

U.S. Consumer Protection Law and Litigation

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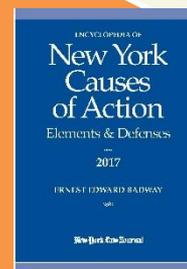
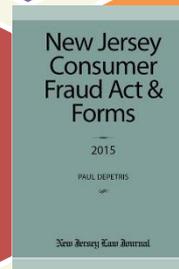
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U.S. Consumer Protection Law: A Patchwork of Federal and State Agencies and Laws



Federal Regulations and Agencies

State Regulations and Agencies



Private Actions Under State Laws

Federal Regulations and Agencies

▶ Federal Trade Commission (FTC)

- Independent agency; 5 commissioners appointed by President
- Role is to (1) protect **consumers** and (2) maintain **competition**
- Investigative, enforcement, and rule-making authority
- **No private right of action** to enforce FTC statute or rules

▶ Consumer Financial Protection Bureau (CFPB)

- Independent bureau within Federal Reserve System
- Created by **Dodd-Frank Wall Street Reform Act (2010)**
- Supervisory and enforcement authority over **consumer financial products and services**
- **Consumer complaints** filed with CFPB as alternative to private lawsuit

Other Federal Regulations and Agencies

- ▶ **U.S. Food and Drug Administration (FDA)** – regulates labeling of food, drugs, cosmetics, medical devices, and tobacco; U.S. Department of Agriculture regulates labeling of meat, eggs
- ▶ **U.S. Consumer Product Safety Commission (CPSC)** – sets product standards to reduce injuries (non-FDA products); recalls
- ▶ **National Highway Traffic Safety Administration (NHTSA)** – sets and enforces vehicle safety standards
- ▶ **Federal Communications Commission (FCC)** – regulates interstate communications (TV, radio, phone, cable, Internet)

State Consumer Protection Systems

- ▶ **State Attorney Generals** in 50 states generally empowered to:
 - Enforce state consumer protection laws
 - File lawsuits on behalf of consumers
 - Investigate potential violations
 - Seek injunctions and restitution
- ▶ **Common law tort and warranty claims and class actions**
 - Fraud and misrepresentation
 - Breach of express warranty, implied warranty of merchantability
 - Governed by state law, i.e., how courts in the state have interpreted and applied the common law or UCC
- ▶ **State consumer fraud and unfair trade practices statutes**
 - Prohibit deceptive and unfair business practices and provide private right of action; vary by state

Multi-Agency and State-Federal Proceedings

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Home » News & Events » Press Releases » FTC and Federal, State and Local Law Enforcement Partners Announce Nationwide Crackdown Against Abusive Debt Collectors

FTC and Federal, State and Local Law Enforcement Partners Announce Nationwide Crackdown Against Abusive Debt Collectors

Authorities Announce 30 New Actions Targeting Illegal Practices Such as Phony Debt Collection, Threats of Arrest & Wage Garnishment

November 4, 2015

TAGS: deceptive/misleading conduct | Finance | Bureau of Consumer Protection | Consumer Protection | Credit and Finance | Debt Collection

The Federal Trade Commission and other law enforcement authorities around the country announced the first coordinated federal-state enforcement initiative targeting deceptive and abusive debt collection practices. This nationwide crackdown encompasses 30 new law enforcement actions by federal, state, and local law enforcement authorities against collectors who use illegal tactics such as harassing phone calls and false threats of litigation, arrest, and wage garnishment. The cases announced today bring to 15 the total number of actions taken so far this year by the more than 70 law enforcement partners in the Operation Collection Protection initiative.

Some of these actions allege that collectors knowingly attempted to collect so-called phantom debts – phony debts that consumers do not actually owe. The illegal practices targeted by authorities also include the failure of some collectors to give consumers legally required disclosures and notices, or to follow state and local licensing requirements.

"Being in debt is stressful enough for many Americans without also being subjected to intimidation and false threats," FTC Chairman Edith Ramirez said. "Debtors have certain rights and rogue collectors that step outside the law will face the consequences of illegal behavior."

