



## Statutory Consumer Fraud Act Claims

By Jeffrey A. Holmstrand

**C**lose examination of the relevant statutory language is necessary to prevent plaintiffs from making an end run on the causation proof requirement.

# Enforcing the Reliance Requirement

For decades, state and federal consumer fraud statutes have declared various types of trade practices “unlawful,” and some of those statutes have provided a direct remedy to a consumer harmed “as a result” of another’s use of a

prohibited practice. Until recently, those statutes were invoked by individual plaintiffs seeking damages on their own behalf or by government officials purporting to act with statutory authorization to obtain declaratory, injunctive, or other noncompensatory relief. Recently however, defendants of all stripes—including retailers, product manufacturers, pharmaceutical companies, and financial service providers—have faced statutory consumer fraud act claims through which plaintiffs have sought to recover damages on behalf of large numbers of people. These aggregate cases can take the form of consumer class actions, third-party payor claims, or suits by state attorneys general on behalf of a state’s citizens for monetary damages or restitution. Because the parties for whom relief is sought in this new form of consumer fraud suit are not limited to consumers who sustained actual injuries, the scope of a defendant’s exposure has broadened exponentially, especially in states permitting aggregate treatment of the claims.

A typical consumer fraud act claim

requires proof that (1) a defendant engaged in some form of conduct which violated the statute, (2) the party seeking relief sustained an ascertainable loss, and (3) a causal relationship exists between the allegedly unlawful conduct and the loss. *See, e.g., International Union of Operating Engineers Local No. 68 Welfare Fund v. Merck & Co., Inc.*, 929 A.2d 1076, 1086 (N.J. 2007). In defending clients against these types of claims, defense attorneys often point to four words typically found in a consumer fraud act—“as a result of”—and argue that individualized proof of causation precludes aggregate treatment of such claims. Plaintiffs, on the other hand, have had some success arguing that aggregate relief is available, despite this common language, by asking courts to ignore the plain meaning of the phrase or its equivalent. This article will first outline the statutory language at issue and touch on some pertinent class certification rules. The second part will discuss a number of cases addressing the causation requirement and suggest ways of showing that a consumer



■ Jeffrey A. Holmstrand is with the Wheeling, West Virginia office of Flaherty Sensabaugh & Bonasso PLLC, where he focuses his statewide practice on defending product liability, mass torts/class actions, and complex insurance disputes. He serves on the steering committee of the DRI’s Product Liability Committee and is immediate past chair of its Mass Torts/Class Action SLG.

fraud act claim cannot be proven on an aggregate basis.

### Elements of a Statutory Consumer Fraud Act Claim

Often modeled on the Federal Trade Commission Act, the Uniform Consumer Sales Practices Act, the Unfair Trade Practices and Consumer Protection Act, or the Uni-

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form Deceptive Trade Practices Act, most states have a consumer fraud act that defines unlawful conduct in greater or lesser detail, describes the available remedies, and delineates who may seek them. See Comment: *The Tennessee Consumer Protection Act: An Overview*, 58 TENN. L. REV. 455, 456–457 (Spring 1991); William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 730 (Apr. 1972). Because of these common characteristics, the language used in a given state's consumer fraud act is generally similar to that used in other states. Many of these statutes provide some sort of private remedy enforceable by private litigants. For example, the Rhode Island consumer fraud act provides:

Any person who purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act, or practice declared unlawful by [the CFA] may bring an action under Rules of Civil Procedure in the superior court of the county in which the seller or lessor resides, is found, has his or her principal place of business, or is doing business, or in the superior court of the county as is other-

wise provided by law, to recover actual damages or two hundred dollars (\$ 200), whichever is greater.

R.I. GEN. LAWS §6-13.1-5.2.

