FROM THE

EDITOR

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Ninth Circuit Reads Hawaii's Deceptive Practices Act to Allow Class Actions Seeking Damages Without Proof of Causation

by J. Russell Jackson & Spencer R. Short

Many states have tried to make it easier for plaintiffs to bring consumer fraud claims by passing consumer protection statutes that eliminate or otherwise weaken the reliance requirement inherent in common law fraud. Still, these statutes generally do not untether liability from actual causation, for to award money damages without causation would potentially make a statute overly punitive. Thus, for nearly all state consumer protection statutes that allow damages, even where reliance is not an element of the statutory claim per se, the plaintiff still must prove that she suffered a loss that was caused by the allegedly deceptive conduct. Some have called this "reliance lite."

Moreover, the further a state consumer protection statute moves from requiring actual causation, it often limits the type of relief available to injunctive relief. In this way, such statutes begin to resemble the Federal Trade Commission Act, which reserves enforcement to the Federal Trade Commission, but then does not require the FTC to prove that any injury was actually caused by deceptive conduct in order to enjoin such conduct to protect the public.

A recent decision by the U.S. Court of Appeals for the Ninth Circuit rejects the distinction between equitable relief and damages, reading Hawaii's Deceptive Practices Act to allow an entire class to sue for damages without anyone establishing that deceptive conduct actually caused any injury.[1] Left unreversed, some argue, the decision in *Yokoyama v. Midland National Life Insurance Company* (*Yokoyama II*) may wreak havoc in the field of consumer fraud class actions.

For critics, what is particularly nonplussing about *Yokoyama II* is the opinion below in *Yokoyama I*,[2] in which the district court judge came to the opposite conclusion.

In *Yokoyama I*, three senior citizens sued on behalf of a putative class of Hawaii residents who bought indexed annuity products ("IAPs") from Midland National Life Insurance Company. The seniors alleged that Midland failed to adequately disclose in its brochures both the risks and the sales charges associated with the products. As a result, the plaintiffs alleged that the marketing and sale of the IAPs was in violation of Hawaii's Deceptive Practices Act, Hawaii Revised Statute § 480-2, and sued for damages pursuant to Hawaii Revised Statute § 480-13.

Hawaii Revised Statute § 480-2 states that "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful." This section is not self-enforcing, however. Rather, Hawaii Revised Statute § 480-13(b) creates a private right of action for "any consumer who is injured by an unfair or deceptive act or practice forbidden or declared unlawful by section 480-2." Under HRS § 480-13, any such injured consumer may sue for treble damages.

The district court denied class certification. First, the court determined that the suit was predominantly one for money damages, not injunctive relief, and thus applied Federal Rule of Civil Procedure 23(b)(3), not Federal Rule of Civil Procedure 23(b)(2). Then, the court determined that the individual issues attendant with plaintiffs' claims overwhelmed the common issues, and thus the predominance requirement of Rule 23 was not met.

District Judge Seabright noted that "under the explicit statutory language of HRS § 480-13(b), only 'injured' consumers have standing to bring suit."[3] As a result, "the elements necessary to recover on an unfair or deceptive trade acts or practices claim under HRS § 480-13(b)(1) are (1) a violation of HRS § 480-2; (2) injury to

the consumer caused by such a violation; and (3) proof of the amount of damages."[4]

The court determined that the plaintiffs' putative class failed to meet Rule 23(b)(3)'s predominance requirement in four ways: (i) individual oral presentations by brokers would necessitate individualized inquiry; (ii) claims brought under HRS § 480-13 require an individualized showing of actual damages; (iii) HRS §§ 480-2 and 480-13 require a causal link between the allegations and injury; and (iv) whether the annuities were suitable for seniors required individual inquiry. In doing so, the court noted that "individual reliance—whether IAP purchasers actually relied on Midland's allegedly misleading or fraudulent publications or omissions—provides the crucial causal link between HRS § 480-2 and HRS § 480-13."[5]

