

State Consumer Protection Laws Run Rampant Without Reform

Law360, New York (January 07, 2014, 5:04 PM ET) -- An intoxicated college student dies after falling down a stairway at a Boston bar, resulting in a multimillion-dollar judgment. Missouri residents who used an allegedly defective drug, but suffered no adverse effects, claim they are owed the difference between the amount they paid for the drug and the amount it is truly worth based on the manufacturer's alleged failure to fully disclose the product's risks. Food makers that market their products as "all natural" face a surge of class actions claiming that such advertising is misleading when the product may contain soy, corn or other genetically modified ingredients.

What do these disparate lawsuits have in common? They were all brought under state consumer protection acts. CPAs were intended to provide a remedy for individuals duped in ordinary, day-to-day purchases of consumer products. Today, plaintiffs' attorneys use them as an alternative to product liability and wrongful death claims, a means to sue under laws that rely on government enforcement, and a tool for implementing a political agenda through the courts.

This article will explore how liability under state CPAs has expanded and identify recent trends in their use. The article observes that state legislatures are increasingly likely to enact reform as such litigation, rather than reimbursing consumers for a loss, intrudes into the public policy realm.

Background

In the 1960s and 1970s most states enacted CPAs. The purpose of these laws was to provide states with the ability to supplement the enforcement efforts of the Federal Trade Commission. For example, while the laws broadly prohibit "unfair and deceptive trade practices," many state statutes explicitly look to the policy guidance of the FTC for determining practices prohibited under the acts. Unlike the federal law, however, most state CPAs, either initially or soon after their enactment, included a private right of action.^[1] Since Iowa's adoption of a private right of action in 2009, all states authorize private lawsuits under their state consumer protection laws.

While CPAs vary from state-to-state, most broadly prohibit "unfair" or "deceptive" practices. These laws were designed to facilitate and encourage consumers to seek recovery for small losses. For this reason, many CPAs provide for statutory (minimum) damages and authorize, or require, a court to award attorneys' fees and costs to a prevailing plaintiff. Some CPAs provide for treble (triple) damages in every case, in the court's discretion, or upon a showing of a willful violation. All except seven states allow consumer class actions. A half dozen additional states limit relief in class actions to actual damages.

The private right of action included in CPAs has provided an opportunity for attorneys representing plaintiffs to apply the vague language of these laws in unforeseen ways. Private lawsuits are not subject to the political accountability, prosecutorial discretion, consistency in policy, and resource limits that constrain government enforcement. In the hands of a private attorney, what is “unfair” or “deceptive?”

For about three decades, consumer litigation generally remained confined to the original purpose of such laws. In the late 1990s and early 2000s, that began to change.

Plaintiffs’ lawyers in California gained notoriety by using their state’s CPA, the Unfair Competition Law (“UCL”), to file thousands of lawsuits against small businesses, from nail salons to restaurants. Lawyers and professional plaintiffs searched for insignificant, technical violation of state regulations then sent demand letters to unsuspecting business owners. California Supreme Court Justice Janice Rogers Brown, now a judge on the Ninth Circuit, observed that consumer lawsuits in her state had become a “growth industry.”[2] The problem reached such epic proportions in California that its voters passed an initiative in 2004, Proposition 64, to stem the abusive lawsuits.[3]

During the same period, an Illinois trial court entered a judgment of over \$1 billion in a class action against State Farm under the state’s Consumer Fraud Act. The lawsuit alleged that the insurer impermissibly required use of non-Original Equipment Manufacturer (OEM) parts, even though such practices were authorized, or required, in many states.[4] Four years after the verdict, the Illinois Supreme Court reversed, finding that the lower courts erred in applying Illinois law to a nationwide class action.[5]

Nevertheless, plaintiffs’ attorneys heard the message: CPAs can be creatively used with vast potential for lucrative awards.

Five Trends in Consumer Litigation

Consumer litigation has significantly increased over the past 15 years. It has become commonplace for plaintiffs’ lawyers to tack CPA claims onto ordinary torts or use them as a substitute for traditional litigation. Here are five trends in consumer litigation.

1. Using CPAs as an Alternative to Traditional Causes of Action

Plaintiffs’ lawyers have found that a CPA claim may provide a stronger basis for recovery than a tort suit when evidence of injury, causation or damages is weak.

For example, a jury found that a Boston restaurant and bar was not responsible for a patron’s fall down a stairway in a back area of the establishment under the state’s wrongful death act. A judge, however, applying Massachusetts’s CPA, known as Chapter 93A, found that because the stairway was constructed without a permit and was not up to code, the local business had committed an unfair or deceptive practice and was liable for triple damages plus attorneys’ fees.[6]

As a result of such rulings, plaintiffs’ lawyers are likely to search for regulatory violations as an alternative basis of recovery in personal injury and wrongful death suits.