Other states have similar provisions authorizing private consumer fraud act claims when the protected person has suffered an “ascertainable loss” “as a result of” the defendant's use or employment of an unlawful practice, and permitting varying degrees of legal and equitable relief. See, e.g., ALASKA STAT. §45.50.531; ARK. CODE ANN. §4-88-113; CONN. GEN. STAT. §42-110g; IDAHO CODE §48-608; 815 ILL. COMP. STAT. ANN. 505/10a; KY. REV. STAT. §367.220; LA. REV. STAT. 51:1409; MISS. CODE ANN. §75-24-15; MO. REV. STAT. §407.025; N.J. STAT. §56:8-19; OR. REV. STAT. §646.638; 73 PA. STAT. §201-9.2; S.C. CODE ANN. §39-5-140; TENN. CODE ANN. §47-18-109; W. VA. CODE §46A-6-106; cf., MINN. STAT. §325D.15 (any person damaged “by reason of a violation” may sue for actual damages).

A plain reading of this type of consumer fraud act suggests that an individual plaintiff's loss must come about “as a result of” the defendant's unlawful practice. In other words, a plaintiff must prove a causal nexus between the loss and the offending conduct. This usually means that a plaintiff must prove that the plaintiff relied on the allegedly deceptive conduct. Where relief is sought on behalf of a class or some other group of consumers, the causation requirement should extend to each individual member of the group, which extends to the reliance element. Plaintiffs in aggregate consumer fraud act claims often attempt to eliminate the reliance requirement from the causation analysis by essentially ignoring the “as a result of” language found in most statutes. Some courts have agreed that proof of direct reliance is not always required. But most courts that have considered the question have held that a reliance inquiry informs the causation analysis. In a case brought by an individual plaintiff, the jury could determine whether to credit his or her testimony that the defendant's conduct caused an “ascertainable loss.” In a class action or other aggregate litigation, the ability to prove that unnamed class members suffered an ascertainable loss “as a result of” of the defendant's conduct in violation of a consumer fraud act implicates the rules for class certification.

### Reliance and Causation in Class and Other Aggregate Litigation

The consumer fraud acts of most states do not specify whether aggregate treatment of claims is permissible. Some states—Mississippi, Louisiana, South Carolina, and Tennessee, for example—explicitly preclude class or other representative actions for consumer fraud act claims. Even then, the Supreme Court's recent decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company*, 559 U.S. \_\_\_, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010), suggests that a class action which otherwise meets the applicable requirements of FED. R. CIV. P. 23 may proceed in federal court notwithstanding a state law bar on class treatment of the statutory claim at issue. In *Shady Grove*, a divided court upheld a plaintiff's attempt to pursue a class action in federal court even though the state law which formed the substantive basis for its claim specifically precluded classwide relief. Under *Shady Grove*, plaintiffs in states with similar laws may not be able to pursue classwide relief in state court, but the decision may allow them to seek class treatment in federal court in some circumstances. This will obviously impact the decision whether to remove such cases, especially where relief is sought on behalf of putative class members from more than one state.

In states permitting class treatment, the question becomes whether plaintiffs can meet the requirements of the applicable class action rules. In federal court or in states with civil procedure rules modeled on FED. R. CIV. P. 23, a plaintiff must show that all four requirements of FED. R. CIV. P. 23(a) are met and that the case falls within one of the categories described in FED. R. CIV. P. 23(b). See Alba Conte and Herbert Newberg, *Newberg on Class Actions* (4th ed.) §3:1 at 210 (2002). Although the details of these are beyond the scope of this article, FED. R. CIV. P. 23(a) has four requirements: numerosity; commonality, typicality, and adequacy of representation. Assuming these can be met, litigants in consumer fraud act actions often attempt to shoehorn their claims into the categories encompassed by FED. R. CIV. P. 23(b)(2) (the party opposing the class has acted on grounds generally applicable to the group) or FED. R. CIV. P. 23(b)(3) (common questions of law or fact predominate over indi-

vidual issues and the class action device is superior to other methods available to adjudicate the controversy). Both have similar requirements to ensure the class action device is appropriate for the circumstances of a given case.