The Ninth Circuit reversed and remanded in *Yokoyama II*, focusing solely on HRS § 480-2's definition of unlawful deceptive conduct and not addressing HRS § 480-13, the provision that deputizes private citizens to enforce HRS § 480-2 by obtaining damages for injuries caused by violations of HRS § 480-2. The Ninth Circuit noted that the district court "refused to certify a class in this case because it determined that Hawaii's consumer protection laws require individualized reliance showings."[6] This, the court held, "was contrary to the Hawaii Supreme Court's interpretation of state law, because the Hawaii Supreme Court has made clear that reliance is judged by an 'objective reasonable person standard.'"[7] Thus, the court held, "Hawaii's consumer protection laws look to a reasonable consumer, not the particular consumer."[8]

As a result, according to the Ninth Circuit, plaintiffs are not required to show reliance, causation, or even injury, at the class certification stage, but instead "only whether [defendant's] omissions were likely to deceive a reasonable person."[9] The court then found that, because there was no reliance requirement under Hawaii's consumer protection statute, the district court's finding that individualized damages inquiries would be necessary was also incorrect. Although "[d]amages calculations w[ould] doubtless have to be made under Hawaii's consumer protection laws," the "amount of damages is invariably an individual question and does not defeat class action treatment."[10]

The decision would constitute a major shift for a number of reasons. Apparently, *no class member*, not even the named plaintiffs, is required to establish that he or she

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Supreme Court to Clarify Rules for Multiplying Attorneys' Fees

by Gregory F. Jacob

More than twenty years ago, in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air* ("*Delaware Valley I*"),[1] the Supreme Court opined that the federal fee-shifting statutes "were not designed as a form of economic relief to improve the financial lot of attorneys."[2] In *Kenny A. v. Perdue*,[3] the Court has the opportunity to revisit this earlier pronouncement by deciding when, if ever, a trial court is permitted to grant a successful plaintiff's attorney a discretionary multiplier of the standard attorney's fees award. Typically, a plaintiff's attorney who wins a case that is subject to a federal fee-shifting statute receives a "lodestar" fee award, which is calculated by multiplying the attorney's reasonable hourly rate by the number of hours the attorney reasonably expended on the case. The prevailing attorneys, of course, would like to receive more fees if they could, and every once in a while they succeed in talking a duly impressed or otherwise sympathetic court into increasing the fee award, usually by employing a "lodestar multiplier."

In the Eleventh Circuit's *Kenny A.* ruling, at least one judge (Judge Carnes) determined that governing Supreme Court precedent interpreting federal fee-shifting statutes does not permit a district court to award prevailing attorneys a lodestar multiplier based on the quality of their performance or the results they obtained. The panel unanimously ruled, however, that binding Eleventh Circuit precedent, handed down subsequent to the governing Supreme Court precedents, compelled the panel to allow precisely such an award. And so it did, affirming a 1.75 lodestar multiplier that cost Georgia taxpayers an additional $4.5 million in attorney's fees. Judge Carnes, however, argued in his separate opinion that the Eleventh Circuit should take the case en banc so that it could reverse its earlier precedents allowing such awards. When the court declined,[4] he issued what he described as his first dissent from a denial of rehearing en banc in his sixteen years on the bench, appealing to a yet higher authority to step in and set his circuit straight.[5] And it just may have worked. The Supreme Court granted certiorari, and argument was heard in the case on October 14, 2009.

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relied on the alleged misrepresentation, or even that the misrepresentation in any way caused her injury, in order to bring a claim for damages under Hawaii's Deceptive Practices Act. The ramifications of this holding are that the statutory scheme would allow for treble damages to each and every putative class member without any showing that the misrepresentations caused injury to any of them. In other words, under *Yokoyama II*, the consumer protection statutes assume both injury and causation.

This reasoning was founded on two Hawaii state court decisions, neither of which addressed the elements of private enforcement actions for damages under HRS § 480-13(b). The Ninth Circuit's determination that the district court committed legal error was based on its reading of the Hawaii Supreme Court's decision *Courbat v. Dahana Ranch, Inc.*,[11] which, the Ninth Circuit explained, "made it clear that [under Chapter 480] reliance is judged by an 'objective reasonable person standard."[12] *Courbat*, however, does not mention reliance and stands only for the proposition that "deception"—which constitutes a violation of Haw. Rev. Stat. § 480-2—is judged using a reasonable consumer standard. HRS § 480-2 itself does not contain any private right of action under which plaintiffs may bring suit for damages. Further, the plaintiffs in *Courbat* were not bringing a claim for damages under Chapter 480, but instead sought rescission of a contract pursuant to HRS § 480-2, which declares void any contract that violates HRS § 480-12.

