and have resulted in multi-billion dollar verdicts. While some of these large awards were overturned on appeal, they still can result in irreparable injury to the company and its shareholders. The costs of such suits are passed down to consumers in higher prices, creating the irony that consumers are harmed by "consumer protection" lawsuits.

Targeting the Pharmaceutical Industry

Pharmaceutical companies are among the principal targets of CPA litigation, despite the FDA's close regulation of prescription drug advertising,[3] and its authority to seek civil and criminal penalties against those who fail to disclose information to regulators.[4] CPA claims are typically brought as class actions on behalf of individuals in a state, or the entire country, who purchased the drug, but did not suffer any ill effects. These lawsuits usually allege that the company promoted a drug as safe and effective, when the product was either not as effective as consumers might have been led to believe or the company's advertising failed to disclose to the public a known risk associated with the drug.

Claims often allege that the company's aggressive advertising allowed it to artificially inflate the product's price beyond its actual value. Damages sought are usually either a complete refund of the purchase price (on behalf of thousands of consumers) or the difference between the sale price and the hypothetical actual value. In recent years, such claims have been made involving Claritin,[5] OxyContin,[6] Prempro,[7] Rezulin[8] and other products. Claims have also involved nonprescription products, such as a recent class action suit against Pfizer claiming that it deceptively represented that using Listerine is as effective as flossing.[9] That lawsuit was brought on behalf of anyone in California who purchased the product within a six-month period, whether or not they saw or relied on such representations in making a purchase.

Vioxx has made the news due to the thousands of individual product liability lawsuits filed after Merck & Co. Inc. voluntarily withdrew the popular arthritis drug from the market in September 2004. The withdrawal came in response to a Merck-sponsored study that found an increased relative risk of heart attack after 18 months of use compared to patients taking a sugar pill. More than half of the product liability claims that have made it to trial have resulted in defense verdicts.

But some lawyers have opted not to recruit injured plaintiffs and have instead filed CPA claims on behalf of thousands of consumers who used Vioxx, but do not allege any personal injury. These claims allege that Merck violated consumer laws by advertising the drug as safe without fully disclosing its risks.[10] A New Jersey lawsuit includes such allegations, but on behalf of third-party payors nationwide, such as insurance companies and health maintenance organizations, rather than common consumers. In July 2005, a trial court granted class certification and ruled that it would apply New Jersey's plaintiff-friendly Consumer Fraud Act to each class member's claim.[11] While acknowledging "sufficient variations" among state CPAs to pose a conflict, the court found that based on a superficial choice-of-law analysis, New Jersey had the strongest interest in applying its laws primarily because the defendant was a citizen of that state. If the plaintiffs win the lawsuit, then they would be entitled to "threefold" damages, attorneys fees and costs under the New Jersey law.[12] The appellate division affirmed the trial court's decision and the New Jersey Supreme Court recently decided to review the case.[13] If upheld, the case is likely to encourage forum shopping of both individual CPA claims and nationwide class actions to New Jersey, where many pharmaceutical companies are subject to suit due to their business operations in the state.

The New Jersey lawsuit exemplifies many of the problems with consumer protection litigation. Product liability implications of the New Jersey claim aside, it seems unlikely that sophisticated third-party payors (organizations that provide insurance benefits to members by reimbursing part of the cost of prescription medication in return for premiums paid by their members) are the type of "consumers" that such laws are intended to protect. In addition, a local court's application of its own state law to regulate trade practices in other states undermines the autonomy of sister states and their ability to regulate conduct within their borders.[14] Moreover, substantial variations between state CPA laws — such as provisions requiring the plaintiff to give notice to the defendant prior to suit, applicable exemptions, the need to show individual reliance, the availability of statutory or treble damages and whether the law permits class treatment at all — makes certification of classes involving plaintiffs from multiple states particularly inappropriate.

Are Pharmaceutical Companies Even Subject to CPA Claims?