The “predominance” and “superiority” requirements of FED. R. CIV. P. 23(b)(3) attempt to ensure that the class device is not misused. Courts have recognized that the presence of individual issues of causation or reliance destroys predominance under FED. R. CIV. P. 23(b)(3). *See, e.g., Basic Inc. v. Levinson*, 485 U.S. 224, 242 (1988) (“individual issues [would overwhelm] common ones” in case where “proof of individualized reliance from each member of [a] proposed plaintiff class” is required); *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 194 (3d Cir. 2001) (where “plaintiffs were not entitled to a presumption of reliance,” district court “did not abuse its discretion in concluding the plaintiffs failed to establish the predominance requirement of Rule 23(b)”; *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 342 (4th Cir. 1998) (“because reliance ‘must be applied with factual precision,’ plaintiffs’ fraud and negligent misrepresentation claims do not provide a ‘suitable basis for class-wide relief’”) (quoting *Jensen v. SIPCO, Inc.*, 38 F.3d 945, 953 (8th Cir. 1994)). Thus, where reliance is uncontested, courts are reluctant to allow aggregate treatment of a claim since individual issues will predominate.

Plaintiffs seeking classwide damages for consumer fraud act violations sometimes try to invoke FED. R. CIV. P. 23(b)(2) when seeking certification. Federal Rule 23(b)(2) was intended to apply primarily to equitable claims and any monetary relief awarded was to be incidental to the equitable, injunctive relief sought by plaintiffs. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1195 (9th Cir. 2001). Thus, courts have held that “class certification under Rule 23(b)(2) is proper only when the primary relief sought is declaratory or injunctive.” *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1121 (8th Cir. 2005). In fact, the United States Supreme Court has previously held there is “at least a substantial possibility” that actions seeking monetary damages are *only* certifiable under FED. R. CIV. P. 23(b)(3), which provides class members with notice and the right to opt-out. *See Ticor Title Ins.*

*Co. v. Brown*, 511 U.S. 117, 121 (1994) (emphasis added). Even assuming a case might qualify for treatment under FED. R. CIV. P. 23(b)(2), courts have noted that because that rule does not require notice or the right to opt-out, the proposed class must exhibit “cohesiveness” as a condition precedent to certification. *See Newberg* §4:11 at 61 (“Rule 23(b)(2) includes an implicit ‘cohesiveness’ requirement, which precludes certification when individual issues abound.”); *St. Jude*, 425 F.3d at 1121 (cohesiveness is more important under Rule 23(b)(2) than predominance under Rule 23(b)(3) because there is no provision for opting out); *Philip Morris Inc. v. Angeletti*, 752 A.2d 200, 253 (Md. 2000) (‘cohesiveness’ requirement is “similar to... predominance, yet one that is even more demanding and difficult to satisfy.”); *see also, Barnes v. American Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998); *Santiago v. City of Philadelphia*, 72 F.R.D. 619, 628 (E.D. Pa. 1976) (court should be no more accepting of certification under Rule 23(b)(2) than 23(b)(3) where there are significant individual issues).

### Instructive Case Law

As defendants in other industries, pharmaceutical and medical device manufacturers have increasingly faced consumer fraud act claims over the past decade. A plaintiff may claim a defendant violated a consumer fraud act by misstating or misrepresenting the risks posed by a particular prescription medicine. A plaintiff may assert this violation entitles the plaintiff and the class that the plaintiff seeks to represent to statutory damages for the purchase and ingestion of the drug, even if the class members have not been physically harmed by ingesting the drug. Third-party payors have claimed a defendant’s violation of a consumer fraud act resulted in its over-purchasing of the prescription medication for insureds. When recovery is sought for purchases made by hundreds or thousands of users of a product, enforcing the “as a result” of language of the relevant consumer fraud act is vital.