The Ninth Circuit also cited *Hawaii v. Bronster*.[13] *Bronster*, however, does not address reliance but rather holds that, because a deceptive act under HRS § 480-2 is determined according to an objective, reasonable person standard, a jury instruction that articulated that objective requirement with an additional requirement that the act be "immoral, unethical, oppressive, or unscrupulous," was legally incorrect.[14] In fact, the jury instructions excerpted in the decision also required a finding by the jury that the alleged "acts or practices were the legal cause of harm or loss to plaintiff's property."[15] Thus, the case actually required causation as an essential element of a claim under the consumer protection law.

As noted above, HRS § 480-2 does not contain any private right of action. Rather, HRS § 480-2 is a virtual clone of section 5(a)(1) of the Federal Trade Commission Act, and therefore courts construing section 480-2 are "guided by the interpretations" given by the Federal Trade Commission and FTCA s 5(a)(1).[16] Thus, like FTCA 5(a)(1), which is enforced by the FTC and not private individuals, HRS 480-2 creates an objective test and does not create a private right of action.[17]

The district court noted in *Yokoyama I* that "the government does not have to wait for individual damages to be sustained prior to the filing of suit" under the FTCA, nor does the government have to wait for individual damages under HRS §§ 480-8, 480-15, 480-16, or 480-18, and proof of damages may not be required when private plaintiffs file suit seeking non-compensatory remedies under HRS § 480-2 (as in *Courbet*) or for injunctive relief under HRS § 480-7(b).[18] But, the court stated, "claims for damages brought under HRS § 480-13 are fundamentally different than claims for injunctive, declaratory, or other forms of non-compensatory relief brought under other sections of Chapter 480."[19] The district court thus found the possibility of treble damages to be intertwined with the requirement that plaintiffs prove causation as an element of their claims. At this intersection of burdens of proof and remedies under the Hawaii statutes, the district court and the Ninth Circuit parted ways. For the Ninth Circuit, the presence of treble damages played no part in determining whether both the elements of plaintiffs' claim and the requirements of Rule 23 could be met.

California's Unfair Competition Law ("UCL") serves as an interesting counterpoint to the Hawaii statutes. To state a claim under California's UCL, a plaintiff need only show that "members of the public are likely to be deceived."[20] As the California Supreme Court noted in *In re Tobacco II*, the California legislature "limited the scope of damages available under the UCL," eliminating damages, but allowing both injunctive relief and restitution.[21] Thus, any diminished evidentiary burden with regard to reliance or causation is paralleled by a limitation on the type of recovery. Further, the court in *In re Tobacco II* reiterated that—at least for the named class representative—the UCL "imposes an actual reliance requirement."[22] California's UCL is acknowledged as one

of America's most lenient consumer protection regimes. And yet, even under California law, the UCL imposes a higher evidentiary burden to initiate suit than the Ninth Circuit did in *Yokoyama II*, and California restricts the relief available in a way that the *Yokoyama II* decision does not.

The decision of the *Yokoyama II* court is all the more notable because the Ninth Circuit previously addressed the interaction of HRS § 480-2 and 480-13 in a decision that is never cited in *Yokoyama II*. In *Jenkins v. Commonwealth Land Title Ins. Co.*,[23] a different panel of the Ninth Circuit observed that:

> Section 480-13 of the Hawai'i Revised Statutes, the section that allows Jenkins to sue for a violation of § 480-2, requires that a plaintiff have sustained damages. "[T]he mere existence of a violation is not sufficient *ipso facto* to support the action; forbidden acts cannot be relevant unless they cause private damage." Jenkins' allegation that he has, as a "direct and proximate result" of Commonwealth's violation, "sustained special and general damages" suffices to withstand a motion to dismiss under Rule 12(b)(6).[24]

Under the Ninth Circuit's analysis in *Yokoyama II*, plaintiffs apparently no longer need to show either component of a claim.

