STATE CONSUMER PROTECTION LAWS UNHINGED

It is Time to Restore Sanity to the Litigation

ATR FOUNDATION

STATE CONSUMER PROTECTION LAWS UNHINGED

It is Time to Restore Sanity to the Litigation

ATR
FOUNDATION

TABLE OF CONTENTS

 The primary purpose of the American Tort Reform Foundation (ATRF), founded in 1997, is to help bring greater fairness, efficiency, and predictability to our civil justice system by educating the public, the media, and policymakers about how the civil justice system operates, the need for a balanced system, the role of tort law, and the impact of litigation on the private, public, and business sectors of society. ATRF periodically publishes papers and reports that advance the understanding of these issues and provide recommendations on how to improve the balance, predictability and overall fairness of the civil justice system. ATRF is a District of Columbia nonprofit corporation designated by the Internal Revenue Service as a 501(c)(3). For more information, visit http://www.atra .org/about/atr-foundation.

Executive Summary

The Problem

- Plaintiffs' lawyers have become the primary beneficiaries of state consumer protection laws. While settlements provide consumers with no more than a few dollars, the lawyers who invent such cases get millions in fees. Such litigation results in needlessly higher prices, less consumer choice, and a drain on the economy.

- Lawyers bring massive class actions on behalf of individuals who experienced no financial loss or where reasonable consumers were not misled by the advertisement or practice at issue.

- The laws' vague prohibition of "unfair" or "deceptive" practices, allows plaintiffs' lawyers to pursue ridiculous lawsuits, even for conduct that is already closely regulated by government agencies.

- Consumer protection laws provide for relaxed evidentiary standards, high damages, and recovery of attorneys fees and costs because they were intended to provide a remedy for fraud in day-to-day consumer purchases. Lawyers misuse these statutes as an alternative to personal injury, wrongful death, and other actions where the law already provides an appropriate remedy.

Key Findings

- Over the past two years, there has been a surge of consumer class action lawsuits, particularly in California courts, against food makers.

- Plaintiffs' lawyers are bringing "economic loss" claims in order to avoid the need to find an injured client or prove a product is defective. For example, "no injury" class actions against pharmaceutical and auto makers claim there is a problem with a product that lowered its value, even if it worked fine for those who sue.

- Some courts have inappropriately allowed plaintiffs' lawyers to use state consumer protection laws to create a way to bring private lawsuits under state laws for which the legislature provided only for government enforcement.

- Some advocacy groups are using consumer protection laws to achieve political goals that they cannot achieve through the legitimate legislative process. These lawsuits often attempt to impose an advocacy group's extreme agenda to limit consumer choices.

Solutions

- Courts and legislatures each have a role to play in restoring sanity to consumer protection litigation.

- Courts should require attorneys who bring such lawsuits to show that their clients were reasonably misled into making a purchase and suffered an actual injury as a result. Courts should interpret the prohibition on "unfair" and "deceptive" practices in a commonsense manner and preclude use of consumer protection laws to bring lawsuits in areas for which they were not intended.

- Where state laws are written so broadly as to require courts to permit lawsuits that are driven by creative plaintiffs' lawyers rather than consumers, or where judges fail to rein in this unhinged consumer litigation, state legislators can and should act.

The Consumer Lawsuit Industry

Consumer protection laws were intended to provide a remedy for people who are duped by false advertising or misleading practices in their day-to-day purchases, but, lately, the primary beneficiaries are plaintiffs' lawyers. By taking advantage of the laws' vague prohibition of "unfair or deceptive practices," plaintiffs' attorneys and some advocacy groups are transforming them from serving a legitimate function for consumers into a virtual lawsuit production factory. As a result of these suits, consumers get less choice in products and services, higher prices, and unnecessary disclaimers. Those who take the time to fill out the paperwork resulting from a settlement may get a few dollars or a coupon off their next purchase, while the attorneys who ginned up the lawsuit take home millions.

Over one hundred consumer class actions were filed against food makers in 2012 alone, five times the number filed four years earlier. The lawsuits literally cover products from soup to nuts.

These lawsuits would be laughable if they were not so costly for consumers and for the employers who have to defend against them. Companies are paying millions of dollars in legal fees in order to defend against frivolous and outrageous lawsuits drummed up by entrepreneurial plaintiffs' attorneys. For example, Subway faces, not one, but seven, class action lawsuits asserting that its "footlong" subs sometimes come out of the oven measuring 11½ inches or so.[1] Plaintiffs' lawyers accused Taco Bell of misrepresenting its tacos as made with "ground beef," a suit that the lawyers withdrew after the company took to the newspapers and Internet to protect its reputation by explaining that ingredients adding spices and texture does not alter the meat-content of its product.[2]

Other lawsuits, which are among the few to be dismissed, have posed such lofty questions as whether Greek yogurt is "Greek" or "yogurt,"[3] and is "Sugar in the Raw" sufficiently raw?[4] Plaintiffs' lawyers in six states recently accused Anheuser-Busch of watering down its beer,[5] claiming it has three-tenths of a percent less alcohol than claimed on its label.[6] Another example involved the maker of Nutella, who recently caved to the pressure of an outlandish lawsuit. The company settled allegations that consumers believed that the chocolate, hazelnut spread, for which the sugar and fat content is fully disclosed on the label, is healthy.[7] Now, lawyers claim that consumers are misled into believing that products such as Froot Loops, Pop Tarts, Fruit Roll-Ups, and Super Mario Fruit Snacks are made of real fruit or are nutritious.[8] Makers of healthy products are not immune from these lawsuits. Plaintiffs' lawyers have sued sellers of frozen vegetables, granola bars, and juice, claiming that the products are not "all natural."

Lawyers attempt to strike it rich – they target product after product and sometimes name the same person over and over as their purported client. Occasionally, they hit the jackpot. For instance, a lawsuit targeting Kellogg's advertising of Frosted Mini-Wheats as raising children's attentiveness led to a settlement in which the lawyers would take home millions. An appellate court initially computed the amount to be equivalent to $2,100 per hour, while the settlement offered class members, at most, $15.[9]

Given the generous recovery available and lesser evidence required, entrepreneurial plaintiffs' lawyers frequently tack on consumer claims in personal injury, product liability, and wrongful death lawsuits, or use them as an alternative to proving an actual injury. For instance, Toyota settled highly questionable unintended acceleration cases brought on behalf of people who did not experience a problem for $1.2 billion.[10]

"Kellogg agreed to set up a $4 million fund. And the complaint against class action lawyers, like you, is always this: The person who thought he was treating his kids' ADHD with Frosted Mini-Wheats gets $15 tops; you get a million bucks or something. It doesn't sound fair at some level."

-Robert Siegel of NPR speaks with Tim Blood, who brought the Frosted Mini-Wheats lawsuit.

Legislators intended consumer protection laws to be enforced by government agencies; however, lawyers are misusing these laws to create new rights to sue. Advocacy groups also are taking advantage of consumer protection laws to achieve regulatory objectives through judicial rulings in plaintiff-friendly courts. This bypasses the normal democratic political process and is a blatant abuse of consumer protection statutes.

These lawsuits not only harm companies, they hurt consumers who, as a result, pay higher prices and are deprived of new products and choices. The lawsuit business also harms the economy as employers are forced to redirect money from job creation to defending their products in court.

Courts and legislatures each have a role to play to ensure consumer protection laws help consumers and to end what has become a courtroom casino for lawyers. Judges must demand that such lawsuits involve an actual injury caused by an allegedly deceptive practice, not speculative or hypothetical harms. They can interpret "unfair" and "deceptive" in a commonsense manner, dismissing cases where reasonable consumers would not have been deceived. Courts should reject plaintiffs' lawyer attempts to use consumer protection claims just to get relaxed evidentiary standards, higher damages, and fees. When government agencies regulate a product or service, courts should defer to their policy making expertise. Legislators can and should take action where state law is unclear and allows abuse, or a judicial interpretation needs correction. These and other steps can restore consumer protection laws to their intended purpose.

The Origin of the Problem

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. For those reasons, Congress established the Federal Trade Commission (FTC) in 1914 and expanded its authority to regulate consumer transactions in 1938. States later adopted similar, broad laws, but, unlike the federal government, provided for enforcement through private lawsuits in addition to government action. 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.

"A certain class of lawyers, especially in large communities, will arise to ply the vocation of hunting up and working up such suits. . . . The number of these suits . . . no man can estimate."

- U.S. Senator William Joel Stone (D-Missouri), expressing concern on a proposed amendment that would have authorized private lawsuits under the FTC Act.

Why Congress Said No to Private Lawsuits

When Congress first established the FTC, it considered including a private right of action. The legislative history of the FTC Act documents that there were many concerns with this proposal. There was unease that the vagueness of the terms "unfair" and "deceptive" could lead to limitless lawsuits by attorneys who made their vocation through "hunting up and working such suits."[11] Members also expressed concern that, given the broad working of the statute, employers would have no way of knowing whether an advertisement or a business practice was illegal until hit with a lawsuit. Members feared that "[t]he number of these suits . . . no man can estimate."[12]

Congress addressed these concerns by rejecting private lawsuits and focusing on public law enforcement. In a bipartisan vote, Congress firmly rejected inclusion of a private right of action under the FTC law.[13] Congress created the FTC, a five-person nonpartisan commission, whose membership would have expertise in the business environment, to justly determine whether a practice is unfair or deceptive.[14] The Commission's authority would be primarily injunctive in nature, meaning that, after finding a deceptive practice, it would issue an order requiring the offender to cease and desist from the activity. If the offender disobeyed the order, then the Commission could impose hefty fines.