Courts have stated that the “as a result of” language in a state’s consumer fraud act amounts to a causation requirement. *See, e.g., Hunt v. United States Tobacco Co.*, 538 F.3d 217, 221 (3d Cir. 2008) (stating that Pennsylvania courts have “categorically

and repeatedly” identified that language as a “causation” requirement). As such, plaintiffs in these states must prove “justifiable reliance” on the defendant’s allegedly fraudulent conduct. *See, e.g., Hunt*, 538 F.3d at 221 (citing *Schwartz v. Rockey*, 593 Pa. 536, 932 A.2d 885, 897 n.16 (Pa. 2007) (stating that “the justifiable reliance criterion derives from the causation requirement which is express on the face” of the consumer fraud act)). Even in states where the state consumer fraud act has been interpreted to eliminate a direct “reliance” requirement, that issue usually remains relevant to the causation inquiry.

For example, the Eighth Circuit addressed this issue in *In re St. Jude Medical Inc. Silzone Heart Valve Products Litigation*, 522 F.3d 836 (8th Cir. 2008). There, the putative class sued under Minnesota’s consumer fraud act and consisted of people who were implanted with an allegedly unsafe heart valve. The Minnesota Supreme Court had previously held the language of the state’s consumer fraud act did not contain a direct reliance element. *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2 (Minn. 2001). The *Group Health* court nonetheless held that causation was a necessary element of a damages action under the Minnesota consumer fraud act and that some proof of reliance was still required as part of the causation analysis. 621 N.W.2d at 13. The district court in *St. Jude* certified a class under Minnesota’s consumer fraud act, rejecting the defendant’s argument that the need for some proof of reliance as part of the causation analysis precluded a finding of predominance.

On appeal, the Eighth Circuit reversed the district court’s certification order, agreeing with the defendant that individualized issues would predominate. Interestingly for the defense practitioner, the Eighth Circuit relied in part on evidence proffered by the defendant showing that neither individual plaintiffs nor their physicians had relied on any particular representation that had allegedly violated the consumer fraud act and calling such evidence “highly relevant and probative on the question whether there is a causal nexus between alleged misrepresentations and any injury.” *St. Jude*, 522 F.3d at 840. It further stated:

Whatever *Group Health* means about the need for these plaintiffs to present direct

evidence of individual reliance, it does not eliminate the right of a defendant to present evidence negating a plaintiff's direct or circumstantial showing of causation and reliance. Given the showing by St. Jude that it will present evidence concerning the reliance or non-reliance of individual physicians and patients on representations made by St. Jude, it is

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clear that resolution of St. Jude's potential liability to each plaintiff under the consumer fraud statutes will be dominated by individual issues of causation and reliance. The need for such plaintiff-by-plaintiff determinations means that common issues will not predominate the inquiry into St. Jude's liability.

*Id.* See also *Zekman v. Direct Am. Market-ers, Inc.*, 286 Ill. App. 3d 462, 221 Ill. Dec. 570, 675 N.E.2d 994 (Ill. App. Ct. 1997), *appeal denied*, 173 Ill. 2d 549, 226 Ill. Dec. 140, 684 N.E.2d 1343 (1997), *rev'd on other grounds*, 182 Ill. 2d 359, 231 Ill. Dec. 80, 695 N.E.2d 853 (1998) (although direct reliance is no longer a requirement under Illinois' consumer fraud act, reliance falls with the parameters of proximate cause and, therefore, a private party must have relied on the wrong to some extent in order to establish proximate cause).