By rejecting the injury and causation requirements of HRS 480 § 13, the *Yokoyama II* decision also departs from a long line of cases holding that HRS § 480-13 "governs lawsuits whose subject is anything forbidden or declared unlawful... by section 480-2."[25] In fact, the Ninth Circuit itself previously noted that very fact.[26]

Further, HRS § 480-13 requires that a plaintiff show *actual* injury *caused* by the alleged violation of Haw. Rev. Stat. 480-2.[27] Until *Yokoyama II*, "the mere existence of a violation [of HRS § 480-2] [was] not sufficient ipso facto to support the action."[28] Causation also was necessary.

While the *Yokoyama II* court held that the district court erred because Hawaii's consumer protection statutes do not "require" reliance, the district court never said Chapter 480 requires reliance. Rather, it found that, in a case based on allegations of deceptive marketing, "individual reliance... provides the crucial causal link between the alleged violation of HRS § 480-2 and the damages claimed under HRS § 480-13."[29] Thus, it was *causation* that was required by the statute, and reliance was likely to be at the root of any proof of causation.

Finally, the *Yokoyama II* opinion states that individual issues regarding damages do not defeat certification. Although that may be the case in a securities class action where the damages calculation involves proof of the number of shares held and the application of a mathematical formula, critics point out that this often is not true in consumer fraud cases. As the district court noted in *Yokoyama I*, Hawaii law would require any court determining damages in the context of a fraud claim involving fixed annuity sales to look to a variety of factors, including:

> financial circumstances and objectives of each class member; their ages; the IAP selected; any changes in fixed rate of interest for that particular IAP; the performance of the selected index; any changes in the index margin for that particular IAP; any cap on the indexed interest; the length of the surrender periods; whether the individual had undertaken or wanted to undertake an early withdrawal of the funds; any benefit the individual policy holder derived from the form of the annuity itself, including the tax-deferral of credited interest; and the actual rate of return of the IAP.[30]

Where, as in *Yokoyama*, the issues related to damages are inextricably intertwined with issues of causation and individual choice, courts everywhere, including the Ninth Circuit, routinely deny certification.[31]

By holding that a court deciding class certification under the Hawaiian consumer protection statutes may not consider the standing, injury, and causation elements of HRS § 480-13, the Ninth Circuit in *Yokoyama II* acted inconsistently with Rule 23's status as a procedural rule that "shall not abridge, enlarge or modify any substantive right."[32] The impact of this decision is significant, and plaintiffs' lawyers will no doubt rely on it for years to come when litigating cases under consumer fraud statutes.

* *Mr. Jackson is a partner and Mr. Short is an associate in the Mass Torts Group at New York's Skadden, Arps, Slate, Meagher & Flom LLP. Mr. Jackson also hosts a blog: www.consumerclassactionsmasstorts.com.*

Endnotes

1 *See Yokoyama v. Midland National Life Insurance Co.*, No. 07-16825, 2009 WL 2634770, (9th Cir. Aug. 28, 2009) (*Yokoyama II*).

2 *See Yokoyama v. Midland National Life Insurance Co.*, 243 F.R.D. 400 (D. Haw. 2007).

3 *Yokoyama I*, 243 F.R.D. at 406.

4 *Id.*

5 *Yokoyama I*, 243 F.R.D. at 411.

6 *Yokoyama II*, 2009 WL 2634770, at *5 (9th Cir. Aug. 28, 2009)

7 *Id.*

8 *Id.* at *4.

9 *Id.* at *5.

10 *Id.* at *6.

11 141 P.3d 427 (Haw. 2006).

12 *Yokoyama II*, 2009 WL 2634770, at *5.

13 919 P.2d 294 (1995).

14 *Id.* at 313.

15 *Id.* at 312.

16 Roberts Waikiki U-Drive, Inc. v. Budget Rent-a-Car Sys. Inc., 491 F.Supp. 1199, 1226 (D. Haw. 1980); Haw. Rev. Stat. 480-3.

17 *See* Norris v. Fairbanks Capital Corp., 178 Fed. Appx. 401, 2006 WL 11698498, at *1 (5th Cir. 2006); Naylor v. Case and McGrath, Inc., 585 F.2d 557, 561 (2d Cir. 1978); Perkins v. Washington Mutual, FSB, 2009 WL 2835781, at *4 (D. N.J. 2009).

