Legal Backgrounder

WLF Washington Legal Foundation

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2009 Massachusetts Avenue, NW
Washington, DC 20036
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Vol. 20 No. 4 January 14, 2005

STATE HIGH COURT RULING DEPARTS FROM TORT PRINCIPLES IN CONSUMER PROTECTION CASES

by

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The Supreme Court of Judicial Appeals of Massachusetts recently stretched the Massachusetts Consumer Protection Act (MCPA) to new and unchartered boundaries of extreme liability. MASS. GEN. LAWS ch. 93A, §9(1). The Court eviscerated the tort law fundamentals of a basis of liability, proof of causation and damages in order to allow a deceptive advertising lawsuit to proceed as a class action against tobacco companies.

Sometimes, extreme rulings such as this are considered "tobacco law" and are not applied to other defendants. The Court's decision-making in this case, though, could apply to other industries, especially if they are the "unpopular" ones of the day. Plaintiffs are more often bringing traditional products liability cases under state consumer protection statutes. They are seeking to escape the basic requirements of product liability law. By watering down the Massachusetts legislature's standards for consumer protection cases, the Massachusetts Court created new law that encourages unprecedented class action lawsuits against an array of businesses.[1]

State consumer protection acts need to be construed in light of their history. Many were simply adopted from older, out-of-date federal law. They were converted from laws that were directed at the public sector and enforced to protect the general public. They were not concerned with private causes of action or the need of private actions to incorporate fundamentals of tort law. Nevertheless, as many courts realize, if consumer protection acts are to be a basis of liability in private lawsuits, these acts need to be construed in light of the private purpose for the suit, rather than their public enforcement purposes. If monetary damages are to be awarded to private plaintiffs, they must prove they were subject to some wrongful act. The act should have caused a specific harm to those individual plaintiffs and they should have sustained some actual damage as a result. The Massachusetts court did the opposite. It abandoned the principles of private causes of action and went beyond both the letter and spirit of the MCPA.

The case, *Aspinall v. Philip Morris Companies, Inc.*, 813 N.E.2d 476 (Mass. 2004), involved a class action lawsuit brought on behalf of smokers who allegedly purchased Marlboro Lights™. Plaintiffs alleged that the marketing of Marlboro Lights™ as "light" cigarettes that deliver "lowered tar and nicotine" was deceptive under the MCPA, entitling them to money damages. To recover under the

[1]Many other state consumer protection statutes are more clearly written than the Massachusetts statute, which should prevent courts from rendering aberrant decisions such as *Aspinall v. Philip Morris Companies, Inc.*, 813 N.E.2d 476 (Mass. 2004).

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MCPA, as under most states' consumer protection statutes, plaintiffs must prove they have an actual injury that was caused by the unfair or deceptive act or practice. *See* MASS. GEN. LAWS ANN. § 9(1). Plaintiffs may proceed on behalf of others if an "unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated." *Id.* at § 9(2).

The trial court had granted class certification, which was reversed by a judge in an intermediate court who applied current principles of law. The Supreme Judicial Court of Massachusetts reversed the intermediate court and granted class certification in a 4-3 decision.

How the Massachusetts Supreme Court Stretched the MCPA. The *Aspinall* majority's decision wrote a number of legal requirements out of the legislature's consumer protection statute: actual injury, causation, commonality among class members, and damages. The ruling contravened the legislature's decision-making and contradicted longstanding Massachusetts jurisprudence. The Court took this extraordinary step without any evidentiary support for its decision.

No Need to establish an Actual Injury. The Court tossed out the fundamental requirement that each plaintiff prove that he or she has an actual injury because of the alleged unfair or deceptive act. *See Leardi v. Brown*, 474 N.E.2d 1094 (Mass. 1985) (Massachusetts Consumer Protection Act "requires an injury before an award of even nominal damages is justified"); *Weld v. Glaxo Wellcome Inc.*, 746 N.E.2d 522 (Mass. 2001) ("plaintiffs bear the burden of providing information sufficient to enable the motion judge to form a reasonable judgment that the class meets the requirements [for certification]"). This allows essentially anyone to be a plaintiff. As the dissent notes, "By certifying a class that includes uninjured members, the motion judge effectively permitted precisely what we have criticized: a "purely 'vicarious suit[] by self-constituted private attorneys-general.'" *Id.* at 495 (quoting *Leardi*, 474 N.E.2d at 1102).

