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Class Actions

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A commentary article reprinted from the December 17, 2009 issue of Mealey's Litigation Report: Class Actions

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Commentary

The Nation's New Lawsuit Capital? D.C. High Court Eliminates Standing Requirements For Consumer Protection Lawsuits, Threatening Flood Of Abusive Litigation

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In *Grayson v. AT&T Corporation*, 980 A.2d 1137 (D.C. 2009), the District of Columbia Court of Appeals — D.C.'s highest court — has held that the 2000 amendments to D.C.'s consumer protection laws permit consumers to sue businesses for allegedly unfair business practices even when the consumer has not been injured by the challenged practice and did not rely on the business's alleged misrepresentations. The decision revives a self-styled private attorney general lawsuit against several phone services companies brought by a single, uninjured plaintiff who purports to represent millions of consumers nationwide. In doing so, this decision threatens to turn D.C. courts into a magnet for the same sorts of abusive faux-consumer protection lawsuits that were routinely filed in California state courts until they were curtailed by a 2004 ballot initiative.

The District Of Columbia Consumer Protection Procedures Act

The District of Columbia Consumer Protection Procedures Act (CPPA), D.C. Code §§ 28-3901 *et seq.* (2009 supp.), prohibits a broad array of unlawful trade practices, including 24 specifically enumerated practices and a host of other incorporated statutory and common law prohibitions. *Id.* § 28-3904. Like many other states' consumer protection laws, the CPPA establishes several overlapping enforcement mechanisms, including agency regulation (*id.* §§ 28-3902 to -3903), official investigation of consumer complaints (*id.* §§ 28-3905(a) to (j)), and a private cause of action in the D.C. courts for restitution, treble and punitive damages, injunctive relief, and attorneys' fees and costs (*id.* § 28-3905(k)).

As originally enacted, the private cause of action under the CPPA was available only to consumers who could satisfy traditional standing requirements — namely that they had "suffer[ed] any damage as a result of the use or employment by any person" of the allegedly unlawful "trade practice" that they challenged. D.C. Code § 28-3905(k)(1) (1998). In 2000, the D.C. Council amended this provision to read as follows:

> A person, whether acting for the interests of itself, its members, or the general public, may bring an action under this chapter in the Superior Court of the District of Columbia seeking relief from the use by any person of a trade practice in violation of a law of the District of Columbia * * *.

Consumer Protection Act of 2000, 47 D.C. Reg. 6308 (June 26, 2000) (codified at D.C. Code § 28-3905(k)(1) (2009 supp.)). The amendments also added a new provision instructing that the law "be construed and applied liberally to promote its purpose." D.C. Code § 28-3901(c).

The Grayson Decision

In March 2004, Alan Grayson sued AT&T, MCI, Sprint, and Verizon in D.C. Superior Court, alleging that the carriers' treatment of remaining balances on prepaid calling cards after customers stop using their cards violates the CPPA. Grayson contends that although the carriers currently retain the unused balances, these amounts constitute unclaimed personal property that must be turned over to the D.C. government. Grayson also asserts that the usable value of a calling card is generally less than the amount of the prepayment, and contends that the carriers have misled consumers about the value of the cards. In his complaint, however, Grayson does not allege that he has personally suffered any harm as a result of these alleged practices.

This lawsuit was not Grayson's first one regarding unused balances on prepaid calling cards. In 2002, Grayson filed the same lawsuit in California state court against AT&T, Sprint, Nextel, and Pacific Bell, alleging that similar conduct violated California's Unfair Competition Law. *See State ex rel. Grayson v. Pac. Bell Tel. Co.*, 142 Cal. App. 4th 741 (Cal. Ct. App. 2006). At the time, California permitted any person to bring fraud claims on behalf of the general public under that statute, even if the plaintiff had not been personally injured by the challenged practice. But in November 2004, California voters enacted Proposition 64 in order to require that plaintiffs who sued under the UCL satisfy traditional "injury in fact" standing requirements. As amended, the Unfair Competition Law requires plaintiffs to have "suffered injury in fact and ha[ve] lost money or property as a result of such unfair competition." Prop. 64 §§ 3, 5 (amending Cal. Bus. & Prof. Code §§ 17204, 17535). Because Grayson could not show that he had ever been injured by the alleged practices, his California lawsuit subsequently was dismissed. *Pac. Bell*, 142 Cal. App. 4th at 757.

Like the California courts, a D.C. trial court held that Grayson lacked standing to bring his new lawsuit under the CPPA because he himself does not claim to have suffered any injury. Although Grayson alleged that he has obtained and used prepaid calling cards in D.C., he admitted that he still has these cards and can use the remaining value at any time, and so has not yet suffered any harm. Moreover, because under Grayson's legal theory the unclaimed calling card balances must be transferred to the D.C. government, the court found that any injury from the companies' practices would have been suffered by the government rather than by Grayson. The trial court further concluded that even if Grayson had standing, his complaint failed to state a valid claim under the CPPA because he did not specifically allege reliance on any of the claimed misrepresentations.

