



Consumer Protection Acts are a Springboard for Lawsuit Abuse

By Victor E. Schwartz

BY NAME, CONSUMER PROTECTION ACTS (CPAs) sound innocent enough, and probably beneficial. Consumers deserve protection from fraud and abuse. In a famous Jerry Seinfeld show, a local restaurant sold yogurt, claiming that it was “non-fat.” Jerry and his friends frequented the place and loved the yogurt, but all of them found that they were gaining weight. The fact was that the yogurt had an exceptionally high fat content. That was an example of consumer fraud.

What was the fraud? There was a false statement by the seller, reasonable reliance by Jerry and his friends, and resulting damage in the form of unwanted weight gain. If they had known the yogurt was high-fat, they would not have purchased it.

In contrast to the law of fraud, state CPAs are often vague and open-ended, and they lack the basic elements for showing fraud. It's hard to believe, but a claim can be brought against a company under some CPAs for an advertisement, even though the company had no intent to deceive, the individual bringing the claim never saw the advertisement, and the claimant suffered no damage.

That is what occurred in Massachusetts, in a class action lawsuit against manufacturers of so-called "light" cigarettes. The Supreme Judicial Court of Massachusetts, the highest court in the state, held that smokers could bring a class action claim against tobacco companies, even though there was no showing that the claimants believed the word "light" meant "healthy," that they saw the advertisements, that they relied on the advertisements, or that they were damaged.

HISTORICAL BACKGROUND

Before states enacted CPA laws, purchasers who were misled relied on common law fraud or contract claims. Neither type of claim, however, provided an effective means to stop deceptive conduct when it resulted in a relatively small harm. Many people in the public could be deceived, and the wrongdoer could get away with improper conduct.

To provide a more effective remedy for such deceptive practices, the U.S. Congress established the Federal Trade Commission in 1914, and then expanded the FTC's authority to regulate consumer transactions in 1938. In light of developments with CPA private "lawsuit abuse," what is most striking is that Congress at that time considered including a "private right of action."

Perceptive senators suggested, however, that the vagueness of the terms of the Act, such as "unfair" and "deceptive," could lead to unlimited lawsuits by lawyers who made their vocation by, in the words of then Sen. William J. Stone (D-MO), "hunting up and working up such suits."

The Senate overwhelmingly and resoundingly rejected including a private right of action under FTC law by a 41-18 vote.

But it was appropriate for the FTC to stop wrongful conduct before anyone was injured.

Taking our original example, the government could shut down the sale of so-called non-fat yogurt that actually contained fat, before anyone was deceived or harmed. The FTC also could act when only minor damage was incurred by an individual, but the conduct of a defendant deserved to be sanctioned.

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Over time, it was found that the FTC alone could not do the job of policing deceptive products throughout the entire United States. For that reason, individual states set up "baby" FTC laws.

Unfortunately, when these laws were enacted, state legislators did not consider the wisdom of Congress with regard to private causes of action. They authorized private claims without making proper adjustments for the key differences between private lawsuits and governmental action.

Obviously, a private cause of action should require that an individual was actually harmed and that he or she relied on the defendant's conduct, but these elements were not included or whether they were required under state law was left vague.

Curiously, these private causes of action lay fallow for many years. Only in the past several years have personal injury lawyers and public interest groups fully discovered and exploited their extraordinary potential.

REGULATION THROUGH LITIGATION

Today, personal injury lawyers use CPA laws to bring massive class action lawsuits without being able to prove actual injury. Their hope is to receive 'statutory damages,' which are minimum awards set by statute in the absence of such proof.

For example, if the statute provides an automatic award of \$25 per person (as in Massachusetts) in a class of 200,000, the claim can add up to real money. Sometimes damages are tripled.

Further, most CPA statutes provide winning plaintiffs with awards of attorney fees. By way of contrast, if a defendant wins the lawsuit, the defendant still pays his or her own attorney.