States Adopt Consumer Protection Laws

In the 1960s, states began adopting their own "mini-FTC acts," which, like the federal law, incorporated a broad prohibition on unfair or deceptive conduct. The purpose of these state laws was to supplement federal consumer protection enforcement by using the financial and human resources of state attorneys general and other government officials to protect the state's consumers.

When state legislatures adopted consumer protection laws, some included private rights of action. Many state laws, like the FTC Act, initially did not allow private lawsuits, but were later amended to permit them.[15] In order to provide an incentive to bring what legislators believed would be small claims arising out of day-to-day consumer purchases, some of these statutes provide for statutory damages, a minimum amount of recovery even if the actual financial loss is less than the amount set by law. For the same reason, many of these laws also provide each prevailing plaintiff with an award to cover attorneys' fees and legal costs. Finally, some of these laws provide for "treble" (triple) damages to punish a defendant for wrongful conduct and provide an additional incentive for bringing such claims, while not necessarily requiring a showing that the defendant acted with the type of malice ordinarily required for punitive damages.[16]

The Problematic Lack of Distinction Between Government Enforcement and Private Lawsuits

In authorizing private lawsuits under broad consumer protection laws, some state legislatures, perhaps inadvertently, did not fully consider the fundamental difference between government enforcement and private litigation.

Government enforcement is primarily injunctive in nature and can stop deceptive conduct before it causes harm. Private lawsuits are retroactive and seek to punish companies for conduct that they may not have known was wrong. Government enforcement is based on considerations of the broad public interest and policy, while private lawsuits are often motivated by money or a particular interest group's social or political agenda. Government enforcement is constrained by human and financial resources, priorities, and, most importantly, public accountability. Private lawsuits are limited only by the entrepreneurial spirit of plaintiffs' lawyers to develop claims, find an individual to serve as a plaintiff, and file what may be a cookie-cutter complaint.

In the absence of an explicit distinction between public enforcement and private lawsuits, courts in some states have interpreted consumer protection statutes to simply extend the broad authority of the attorney general or state consumer protection official to private lawyers with their own agendas. Many state consumer protection laws do not clearly require a plaintiff to show that he or she relied on the advertisement or practice at issue when making a purchase or that the plaintiff experienced an actual out-of-pocket loss. In addition, some courts have cast aside any limitation on such actions, such as by requiring that such lawsuits involve economic losses from purchases of consumer products, as opposed to personal injuries.[17] As a result, consumer protection laws have morphed into a type of universal lawsuit, providing a means to circumvent the usual evidentiary requirements, obtain statutory or treble damages, and seek recovery of attorneys' fees that are otherwise not allowed.

No Deception, No Injury, No Problem

Some state courts have interpreted consumer protection laws so broadly as to dispense with simple requirements that keep lawsuits in check. This has led to widespread abuse.

Fundamental Requirements of Proof in Private Lawsuits

Before an individual brings a lawsuit based on purchase of a product or service, one would reasonably expect that he or she can show four basic elements:

- the person experienced an injury – a loss of money or property – stemming from the purchase;
- the person was misled or deceived by a representation made;
- the person saw or heard an advertisement or was subject to allegedly unfair or deceptive conduct; and
- the deception led the person to act in a way that he or she otherwise would not have, such as by purchasing the product or service.

Without such reasonable limits, entrepreneurial lawyers can recruit clients to play the lawsuit lottery. Consumer protection claims today routinely attempt to skirt these basic requirements that separate private lawsuits from government enforcement.

Lawsuits Without an Injury

Perhaps the most fundamental requirement to bringing a lawsuit is that the plaintiff has experienced an injury. This core principle of standing ensures that courts decide only actual controversies and do not use their power in cases based on hypothetical or speculative harms. But some courts have interpreted state consumer protection statutes as allowing citizens to bring lawsuits on behalf of the general public whether or not anyone has actually been harmed. This opens the door for courts to permit individuals who have never been harmed to sue and recover a cash award.

California's Consumer Lawsuit Nightmare

Removing such limits on lawsuits wreaked havoc in California. In 2004, California Supreme Court Justice Janice Rogers Brown, now a judge on the U.S. Court of Appeals for the Ninth Circuit, recognized that consumer lawsuits in her state became a "growth industry" after the court adopted a "sweeping" construction of its consumer protection law that did away with the need for standing.[18] Voters attempted to rein in the plaintiffs' attorneys with the enactment of Proposition 64; however, the state still has a long way to go.

Under California's "Unfair Competition Law" (UCL), plaintiffs' lawyers launched an unending attack on businesses all over the state. For example, thousands of suits were filed against auto dealers and homebuilders for technical violations. These violations included using the wrong font size or abbreviations, such as "APR," instead of "Annual Percentage Rate", in advertisements or contracts, and travel agents were targeted for not posting their license numbers on their websites.[19] They sued nail salons in Riverside and San Bernardino that used the same nail polish bottle for more than one customer.[20] They sued a national lock manufacturer for labeling locks as "Made in the U.S.A.," when the locks included six screws made in Taiwan.[21] Another UCL suit was filed against Colorado Grill, a Fresno fast-food restaurant, claiming that the restroom mirror was an inch too high to meet disability requirements.[22] To show just how bad it was, one Beverly Hills law firm filed more than 2,200 claims against restaurants and auto repairs shops on behalf of a front corporation located in Santa Ana.[23] The claims were based on technical violations of the state's Automotive Repair

Act. The law firm sent the defendants settlement offers that demanded payments ranging from $6,000 to $26,000.[24]

Small businesses were not the only targets of these lawsuits, as plaintiffs' lawyers also sued AOL Time Warner, Disney, and Metro-Goldwyn-Mayer for using movie reviews from critics who received perks for their reviews.[25] Public outrage led California voters to overwhelmingly pass Proposition 64 in 2004,[26] which reduced the potential for abuse of the law in this way; however, plaintiffs' lawyers continue to take advantage of other aspects of California's broad consumer law. California continues to find itself among the top Judicial Hellholes in the country because of the sweeping consumer protection lawsuit abuse that is allowed to occur in the courts.

No Injury, No Standing to Sue

While California presents an extreme example of how consumer lawsuits can spin out of control, this type of abusive litigation occurs in other areas as well. The District of Columbia has adopted some of the broadest consumer law language in the country with respect to the lack of a need to show an injury.[27] Fortunately, court rulings have helped place reasonable bounds on the resulting lawsuits through adhering to the core principle that only those who are injured have standing to sue.

In 2011, the District's highest court considered two absurd cases. In the first case, Alan Grayson, a member of Congress from Florida, sued AT&T and others on behalf of D.C. residents and the city claiming that phone card companies somehow misled consumers by not turning over leftover balances on calling cards (referred to as "breakage") to the city as "unclaimed property." In the second case, Paul Breakman, a District resident, sued AOL for offering better deals to new members than current members for the same basic internet service. Mr. Breakman, however, was not even an AOL member himself, yet he sought actual damages, treble damages, punitive damages, an injunction, and reasonable attorneys' fees against AOL for each individual D.C. subscriber.

The District's highest court dismissed both claims, which threatened to make the nation's capital a magnet for consumer lawsuit abuse.[28] The D.C. Court of Appeals found that while Mr. Grayson at least alleged that he bought a calling card in the District, he failed to identify anything the company said that misled consumers about the obvious nature of calling cards that would make them think the city or a charity would receive any leftover balance. Mr. Breakman, the Court found, lacked standing to bring a suit. In other words, he had not made even a rudimentary showing that he suffered an injury.[29] The requirement of standing, the Court recognized, ensures that a person who sues has a personal stake in the outcome of a controversy and that judicial power is used only to redress or otherwise protect a person against injury.

The broader message of these well-reasoned decisions is that a person or organization that sues for generous damages and attorneys' fees must show "concrete injury-in-fact to himself." The alternative, the court recognized, "would open our courts to any person from anywhere who decides to lodge a complaint labeled as a 'representative action' under the [consumer protection law], even though that person has suffered no injury-in-fact related to a District of Columbia merchant's unlawful trade practice."[30]

While many of the courts have issued well-reasoned decisions, plaintiffs' attorneys continue to file these types of lawsuits because they understand that it only takes one bad decision from a court in a judicial hellhole for them to receive a huge payday. Until state legislators tighten up the consumer protection laws to prevent a rogue judge from issuing an outlandish decision, abusive lawsuits will continue to be filed and businesses will be forced to defend themselves against ridiculous claims.

Individuals Should Not Receive Money If They Were Not Deceived

Some courts interpret consumer laws to allow a person to sue if a business practice has a "tendency" or "capacity" to deceive, even if it did not mislead anyone.[31] For example, the highest court of Massachusetts has ruled, "[a] successful [Massachusetts] action based on deceptive acts or practices does not require proof that a plaintiff relied on the representation, or that the defendant intended to deceive the plaintiff, or even knowledge on the part of the defendant that the representation was false. . . . [C]onduct is deceptive if it possesses 'a tendency to deceive.'"[32] Consumer protection statutes in several jurisdictions, such as Illinois, Maryland, Kansas, New Jersey, West Virginia, and the District of Columbia, specifically allow lawsuits regardless of "whether or not any person has in fact been misled, deceived, or damaged thereby."[33]

A local dry cleaner faced a $54 million "consumer protection" lawsuit when a customer claimed it lost his pants. After three years of litigation, the dry cleaners "won" the case, but was forced to shut down due to the cost and experience of defending itself.