CPA claims are brought against pharmaceutical companies despite a strong argument that FDA-approved drugs were never meant to fall within the scope of such laws. Approximately half of state CPA laws explicitly provide that they do not apply to conduct or activities regulated by federal agencies or in compliance with federal rules, regulations or orders.[15] The clear public policy behind these provisions is that CPAs were meant to fill a gap by protecting consumers where product safety was not already closely monitored and regulated by the government. Some courts have properly recognized that the FDA's regulation of prescription drug marketing precludes CPA claims.[16]

A Problem of Broad Concern

The pharmaceutical industry is far from the only target of lawyer-generated CPA claims. Other targets have included soft-drink companies and breakfast-cereal manufacturers for purportedly enticing children or their parents to purchase unhealthy products; the fast food industry for causing America's obesity problem; the alcoholic beverage industry for the purchase of their products by minors; the tobacco industry for marketing cigarettes as "light" or "low tar" leading some to purportedly believe they are healthy substitutes to regular cigarettes; and the dairy industry for failing to warn of the effects of lactose intolerance on milk cartons or promoting milk as part of a healthy weight loss program.

Dupont faces several class action lawsuits alleging that consumers of pots and pans with the nonstick coating Teflon® are due a $5 billion refund because the coating could pose a health risk, despite a lack of scientific or real life evidence of any such danger. Cellular phone manufacturers have faced claims that they should provide users with free headsets because radiation from the phone could cause a brain tumor, despite their full compliance with safety standards established by the Federal Communications Commission. Sunscreen makers face claims from lawyers alleging that their products, rather than protecting the public, lull them into a false sense of security over prolonged sun exposure, putting them at greater risk of cancer and other dangers.

What these types of lawsuits generally have in common is that they are generated by lawyers and interest groups for profit or politics, not by consumers who have experienced a loss. These lawsuits add to the cost or even decrease the availability of products and provide "benefits" that are of no use to ordinary, reasonable consumers. Private "consumer" protection claims are now routinely used to make an end-run around the rational requirements of product liability, tort and contract law.

Addressing Lawsuit Abuse Through Courts and Legislatures

The vague wording of state consumer protection laws often empower courts to make reasoned choices based on sound public policy and the fundamental distinction between private lawsuits and government enforcement. They can promote sound public policy by requiring plaintiffs to satisfy basic standing and proof requirements, uphold procedural safeguards applicable to all class action litigation, and provide appropriate deference to experts in government agencies, such as the FDA and FTC, to make decisions on marketing practices.

When courts find that the language of the law does not provide them with the flexibility to interpret them in a manner that distinguishes between public enforcement and private claims, or where courts refuse to rein in lawsuit abuse, state legislators should intervene. The American Legislative Exchange Council (ALEC), the nation's largest nonpartisan membership organization of state legislators, has adopted a "Model Act on Private Enforcement of Consumer Protection Statutes" that provides guidance to state legislators. Legislation based on the model act would restore fair, rational tort law requirements in private lawsuits under consumer protection acts without interfering with the state's authority to stop unfair or deceptive practices.

Courts and legislatures can and should restore the "consumer" to consumer protection laws. They can do so by ensuring that those who lose money because they were deceived are made whole, while eliminating the lawyer and interest group-generated lawsuits that are brought for profit and politics.

Endnotes

[1] 51 Cong. Rec. 13,113, 13,120 (1914) (statement of Senator William J. Stone (D-MO)).

[2] *Id.* at 13,149 (rejecting the proposed amendment to provide a private right of action by a vote of 41-18).

[3] The FDA oversees the advertising, marketing, and promotion of prescription drugs. *See* 21 U.S.C. § 321(n), 331(a), 352(a); 21 C.F.R. §§ 202.1(e)(4)(i)(a). When the FDA finds that an advertisement is misleading, it issues a public warning letter and requires corrective action. *See* http://www.fda.gov-/cder/warn/.

[4] Manufacturers that fail to comply with FDA requirements for the submission of information are subject to civil and criminal penalties. 21 U.S.C. § 331(e). The FDA investigates suspected fraud using its general statutory investigative authority, and it is empowered to address fraud by seeking injunctive relief, and civil and criminal penalties. 21 U.S.C. §§ 332-334. In addition, the FDA can seek penalties against any manufacturer that makes a false statement to the Federal Government. 18 U.S.C. § 1001.