So-called public interest groups use the laws to try to achieve regulatory objectives that they cannot obtain through the normal legislative or administrative channels. This inappropriate process has been called “regulation through litigation.” These lawsuits seek to regulate entire industries, even when the government has explicitly approved the practices attacked, or has opted to provide consumers with a choice to use the product, as opposed to banning it.

The broad scope of these statutes, and their interpretation by some courts, have placed both small and large businesses in fear of uncertain, unpredictable and potentially huge liability. In California, CPAs were used to extort settlements from small business. The situation became so unfair that it triggered a ballot initiative, and voters overwhelmingly approved Proposition 64 in 2004. This required the basics. Plaintiffs had to show that the alleged wrongful act caused them to lose money or property, and class actions could not be put together with paper maché – the class had to be real, and each member had to have suffered actual harm.

It's advisable for persons outside the company to review advertisements, because no matter how careful a company might be, the understandable and proper motive to sell a product sometimes can result in a failure to pick up a minor nuance that would be pounced on by personal injury lawyers.

UNPOPULAR DEFENDANTS AS TARGETS

The biggest targets for CPAs are so-called unpopular defendants. They include the manufacturers of pharmaceuticals, tobacco, soft drinks, breakfast cereals, and automobiles. But targets for CPA

defendants are expanding rapidly. DuPont faces several CPA class actions, alleging that consumers of pots and pans with a non-stick coating (Teflon®) are due a \$5 billion refund, because the coating might cause a health risk. The assertions are made even though there is virtually no scientific or real life evidence of any such danger.

While defendants often have some viable defenses to these actions, the threat of massive class action liability is a jack hammer for settlement of claims once class actions are approved by courts, even if such settlements are unwarranted.

REFORM EFFORTS

Civil justice reform movements are now attempting to modify laws in states that have extreme and unfair CPAs. That 59 percent of California voters supported reform of CPAs shows that reform is indeed possible and that state legislators can be brought around. This movement is being led by the American Legislative Exchange Council and the American Tort Reform Association, and they welcome corporate support.

Reform would require that a plaintiff show that he or she had relied on an advertisement and experienced a financial loss as a result. Damages would be tripled only upon a showing of wrongful and intentional conduct, and conduct regulated or approved by a federal or state government agencies would not be subject to conflicting state CPA lawsuits.

Meanwhile, given that CPAs often have vague and uncertain terms, courts have the power to interpret those terms. Our peer-reviewed article published in the University of Kansas Law Review, “Commonsense Construction of Consumer Protection Acts,” (2005) will provide lawyers with ammunition to persuade courts to interpret those terms reasonably.

WATCHING WHAT YOU SAY

Civil justice reform efforts cannot do it all. Much can be done with self-help. The Supreme Judicial Court of Massachusetts has stated that a business may be subject to liability if its advertisement had the capacity or tendency to deceive the general public, which historically was defined as including “the ignorant, the unthinking, and the credulous.” This may seem impossible, but it is true. More than ever, advertisements must adhere to facts.

It's advisable for persons outside the company to review advertisements, because no matter how careful a company might be, the understandable and proper motive to sell a product sometimes can result in a failure to pick up a minor nuance that would be pounced on by personal injury lawyers. In this regard, one prominent personal injury lawyer has hired law students to look at ads – particularly from the pharmaceutical industry – to see if there is any possibility of a CPA lawsuit.

Lawsuit abuse under CPAs grows worse each year, and your company could be targeted.



Victor Schwartz is partner and chair of the public policy group at Shook, Hardy & Bacon L.L.P. He also serves as both general counsel to the American Tort Reform Association and the private sector chairman of the civil justice task force of the American Legislative Exchange Council. He co-authored the most widely-used torts casebook in the United States, Prosser, Wade and Schwartz's Torts (11th edition), and he formerly served as dean of the University of Cincinnati School of Law, where he taught tort law and evidence. He is a member of the Executive Counsel Editorial Advisory Board.

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