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Practice Tip: A Litigator's Guide to the 'Siren Song' of 'Consumer Law' Class Actions

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> *The siren song of consumer law in its modern, disembodied state is precisely that everyone should have a day in court, injured or not. To show that this bastard regime cannot be efficient from any perspective is the easy part. The hard part is to tie ourselves to one mast or the other.*
>
> — *Michael Greve*

Introduction to 'the Consumer Law of the Horse'

Like a "siren song," statutory consumer-protection laws in the U.S. legal system are rapidly displacing common law tort principles. Those behind this disturbing trend say that these lawsuits (typically class actions) represent a "different avenue of relief for a different type of injury." A. Bronstad: Consumer Class Actions Usurping Personal Injury Claims, *Law.com* (July 11, 2007). Most admit, however, that they are actually running consumer class actions for "risk of injury" because personal-injury class action torts are too difficult to certify. More specifically, under the umbrella of statutory consumer law and for profit, typically in the form of trebled damages and attorneys' fees, plaintiffs' class-action lawyers are using consumer class actions to carve "new 'lucrative' areas for monetary relief." *Id*.

Despite warnings by Judge Frank Easterbrook about the absurdity of creating such a thing as "the law of the horse," just such a thing has happened by statute, in the form of "the consumer law of the horse." M. Greve: Harm-Less Lawsuits? (What's Wrong with Consumer Class Actions) 4 (2005). It occupies the same ground as common-law tort and fraud theories of liability — jointly and simultaneously "cover[ing] the same transaction." *Id*. at 4-5. Statutory "consumer law" claims, however, do not cover "a single transaction that is not also covered by traditional common-law doctrines." *Id*. at 5.

In fact, the "consumer law of the horse" (harmless lawsuits) is a Trojan horse. There is no need for an additional layer of defense against consumer fraud, much less to deputize private litigants with roving commissions to act in the "public interest" against statements or conduct capable of deceiving some hypothetical cohort of individuals. First, "government enforcement is [now] strong" and working. S. Scheuerman: The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance As an Essential Element. 43 *Harvard Journal on Legislation* 1, 33 (2006). Second, as with Judge Easterbrook's "horse trader" example, transactions in the horse market already "are easily captured under the traditional doctrines of contracts and torts, and they are comprehensible only in the broader context of commercial law." M. Greve: Harm-Less Lawsuits? at 4. The same thing can be said about statutory consumer law.

Briefly, because "today's FTC and state attorneys general take an active role in protecting the public from manufacturers' misrepresentations," the historical underpinning of judicial abandonment and relaxation of the reliance-causation requirement in the name of consumer protection (beginning in the 1970s) — "non-enforcement by government agencies and application of the 'public law' theory" — no longer obtains. S. Scheuerman: The Consumer Fraud Class Action, at 33. Nowhere is the insidiousness of this development more apparent than at the certification stage of class actions, which tends to be the decisive point. Specifically, rather than bet the company on a single consumer-law class action, companies often are forced "by fear of the risk of bankruptcy to settle even claims" lacking merit. *Id*. at 8.

A significant factor in the rise of consumer fraud class action suits is the emerging practice of allowing these claims to proceed through the process of class certification without any allegation of reliance — the traditional causal element of a common law misrepresentation claim that requires an injured party to allege that the manufacturer's misrepresentation induced the consumer to purchase the product. *Id*. at 2-3 (emphasis added).

This development, the running of "the consumer law of the horse," is a real and costly nuisance.

The Root Problem of Incoherent Statutory Construction

What Does Causation Require?

It all begins with the words "as a result of," found in practically every state consumer-protection statute authorizing private causes of action for the recovery of "ascertainable loss" (or "actual damage") caused by violations of "consumer law" statutes. See, *e.g., Oliveira v. Amoco Oil Co.*, 776 N.E.2d 151, 160 (Ill. 2002) ("Any person who suffers actual damage *as a result* of a violation of [the] Act committed by any other person may bring an action against such person") (emphasis added). Over the past quarter century in the U.S., these laws — more specifically their "ascertainable loss" and "as a result of" requirements — have given rise to two schools of judicial thought regarding the causation standard in private "consumer law" actions for money damages in respect of product misrepresentation claims.