Illinois Attorney General Lisa Madigan said, "My office receives thousands of calls and complaints each year from consumers who are victims of illegal debt collection tactics. Through our partnership with the FTC and states across the country, we are putting scam operators out of business and protecting consumers from abusive

OPERATION Collection Protection

STOPPING Abusive Debt Collection

The largest-ever coalition of enforcement actions against abusive debt collectors

115

- ▶ Parallel and coordinated investigations and proceedings are common
 - FTC and State Attorneys General
 - U.S. Department of Justice and FTC
 - FTC and FCC, FTC and FDA

- ▶ Agencies may agree who “goes first”
- ▶ Copycat civil actions often follow agency investigations and enforcement actions
- ▶ Global settlements may resolve both regulatory and private litigation, e.g., proposed VW settlement

State, Federal Agencies Crack Down On Companies That Allegedly Facilitate Mail Fraud Of Elderly

September 22, 2016
4:00 pm EDT

By Aphae Keller

A BIG MOVE
PROTECTING THE ELDERLY
MAIL FRAUD
A CRACKDOWN
WORKING TOGETHER
FRAUD SCHEMES
ACTION
DEPARTMENT OF JUSTICE
SEC. RATHERBY GENERAL
FEDERAL TRADE COMMISSION
U.S. POSTAL

Each year, millions of elderly consumers are lured into mail fraud schemes by all-too-attractive claims that they have won unimaginable prizes, like millions of dollars or trips around the world. Today, the U.S. Department of Justice took unprecedented steps to ensure these scammers no longer victimize older Americans by announcing action against companies that they allege are some of the little-known perpetrators of the alleged schemes: the payment processor, mailer printers, and lead generators.

The U.S. Attorney General's Office, along with U.S. Postal Inspection Service (USPIS), U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC), the Federal Trade Commission, and other law enforcement agencies, announced Thursday sweeping action involving mass mail fraud that resulted in criminal charges, seizure of allegedly criminal proceeds, and civil injunction lawsuits against several companies and individuals.

The sweep targeted a global network of mass mailing schemes that have allegedly defrauded millions of elderly and vulnerable victims across the U.S. out of hundreds of millions of dollars, according to the AG's office.

"Today's actions send a clear message that the Department of Justice is determined to hold the perpetrators of these harmful schemes accountable."

<https://www.ftc.gov/news-events/press-releases/2015/11/ftc-federal-state-local-law-enforcement-partners-announce>; <https://consumerist.com/2016/09/22/state-federal-agencies-crack-down-on-companies-that-allegedly-facilitate-mail-fraud-of-elderly/>.

A Decade of Consumer Fraud Litigation

Class Action Fairness Act (2005)

Twombly (2007) and *Iqbal* (2009)

2006-08

- Toyota unintended acceleration cases
- “All natural” food and drink labeling cases
- Mortgage and lending fraud cases
- Home building products cases

DirecTV (2015) (upholding binding arbitration clauses)

2013-16

- “Light” cigarette cases
- Cases against alcohol industry re: minors
- Pharmaceutical lack-of-efficacy, over-promotion, and off-label promotion cases
- Third-party payor plaintiffs
- RICO claims

2009-12

Consumer electronics, technology, and appliances cases

- VW diesel emissions
- Opioid addiction cases
- Diagnostic testing kits and fitness trackers
- “Made in USA” apparel cases
- More food & cosmetic labeling cases

2006-08 Plaintiffs' Cases and Strategies

- ▶ **Tobacco and pharmaceutical consumer class actions** in response to limited viability of personal injury class action after *Amchem*, 521 U.S. 591 (1997), and *Ortiz*, 527 U.S. 815 (1999)
- ▶ Borrow from **antitrust and securities class action playbooks**: damages and pricing models, “fraud on the market”
- ▶ Third-party payor union **pension funds and health insurers as plaintiffs** to try to avoid individual and physician reliance issues
- ▶ Focus on **advertising**, “bad company” conduct, **federal enforcement actions and pleas**
- ▶ **Couple with personal injury litigations** and seek federal multidistrict litigations (MDLs), e.g., *In re Bextra and Celebrex Marketing, Sales Practices & Products Liability Litigation*

Defense Response

- ▶ Motions to dismiss on the pleadings:
 - **No standing**: failure to allege (1) an injury-in-fact (must be “concrete” and “particularized”) and (2) a causal connection between that injury and the conduct alleged
 - **Consumer protection statute “safe harbors”**: bar to liability based on regulated conduct or conduct that complies with federal law
 - **Preemption or primary jurisdiction** based on FDA’s authority over drug marketing and advertising
- ▶ Motions to **strike class allegations**; oppositions to class certification based on individual issues and varying state laws
- ▶ Motions to **exclude class-wide damages experts** and models
- ▶ Strategic **discovery of plaintiffs**, e.g., to show plaintiff health insurer still purchases/reimburses for the product

Illustrative Cases

- ▶ *Prohias v. Pfizer, Inc.*, 490 F. Supp. 2d 1228 (S.D. Fla. 2007): Dismissing claims by consumers and TPPs that Lipitor was not effective for women and elderly for primary prevention of heart disease
 - Post-2004 claims were preempted and barred by statutory safe harbors because FDA had approved primary prevention indication in 2004
 - “[G]iven the FDA’s additional approvals of Lipitor, namely, to reduce the risk of heart attacks ..., Pfizer’s post-July 2004 advertisements were not misleading as a matter of law.”