In *Aspinall*, the plaintiffs claimed they sustained economic injury because, while the "lights" cigarettes were advertised as delivering "lowered tar and nicotine," the cigarettes allegedly failed to do so and therefore were not worth what plaintiffs paid for them.

The "lights" cigarettes were able to deliver lowered tar and nicotine due to small vent holes in the cigarette paper. If a smoker covered the holes, though, the tar and nicotine levels were higher. Smokers hold their cigarettes in different ways; some may cover the holes and some may not. These variances in how a person smokes cigarettes created legitimate distinctions among the proposed class members. In fact, the plaintiffs themselves conceded that a number of "lights" smokers did receive lowered tar and nicotine. These smokers were not "injured by" the alleged deceptive statements at all.

With the benefits of the "lights" product varying widely among proposed class members, the Court should have required factual determinations to be made about whether a particular smoker did or did not purchase a product that delivered lowered tar and nicotine. The majority, though, said it would be "wholly impractical" to require such individual determinations, even though that is what is necessary to prove a class member's injury in this case. In other words, the court held that a fundamental requirement of state class action law was "wholly impractical."

No Need to Establish Reliance on Actually Deceptive Advertising. The majority of the Court held that a manufacturer could be subject to liability in a MCPA class action if the advertisement, although not deceptive, possessed a "tendency to deceive." *Id.* at 487. The opinion indicated that the manufacturer could be subject to liability even if the advertisement were "true as a literal matter," if it "create[d] an overall misleading impression through failure to disclose material information." *Id.*

The Court also indicated that the plaintiffs did not have to show that the advertisement deceived any particular person. "Neither an individual's smoking habits nor his or her subjective motivation in purchasing Marlboro Lights bears on the issue whether the advertising was deceptive." *Id.* at 489. All

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that mattered was that the advertisement had a "tendency to deceive the general public." *Id.* at 487. The Court did not interpret the word "tendency." A standard dictionary defines "tendency" as a "demonstrated inclination to think, act, or behave in a certain way." WEBSTER'S NEW RIVERSIDE UNIV. DICTIONARY 1192 (2nd ed.1998). Regardless of a dictionary definition, "tendency" is a "weasel word." It allows vague and amorphous charges to be brought to trial. It is a recipe for endless litigation.

Moreover, in defining its application of the "tendency to deceive," the Court suggested that there may be a very low standard to meet. While the Court acknowledged that under state law, a court is to look at the advertisement's potential effect on the *reasonable* consumer, it favorably cited a test that has now been abandoned as unwise under federal law. That test defined the "general public" to include "the vast multitude, which includes the ignorant, [the] unthinking and the credulous …" *Aspinall*, 813 N.E.2d at 487. In other words, under this approach, any advertisement that may have a tendency to deceive an ignoramus could be a potential target for a class action lawsuit. The federal government later revised that test to focus on the likely reaction of the *reasonable* consumer, *id.*, but the majority said it was not bound by changes in federal law. *Id.* at 488.

In sum, the Massachusetts Court would allow a claim without any showing that any particular person was deceived by the advertisements.

Class Certification Without Commonality. The 4-3 majority assumed, without *any* proof, that those who received the actual benefits of "lights" constituted only a *de minimus* part of the class. Put another way, the court assumed that the commonality or "similar injury" requirement for class certification under the consumer protection statute was satisfied. As a result, the 4-3 majority ruled that because the uninjured (or "low-tar") members of the proposed class "are both very few in number and impossible to identify," class treatment of the claims was appropriate to provide an effective private remedy for consumers, who were unlikely to bring their own lawsuits to recover such small amounts of money.

The three dissenting justices made clear that plaintiffs produced no evidence to support the Court's determination that their proposed class could satisfy the "similar injury" requirement. To the contrary, the dissent found that plaintiffs' evidence indicated that the group of proposed class members who received the promised lower levels of tar and nicotine (and thus were not injured) was "fairly large." *Id.* at 494. The dissent also rejected the majority's finding that it would be impossible to identify members of the low tar group and exclude them from the class. *Id.* at 495.