18 *Yokoyama I*, 243 F.R.D. at 410 n.16.

19 *Id.*

20 *In re* Tobacco II, 207 P.3d 20, 30 (2009).

21 *Id.*

22 *Id.* at 39.

23 95 F.3d 791 (9th Cir. 1996).

24 *Id.* at 799.

25 Flores v. Rawlings Co., Inc., 177 P.3d 341, 350 (2008); *see also Roberts Waikiki*, 491 F. Supp. at 1226 ("Section 480-13 creates a private right of action for violations of 480-2").

26 *See* Cunha v. Ward Foods, Inc., 804 F.2d 1418, 1433 (9th Cir. 1986) ("Haw. Rev. Stat. 480-13 provides a private right of action for violation of 480-2.")

27 *See Cunha*, 804 F.2d at 1433 ("[T]o maintain a cause of action under 480-13, a private plaintiff must demonstrate: (1) a violation of chapter 480... (2) that an injury to plaintiff's business or property has resulted; [and] (3) proof of damages."); Davis v. Wholesale Motors, Inc., 949 P.2d 1026, 1039 (Haw. Ct. App.1997) ("elements necessary to recover on an unfair or deceptive trade acts or practices claim under HRS s 480-13(b)(1) are (1) a violation of HRS 480-2; (2) injury to the consumer caused by such a violation, and (3) proof of the amount of damages.")

28 *Jenkins*, 95 F.3d at 799.

29 *Yokoyama I*, 243 F.R.D. at 411.

30 *Yokoyama I*, 243 F.R.D. at 410-11.

31 *See* Forsyth v. Humana, Inc., 114 F.3d 1467, 1481 (9th Cir.1997) ("To maintain a claim under RICO, a plaintiff must show not only that the defendant's violation was a "but for" cause of his injury, but that it was the proximate cause as well.... [The] plaintiff must show a concrete financial loss."); Mazur v. eBay Inc., 257 F.R.D. 563, 570 (N.D. Cal. 2009) (denying certification where "plaintiffs allege financial harm and seek damages in all of their causes of actions. Such allegations will require evidence of injury and damages."); Deitz v. Comcast Corp., 2007 WL 2015440, *6-7 (N.D. Cal. 2007) (class certification not appropriate for claims for negligent misrepresentation, CLRA violations, and unjust enrichment where damages required individual inquiry); Stickrath v. Globalstar, 527 F. Supp. 2d 992, 996 (N.D. Cal. 2007) ("[B]oth the UCL and CLRA protect only plaintiffs who have suffered harm 'as a result of' defendants' unlawful or unfair practices.").

32 Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999).

Members of Congress Propose Amendment to Medicare Secondary Payer Statute

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The Medicare Secondary Payer statute (MSP) implements such a subrogation right, preventing Medicare beneficiaries from potentially being paid twice for the same expenses and reducing federal health care costs. Medicare is entitled to reimbursement (as the "secondary payer") for medical services provided to Medicare patients whenever payment is available from another source: a primary payer such as "a group health plan" or "an automobile or liability insurance policy or plan (including a self-insured plan) or [] no fault insurance."[1] Payment by Medicare of benefits is "conditioned on reimbursement" from the primary plan. The requirement to reimburse Medicare is triggered by a judgment or payment by a primary plan to the Medicare beneficiary conditioned upon the Medicare beneficiary's compromise, waiver, or release of a claim (based on state law) against the primary plan.[2]

Beneficiaries are permitted to sue and collect double damages from a "primary plan that fails to provide for primary payment (or appropriate reimbursement)."[3] If successful, the beneficiary reimburses Medicare (which is subrogated to the extent of payment made) and keeps the other half of the double damages. However, no right to sue under the MSP arises against a party "whose responsibility to pay medical costs has not yet been established."[4] Thus, "it is necessary to establish tort liability by a [legal] judgment or settlement before a private right of action arises under the MSP statute."[5]

The attempts of plaintiffs' lawyers to pursue MSP suits against tobacco companies for injuries to Medicare recipients before any liability had been established were rebuffed in the courts, as were a series of cases filed against