- ▶ *S. Ill. Laborers’ v. Pfizer Inc.*, 2009 WL 3151807 (S.D.N.Y. 2009): Dismissed TPP RICO and consumer fraud class action involving marketing of Lipitor; TPPs lacked standing because they failed to link any action or statement by Pfizer with any payment for Lipitor
 - “Plaintiffs do not cite a single instance in which a physician received the fraudulent information and decided to prescribe Lipitor based on the information she received. Plaintiffs do not even explicitly allege the more general claim that physicians in general relied on Defendant’s misrepresentations. Accordingly, this causation argument fails as currently pled.”

Illustrative Cases

- ▶ *In re Epogen and Aranesp Off-Label Mktng & Sales Practices Litig.*, 2009 WL 1703285 (C.D. Cal. June 17, 2009), *aff'd* (9th Cir. Oct. 21, 2010): Dismissed TPP RICO and consumer fraud class action MDL alleging off-label promotion of anemia biologics
 - “Plaintiffs’ asserted causes of action remain claims of misbranding (i.e., promotion of non-FDA-approved uses) in disguise,” an impermissible attempt to privately enforce the FDCA, “not claims of false advertising or other fraudulent conduct”; plaintiffs failed to allege any cognizable consumer fraud claim
 - Ninth Cir.: “Moreover, the complaint failed to plead a cognizable theory of proximate causation that links Amgen’s alleged misconduct to Appellants’ alleged injury. Instead, the complaint proffered an attenuated causal chain that involved at least four independent links,” including “doctors’ decisions to prescribe ... for [the allegedly off-label] uses.”

Other Case Law Developments

- ▶ **Wide dismissal** of consumer and TPP pharma cases and alcohol industry cases **on standing and safe harbor grounds**
 - *See, e.g., Hakki v. Zima Co.*, 2006 WL 852126 (D.C. Super. 2006); *Eisenberg v. Anheuser-Busch*, 2006 WL 290308 (N.D. Ohio. 2006), *vacated sub nom. Alston*, 494 F.3d 562 (6th Cir. 2007) (remanding to dismiss for lack of standing); *Ironworkers Local Union 68 v. AstraZeneca Pharm.*, 634 F.3d 1352 (11th Cir. 2011); *Zafarana v. Pfizer Inc.*, 724 F. Supp. 2d 545 (E.D. Pa. 2010)
 - *But see In re Neurontin*, 712 F.3d 21 (1st Cir. 2013); *In re Avandia*, 804 F.3d 633 (3d Cir. 2015) (both finding TPP standing under RICO; *Avandia*: “The TPPs’ damages do not depend on the effectiveness of the Avandia that they purchased, but rather on the inflationary effect that GSK’s allegedly fraudulent behavior had on the price of Avandia.”)
- ▶ **Mixed record on class certification** in light cigarettes cases
 - *Compare, e.g., McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008) (decertifying class) with *Aspinall v. Philip Morris Co.*, 813 N.E. 2d 476 (Mass. 2004)
- ▶ **“Fraud on the market” theory rejected** outside securities cases as substitute for pleading reliance on misrepresentation

2009-12 Plaintiffs' Cases and Strategies

- ▶ Attempt to avoid individualized reliance issues by alleging **uniform product defects, uniformity in marketing** statements
 - **Car defects**
 - Alleged false or misleading **food and beverage labeling** (“nutritious,” “healthy,” “all natural,” “organic”)
 - **Home product defects** (doors, windows, decking), allegedly compensable even if unmanifested because product is worth less
- ▶ Mortgage lending litigation arising out of 2008 market crash

Defense Response

- ▶ **Motions to dismiss** on the pleadings:
 - **Claim is not plausible** on its face (*Iqbal/Twombly*) – no reasonable consumer would believe that labeling statement or alleged misrepresentation meant what plaintiffs claim
 - **Failure to allege fraud with specificity** under Fed. R. Civ. P. 9(b)
 - **Preemption and primary jurisdiction:** Nutrition Labeling and Education Act prohibits states from “directly or indirectly establish[ing]” requirements that are “not identical” to FDA’s
- ▶ Use **sampling or discovery** to show that substantial percentage of putative class members’ products **did not manifest the alleged defect** to defeat class claims
- ▶ Oppose class certification based on **individual injury and reliance** and **variations in state consumer protection laws**