In *International Union of Operating Engineers Local No. 68 Welfare Fund v. Merck & Co., Inc.*, 929 A.2d 1076 (N.J. 2007), the plaintiff, a third-party payor, contended it suffered losses as a result of the defendant's allegedly fraudulent marketing scheme. It sought to represent a nationwide class of all third-party payors that had paid for the prescription medicine at issue. The plaintiff contended the defendant violated the New Jersey consumer fraud act because it "marketed its product as a safer and more

effective alternative to other traditional pain medications, thus driving the price of its product substantially higher than the price charged for similar medications" and that it "did so through an aggressive marketing campaign undertaken at a time when defendant was aware that its product was neither more effective nor safer than other available products." 929 A.2d at 1079. The plaintiff claimed it and other class members either would not have authorized the drug's inclusion in their formularies or would have placed it in a tier that would have discouraged consumers from purchasing it had they known of the true risks. Thus, the plaintiff claimed, the defendant's alleged misrepresentations caused it to purchase more of the drug than it and the class members would have otherwise. 929 A.2d at 1082.

The New Jersey Supreme Court considered whether the proposed consumer fraud act class action could meet the requirements for predominance and superiority. A consumer fraud act claim under New Jersey law requires a plaintiff to allege and prove "three elements: (1) unlawful conduct...; (2) an ascertainable loss...; and (3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss." *Engineers Local No. 68*, 929 A.2d at 1086 (quoting *N.J. Citizen Action v. Schering-Plough Corp.*, 842 A.2d 174 (N.J. Super. Ct. App. Div. 2003), *cert. denied*, 837 A.2d 1092 (N.J. 2003)). Even though it had previously held that "reliance" was not an element of a consumer fraud act claim in *Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234, 246, 872 A.2d 783 (N.J. 2005), the court in *Engineers Local No. 68* nonetheless recognized that the causation requirement had teeth:

Although the record does not identify the members of the proposed class, other than the named plaintiff, with any precision, the available information makes it plain that they are a diverse group of entities. More important to our analysis, however, plaintiff does not suggest that each of these proposed class members, receiving the same information from defendant, reacted in a uniform or even similar manner. Rather, the record speaks loudly in its demonstration that each third-party payor ... made individualized decisions concerning the

benefits that would be available to its members for whom [the drug] was prescribed. The evidence about separately created formularies, different types of tier systems, and individualized requirements for approval or reimbursement imposed on various plans' members and, to some extent, their prescribing physicians, are significant. That evidence convinces us that the commonality of defendant's behavior is but a small piece of the required proofs. Standing alone, that evidence suggests that the common fact questions surrounding what defendant knew and what it did would not predominate.

929 A.2d at 1087. Note how the defendant successfully demonstrated the relevant differences among proposed class members using the causation analysis.

The *Engineers Local No. 68* court also addressed why the "fraud on the market" theory found in federal securities litigation did not apply to consumer fraud claims. The *Engineers Local No. 68* court described that theory as allowing plaintiffs to demonstrate that they were damaged simply because a defendant engaged in behavior otherwise prohibited and because there was a change in the price of the security. 929 A.2d at 1088. Noting that the theory "presumes reliance," the court rejected the suggestion that mere proof that the price charged for the medicine was higher than it should have been as a result of the defendant's allegedly fraudulent marketing campaign was sufficient under the consumer fraud act. *Id.* Instead, it reiterated that a plaintiff "must nonetheless plead and prove a causal nexus between the alleged act of consumer fraud and the damages sustained." *Id.*

The court also rejected the argument that proof of damages could be shown through the use of an expert testifying about the effect on pricing of the defendant's marketing campaign, stating that such proof would "be the equivalent" of an impermissible fraud on the market theory. *Id.* See also, *In re Neurontin Mktg., Sales Practices & Prods. Liab. Litig.*, 257 F.R.D. 315 (D. Mass. 2009) (discussing predominance and superiority in a suit involving off-label uses of a prescription medicine and relying on *Engineers Local No. 68* in rejecting a fraud on the market theory); *Clark v. Pfizer, Inc.*, 2010 PA Super 6, 2010