The D.C. Court of Appeals reversed the dismissal of Grayson's CPPA claim and remanded the case to the trial court for further proceedings. Examining the 2000 amendments to the CPPA, the court of appeals determined that the changes were "intended to eliminate the requirement that [the plaintiff] experience an injury" in order to bring suit. *Grayson*, 980 A.2d at 1155. The court acknowledged that "we have generally adhered to that requirement in determining whether a party has standing before this court." *Id.* at 1155 n.78.. But it held that the D.C. courts are not required to abide by any of the traditional constitutional or prudential standing principles that apply in federal courts "when the Council has provided [the] cause of action." *Id.*

The Court of Appeals noted that the 2000 amendments to the CPPA specifically deleted the language restricting the private cause of action to consumers "who suffer[] any damage." *Id.* at 1154. The court further stated that its "literal reading" is supported by comparing the private cause of action language with an adjacent provision, which the amendments left unchanged, that preserves other remedies for "'any person *who is injured* by a trade practice.'" *Id.* at 1154-55 (quoting D.C. Code § 28-3905(k)(2); emphasis by court). The court also relied on the CPPA's express instruction that it "be construed and applied liberally to promote its purpose." *Id.* at 1155 (discussing D.C. Code § 28-3901(c)). Finally, because the CPPA prohibits unfair trade practices "whether or not any consumer is in fact misled, deceived or damaged thereby" (D.C. Code § 28-3904), the court concluded that a plaintiff need not allege any reliance to state a valid CPPA claim. 980 A.2d at 1157 & n.81.

Analysis

The *Grayson* decision threatens to turn the CPPA — and therefore D.C. — into a magnet for abusive lawsuits against businesses brought in the name of plaintiffs who suffered no injury because of the

challenged practice nor relied on a business's alleged misstatements. By allowing businesses to be sued by these stranger plaintiffs, the decision extends the law's reach far beyond all traditional standing limits and risks opening the D.C. courts to a flood of litigation. Indeed, given *Grayson*'s holding that no showing of reliance is required under the CPPA, plaintiffs will argue that they can sue without ever proving that *anyone* was actually misled, deceived, or damaged by the challenged practices.

Grayson thus appears to revive all of the sorts of extreme litigation abuses that plagued businesses operating in California before Proposition 64's enactment. The standing requirements that the D.C. Court of Appeals discarded in *Grayson* are vital for ensuring that D.C.'s consumer protection laws operate to protect injured consumers, rather than becoming a vehicle for extortionate lawsuits against businesses operating in the nation's capital. It is true that the CPPA's provisions for enforcement by agency regulation and investigation are extremely broad, but those provisions can be invoked only by government officials who are accountable to the public and who must exercise prosecutorial discretion. By contrast, there are no such constraints on lawsuits brought by private plaintiffs and their attorneys. The main incentive for such private attorneys general is not the public interest, but rather maximizing their own personal payouts — a goal especially easy to achieve given the CPPA's provisions for punitive damages and attorneys' fees. Indeed, given the serious risk of substantial penalties if a business loses a CPPA suit, the law may well serve as a ready vehicle for "shakedown" lawsuits by plaintiffs' lawyers whose sole interest is in extracting a lucrative settlement rather than remedying true harms to consumers.

As interpreted in *Grayson*, the CPPA may also permit plaintiffs to skirt well-established class certification requirements, such as the requirements that the named plaintiff be an adequate class representative and have claims typical of those of the putative class. Rather than seeking formal class certification, the CPPA allows plaintiffs to file "representative actions" (D.C. Code § 28-3905(k)(1)(E)), and to bring suit in the name of "the general public" (*id.* § 28-3905(k)(1)). Indeed, a plaintiff who has not been injured and has not relied on the business's actions in any way surely would *not* be an adequate representative for a class of the business's customers, but the *Grayson* decision expressly allows such suits to go forward.

In addition, plaintiffs in future cases may argue that, under the *Grayson* court's logic, the 2000 amendments to the CPPA also eliminate the law's jurisdictional limitations. The pre-2000 language of the CPPA restricted civil actions to "violation[s] * * * within the jurisdiction" of the D.C. Department of Consumer Affairs. D.C. Code § 28-3905(k)(1) (1998). But the 2000 amendments deleted this language from that provision. *See* D.C. Code § 28-3905(k)(1) (2009 supp.). The amendments left identical language in place in an adjacent provision (*id.* § 28-3905(k)(2) (2009 supp.)), arguably setting up the same contrast that the *Grayson* opinion relied upon as demonstrating that the amendments purposely eliminated the CPAA's standing requirements. If the D.C. courts interpret the CPPA to lack any jurisdictional limit, the statute could potentially be used to bring suit in D.C. against any business amenable to suit in D.C., regardless of where in the country the challenged practices allegedly were used. In an extreme case, consumer protection claims that would be barred where the conduct occurred — for example, through a measure like Proposition 64 — might nonetheless become the subject of a CPPA suit in D.C.

Grayson's interpretation of the CPPA abandons traditional and vital safeguards against abusive and meritless lawsuits. Any company that does business in D.C. should be wary of the potential for burgeoning abusive lawsuits filed in the District under the CPPA. ■

MEALEY'S LITIGATION REPORT: CLASS ACTIONS
edited by David Eldreth
The Report is produced twice monthly by

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ISSN 1535-234X