Courts in states, such as Florida and New York, interpret consumer protection laws to allow attorneys to sue on behalf of a person who has not actually seen or heard the representation at issue, so long as it finds that a hypothetical "reasonable" person might be misled.[34] While these may be appropriate standards to spur state regulators into action to protect the public, it is not appropriate in private lawsuits. Individuals who have not actually been injured should not be allowed to recover. Some courts, such as those in Missouri, New Jersey, and New Mexico, draw a fuzzy distinction between reliance and causation, finding only that "causation," something less strict than reliance, is required.[35]

Other courts, such as those in Georgia, Kansas, and Pennsylvania, properly understand that conduct cannot cause a person's injury if he or she did not rely upon it.[36] In other words, if an advertisement or practice did not influence a consumer's decision to purchase a product or service, then it did not cause any harm.

There is a strong public-policy basis for confining private consumer protection lawsuits to cases involving actual, material reliance by the plaintiff on the alleged deceptive behavior. Private lawsuits need an objective measure that links a plaintiff's harm with a defendant's alleged wrongful conduct. The alternative is to give a green light to plaintiffs' lawyers to sue for any representation or omission they can characterize as unfair or deceptive even when it had no impact on an individual or any consumer. This "no harm but a lawsuit is ok" approach opens the door for interest groups to sue purely to achieve their own goals. Such a course broadly expands potential liability and frees the law from the common-sense bounds developed over centuries recognizing a distinction between public and private rights of action.

A Small Claim Can Mean a Big Lawsuit

Consumer protection lawsuits are enticing to plaintiffs' lawyers because they provide for generous monetary awards.

A now-notorious example is the lawsuit brought by Roy Pearson, a D.C. resident who sued his local dry cleaners for $54 million after they allegedly lost his pants. His theory – the lawsuit was not strictly about his lost pants, but about whether the owners of the neighborhood business misled consumers with a sign that claimed "Satisfaction Guaranteed." He claimed thousands of dollars in damages for each day the pants were missing over a nearly four-year period, relying on the D.C. law's promise of $1,500 "per violation."[37] At the time, Mr. Pearson served as an administrative law judge – he knew the District's loose law and how to exploit it. After three years of litigation, his claim was thrown out and his appeal was denied.[38] But the damage was done. Facing mounting litigation expenses and a harrowing experience, the dry cleaner closed its doors.[39]

More than a dozen states, including Massachusetts, Michigan, Rhode Island, and West Virginia, provide for "statutory" damages. Statutory damages allow a plaintiff who cannot show an actual financial loss or can only show a nominal loss to recover an amount set by statute, ranging from $25 to $2,000 per violation. When statutory damages are permitted in class actions that are brought on behalf of thousands of consumers, awards for relatively harmless conduct can result in claims for extraordinary damages.

Many state consumer protection laws impose triple damages and require the defendant to pay the plaintiff's attorney fees and costs, an amount that can dwarf any actual financial loss.

In addition, about two-thirds of states provide for "treble" or a tripling of actual damages. Some state laws permit an award of treble damages only when a defendant commits an intentional or willful wrongful act, a standard similar to that required for awarding punitive damages. Other states, however, provide treble damages to every plaintiff, regardless of whether the defendant made an innocent mistake in believing that its conduct was lawful, a mistake that is easy to make given the undefined nature of an "unfair" or "deceptive" act. Among these states are Hawaii, New Jersey, North Carolina, as well as the District of Columbia.[40] Other state laws, such as those in Montana, Vermont, and Washington, allow courts to award treble damages without any guidepost as to when such damages are appropriate.[41] Finally, in some states, plaintiffs may seek punitive damages on top of these statutory and treble damages.[42]

The ability to receive attorneys' fees is the icing on the cake. Ordinarily, in civil litigation, parties are required to pay their own attorneys' fees and costs. Nearly half of state consumer protection laws provide that every prevailing plaintiff receives attorneys' fees and costs, an amount that can dwarf any actual financial loss in the case. The potential to obtain fees encourages plaintiffs' lawyers to add a consumer protection claim to what would ordinarily be a personal injury or contract action.

As noted earlier, these types of provisions were intended to make it worthwhile to bring an action to recover in ordinary consumer transactions involving small losses. Awarding statutory damages, treble damages, and attorneys' fees does not serve these purposes in lawsuits involving thousands of plaintiffs or the substantial amounts of damages that are typically awarded in personal injury lawsuits.

Turning Consumer Protection Acts into a Universal Claim

Plaintiffs' lawyers take advantage of state consumer protection laws to circumvent the evidence required in product liability and other types of personal injury lawsuits, such as an actual physical injury, causation, and damages. By inserting a consumer protection claim into another action, lawyers can seek triple damages, attorneys' fees, and litigation costs, which are not otherwise available.

How Lack of a Construction Permit Results in Triple Damages

Plaintiffs' lawyers increasingly use CPA laws, meant to help consumers get their money back when misled into making a purchase, as an alternative to personal injury lawsuits.

A recent example comes from Massachusetts this year, in which a trial court judge accepted the invitation of a plaintiff's lawyer to use the state's consumer protection law to override a jury's decision in a wrongful death case. In that case, a young man who had been drinking heavily entered an off-limits area of a local bar to talk on his cell phone and somehow fell down a stairway leading to the basement. There were no witnesses to the tragic accident.

"The stairway was in a private part of the restaurant. It's in the very back of the kitchen. It's not meant for customers to use. He wasn't there to use the stairs. He was there to stand at the bar and visit friends. The condition of the stairs had nothing to do with the consumer relationship between Mr. Freeman and Our House East restaurant."

- Michael Aylward, appellate lawyer for the owners of Our House East

A Boston jury found that the bar was not responsible for his death. But the plaintiffs' lawyers had also asserted a creative claim under the state's consumer protection law, known as Chapter 93A. Since consumer protection claims in Massachusetts are not entitled to a jury trial, the jury issued only an advisory verdict on the Chapter 93A claim, finding that the bar did not engage in any unfair or deceptive conduct. Remarkably, the judge disregarded the jury's conclusion and entered a verdict for the plaintiff on the consumer protection claim. He found that because the bar constructed the stairway at issue, years earlier, without proper permits, and since the stairway was not up to code, the bar had engaged in an unfair trade practice. By applying the consumer protection law, the judge transformed a defense verdict into a plaintiff's verdict and, given the generous recovery allowed by Chapter 93A, hit the small business with triple damages, $6.7 million, plus over $2.3 million for the family's attorneys' fees and litigation costs.[43]

On appeal, the amount of the verdict was overturned, but not its basis, which found that, by constructing the stairway at issue without a permit decades earlier, the business engaged in unfair or deceptive conduct.[44] In fact, after issuing its decision, the Massachusetts Supreme Judicial Court, required the small business to pay an additional $223,977 in fees and $9,746.76 in costs to cover the plaintiffs' appellate expenses before remanding the case for further consideration.[45]

As this case shows, tacking a consumer protection claim onto a personal injury or other lawsuit may not only reduce the evidence needed to recover, it can significantly increase the value of a claim. This further demonstrates why entrepreneurial plaintiffs' attorneys continue to file these types of claims. There is a low evidential threshold to meet with the possibility of a very large reward.

Product Liability Claims Without an Actual Injury or Scientific Support

Consumer protection claims often come disguised as product liability actions. Rather than show that a product had a defect in its design, manufacturing, or labeling, that resulted in an injury, these lawsuits skip over showing an injury. Instead, plaintiffs' lawyers typically claim that the product was worth less than the purchase price, or has less resale value, due to some flaw, even if the product worked as intended for the individuals on whose behalf they sue. These claims allege "economic loss" and sometimes rely on complex statistical models or other expert testimony as a substitute for showing an actual injury.

**If you can find a client who is injured… you sue under product liability law.
If you cannot, you bring a consumer class action lawsuit on behalf of everyone else. Everyone sues. It's no lawsuit left behind.**

In other words, when a potential problem arises with a product, plaintiffs' lawyers recruit clients who may have been injured and sue under product liability law. Other plaintiffs' lawyers broadly sue on behalf of everyone else – those who were not harmed by the product – and use state consumer protection laws to do it. These lawyers do not need to advertise to find clients, they just need one person who purchased the product to serve as a "representative plaintiff" in a class action. As Judge Jerry E. Smith of the U.S. Court of Appeals for the Fifth Circuit recognized, in such cases, the plaintiff essentially says, "you sold it, we bought it, there was an issue with the product or it's labeling, and we want our money back, even though the product worked just fine for us." But "[m]erely asking for money does not establish an injury in fact." [46]

For example, instead of showing that a prescription drug has an inadequate warning label, personal injury lawyers have alleged that a drug is simply not as safe or effective as patients were led to believe, or that the patient would not have purchased the drug had she fully appreciated the risks, even when the medicine helped. One plaintiff used the District of Columbia's broad Consumer Protection Procedures Act to claim that he would not have purchased Vioxx™ if Merck accurately had represented the risks associated with the use of the drug. But the plaintiff did not allege that he suffered any injury while taking Vioxx or that the drug was ineffective in relieving his pain. "There is no obvious, quantifiable pecuniary loss that Plaintiff incurred from purchasing a drug that worked for him and did not cause him any harm," Judge Eldon E. Fallon wisely observed in dismissing the complaint.[47]

While Judge Fallon properly applied the law, other courts have found that state consumer protection laws allow plaintiffs' lawyers to proceed with "no injury" class actions against pharmaceutical makers. For instance, in contrast to Judge Fallon's ruling, a state appellate court affirmed certification of a class of Missouri residents who were prescribed Vioxx, but experienced no injury, under the Missouri Merchandising Practices Act (MMPA). In that case, the court found that the plaintiffs could state a valid claim in alleging that Vioxx was worth less than the product as represented because the company had not fully disclosed risks associated with the drug (which the plaintiffs did not suffer). Those who purchased Vioxx did not have to claim they relied on a misrepresentation when purchasing the drug, the court found, and merely had to assert that the product was worth less than its price when purchased.[48] Given the pressure of class certification, Merck settled the case for $39 million (the lawyers had sought $220 million, representing their estimated value of all Vioxx prescriptions filled in Missouri).[49] It then settled an "economic loss" consumer class action on behalf of everyone else, those who used Vioxx without incident outside of Missouri, for another $23 million in July 2013.[50] This is wasted money that could have been spent on developing new and better drugs for consumers or creating more jobs.