Ignoring both context and basic rules of statutory construction, a majority of courts (state and federal) have read the words "as a result of" altogether out of statutes authorizing private causes of action for statutory "consumer law" violations, saying it means no more than cause-in-fact, but often seeming not to know precisely what that means. They have done so by eliding the statutory pleading requirements applicable to *public* enforcement of "consumer law" — that is, *deterrence-oriented* instruments designed to allow public prosecutors to act against threatened or incipient consumer fraud in the public interest — with those applicable to private, *compensation-oriented* consumer class actions. The result, significant relaxation of the private plaintiff's burden of proof by elimination of a reliance requirement, is justified by the claimed need to supplement public-enforcement actions in the name of deterrence.

However, putting such power and pleading benefits in the hands of private litigants, to the end of still greater deterrence, makes little sense in the light of the National Association of Attorneys General's (NAAG) now decade-old revival and purposeful pursuit against "consumer law" violations. See, e.g., S. Scheuerman: The Consumer Fraud Class Action, at nn.3 & 4; C. Provost: The Politics of Consumer Protection: Explaining State Attorney General Participation in Multi-State Lawsuits, *Political Research Quarterly*, 609-18, 610 (Dec. 2006). Also, whereas public prosecutors are subject to accountability in the form of budgetary and political checks and balances, in entrepreneurially driven consumer class actions by contrast, plaintiffs' lawyers — as *de facto* clients — are largely uncontrolled and unaccountable. *See* M. Greve: Consumer Law, at 160.

These courts (unconvincingly) distinguish "causation" and "reliance" as being somehow different concepts in the context of statutory "consumer law" claims alleging affirmative misrepresentations. As in *Smoot v. Physicians Life Ins. Co.*, 87 P.3d 545, 550 (N.M. Ct. App. 2003), which typifies this approach, they say things like (emphasis added):

> Defendant mistakenly contends that the statutory requirement for a causal connection between the deceptive practice and the claimant's damages equates to a requirement that the claimant prove detrimental reliance. However, causation and reliance are distinct concepts. 'Causation requires a nexus between a defendant's conduct and a plaintiff's loss; reliance concerns the nexus between a defendant's conduct and a plaintiff's purchase or sale.'

This obscures the point entirely, however. Simply put, since most consumer class actions seek to recover the money spent on the product as damages, a detrimental reliance component (what securities law calls transaction-causation) inheres in the obligation to prove loss-causation. That is because, [a]s a practical matter, damages cannot be 'caused' by a defendant's misrepresentation without reliance on the statement. [C]ourts that

have rejected this principle have misunderstood the relationship between reliance and causation in a misrepresentation case ... *This argument, however, ignores the fact that in a misrepresentation case, the plaintiff's 'loss' is the 'purchase or sale.'* S. Scheuerman, "The Consumer Fraud Class Action," at 45 (emphasis added).

One of the best examples of how abandonment of the common-law reliance requirement in consumer class actions produces absurd results is *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2 (Minn. 2001), where several health maintenance organizations sued the major tobacco companies in the U.S. under Minnesota's consumer-protection statutes to recover the "costs for increased health care services they provided [subscribers] ... as a result of tobacco-related illnesses." *Id*. at 4. In answering the question whether "private plaintiffs [must] *plead and prove* individual purchaser reliance" to be "eligible for relief in the form of damages" under Minnesota statutory law, the Minnesota Supreme Court said: "It is not necessary for plaintiffs to *plead* reliance by individual purchasers of defendants' products in order to properly plead a claim under" Minnesota consumer law. *Id*. at 4 & 5 (emphasis added).

Like other courts taking this position, *Group Health* reasoned itself to this outcome by way of "the broad language of" the consumer-protection statutes at issue, together with what it perceived as a "legislative intent" to "create remedies broader than those available in an action for common law fraud." *Id*. at 4. Fixing its gaze upon the remedial section of the statute giving "the attorney general authority to investigate and enforce" consumer statutes for purposes of "regulat[ing] 'unfair, discriminatory, and other unlawful practices in business, commerce, or trade,'" *Id*. at 6, the *Group Health* opinion concluded that "[i]n passing consumer fraud statutes, the legislature clearly intended to make it easier to sue for consumer fraud than it had been to sue for fraud at common law. The legislature's intent is evidenced by the *elimination* of elements of common law fraud, such as proof of damages or reliance on misrepresentations," *Id*. at 12 (emphasis in original).