2. No-Injury Lawsuits

Mass tort litigation often arises after an alleged defect in a drug, automobile or consumer good leads to thousands of injuries. In recent years, plaintiffs' lawyers have found that they can also sue on behalf of every person who purchased the product at issue who was not injured. These lawsuits often use state CPAs to seek recovery of the difference in value between the amount the consumer paid for the product and what the product is allegedly worth, the "economic loss," due to an alleged problem with the product or its labeling that affected others.

For instance, relatively few of the "sudden unintended acceleration" cases against Toyota involved people who were actually involved in a car accident. Nevertheless, Toyota settled these economic loss claims for \$1.2 billion to protect its reputation, even as government officials concluded there was no evidence that faulty electronics systems contributed to the acceleration issues.[7]

Similarly, while a court found that the District of Columbia's consumer protection law does not allow individuals who used Vioxx without incident to sue,[8] another court, applying Missouri's Merchandising Practices Act, certified just such a class, and an appellate court affirmed.[9] The pressure of class certification led Merck to settle the Missouri litigation for \$39 million in 2012,[10] and enter a second settlement on behalf of everyone outside Missouri who used Vioxx without any adverse effect, for \$23 million in July 2013.[11]

3. Creating New Rights to Sue Where not Authorized by the Legislature

Another common tactic used by plaintiffs' lawyers is to claim that violation of a state statute or regulation, which does not provide for a private right of action, constitutes an unfair or deceptive practice under the state's CPA. This allows the courts to effectively create a private right of action under a state health and safety law that the legislature decided would only be enforced through government agencies.

This year, the California Supreme Court ruled that plaintiffs may "borrow" alleged violations of the federal Truth in Savings Act as a basis for suing under the UCL, even after Congress repealed the federal law's private right of action for damages.[12] In a separate case, the California high court held that violations of a state insurance law may serve as a predicate for UCL claims, even where the legislature charged the insurance commissioner with sole enforcement of the statute.[13]

Also this year, a Minnesota appellate court found that although the legislature intended that the Board of Pharmacy enforce a state law requiring pharmacies to pass on savings from substituting generic drugs for brand-name versions to customers, an alleged violation of that law could violate the Minnesota Prevention of Consumer Fraud Act.[14]

4. Lawyer-Generated Lawsuits

Consumer class actions are frequently generated at a conference table in a law firm, rather than by consumers who feel they were swindled in making a purchase. Some plaintiffs' attorneys draft cookie-cutter complaints, then investigate products and seek representative plaintiffs in order to file a class action.

For example, in California, about a dozen plaintiffs' law firms are responsible for filing approximately 75 class actions against food makers in the past two-to-three years. One attorney, in less than a year, filed consumer class actions against 32 food manufacturers.[15]

In some instances, the law firms repeatedly name the same individual as the representative plaintiff in separate class actions against different companies regarding a diverse range of products.

Are consumers actually misled in these cases? Does a television commercial or other representation lead families to believe that products such as a chocolate hazelnut spread, sweetened cereals and snacks are nutritious despite the information disclosed on the labels? Settlements in these suits have provided the lawyers who bring them millions in fees while providing consumers they purportedly represent with a nominal amount (e.g. \$4 per purchase, which is hardly worth reading the fine print of the settlement terms and spending time to fill out paperwork.) Unclaimed settlement funds go to charity or, sometimes, an advocacy group that might use the money to finance future litigation.[16]

5. Advancing a Political Agenda in the Courts

In some instances, advocacy groups have commandeered CPAs for use in achieving their own regulatory goals outside of the political process. The purpose of these lawsuits is not to recover on behalf of consumers who experienced a loss resulting from a deceptive practice; it is to change public policy in a manner that the organization could not obtain through the legislative or regulatory system.

For example, the Center for Science in the Public Interest ("CSPI") used state CPAs to threaten soft drink makers and schools with litigation if they did not remove regular soda from vending machines, a result they achieved in 2006. More recently, the group, which critics call "the food police," turned its attention to ridding McDonalds Happy Meals of toys, a suit dismissed by a California court in 2012. It is now targeting products with high fructose corn syrup or artificial sweeteners.

Physicians Committee for Responsible Medicine, a group known for promoting a vegetarian or vegan diet, unsuccessfully brought CPA claims against supermarkets for not including graphic warnings on milk containers about the various types of "gastrointestinal discomfort" that can result from lactose intolerance.[17]

And while many of the consumer class actions against food manufacturers today may be driven by the potential for a lucrative settlement, some may be motivated by regulatory goals. For example, plaintiffs' lawyers have filed numerous class actions against manufacturers who advertise products as "all natural" when they contain corn, soy, beets, or canola, which are commonly genetically modified. Food makers and farmers counter that the technology has created disease-resistant plants and that scientific evidence has shown that genetically modified ingredients has no difference on health than other

ingredients. The question is whether disclosure rules regarding genetically modified ingredients, which could scare people away from purchasing nutritious foods for no sound health reason, should be determined by legislatures and health officials, or by courts based on litigation in individual CPA cases.