Another example of a product liability suit masquerading as a consumer protection claim is the one filed against cell phone manufacturers and retailers claiming that their products emit dangerous levels of radiation that could lead to brain cancer. Consumer protection laws provide cover to file such lawsuits even when the plaintiffs' lawyers cannot present anyone who suffered an injury from cell phone use.[51] In that instance, a federal appellate court threw out the suit on the grounds that the emission levels at issue were within those considered safe by the Federal Communications Commission, and the U.S. Supreme Court declined to review the ruling.

Toyota settled "sudden unintended acceleration" lawsuits brought by lawyers on behalf of owners who had no problem with their cars for $1.2 billion. Now, they're suing Ford.

Recently, Toyota was hit with a surge of lawsuits alleging that the electronics system in certain vehicles can result in "sudden unintended acceleration." Relatively few of these cases involved people who actually were injured in an accident allegedly resulting from such an occurrence. Rather, most of these suits claimed that, while no one was harmed, the owners are entitled to money damages representing the lost resale value of their cars due to adverse publicity regarding the potential defect. Toyota opted to settle these economic loss claims for about $1.2 billion to protect its reputation, even though government officials concluded that there was no evidence that faulty electronics systems contributed to the acceleration issues. The settlement provides $227 million in fees and costs for the plaintiffs' lawyers who brought the lawsuits.[52] The settlement is the largest of its type in automobile history.[53] Predictably, plaintiffs' lawyers have now filed similar lawsuits against Ford.[54]

"A jury determination that cell phones in compliance with [FCC standards] were still unreasonably dangerous would, in essence, permit a jury to second guess the FCC's conclusion on how to balance its objectives. . . . [G]iven the current state of the science, the FCC considers all phones in compliance with its standards to be safe. These standards represent a "consensus view" of the agencies . . . and incorporate the views of numerous expert organizations and interested parties. As an agency engaged in rulemaking, the FCC is well positioned to solicit expert opinions and marshal the scientific data to ensure its standards both protect the public and provide for an efficient wireless network."

-U.S. Court of Appeals for the D.C. Circuit

Creating New Rights to Sue Where Not Authorized by the Legislature

Plaintiffs' lawyers have also used state consumer protection laws to create a way to sue under other state laws. Typically, when a state legislature passes a law regulating a consumer, business, or health and safety issue, it makes a conscious decision as to how the law will be enforced. In some instances, legislators charge a government agency with enforcing the law. For example, a health inspector may impose fines on a restaurant that violates the health code. In other instances, legislators may authorize individuals that are harmed by a violation of the law to bring a private lawsuit. Such laws typically specify the type of evidence needed to prevail on such a suit and how damages are calculated.

When a statute is silent on whether it authorizes a private right of action, plaintiffs' lawyers sometimes attempt to bootstrap their claim for a regulatory violation into the state's consumer protection law. They do so by claiming that the conduct prohibited under a law that charges that government with sole responsibility for its enforcement also constitutes an "unfair or deceptive" trade practice.

"In this case, the sale of generic prescription drugs is subject to a detailed regulatory scheme created by the legislature, like '[i]nsurance companies operating within Minnesota [which] are subject to a detailed regulatory scheme created by the legislature.' Appellants are attempting to circumvent Minnesota's administrative remedies and create a private right of action when the legislature has not."

- Judge Heidi S. Schellhas, dissenting from the Minnesota Court of Appeals' ruling.

This report includes several examples of such suits. A significant amount of the litigation that led voters to pass Proposition 64 in California, for example, targeted mom-and-pop businesses, such as immigrant-owned nail salons for using the same bottle of nail polish for more than one customer, restaurants for alleged health code violations, or newspaper ads that omitted required text. The recent Massachusetts case that transformed a wrongful death suit into a consumer protection claim subject to triple damages and attorneys' fees was premised on the lack of a permit for constructing a stairway and its noncompliance with the building code. Numerous city health and fire inspectors, charged with monitoring code compliance, inspected the premises over the years but never noted a problem with the stairway or issued a citation.

An example of this practice recently occurred in Minnesota, where groups that administer health benefit plans sued the state's pharmacies claiming that they failed to fully pass savings on to customers who were provided with the generic version of a drug rather than the brand name, as required by state law. The trial court found that the legislature did not intend to create a private remedy under that state law, but created a Board of Pharmacy with significant enforcement tools, including the ability to suspend or revoke licenses and impose fines of up to $10,000 per violation. That did not end the suit since the plaintiffs also claimed that pharmacies violated the Minnesota Prevention of Consumer Fraud Act (CFA) by not disclosing their acquisition costs for drugs. The trial court found no CFA violation because there was no misrepresentation and no duty for a pharmacy to disclose its acquisition costs any more than a grocery store has an obligation to list the amount it pays at wholesale for products it sells. The trial court also observed that even if customers knew the acquisition cost of a drug, the plaintiffs had not claimed they would have acted differently in making a purchase.[55] In a May 2013 ruling, a state appellate court agreed that there is no private right of action under the state's generic prescription drug substitution statute, but found that an alleged violation of that law could violate the CFA.[56] A dissenting judge observed that the plaintiffs' lawyers "are attempting to circumvent Minnesota's administrative remedies and create a private right of action when the legislature has not."

Regulation Through Litigation

"[W]e've had a sudden explosion of obesity. We would much prefer— I think my colleagues and I would much prefer appropriate legislation, but as in the tobacco area, where the legislatures did not act, we were forced to litigate, and we were able to use that weapon very successfully. So here we're using litigation, hoping, however, that the legislatures will legislate."

- Professor John F. Banzhaf III of The George Washington University Law School, NPR interview.

Professor John F. Banzhaf III of The George Washington University Law School, one of the architects of "regulation through litigation," has explained that if the legislatures won't legislate, then trial lawyers will litigate.[57] His comment is representative of some lawyers and advocacy groups that view consumer protection laws as a key mechanism for regulating entire industries. They ask the courts to step outside their role of adjudicating private disputes and use the threat of liability to establish regulatory codes. Such lawsuits often attack unpopular industries or companies with "deep pockets" for financial gain.

Regulation through litigation circumvents the considered public policy decisions made by legislators – those democratic representatives who are elected by the public at large to serve the will of the people. The conduct challenged by the lawsuits may conflict with the decisions reached by experts at government agencies after what is often a lengthy and public process. Former Labor Secretary Robert Reich has called such regulation through litigation "faux legislation, which sacrifices democracy."[58]

Regulating Consumer Choice: No Soda… No Happy Meals… No Dairy.

Ten years ago, Professor Banzhaf was among the participants in a conference on obesity litigation at which "[m]ore than 100 lawyers and consumer advocates . . . pledged a broad series of lawsuits against fast-food chains, food manufacturers and even school boards that sell high-calorie soft drinks without offering healthier choices."[59] The purpose of such lawsuits is not to recover on behalf of consumers who experienced a loss due to deceptive conduct; it is to change public policy to combat obesity. While this may be a laudable goal, the proper means to achieve it is through changing health policy, not suing businesses. Today the courts, the public, and food makers are experiencing the full effect of this philosophy.

Soon after the conference, the Center for Science in the Public Interest (CSPI), a group "known primarily in the past for pestering government officials about nutrition issues and documenting the fat content of foods such as kung pao chicken and microwave popcorn," turned its attention to the courts.[60] The Washington, D.C.-based group publicized that they were recruiting parents and teenagers to serve as plaintiffs in consumer lawsuits alleging that companies which sell soda to kids know that soda is dangerous to their health and contributes to obesity.[61] The lawsuit, which was modeled after claims against the tobacco industry, was first brought in Massachusetts, which has a particularly plaintiff-friendly consumer law. After a victory in the Massachusetts court, the case spread to courts in other states.[62] Under the threat of litigation, the soft drink makers agreed to remove regular soda from school vending machines, but may continue to sell sports drinks and diet soda.[63] As a result, consumers have lost their right to choose their own beverages and foods and are forced to consume only those products that have been deemed acceptable by activist plaintiffs' lawyers, special interest groups, and the courts.

More recently, CSPI took on another critical mission: ridding the world of toys in Happy Meals™. CSPI brought its suit in California, which came as no surprise due to its expansive consumer protection laws. According to the complaint, McDonalds knows that advertisements for Happy Meals™ with toys "will result in kids nagging parents" to buy them. The lawsuit alleged a vast conspiracy to "subvert parental authority" and manipulate young children to "insidiously and deceptively access parents' wallets."[64] The plaintiff, Monet Parham, a mother of two whose job is promoting child nutrition for the State of California, nevertheless felt she had no choice but to bring her kids to McDonalds.[65] She claimed that the Happy Meals™ are part of a "highly sophisticated scheme to use the bait of toys to exploit children's developmental immaturity." In April 2012, the court dismissed the lawsuit.[66] Ruling from the bench, Judge Richard Kramer noted that there were no grounds for a consumer protection lawsuit because parents got exactly what they paid for, a Happy Meal™ with a toy. What the problem really is, Judge Kramer observed, is parents who "don't want to tell their children, 'No.'"[67] CSPI continues to use consumer protection laws to serve as the self-appointed food police with lawsuits targeting products with high fructose corn syrup or artificial sweeteners, among others.