Pa. Super. LEXIS 7 (Pa. Super. Ct. 2010) (relying on *Neurontin* to reject certification of a claim under the Pennsylvania CFA); *Ironworkers Local Union No. 68 v. Astra-Zeneca Pharms. LP*, 585 F. Supp. 2d 1339, 1344 (M.D. Fla. 2008) (causation requirement would necessarily require inquiry into a physician's independent judgment and would be influenced by a number of things, only one of which may be representations by a manufacturer as to a particular drug's relative safety and efficacy); *but see, Plubell v. Merck & Co.*, 289 S.W.3d 707, 714 (Mo. Ct. App. 2009) (applying Missouri law and holding that class members are not individually required to show what they would or would not have done had the product not been misrepresented); *White v. Wyeth*, West Virginia Supreme Court Docket No. 35296 (certified question argued May 4, 2010 asking whether reliance is an element of a consumer fraud act claim under West Virginia law).

Two recent decisions from different federal circuits illustrate the continuing battle over the language in consumer fraud acts. The first, a panel decision from the United States Court of Appeals for the Ninth Circuit, *Yokoyama v. Midland National Life Insurance Company*, 594 F.3d 1087 (9th Cir. 2010), illustrates a successful effort to convince a court to read causation out of a state's consumer fraud act. There, the plaintiff contended he had purchased a deceptively marketed annuity and sought relief under Hawaii's consumer fraud act on his own behalf and on behalf of a class of annuity purchasers. The district court held the plaintiff could not meet FED. R. Civ. P. R23(b)(3)'s predominance requirement because it concluded, among other things, that the state consumer fraud act required proof of a causal link (*i.e.*, reliance) between an allegedly deceptive act and the damages each class member sustained. *Yokoyama v. Midland Nat'l Life Ins. Co.*, 243 F.R.D. 400, 411–12 (D. Haw. 2007). The Ninth Circuit reversed, holding that Hawaii did not require proof of individual reliance and that class relief was available whenever the act at issue was "likely to mislead consumers acting reasonably under the circumstances." 594 F.3d at 1089 (citing *Courbat v. Dahana Ranch, Inc.*, 141 P.3d 427, 435 (Haw. 2006). This test, it held, is "an objective test, and therefore actual

reliance need not be established." *Id.* As a result, it reversed the district court's denial of class certification. It reached this conclusion without analyzing the pertinent language of Hawaii's consumer fraud act.

In contrast, the district court's decision denying class certification had focused on two sections of the statute at issue. The first, HAW. REV. STAT. §480-2, simply declares various trade practices to be "deceptive" and "unlawful." The statute does not define "deceptive," however, and prior state decisions had held that the test for determining whether an act was deceptive was an objective one, focusing on "whether a material representation, omission, or practice occurred which was likely to mislead reasonable consumers." 243 F.R.D. 400 at 411 (citing *Courbat*, 141 P.3d at 435). This provision, standing alone, does not necessarily require proof of reliance. But all it does is describe what might qualify as a deceptive act under the state's statute. It does not specify what relief might be available for a violation of §480-2 or who might sue for a statutory violation.

Another section of Hawaii's consumer fraud act—which the Ninth Circuit's panel decision neither cites nor discusses—is the one which actually creates a cause of action for damages. HAW. REV. STAT. §480-13(b) requires that a consumer seeking damages for a violation of §480-2 show that he or she was "injured by" the deceptive act committed in violation of §480-2. This is plainly a causation requirement. If a consumer has not been "injured by" a deceptive practice, he or she cannot claim statutory damages and this test is an objective one. The panel's decision to ignore the "injured by" language illustrates how courts can lose sight of the statutory language, especially where aggregate treatment of the claim is at issue.

