

## Federal Appeals Court Holds “No Reliance” Defense Defeats Certification in Consumer Fraud Class Action

Unlike common law fraud, most consumer fraud statutes do not require a showing of reliance. For this reason, plaintiffs have repeatedly argued that manufacturers can be held liable to an entire class of plaintiffs for an alleged misrepresentation—even if most members of the class never saw the misrepresentation, or saw it but purchased the item for some other, unrelated reason. Consumer fraud defendants have fought back against this line of attack, with varying degrees of success, by arguing that causation, which is required under most consumer fraud statutes, cannot be proven in such situations. But in a ground-breaking decision, the U.S. Court of Appeals for the Eighth Circuit pushed reliance back to the forefront of consumer fraud litigation. In *In re St. Jude Medical, Inc., Silzone Heart Valve Products Liability Litigation*, No. 06-3860, 2008 WL 942274 (8th Cir. April 9, 2008), the court held that even if a consumer fraud statute does not require *plaintiffs* to prove reliance, the *defendant* can assert the lack of reliance as a defense. The court went on to recognize that when raised as a defense reliance is so inherently individualized that it precludes class certification. In so doing, the court dealt a significant blow to plaintiffs seeking class treatment of cases alleging consumer fraud and misrepresentation.

At issue in *St. Jude* was the certification of a nationwide class of plaintiffs who had received prosthetic heart valves. After a clinical trial suggested that the valve was subject to an increased risk of leakage, the manufacturer, St. Jude Medical, issued a recall. Plaintiffs around the country filed suit for consumer fraud, medical monitoring, and personal injuries, and the cases were consolidated in the District of Minnesota. After a complicated history that in-

cluded a prior appeal to the Eighth Circuit,<sup>1</sup> the district court certified a consumer fraud class, holding that common questions of law and fact would predominate.<sup>2</sup> This conclusion was expressly premised on the lack of a reliance requirement under the Minnesota consumer statute:

It is by now well established that plaintiffs need not establish reliance when seeking injunctive relief under Minnesota's consumer fraud and deceptive trade practices statutes. More recently, the Minnesota Supreme Court broadened the scope of statutory claims under these statutes in [*Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2 (Minn. 2001)], holding that a plaintiff need not plead individual reliance on a defendant's wrongful conduct to state a claim for damages. Rather, plaintiffs seeking damages need only establish a "causal nexus between their damages and the defendant's wrongful conduct."

*In re St. Jude Med., Inc.*, No. MDL-01-1396, 2003 WL 1589527, at \* 18 (D. Minn. Mar. 27, 2003) (citations omitted).

From the outset, the Eight Circuit recognized that the case involved individual issues, such as

<sup>1</sup> The Eighth Circuit's April 9 decision was the second time it reversed the district court's certification of a class in the case. See *In re St. Jude Med., Inc.*, 425 F.3d 1116 (8th Cir. 2005).

<sup>2</sup> The district court also held that Minnesota law should apply to the entire nationwide class. The Eighth Circuit declined to address the merits or constitutionality of this choice of law analysis.

how treating physicians had learned about the St. Jude valve and whether each plaintiff had been exposed to representations about the efficacy of the valves. Indeed, the court explained: “Whether the information on which physicians based their actions ultimately can be traced to a representation by St. Jude undoubtedly will vary by individual physician.” *St. Jude Medical*, 2008 WL 942274, at \*2. After all, “[p]hysicians learned about St. Jude’s heart valve in different ways. One doctor heard about the valve from a senior partner, another discovered it at a cardiology conference, and a third learned about the valve from a St. Jude sales representative and a St. Jude advertisement.” *Id.* Moreover, the court concluded: “Even where the present record does contain evidence that a physician eventually talked to a St. Jude representative or read Silzone promotional materials, those physicians assert that they did not rely on the representations by St. Jude in deciding to recommend the Silzone valve to their patients.” *Id.* Likewise, the court concluded that the facts showed that not every plaintiff had been exposed to the same material representations about the valve. For example, “a number of implant patients did not receive any material representation about the heart valve” and “[t]wo of the five named plaintiffs . . . did not remember hearing anything about the unique qualities of the Silzone valve.” *Id.*

Despite these individual issues, the Plaintiffs argued that class certification was still appropriate because the Minnesota consumer protection statutes, unlike common-law fraud, do not require proof of individual reliance. Indeed, the Minnesota Supreme Court has expressly so held in *Group Health Plan, Inc.*, *supra*. Thus plaintiffs contended that whether they or their physicians had been exposed to representations of the efficacy of the valve was irrelevant to their claims.

The Eighth Circuit disagreed, holding that the district court had overstated the significance of *Group Health*:

[A]ssuming this case fits within the *Group Health* category, and thus does not require the plaintiffs to present direct proof of individual reliance, *Group Health* surely does not prohibit *St. Jude* from presenting direct evidence that an individual plaintiff (or his or her physician) did not rely on representations from St. Jude. When such evidence is available, then it is highly relevant and probative on the question whether there is a causal nexus between alleged misrepresentations and any injury. 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 pre-

sent evidence negating a plaintiff’s direct or circumstantial showing of causation or reliance.

*Id.* at \*3 (emphasis in original).

The court thus concluded that given the evidence “concerning the reliance or non-reliance of individual physicians and patients on representations made by St. Jude, it is 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.” *Id.*

All too frequently, courts are being asked to certify sweeping consumer fraud class actions based on abstract and unproven economic injuries. *St. Jude* provides strong precedent for defendants’ right to present a defense based on lack of reliance. If other courts follow this sound ruling, they will refuse to certify these classes, and will roll back the tide on consumer fraud class actions.



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