> **"A bout of gas or indigestion does not justify a race to the courthouse. Indeed, were the rule otherwise, a variety of food manufacturers as well as stadiums, bars, restaurants, convenience stores, and hot dog stands throughout the country would be liable to millions of would-be plaintiffs every day."**
>
> **-U.S. Court of Appeals for the D.C. Circuit**
> ***Mills v. Giant of Maryland* (2007)**

CSPI is not the only group to file a lawsuit driven by the organization's extreme agenda. Several years ago, Physicians Committee for Responsible Medicine (PCRM), a group known for its anti-meat and anti-dairy agenda,[68] sued supermarket chains for not alerting District of Columbia consumers as to the effects of lactose intolerance on milk containers.[69] PCRM wanted each carton to scare consumers with the message: "Warning -- Lactose Intolerant Individuals May Experience Bloating, Diarrhea, or Other Gastrointestinal Discomfort From Consuming Milk. Check With Your Physician." The D.C. Circuit ultimately affirmed dismissal of the case, finding that "a reasonable consumer today would be well aware that milk may adversely affect some people."[70] Had this case been brought in a Judicial Hellhole, the outcome could have been very different.

Next on the Lawyers' Menu: "All Natural" Products

Recent lawsuits attempt to exploit the absence of federal regulation that precisely defines what qualifies as an "all natural" product. Plaintiffs' lawyers have filed dozens of claims, on this basis, against makers of ice tea, chips, soup, ice cream, canned tomatoes, frozen vegetables, cooking sprays, cocoa, nutrition bars, and cereal.

Many of these lawsuits claim that it is deceptive to advertise a product as natural if it may contain genetically modified ingredients. Since genetically modified ingredients are commonplace in processed foods that contain corn, soy, beets, or canola, the number of potential lawsuits is endless. Even Pepperidge Farm, as the maker of Goldfish™ crackers, is facing such a suit.[71] Food makers and farmers counter that the technology has created disease-resistant plants and that scientific evidence has shown genetically modified ingredients to have no difference on health than other ingredients. Some advocates, however, feel that, even if this is so, the public should be able to recognize whether a product has genetically modified ingredients or not. Whether such information is helpful, or scares people away from purchasing certain foods for no sound health reason, is a matter for public debate. The question is whether such public policy decisions, involving food or other products, should be made by publicly accountable elected officials and experts, or by a court, composed of a single judge and jury, constrained to decide the case before it.

Are Consumers Really Misled?

The lawyers who claimed their client was "shocked" to find Nutella wasn't nutritious, sought $3.75 million in fees; they took home about $1.2 million. Consumers got up to $20.

Lawyers have also sued food companies claiming that images or statements made in advertising lead consumers to believe products that are clearly not health foods, are good for you. If these lawsuits were not so costly for employers, they might be humorous.

At least one person, for example, was purportedly "shocked to learn" that the chocolate hazelnut spread Nutella is not healthy, even though the nutrition label fully discloses the calories, sugar, and fat per spoonful.[72] In that instance, the manufacturer, Ferrero USA, agreed to establish a $2.5 million fund in case anyone was misled after it ran an ad suggesting parents who "need all the help they can get" can place a little Nutella on multi-grain toast or a whole wheat waffle to entice children to eat a healthy breakfast.[73] Did you miss your opportunity to get $4 per jar purchased (but no more than $20)?[74] The plaintiffs' lawyers who brought the Nutella case sought $3.75 million fees and costs; they got about $1.2 million.[75]

Today, similarly outrageous claims allege that consumers are misled into believing that products such as Froot Loops, Pop Tarts, Fruit Roll-Ups, Super Mario Fruit Snacks, cookies and other treats are healthy and nutritious.[76]

Some lawyers have turned to actively searching for purely technical violations of federal labeling regulations, where no one was actually deceived, to bring lawsuits. For example, lawsuits have targeted "sugar-free" gum for lacking a government-required disclaimer that the product is not low calorie or for weight control and attacked a manufacturer's computation of the proper serving size for a breath mint.[77]

California: The Golden State for Consumer Lawsuits

Over the past two years, plaintiffs' lawyers have unleashed a flood of consumer class actions targeting what they have labeled as "Big Food." Some of these claims are brought by plaintiff-attorney veterans of lawsuits against the tobacco industry who are looking for the next deep pocket to sue.[78] About a dozen plaintiffs' law firms have taken to the courts with gusto, filing about 75 class action lawsuits between them in the past two-to-three years.[79] By one count, over one hundred consumer class actions were filed against food makers in 2012 alone, five times the number filed four years earlier.[80] Rarely has there been a week in 2013 without a report of another class action filing against a food maker. In some instances, the lawyers bringing the cases do not even bother to find new clients – they name the same individuals as plaintiffs over and over again in lawsuits involving different manufacturers and products.[81]

Despite the enactment of Proposition 64, California is the epicenter of this litigation due to its plaintiff-friendly consumer laws, large population, and a federal district court perceived as receptive to such claims. Some also point to the Ninth Circuit's friendliness toward certification of class actions and leniency in requiring consumers to show they relied on the alleged misleading conduct as a potential contributing factor.[82] The Northern District of California has earned the moniker of "the food court,"[83] since it hosts more food lawsuits than any other federal court.[84]

About two-thirds of the food lawsuits highlighted in this paper have found their home in the California court system. In 2012 alone, a consortium of out-of-state lawyers filed 24 suits in less than two months in the U.S. District Court for the Northern District of California against over 30 different companies, including Procter & Gamble, Chobani, Whole Foods Market, and Dole Foods Company.[85] Unfortunately, as is often the case with consumer protection lawsuits, the lawyers were the ones who sought out the plaintiffs because they saw a great opportunity for their next big payday. When asked why they chose this specific court, one of the plaintiffs' lawyers replied, "The law is more favorable here than in any other jurisdiction that we've looked at." Another well-respected defense lawyer involved in several of these suits, pin-pointed the main problem, "In the Northern District, the judges have shown they're going to allow cases… It's like having a welcome mat on the front door."[86] The California laws are loosely written so as to provide judges with the latitude to adjudicate and regulate from the bench as they see fit. Opportunistic plaintiffs' attorneys recognize the trend and they are flocking to the courts to file as many lawsuits as possible.

A single lawyer has used California's consumer law to sue Bigalow and Twinings teas, Bumble Bee tuna, Chobani Greek yogurt, Clover Stornetta Farm yogurt, Wholesoy yogurt, Del Monte and Dole fruit products, Frito-Lay and 7-Eleven chips, Gerber baby food products, Ocean Spray drinks, Turtle Mountain frozen desserts, Horizon soy milk, as well as numerous products made by Kraft, ConAgra, and Nature's Path products.

As long as plaintiffs' lawyers have reason to believe that lawsuits of this nature might result in a big payday, they will continue to roll the dice. A proposed settlement with Kellogg provides a reason for lawyers to continue to play the game. Under a settlement initially reached with plaintiffs' lawyers, Kellogg was obligated to pay $10 million for asserting that kids are more attentive when they eat Frosted Mini-Wheats cereal for breakfast. Giving kids something frosted for breakfast is probably going to increase their attentiveness, but the "science" adduced by plaintiffs supports only an 11% boost in attentiveness over kids who skip breakfast, not the 20% boost advertised by the manufacturer. The lawyers would have pocketed $2 million in attorneys' fees for their efforts, an amount that a federal appellate court initially found "breaks down to a $2,100 hourly rate — while offering class members a sum of (at most) $15."[87] And, recognizing that most people will not bother filling out forms for such a paltry sum, about half of the proposed settlement would have come in the form of $5.5 million "worth" of food given to unnamed charities.[88]

This last factor led the U.S. Court of Appeals for the Ninth Circuit to reject the settlement because it found no tie between the donations and consumers for whose benefit the lawsuit was purportedly brought.[89] As a result, there is a new proposed settlement of $4 million, of which about $1.5 million will go to the lawyers for their fees and costs.[90] Those who purchased the cereal in certain months in 2008 and 2009 are still eligible to receive the same $5 per box, up to $15. Instead of sending unclaimed settlement money to food charities, it will go to Consumers Union, Consumer Watchdog, and the Center for Science in the Public Interest so that they can bring more lawsuits.

Restoring the Purpose of Consumer Protection Laws: Ten Principles for Courts and Legislatures

Today, state consumer litigation is, as U.S. Senator William Joel Stone (D-Missouri) predicted a century ago in the debate that led Congress to reject a private right of action under the FTC Act, driven by "[a] certain class of lawyers" who have arose "to ply the vocation of hunting up and working up such suits. . . ."[91] Consumers are largely bystanders in this process, sitting on the sidelines until they have an opportunity to fill out paperwork to receive a few bucks of a multimillion dollar settlement that primarily benefits the creative lawyers who dream up the case. Ironically, the costs of these settlements, which are, at best, of dubious value to consumers, are passed on to those who buy products in the form of higher prices or can adversely affect employers who already are in a weak financial position.

State consumer protection laws can again serve consumers through application of basic legal principles. In many cases, courts can interpret and apply state consumer protection laws in a manner that refocuses them on recovering actual losses stemming from misleading advertising or deceptive practices.[92] Where state laws are written so broadly as to require courts to permit lawsuits that are driven by creative plaintiffs' lawyers rather than consumers, or where judges fail to rein in this unhinged consumer litigation, state legislators can and should act.