[5] *New Jersey Citizen Action v. Schering-Plough Corp.*, 842 A.2d 174, 177 (N.J. Super. Ct. App. Div. 2003) (in which plaintiffs claimed that allergy medication was not as effective as advertised, finding that statements made were not actionable and that consumers failed to establish a causal nexus between allegedly misleading advertisements and any loss suffered under the New Jersey Consumer Fraud Act).

[6] *Williams v. Purdue Pharma Co.*, 297 F. Supp. 2d 171, 177-78 (D.D.C. 2003) (dismissing District of Columbia's Consumer Protection Procedures Act claim that the manufacturer over-promoted the drug as providing "smooth and sustained" pain relief for 12 hours with little chance of addiction, which allowed the manufacturer to artificially inflate its prices).

[7] *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555, 566-68 (E.D. Ark. 2005) (denying certification of a consumer-protection class due to material variations in the consumer laws of the 29 states at issue and the need to show individual plaintiffs relied on the allegedly deceptive advertisement and were injured as a result).

[8] *In re West Virginia Rezulin Litig. v. Hutchinson*, 585 S.E.2d 52 (W. Va. 2003) (in case in which plaintiffs argued that manufacturers aggressively and falsely marketed the drug as having breakthrough effectiveness with low side effects, but did not fully disclose problems with the drug, ruling that the statutory requirement that a plaintiff show an "ascertainable loss" under West Virginia Consumer Credit and Protection Act did not require a showing of actual damages and finding that plaintiffs needed only to allege that they received a product that was different or inferior to that which they believed they purchased).

[9] *Pfizer Inc. v. Superior Ct. (Galfano)*, No. B188106 (Cal. 2d App. Div., 3d Dep't July 11, 2006) (reversing the trial court's grant of class certification).

[10] *See* Beth Musgrave, *Vioxx Class-Action Suit in State Law; Firm Says 150,000 Kentuckians Took Drug, Weren't Told of Risks*, LEXINGTON HERALD-LEADER, Oct. 26, 2004, at B6 (reporting on a class action lawsuit filed on behalf of more than 150,000 Kentucky residents); Complaint, House v. Merck & Co., No. 04-1235 (W.D. Okla., filed Sept. 30, 2004), *available at* http://www.federman-law.com/pdf/CompHouse.pdf.

[11] *Int'l Union of Operating Eng'rs Local #68 Welfare Fund v. Merck & Co.*, No. ATL-L-3015-03, 2005 WL 2205341 (N.J. Super. Ct. July 29, 2005).

[12] N.J. Stat. § 56:8-19.

[13] *Int'l Union of Operating Eng'rs Local #68 Welfare Fund v. Merck & Co.*, 894 A.2d 1136 (N.J. Super. App. Div. 2006), *appeal granted*, 902 A.2d 1232 (N.J. 2006) (Docket No. A-59,588).

[14] *See, e.g., Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801 (Ill. 2005).

[15] *See* Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Statutes*, 54 Kan. L. Rev. 1, 31 n. 160 (2005) (providing statutory citations). Ordinary principles of conflict preemption may also preclude suits that would require warnings that differ from what the FDA has approved. *See* Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products and Draft Guidances and Two Guidances for Industry on the Content and Format of Labeling for Human Prescription Drug and Biological Products; Final Rule and Notices, 71 Fed. Reg. 3921, 3935-36 (daily ed. Jan. 24, 2006).

[16] *See, e.g., Pennsylvania Employee Benefit Trust Fund v. Zeneca, Inc.*, Slip Op., No. Civ. 05-075-SLR, 2005 WL 2993937, at *2-4 (D. Del. Nov. 8, 2005) (holding that the Delaware Consumer Fraud Act does not apply to actions involving the safety and efficacy of an FDA-approved prescription drug); *cf. Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 34-51 (Ill. 2005) (finding that under the Illinois Consumer Fraud and Deceptive Business Practices Act, the long-standing actions of the Federal Trade Commission with respect to regulating cigarette advertising including promotions regarding light cigarettes or low tar or nicotine cigarettes, barred any private cause of action).