Case Law Developments

- ▶ Courts have dismissed a number of **deceptive food labeling** cases for **failure to allege a plausible cause of action**
 - *Mason v. Coca-Cola Co.*, 774 F. Supp. 2d 699 (D.N.J. 2011); *Werbel v. Pepsico, Inc.*, 2010 WL 2673860 (N.D. Cal. 2010); *Videtto v. Kellogg USA*, 2009 WL 1439086 (E.D. Cal. 2009)
- ▶ Courts have found **claims preempted** where they involve statements specifically **required or permitted by FDA**
 - *Henderson v. Gruma Corp.*, 2011 WL 1362188 (C.D. Cal. 2011) (FDA allows: “0 g cholesterol,” “0 g transfat”); *Turek v. Gen. Mills, Inc.*, 754 F. Supp. 2d 956 (N.D. Ill. 2010), *aff’d* 662 F.3d 423 (7th Cir. 2011) (FDA permitted labeling statement about “fiber”)
- ▶ Courts have found claims **not preempted** where **FDA does not specifically define or address** the claim or term at issue
 - *Holk v. Snapple Beverage Corp.*, 575 F. 3d 329 (3d Cir. 2009) (the term “natural”)
- ▶ Courts have stayed cases pending FDA action on labeling issues
 - *Coyle v. Hornell Brewing Co.*, 2010 U.S. Dist. LEXIS 59467 (D.N.J. 2010) (stay to allow FDA to decide whether high fructose corn syrup is “natural”; extinguished when FDA declined)

2013-16 Plaintiffs' Cases and Strategies

- ▶ Claims that prescription diagnostic devices are inaccurate or malfunctioned, citing FDA warning letters and recalls
- ▶ Class actions based on “clinically proven” or “scientifically proven” claims in food or cosmetics labeling and advertising
- ▶ Using defendants’ statements or ads on social media to try to show uniform misrepresentations to support class certification
- ▶ Employer, municipality, and consumer litigations against prescription opioid manufacturers, alleging off-label promotion, misrepresentations about risks of addiction

Defense Response

- ▶ **Motions to dismiss** on the pleadings:
 - Failure to plead injury or causation
 - Preemption and primary jurisdiction
- ▶ **Opposing class certification**
 - Individualized purchasing decisions and experiences
 - Role of learned intermediary (doctor) creates individual issues in prescription drug and diagnostic products cases

Recent Case Law

- ▶ *Andren v. Alere, Inc.*, 2016 WL 4761806 (S.D. Cal. Sept. 13, 2016): Dismissing action involving blood clot monitoring strips for failure to allege reliance and concealment
- ▶ *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753 (9th Cir. 2015): Primary jurisdiction applied to class action alleging cosmetic was fraudulently labeled “natural,” but district court should have stayed, not dismissed, the case
- ▶ *Brazil v. Dole Food Co. Inc.*, 2016 WL 5539863 (9th Cir. 2016): Reversing summary judgment in “all natural fruit” case; affirming class decertification and limiting damages to difference between price paid and value of fruit
- ▶ *Elkind v. Revlon Consumer Prods. Corp.*, 2015 WL 2344134 (E.D.N.Y. May 14, 2015): Dismissing as preempted claims that labeling for face cream was misleading, but allowing false advertising claims to proceed; *see also Bimont v. Unilever U.S.*, 2015 WL 5256988 (S.D.N.Y. 2015) (dismissing deodorant “fill” claims as preempted)
- ▶ *Pagliaroni v. Mastic Home Exteriors*, No. CV 12-10164 (D. Mass. 2015): Denying certification of home decking class based on lack of common question and where some consumers’ decks had no problems; *see also Brown v. Electrolux Home Prods. Inc.*, 2016 WL 1085517 (11th Cir. 2016) (reversing certification of washer buyers)
 - *But see Butler v. Sears*, 727 F.3d 796 (7th Cir. 2013): Affirming certification of class of consumers of allegedly defective washing machines, finding common question of defect even though different models may be differently defective

Next Generation Claims

- ▶ Products labeled as “pure,” “artisanal,” “handmade”
- ▶ Virtual reality and videogame marketing
- ▶ Fitness tracking and other wearable technologies
- ▶ Smartphone service apps, e.g., 2016 Uber consumer settlement
- ▶ Driverless cars

THANK YOU