Application of the ten principles below can restore sanity and a legitimate purpose to state consumer protection litigation:

1. **All private plaintiffs must show an actual injury.** This basic principle ensures that lawsuits provide recovery for actual harms, not hypothetical or speculative theories. The D.C. Court of Appeals' recent rulings (discussed p. 9), as well as California voters' support of Proposition 64, provide examples for other states to follow if courts disregard core principles of standing.

2. **Plaintiffs must show that the injury they suffered was in fact caused by the alleged misrepresentation or deception.** Lawsuits should not result in awards to consumers who never saw or heard the alleged misrepresentation or were otherwise not influenced to purchase a product by the conduct at issue. Nor should the law permit recovery based on statements that any reasonable consumer would understand as acceptable "puffery" in advertising.

3. **Consumer protection laws provide for recovery of actual economic losses stemming from purchase of consumer goods or services. They should not apply in cases involving personal injuries, wrongful death, or other areas where the law already provides a specific means for recovery.** For example, the Washington Supreme Court has ruled that the state's consumer protection law does not provide a remedy in medical negligence cases because medical treatment is not an injury to one's "business or property," as used in the law.[93] The alternative would have led to triple damages and attorney fees in already expensive medical malpractice litigation, driving up insurance premiums for doctors and healthcare costs for patients.

4. **Courts should interpret "unfair" and "deceptive" in a commonsense manner, dismissing cases where reasonable consumers would not have been deceived.** If needed, state legislatures can better define and enumerate prohibited practices. They can also take the approach, adopted in Tennessee in 2011, of limiting enforcement of its "catch all" provision, which generally prohibits "any other act or practice which is deceptive," to the government.[94]

5. **Manufacturers should not be liable under consumer protection acts when they follow the law.** When the conduct that a plaintiff's lawyer claims is unfair or deceptive complies with federal law, courts should find that the claim is "preempted," meaning that the federal law governs. A separate federal doctrine, known as "primary jurisdiction," similarly permits courts to decline to decide cases when a government agency is considering the public policy issue involved in the litigation.[95]

6. **Consumer protection laws should not apply to conduct that is already closely regulated by government agencies.** About two-thirds of state consumer protection laws explicitly state that they do not apply to conduct that is authorized or permitted by a state or federal agency.[96] In such situations, there is already a safeguard against unfair and deceptive practices. There is "no need to fill in a legal gap or create a consumer right" where the practice at issue is already regulated by a government agency.[97] The West Virginia Supreme Court of Appeals, a court that is not viewed as favorable to corporate defendants, recognized this principle when it ruled in 2010 that the state's consumer protection law does not apply to cases involving the sale of prescription drugs because the industry's marketing practices are already closely regulated by federal law.[98] Other examples where such treatment may be appropriate are lawsuits challenging rates set by utility companies or insurer practices that are approved by state regulators.

7. **Consumer protection acts should not create new rights to sue under other laws for which the legislature decided not to provide a private right of action.** Legislatures know full well how to provide a private right of action to enforce a law. The choice of elected officials to charge a government agency with enforcing the law in a consistent and understood way should not be overridden by a court by creating a right to sue where a legislature has not done so.

8. **Statutory and treble damages, and awards of attorneys' fees, serve no purpose in class action litigation.** These provisions were intended to make it feasible to bring small suits for individual consumer purchases, not augment recovery in an already massive class action, which serves the same purpose of facilitating litigation of small claims. For these reasons, several states either do not permit consumer lawsuits to be brought as class actions[99] or provide that statutory damages are unavailable in class actions.[100]

9. **Companies should not be punished for innocent mistakes.** Some level of willfulness or intentional conduct should be required for an award of treble (triple) damages.

10. **Class action settlements should be subject to careful judicial scrutiny.** Careful judicial review of settlements is needed to assure that consumer protection litigation does not result in a windfall for lawyers and meaningless "coupon" recovery for actual consumers.

ENDNOTES

[1]*See* Nadia Arumugam, *Why Lawsuits Over Subway's Short Footlong Sandwiches Are Baloney,* Forbes, Jan. 27, 2013. The federal courts have transferred these lawsuits, which were filed in Arkansas, California, Illinois, New Jersey, and Pennsylvania, to the Eastern District of Wisconsin. *See In re Subway Footlong Sandwich Marketing & Sales Practices Litig.,* MDL No. 2439 (J.P.M.L. June 10, 2013).

[2]*See* Diane Macedo, *Taco Bell Still Has Beef With Firm That Dropped Lawsuit,* Fox News, Apr. 26, 2011; Elizabeth Flock, *Taco Bell Says Taco Meat Is Actually Meat; Lawsuit Withdrawn,* Wash. Post, Apr. 19, 2011.

[3]*See, e.g.*, *Smith v. Cabot Creamery Co-op. Inc.,* No. 12-cv-4591, 2013 WL 685114 (N.D. Cal. Feb. 25, 2013) (dismissing claim that Greek yogurt did not qualify as yogurt on basis that product complied with FDA regulations); *Taradejna v. General Mills Inc.*, No. 12-cv-993, 2012 WL 6113146 (D. Minn. Dec. 10, 2012) (dismissing similar claim on primary jurisdiction grounds).

[4]*Rooney v. Cumberland Packing Corp.,* No. 3:12-cv-00033, 2012 WL 1512106 (S.D. Cal. Apr. 16, 2012) (dismissing claim on basis that reasonable consumers could not be led to believe that Sugar in the Raw contains unprocessed and unrefined sugar, as the plaintiff had claimed).

[5]The federal courts have transferred this litigation, which includes class action lawsuits filed in California, Colorado, New Jersey, Pennsylvania, and Texas to the Northern District of Ohio. *See In re: Anheuser-Busch Beer Labeling Marketing & Sales Practices Litig.,* MDL No. 2448 (J.P.M.L. June 10, 2013).

[6]*See* Michael Martinez, *CNN Tests Alcohol of Anheuser-Busch Beers; Brewer, Attorney Dispute Findings,* CNN.com, Mar. 2, 2013; Lee Moran, *Anheuser-Busch Responds to 'Watered Down' Budweiser Lawsuit With Funny Ad Campaign,* N.Y. Daily News, Mar. 4, 2013.

[7]*See* Nutella Consumer Class Action Settlements, at https://nutellaclassactionsettlement.com/ (last updated Sept. 5, 2012); *see also* Laurent Belsie, *Nutella Settles Lawsuit. You Can Get $20*, Christian Science Monitor, Apr. 27, 2012.

[8]*See, e.g.*, Mark Anstoetter & Madeleine McDonough, *Spate of Consumer-Fraud Lawsuits Filed Against Kellogg Over "Real Fruit" Claims,* June 21, 2013; Reuters, *Suit Over Fruit Content Of General Mills Snacks to Proceed,* Chic. Trib., May 11, 2012; Erin Fuchs, *Kellogg Tries To Shake Fight Over Nutrition Claims,* http://www.law360.com/articles/272579/kellogg-tries-to-shake-fight-over-nutrition-claims, Sept. 20, 2011.

[9]*Dennis v. Kellogg Co.,* 687 F.3d 1149, withdrawn and superseded by 697 F.3d 858 (9th Cir. 2012). *See* infra pp. 19 for further discussion of this case.

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

[11]51 Cong. Rec. 13,113, at 13,120 (1914) (statement of Sen. Stone).

[12]*Id.*

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

[14]51 Cong. Rec. 11,084, at 11,108-09 (1914) (stating that the power to determine unfair practices would be placed in a nonpartisan Commission, composed of "a body of five men, intelligent men . . . [including] lawyers economists, publicists, and men experienced in industry, who will . . . be able to determine justly whether the practice is contrary to good morals or not") (statement of Sen. Newlands).

[15]In 2009, Iowa was the last state to adopt a private right of action. 2009 Acts, Ch. 167, § 9 (Iowa 2009) (codified at Iowa Code § 714H.5) (permitting a private right of action to recover actual damages, but not for claims for bodily injury or pain and suffering, authorizing consumers to seek punitive damages of up to three times actual damages in cases of willful and wanton misconduct, requiring courts to award prevailing plaintiffs reasonable attorneys' fees, and providing a defense for unintentional violations).

[16]For an in-depth survey of state consumer protection statutes, *see* Victor E. Schwartz & Cary Silverman, *Common-sense Construction of Consumer Protection Acts,* 54 U. Kan. L. Rev. 1, 15-31 (2006).

[17]*See, e.g., Green v. N.B.S., Inc.,* 976 A.2d 279 (Md. 2009) (permitting use of the Maryland Consumer Protection Act to recover damages, including pain and suffering, in a personal injury case stemming from alleged exposure to lead paint, while finding that the state's limit on noneconomic damages applied to recovery).

[18]*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.,* 17 Cal.4th 553, 587 (1998) (Brown, J., dissenting) (citing *Barquis v. Merchants Collection Ass'n,* 496 P.2d 817 (Cal. 1972)).

[19]*See* John Wildermuth, *Measure Would Limit Public Interest Suits,* S.F. Chron., May 31, 2004, at B1; Walter Olson, *Stop the Shakedown,* Wall St. J., Oct. 29, 2004, at A14.

[20]Amanda Bronstad, Nail Biter, L.A. Bus. J., Dec. 16, 2002, at 12, *available at* 2002 WLNR 14731257.

[21]*See* Walter Olson, *Stop the Shakedown,* Wall St. J., Oct. 29, 2004, at A14.

[22]Robert Rodriguez, *Business Coalition Seeks to Tighten Law, Lawyers Use Loophole to Sue, Group Says,* Fresno Bee, Sept. 24, 2004, at C1, *available at* 2004 WLNR 20532411.

[23]Monte Morin, *State Accuses Law Firm of Extortion,* L.A. Times, Feb. 27, 2003, at 5.