This logic, however, is almost certainly flawed in light of the language of the statute itself, not to mention the balance of the court's holding. More to the point, although the Minnesota statute creating private remedies for violations of "consumer law" does not literally contain the word "reliance," the concept of causal nexus is plainly encompassed by the statute's standing requirement, which provides: "*any person injured by a violation* of any of the [consumer] laws referred to in subdivision 1 may bring a civil action and recover damages." *Id*. at 8 (emphasis added). In fact, the Minnesota Supreme Court later concedes as much, paradoxically holding that while it is not necessary for plaintiffs to *plead* reliance for class-action certification purposes (that is, at the front-end), *it will be necessary to prove reliance on those statements or conduct to satisfy the causation requirement [on the merits, post-certification]* ... [Plaintiffs] must demonstrate that defendants' conduct had some impact on their members' use of tobacco products that caused their damages. *Id*. at 13-14 (emphasis added).

This is little more than sleight of hand, though, given that in nearly all consumer class-action litigation, certification is the whole shooting match. Further, "[a] court that has slighted or sidestepped [the need for reliance] at the class certification stage is unlikely to emphasize it at a later stage." M. Greve: "Consumer Law at 170.

Reliance-Causation As Safe Harbor from 'the Siren Song'

"[A] simple fix" is to require reliance-causation for "consumer law" claims sounding in misrepresentation, as at common law. S. Scheuerman: The Consumer Fraud Class Action, at 33. Less than a dozen or so states, however, take this approach. Distinguishing the public-law enforcement template as inapposite, and seeing no need for further erosion of common-law pleading and proof requirements for private litigants (past abandonment of the scienter requirement), "reliance-causation" states read the operative statutory "as a result of" language to require proof of both detrimental reliance (or transaction causation) and loss causation.

Washington was one of the first jurisdictions to recognize the distinctly different purposes served by public and private "consumer law" actions, and the corresponding need for different pleading requirements. Seizing precisely on the question whether proof of causation in a private action

incorporated a reliance element, and in the process distinguishing the public-law function of deterrence by public prosecutors, the Washington Court of Appeals in *Nuttall v. Dowell*, 639 P.2d 832, 840 (Wash. Ct. App. 1982), held that "a party has not established a causal relationship with a representation of fact where he does *not* convince the trier of fact that he relied upon it" (emphasis added).

In *Weinberg v. Sun Co.*, Inc., 777 A.2d 442, 446 (Pa. 2001), the Pennsylvania Supreme Court adopted a similar approach, noting that the "tendency to deceive" statutory language used by some courts to justify abandonment of the reliance requirement was a consideration uniquely "appropriate for a high public official responsible for protecting public interests." Continuing, it found no warrant for the Trojan horse of reliance-less "consumer law" in the legislative history or elsewhere, holding: "The statute clearly requires, in a private action, that a plaintiff suffer an ascertainable loss as *a result of* the defendant's prohibited action. That means ... a plaintiff must allege reliance." *Id.* at 617-18 (emphasis added). The Illinois Supreme Court followed suit in *Barbara's Sales, Inc. v. Intel Corp.*, 879 N.E.2d 910, 926-27 (Ill. 2007), ruling:

The 'as a result of' language ... imposes an obligation upon a private individual seeking actual damages under the Act to 'demonstrate that the fraud complained of proximately caused' those damages in order to recover for his injury. [P]laintiffs must prove that each and every consumer who seeks redress actually saw and was deceived by the statements in question (emphasis added).

See also Feitler v. Animation Celection, Inc., 13 P.3d 1044, 1047 (Or. Ct. App. 2000) ("the causal/'as a result of' element requires proof of reliance-in-fact by the consumer").

Recommendation: Tie Yourself to the 'Reliance-Causation' Mast

So, what to do? A practical solution would confine each liability theory to its intended purpose; use public enforcement mechanisms to prohibit and abate threatened or incipient harmful conduct, for deterrence in the "public interest," and leave entrepreneurial private class actions for the compensation of actual harm causally connected to ("as a result of") wrongful conduct. With the NAAG now regularly extracting large cash settlements (and voluntary injunctions) from companies and industries for allegedly "unfair" and "deceptive" business practices, acting much as *de facto* national regulatory authorities, the original justification for encouraging private attorney general actions through abandonment of traditional "intent" and "reliance" requirements — the need to supplement past perceived laxity in public enforcement of "consumer law" — seems no longer apt.

In short, there is no need for a separate body of "consumer law" as a common-law overlay for purposes of making people whole, compensation. Maintaining a reliance requirement in consumer class actions keeps the different objectives of "public" and "private" law in equilibrium, while at the same time checking systemic abuse to maximize the predictability and efficiency of liability (and cost) allocations for purposes of consumer protection.

So when the "siren song of consumer law" plays at the intersection of the common law and statutory law — and "the consumer law of the horse" appears — tie yourself to the mast of "reliance-causation." There is much room for advocacy of this point, notwithstanding misguided precedent to the contrary.

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