Damages Without Injury. Just as the Court eviscerated the first two fundamentals of tort law — the basis of liability and causation — it eliminated the damages requirement. The 4-3-majority opinion conceded that if a person did not smoke "lights" cigarettes, he or she would have smoked regular cigarettes. Also, the court agreed that the "lights" cigarettes and regular cigarettes were identically priced. *Id.* at 490. For that reason, the plaintiffs lost nothing in terms of out-of-pocket expenditures.

Nevertheless, the Court left the issue of damages for trial. It also ruled that even if plaintiffs could not prove actual damages, they could recover statutory damages of $25 each, as well as attorneys' fees. The Court rejected the defense argument that Massachusetts case law requires that some monetary loss be proved before minimum damages may be awarded. *Id.* at 491. The Court interpreted that the precedent cited merely stood for the proposition that causation is a required element of a successful consumer protection act claim — and opined that the fact of deceptive advertising, if proved, "effected a per se injury on consumers who purchased the cigarettes represented to be lower in tar and nicotine." *Id.* at 492.

Is This Just "Tobacco Law" or Does It Put a Wide Variety of Industries at Risk of Frivolous Claims? Because tobacco companies are perceived by some as "unpopular" defendants, some courts

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have rendered decisions that can be characterized as "tobacco law." These decisions jettison fundamental tort law rules and apply them only to tobacco cases. A similar phenomenon has occurred in asbestos lawsuits.

While the court hinted in a footnote that its opinion might be confined to tobacco litigation, its express ruling that "impracticality" of proof of "similar injury" could apply class treatment to other manufacturers. In footnote 21, the Court stated:

> The defendants' allegedly deceptive claims should be distinguished from other statements by manufacturers that their products deliver certain benefits (such as "helps to lower cholesterol") where *most* consumers actually receive the promised benefit, as may be ascertained by objective tests. If such a statement is untrue as to only a *tiny* percentage of consumers, a class action consisting of all purchasers would obviously not be appropriate. What we have in the present case, however, is the exact opposite: statements made by defendants which are alleged to be untrue for the overwhelming majority of smokers, with only a few smokers who fortuitously happen to smoke all of their cigarettes in a manner that has resulted in the intake of lower tar and nicotine. (emphasis added)

Id. at 398 n. 21. Nevertheless, the court went on in that same footnote to emphasize that its decision to gloss over basic rules of tort law was done to promote expediency. The Court stated:

> Requiring individual actions to be brought by thousands of individual smokers merely to provide absolute certainty that (for example) each plaintiff sometimes covered up the vent holes, would be wholly impractical.

If expediency is the engine that drives the predicate for class actions, and the requirement that class members must prove they were similarly injured because of a defendant's act is to be ignored, the Court's decision could apply to advertising by companies engaged in the manufacture or sale of other products.

For example, a headline-seeking plaintiffs' lawyer could try to apply *Aspinall* to a seller of fast food because an advertisement showed a non-obese person eating at a fast food restaurant. If such an approach were successful, class action plaintiffs would not have to prove they were actually injured by eating the defendant's food, or that they relied on the advertisements in choosing what and where to eat, or that they sustained any monetary damage. Hopefully, common sense will prevail and no court would allow such a claim, but the gremlinesque nature of the *Aspinall* decision creates the potential for some plaintiffs' lawyers to try all sorts of mischief to force "legal extortion" settlements.

More importantly, having the popularity or unpopularity of a defendant as the "real jurisprudence" of Massachusetts law violates a fundamental precept of our legal system: equal justice under law. Those words are enshrined on the front façade of the Supreme Court of the United States. There are no footnotes for "unpopular defendants."

Conclusion. Lawmakers in Massachusetts should consider clarifying the MCPA and show that the slim majority of the Supreme Court of Massachusetts misconstrued the will of the Legislature. Courts in other states should disavow and reject the decision in construing their own consumer protection acts. Placing unchartered and unsound liability on any industry and creating incentives for frivolous, expensive litigation is fundamentally unsound public policy.

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