[24]California Attorney General Bill Lockyer filed a Section 17200 lawsuit on behalf of the state *against* the law firm involved in suing restaurants and automobile repair shops for abusing Section 17200. *Id.* Ultimately, the lawyers involved surrendered their licenses, rather than face disciplinary proceedings. *See* Lisa Muqoz, *Three Beverly Hills Lawyers Resign from California Bar in Face of Disbarment,* Orange County Register, July 13, 2003, *available* at 2003 WLNR 10915127.

[25]*See* John H. Sullivan, *California's All-Purpose Plaintiffs' Law Continues to Reach Out, Touch Everyone*, 10 Metro. Corp. Couns., Jan. 2002, at 52.

[26]*See, e.g.,* Alexander S. Gareeb, *Evaluating the Retroactive Application of Proposition 64,* 28 L.A. Law., Mar., 2005, at 10; George Avalos, *Prop. 64 Draws Strong Arguments, State Measure Would Limit Right to Sue; Backers and Foes Both Predict Calamity If They Lose, Contra Costa Times*, Oct. 25, 2004, at 4; David Reyes, *Business Owners Rally Around Initiative to Limit Lawsuits; Proposition 64 Aimed at 'Shakedowns,' Would Weaken Unfair Competition Law*, L.A. Times, Sept. 16, 2004, at B3.

[27]D.C. Code Ann. § 28-3905(k)(1) (providing that "[a] person, whether acting for the interests of itself, its members, or the general public, may bring an action under this chapter in the Superior Court of the District of Columbia seeking relief from the use by any person of a trade practice in violation of a law of the District of Columbia" and may seek treble damages or $1,500 per violation, whichever is greater, punitive damages, reasonable attorneys' fees, injunctive relief, additional relief as may be necessary to restore to the consumer money or property in a representative action, and any other relief that the court deems proper).

[28]*See* Grayson v. AT&T Corp., 15 A.3d 219 (D.C. 2011).

[29]*See* id. at 234.

[30]*Grayson* at 234.

[31]*See, e.g.,* Forbes v. Par Ten Group, Inc., 394 S.E.2d 643, 650 (N.C. Ct. App. 1990); *Peabody v. P.J.'s Auto Village, Inc.,* 569 A.2d 460, 462 (Vt. 1989).

[32]*Aspinall v. Philip Morris Cos.,* 813 N.E.2d 476, 496-87 (Mass. 2004).

[33]*See, e.g.*, Ariz. Rev. Stat. Ann. § 44-1522(A); Del. Code Ann. tit. 6, § 2513; D.C. Code Ann. § 28-3904; 815 Ill. Comp. Stat. Ann. 505/2; Iowa Code Ann. § 714.16(2); Kan. Stat. Ann. § 50-626(b); Md. Code Ann., Com. Law § 13-302; Minn. Stat. Ann. § 325F.69(subd. 1); N.J. Stat. Ann. § 56:8-2; N.D. Cent. Code § 51-15-02; S.D. Codified Laws § 37-24-6; W. Va. Code Ann. § 46A-6-102(7)(M).

[34]*See* *PNR, Inc. v. Beacon Prop. Mgmt,* 842 So. 2d 773, 777 (Fla. 2003); *Blue Cross, Inc. v. Corcoran,* 558 N.Y.S.2d 404, 405 (N.Y. App. Div. 1990).

[35]*See* Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element,* 43 Harv. J. on Legis. 1, 29, 45 (2006) (citing *Collora v. R. J. Reynolds Tobacco Co.*, No. 002-00732, 2003 WL 23139377, at *2 (Mo. Cir. Ct. Dec. 31, 2003), *Varacallo v. Massachusetts Mut. Life Ins. Co.*, 752 A.2d 807 (N.J. Super. Ct. App. Div. 2000), and *Smoot v. Physician's Life Ins. Co.*, 87 P..3d 545, 550 (N.M. Ct. App. 2003)).

[36]*See, e.g.,* *Campbell v. Beak,* 568 S.E.2d 801 (Ga. Ct. App. 2002); *Finstad v. Washburn Univ.*, 845 P.2d 685 (Kan. 1993); *Weinberg v. Sun Oil. Co.*, 777 A.2d 442 (Pa. 2001).

[37]D.C. Code Ann. § 28-3905(k)(1)(A).

[38]*See* *Pearson v. Chung,* 961 A.2d 1067 (D.C. 2008).

[39]*See* Marc Fisher, *Dry Cleaners' Victory in Pants Lawsuit Still Comes With a Loss,* Wash. Post, Sept. 20, 2007.

[40]*See* D.C. Code Ann. § 28-3905(k)(1)(A) (providing for the greater of treble damages or $1500 per violation in addition to the potential for punitive damages); Haw. Rev. Stat. Ann. § 480-13 (providing for the greater of treble damages or $1,000); N.J. Stat. Ann. § 56:8-19 (providing for treble damages); N.C. Gen. Stat. § 75-16 (providing for treble damages).

[41]*See, e.g.,* Mont. Code Ann. § 30-14-133(1) (providing the court with discretion to award treble damages); Vt. Stat. Ann. tit. 9, § 2461(b) (providing for exemplary damages of up to three times actual damages); Wash. Rev. Code Ann. § 19.86.090 (providing the court with discretion to award up to three times actual damages not to exceed $10,000).

[42] *See, e.g.,* D.C. Code Ann. § 28-3905(k)(1), (2).

[43] *See* Travis Andersen, *NU Student's Kin Awarded $6.7m,* Boston Globe, Feb. 18, 2011.

[44] *Klairmont v. Gainsboro Rest., Inc.,* 987 N.E.2d 1247 (Mass. 2013).

[45] *See* *Klairmont v. Gainsboro Restaurant, Inc.,* No. SJC-11154 (Mass. July 23, 2013) (notice of docket entry).

[46] *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 321 (5th Cir. 2002) (dismissing nationwide class action of users of Duract, a non-steroidal anti-inflammatory drug that was voluntarily withdrawn from the market, who had not sustained any personal injury by the drug but sought a refund, finding no cognizable injury).

[47] *Walker v. Merck Sharp & Dohme Corp.*, No. 2:08-cv-4148, at 11 (E.D. La. June 13, 2012). Other pharmaceutical companies have faced similar lawsuits by individuals who used a drug without incident, but nevertheless sought refunds through class actions brought under state consumer protection laws based on some claimed inadequacy associated with the drug or its labeling. *See, e.g., Rivera,* 283 F.3d at 321; *Williams v. Perdue Pharma Co.*, 297 F. Supp.2d 171 (D.D.C. 2003) (dismissing a class action by users of a pain killer for whom the drug provided relief, but who claimed they were due a refund because some consumers did not receive 12-hour plain relief as advertised, because the plaintiffs had received the benefit of the bargain).

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

[49] *See* Carolina Bolado, *Merck Puts Up $39M To Settle Vioxx Class Action,* http://www.law360.com/articles/391401/merck-puts-up-39m-to-settle-vioxx-class-action, Nov. 1, 2012.

[50] *See* Ciaran McEvoy, *Merck To Pay $23M To Settle Vioxx Economic-Loss Claims*, http://www.law360.com/articles/458233/merck-to-pay-23m-to-settle-vioxx-economic-loss-claims, July 18, 2013 (discussing *Herke v. Merck & Co.*, No. 2:09-cv-07218 (E.D. La.)).

[51] *See* *Farina v. Nokia*, 625 F.3d 97 (3d Cir. 2010) (finding state consumer protection claim preempted by Federal Communication Commission regulations establishing acceptable radiation levels), *cert. denied,* 132 S. Ct. 365 (2011).

[52] *See* Megan Stride, *Attys' Fee War Accelerates Between Firms In $1B Toyota Deal*, http://www.law360.com/articles/463051/attys-fee-war-accelerates-between-firms-in-1b-toyota-deal, Aug. 7, 2013 (reporting that other attorneys who objected to the settlement as not providing sufficient relief to consumers are challenging the fee award and seeking $8.25 million for their own compensation).

[53] *See* Bill Vlasic, *Toyota Agrees to Settle Lawsuit Tied to Accelerations,* N.Y. Times, Dec. 26, 2012; W.J. Hennigan, *Toyota Settlement in Sudden-Acceleration Case Will Top $1 Billion,* Dec. 26, 2012.

[54] *See* Margaret Cronin Fisk, *Ford Sued in Class Action Claiming Sudden Acceleration,* Bloomberg, Mar. 29, 2013.

[55] *See* Findings of Fact, Conclusions of Law, and Order for Judgment, *Graphic Communications Local 1B Health & Welfare Fund "A" v. CVS Caremark Corp.*, No. 27CV09-19222 (Minn. Dist. Ct., County of Hennepin, July 11, 2012).

[56]*Graphic Communications Local 1B Health & Welfare Fund "A" v. CVS Caremark Corp.*, No. A12-1555 (Minn. Ct. App. May 6, 2013).

[57]*Fast Food on Trial,* Nat'l Public Radio broadcast, Aug. 8, 2002.

[58]Robert B. Reich, *Don't Democrats Believe in Democracy?,* Wall St. J., Jan. 12, 2000, at A22.

[59]Marguerite Higgins, *Fast Food Next on the Menu for Lawyers,* Wash. Times, June 23, 2003.

[60]Bruce Mohl, *Activists Look to Sue Over Cartoons in Cereal Ads, Boston Globe,* Jan. 19, 2006.

[61]*See, e.g.,* Michael Blanding, *Hard on Soft Drinks,* Boston Globe, Oct. 30, 2005.