In contrast, the United States Court of Appeals for the Eighth Circuit in August of this year declined an invitation to read causation out of California's consumer fraud act. *Arvitt v. Reliastar Life Ins. Co.*, 2010 U.S. App. Lexis 16700 (8th Cir. Aug. 12, 2010). Like the plaintiff in *Yokoyama*, the plaintiff in *Arvitt* also claimed to have purchased a deceptively marketed annuity and sought relief on behalf of a class of other annuity purchasers. California's consumer fraud act was amended in 2004 to require an individual plaintiff to have sus-

tained an injury as a result of the allegedly deceptive practice in order to have standing to pursue a consumer fraud act claim. The California Supreme Court recently held that the 2004 amendment applied only to the named plaintiff in a class action and that the standing requirement did not apply to class members. *In re Tobacco Cases (Tobacco II)*, 46 Cal. 4th 298, 93 Cal. Rptr. 3d 559, 207 P.3d 20, 35 (2009). Relying on that case, the plaintiffs argued that they were not required to show proof of individual reliance in order to present a class-wide claim.

The Eighth Circuit rejected that argument for several reasons. First, it expressed doubt that the discussion of standing in *Tobacco II* had any bearing "on whether a plaintiff can satisfy the class certification requirement that common questions of law or fact predominate." 2010 U.S. App. Lexis 16700, at \*25–26 (citing *Cohen v. DirectTV, Inc.*, 178 Cal. App. 4th 966 (Cal. Ct. App. 2009), *rev. denied* (Feb. 10, 2010)); *but see In re Steroid Hormone Prod. Cases*, 181 Cal. App. 4th 145 (Cal. Ct. App. 2010), *rev. denied* (Apr. 14, 2010) (observing that *Cohen* may not be consistent with *Tobacco II*). Second, it held that application of federal Article III standing doctrine would be inconsistent with an understanding of California law that permitted suits on behalf of class members who lacked standing. That doctrine provides that the "irreducible constitutional minimum of standing requires a showing of injury in fact to the plaintiff that is fairly traceable to the challenged action of the defendant, and likely to be redressed by a favorable decision" and is equally applicable to class actions. *Id.* at \*26–27. Finally, it held that because the allegedly deceptive conduct and the reaction of different class members to that conduct would vary, proof of individual reliance would still be necessary even in the absence of a standing requirement. As such, it held that certification was not appropriate. *See also, In re Vioxx Class Cases*, 180 Cal. App. 4th 116, (Cal. Ct. App. 2009), *rev. denied* (Mar. 30, 2010) (patient-specific issues including reliance and the presence of a comparator drug precluded a predominance finding); *Schnall v. AT & T Wireless Services, Inc.*, 225 P.3d 929, 939–41 (2010) (holding that proof of causation is an "essential element" of a consumer fraud



act claim and cannot be proven simply by a capacity to deceive in actions by consumers seeking damages).

### Conclusion

Defending a pharmaceutical or other product manufacturer against class action allegations under a state consumer fraud act requires close examination of the relevant statute's operative language. Consider first how to defend against an individual plaintiff's claim. For example, did the individual know of the alleged misrepresentation or did the individual rely on some other factor in choosing to purchase and ingest the medicine? How did the physician exercise his or her independent medical judg-

ment in prescribing the medication? Once the elements of a successful defense to an individual's claim are identified, turn to the class allegations. When appropriate, a successful challenge to certification may come from invoking the predominance and superiority requirements of FED. R. CIV. P. 23(b)(3) or the "cohesiveness" requirement implicit in FED. R. CIV. P. 23(b)(2) or their state equivalents. For example, show that the relevant statute contains a reliance or causation element which requires individualized proof by the plaintiff or which permits the defendant to overcome some sort of presumption of reliance or causation.

If a court has yet to interpret the statute, consider the cases discussed in this

article in which reliance was either explicitly required or was subsumed in the causation element. Demonstrate the difference between consumer fraud act claims and the federal securities law that gave rise to the fraud on the market theory. In preparing to challenge certification, show how providers or their patients were not aware of the allegedly wrongful conduct at all or that the prescribing decision was otherwise independent of the alleged misrepresentations or omissions forming the basis for the consumer fraud act claim. In short, keep in mind at all times both the statutory language of the law at issue and the applicable requirements for class certification. 