States Legislatures Consider Reform

State courts play a critical role in establishing bounds for CPA lawsuits to ensure that the laws do not give rise to an all-purpose claim. As CPA liability intrudes into the legislative domain by effectively imposing regulations based on the priorities of advocacy groups rather than elected officials, and authorizing new rights to sue where the legislature chose not to do so, calls for legislative reform will rise. As California's early experience with Proposition 64 demonstrates, the public does not support opportunistic lawsuits in the name of "consumer protection."

A recent report by the American Tort Reform Foundation provides commonsense principles for restoring the purpose of consumer protection laws for the consideration of courts and legislatures. States have already taken action. For example, the Tennessee legislature limited enforcement of its CPA's "catch all" provision, which generally prohibits "any act or practice which is deceptive," to the government, among other reforms.[18]

As the 2014 legislative session approaches, more states are likely to consider reforms intended to restore CPAs to their original purpose: providing an effective remedy to those who are misled in purchasing consumer products and services.

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[1] For an in-depth survey of state consumer protection laws and their history, see Victor E. Schwartz & Cary Silverman, Common-Sense Construction of Consumer Protection Acts, 54 Kan. L. Rev. 1 (2006).

[2] Stop Youth Addition Inc. v. Lucky Stores Inc., 17 Cal.4th 553, 587 (1998) (Brown, J., dissenting).

[3] Proposition 64 limited standing under the UCL to those who have "suffered injury in fact and [have] lost money or property as a result of ... unfair competition." Cal. Bus. & Prof. Code § 17204.

[4] See Victor E. Schwartz & Leah Lorber, State Farm v. Avery: State Court Regulation Through Litigation Has Gone Too Far, 33 Conn. L. Rev. 1215 (2001).

[5] Avery v. State Farm Mut Auto Ins Co., 835 N.E.2d 801 (Ill. 2005).

[6] See *Klaimont v. Gainsboro Restaurant Inc.*, 987 N.E.2d 1247 (Mass. 2013) (upholding application of Chapter 93A despite remedy provided by the state’s wrongful death act, but remanding for reconsideration of proper damages under Chapter 93A).

[7] See Bill Vlasic, *Toyota Agrees to Settle Lawsuit Tied to Accelerations*, N.Y. Times, Dec. 26, 2012.

[8] See Jonathan Randles, *Merck Wins Dismissal of Vioxx False Claims Suit From MDL*, Law360, June 14, 2012 (discussing *Walker v. Merck Sharp & Dohme Corp.*, No. 2:08-cv-4148 (E.D. La. June 13, 2012)). Other courts have also dismissed CPA class actions brought against pharmaceutical companies on behalf of uninjured people who seek refunds based on some alleged inadequacy in the product or its labeling. See, e.g., *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 321 (5th Cir. 2002); *Williams v. Perdue Pharma Co.*, 297 F.Supp.2d 171 (D.D.C. 2003).

[9] See *Plubell v. Merck & Co.*, 289 S.W.3d 707 (Mo. Ct. App. 2009).

[10] See Carolina Bolado, *Merck Puts Up \$39M to Settle Vioxx Class Action*, Law360, Nov. 1, 2012.

[11] See Ciaran McEvoy, *Merck to Pay \$23M to Settle Vioxx Economic-Loss Claims*, Law360, July 18, 2013.

[12] *Rose v. Bank of America, N.A.*, 304 P.3d 181, 185 (Cal. 2013).

[13] *Zhang v. Superior Court*, 304 P.3d 163, 177 (Cal. 2013).

[14] *Graphics Communications Local 1B Health & Welfare Fund “A” v. CVS Caremark Corp.*, 833 N.W.2d 403 (Minn. Ct. App. 2013) (pending review before the Minnesota Supreme Court).

[15] See Joe Satran, *Trader Joe’s Lawsuit Over ‘Evaporated Cane Juice’ Part of Firm’s Crusade Against Mislabeled Foods*, Huffington Post, March 29, 2013.

[16] See, e.g., *Dennis v. Kellogg Co.*, 697 F.3d 858, 869 (9th Cir. 2012) (rejecting class action settlement where the proposed donation of unclaimed funds, estimated at more than half of the total settlement, would be food given to unnamed charities because there was no tie between the charities and the consumers for whose benefit the lawsuit was purportedly brought).

[17] See *Mills v. Giant of Maryland*, 508 F.3d 11 (D.C. Cir. 2007).

[18] See H.B. 2008, §§ 14-20 (Tenn. 2011) (amending Tenn. Code §§ 47-18-104(b)(27), 47-18-109). The Tennessee legislature also clarified that a court may not award treble damages authorized for willful or knowing violations of the CPA and punitive damages for the same conduct and provided that class actions are not appropriate under the CPA. See *id.*