[62]*See* Caroline E. Mayer, *Lawyers Ready Suit Over Soda,* Wash. Post, Dec. 2, 2005.

[63]*See* Chris Mercer, *Lawsuit Pressure Brings School Soft Drink Deal,* Beverage Daily, May 4, 2006.

[64]*See* *Amended Class Action Complaint*, *Parham v. McDonald's Corp.*, No. CGC-10-506178 (Cal. Super. Ct., San Francisco County filed Jan. 5, 2011).

[65]*See* Walter Olson, *McDonald's Suit Over Happy Meal Toys by California Mom Monet Parham New Low in Responsible Parenting,* N.Y. Daily News, Dec. 15, 2010.

[66]*See* Assoc. Press, *Calif. Judge Dismisses Suit Against McDonald's Toys,* USA Today, Apr. 5, 2012.

[67]*See* *Minutes of Apr. 4, 2012 Hearing*, *Parham v. McDonald's Corp.,* No. CGC-10-506178 (Cal. Super Ct., San Francisco County).

[68]*See, e.g.,* Physicians Committee for Responsible Medicine, *ActivistCash.com* (last visited June 30, 2013).

[69]*See* Henri E. Cauvin, *Lactose Intolerant Say Grocers Hide Risks,* Wash. Post, Oct. 5, 2005 (discussing Plaintiffs' Class Action Complaint, *Mills v. Giant of Maryland,* Civ. Action No. 05-0008054 (D.C. Super. Ct., filed Oct. 6, 2005)).

[70]*Mills v. Giant of Maryland,* 508 F.3d 11 (D.C. Cir. 2007); *see also* Howard J. Bashman, *D.C. Circuit Doesn't Swallow Lactose-Intolerance Class Action,* http://www.law.com/jsp/article.jsp?id=900005558606&DC_Circuit_Doesnt_Swallow_LactoseIntolerance_Class_Action&slreturn=20130909114155, Nov. 19, 2007.

[71]Rosie Mestel, *GMO Latest: Goldfish Crackers Lawsuit Over 'Natural' Claim,* L.A. Times, Nov. 15, 2012.

[72]Jeff Gray, *Nutella Faces Lawsuit Over 'Healthy' Claims,* Globe & Mail, Feb. 3, 2011.

[73]*See* Laura Northrup, *There's Actually A Settlement In Nutella 'Health Food' Class Action Lawsuit,* Consumerist, Apr. 26, 2012 (providing embedded video of advertisement).

[74]*See* Nutella Consumer Class Action Settlement *website* (last visited June 19, 2013).

[75]*See* Final Approval Order & Judgment, In re Nutella Marketing & Sales Practice Litig., No. 3:11-cv-01086-FLW-DEA (D. N.J. July 31, 2012).

[76]*See, e.g.,* Mark Anstoetter & Madeleine McDonough, *Spate of Consumer-Fraud Lawsuits Filed Against Kellogg Over "Real Fruit" Claims,* June 21, 2013; Reuters, *Suit Over Fruit Content Of General Mills Snacks to Proceed,* Chic. Trib., May 11, 2012; Erin Fuchs, *Kellogg Tries To Shake Fight Over Nutrition Claims,* Law360, Sept. 20, 2011.

[77]*See, e.g., Ivie v. Kraft Foods Global Inc.,* No. 5:12-cv-02554 (N.D. Cal.) (complaint filed May 17, 2012).

[78]*See* Stephanie Strom, *Lawyers From Suits Against Big Tobacco Target Food Makers,* N.Y. Times, Aug. 18, 2012.

[79]*See* Joe Satran, *Trader Joe's Lawsuit Over 'Evaporated Cane Juice' Part Of Firm's Crusade Against Mislabeled Foods,* http://www.huffingtonpost.com/2013/03/29/trader-joes-lawsuit-evaporated-cane-juice_n_2980706.html, Mar. 29, 2013 (reporting that between April 2012 and March 2013, Pierce Gore filed class action lawsuits against 32 companies challenging the labeling of their products).

[80]*See* Jessica Dye, *Food Companies Confront Spike in Consumer Fraud Lawsuits,* Thomson Reuters News & Insight, June 13, 2013 (citing data compiled by Perkins Coie attorneys).

[81]For example, a coalition of plaintiffs' law firms has named Skye Astiana as a representative plaintiff in "all natural" lawsuits against Kashi, Ben & Jerry's, Dreyer's Grand Ice Cream, and Hain Celestial Group Inc. *See Astiana v. Hain Celestial Group Inc.,* 905 F. Supp.2d 1013 (N.D. Cal. 2012) (granting motion to dismiss on the ground that the FDA has primary jurisdiction over determining the definition of "natural" on cosmetic labels); *Sethavanish v. Kashi Co.*, 11-cv-2356 (S.D. Cal.) (complaint filed Oct. 12, 2011) (including Ms. Astiana among three representative plaintiffs); *Astiana v. Dreyer's Grand Ice Cream Inc.*, No. 3:11-cv-02910 (N.D. Cal.) (complaint filed June 14, 2011); *Astiana v. Ben & Jerry's Homemade, Inc.*, No. cv-10-4387 (N.D. Cal.) (complaint filed Sept. 29, 2010).

[82]*See* Anthony J. Anscombe & Mary Beth Buckley, *Jury Still Out on the 'Food Court': An Examination of Food Law Class Actions and the Popularity of the Northern District of California,* Bloomberg Law, July 2013.

[83]*See* Vanessa Blum, *Welcome to the Food Court,* The Recorder, Mar. 1, 2013.

[84]Between April 2012 and April 2013, plaintiffs' lawyers filed 68 consumer class actions in the Northern District of California. Anscombe & Buckley, *supra*. California's other three federal district courts *combined* hosted about 12 to 15 claims against food makers and another 40 involving dietary supplements. *Id.* New Jersey, New York, and Florida are also relatively popular jurisdictions to file such claims.

[85]*See* Glenn G. Lammi, *Who's Filling the 'Food Court' with Lawsuits: Consumers or Lawyers?,* Forbes, July 22, 2013.

[86]Vanessa Bloom, *Welcome to Food Court,* The Recorder, Mar. 1, 2013.

[87]*Dennis v. Kellogg Co.,* 687 F.3d 1149, *withdrawn and superseded by* 697 F.3d 858 (9th Cir. 2012). The modified order does not include a computation of the plaintiffs' attorneys' effective hourly rate. Rather, the Ninth Circuit found that when considering only the amount of the settlement that would go to consumers, and not various charities, the proportion of the recovery that would go to the plaintiffs' lawyers would be "clearly excessive" under the court's guidelines. See 697 F.3d at 868.

[88]Maura Dolan, *Kellogg Class-Action Settlement Rejected by Federal Appeals Court,* L.A. Times, July 14, 2012.

[89]*Dennis v. Kellogg Co.,* 697 F.3d 858, 869 (9th Cir. 2012). The court also found that the vagueness of how the food donation would be valued (i.e., at Kellogg's cost, wholesale value, or retail value) could allow plaintiffs' lawyers to improperly justify an inflated award of attorneys' fees.

[90]*See Order Granting Plaintiffs' Motion for Preliminary Approval, Dennis v. Kellogg Co.,* Case No. 09-CV-1786-IEG (S.D. Cal. May 13, 2013).

[91]51 Cong. Rec. 13,113, 13120 (1914) (statement of Sen. Stone).

[92]*See generally* Victor E. Schwartz & Cary Silverman, *Common-sense Construction of Consumer Protection Acts,* 54 U. Kan. L. Rev. 1 (2006).

[93]*Ambach v. French,* 216 P.3d 405 (Wash. 2009).

[94]Tenn. Code Ann. § 47-18-104(b)(27).

[95]*See* Cary Silverman, *I'll See You in the Agency! 'Primary Jurisdiction' Gains Ground As a Defense for Regulated Industries,* LJN Prod. Liab. Law & Strategy, vol. 31, no. 11, May 2013.

[96]*See* Victor E. Schwartz, Cary Silverman & Christopher E. Appel, *"That's Unfair!" Says Who – The Government or Litigant?: Consumer Protection Claims Involving Regulated Conduct,* 47 Washburn L.J. 93, 102-15 (2007) (surveying such provisions).

[97]*Taylor v. Bear Stearns & Co.,* 572 F. Supp. 667, 675 (N.D. Ga. 1983) (addressing an investor's claims involving conduct falling under the oversight of federal securities regulators).

[98]*White v. Wyeth,* 705 S.E.2d 828 (W. Va. 2010).

[99]*See, e.g.,* Ala. Code § 8-19-10(f); Ga. Code Ann. § 10-1-399(A); La. Rev. Stat. Ann. § 51:1409(A); Miss. Code Ann. § 75-24-15(4); Mont. Code Ann. § 30.14-133(1); S.C. Code Ann. § 37-5-202(1), (3); Tenn. Code Ann. § 47-18-109(g).

[100]Colorado, New York, Ohio, Oregon, and Utah laws provide that class members may not receive more than actual damages in a class action lawsuit; they are not entitled to the minimum amount per violation or treble damages otherwise provided by statute. *See* Colo. Rev. Stat. § 6-1-113(2); N.Y. C.P.L.R. § 901(b); Ohio Rev. Code Ann. § 1345.09(E); Utah Code Ann. § 13-11-19(2); Or. R. Civ. P. 32(K). Similarly, New Mexico limits receipt of treble damages to class representatives while allowing class members to recover only actual damages. N.M. Stat. Ann. § 57-12-10(E).

ATR
FOUNDATION

1101 Connecticut Avenue, NW Suite 400,
Washington, DC 20036

State Consumer Protection Laws Unhinged, It's Time to Restore Sanity to the Litigation