Illinois Supreme Court Rules Patient Must Be Misled In Fact to Maintain Consumer Fraud Action Against Pharmaceutical Company

On December 17, 2009, the Illinois Supreme Court, expanding on a long line of its prior opinions, held that the patient must, in fact, be deceived by a pharmaceutical company's allegedly false statement or omission in order to maintain an action under the Illinois Consumer Fraud Act ("CFA"). *DeBouse v. Bayer AG*, 2009 Ill. LEXIS 2306 (Ill. Dec. 17, 2009). At the same time, however, the Illinois Supreme Court clarified that a patient may be indirectly deceived if the deceptive statement by the pharmaceutical company reaches the patient via his or her doctor and the patient relies on the deceptive statement. Finally, the Court held that the mere offering of a prescription drug for sale in Illinois is not a representation that the drug is safe for its intended purposes. This is a significant decision both because of its reaffirmation of the requirement of proximate causation under the CFA — and as a precedent for interpreting similar consumer fraud acts of other states — and because of its application of this requirement to the increasingly popular assertion of CFA claims in product liability and "no injury" consumer fraud actions involving prescription medications.

In *DeBouse*, the plaintiff, on behalf of a putative class of purchasers of Baycol®, a cholesterol-lowering drug, alleged that Bayer deceived the "medical community and the public at-large" by concealing information about negative side effects of Baycol. In her deposition, the plaintiff testified that she saw no advertising for Baycol, knew nothing of the drug prior to her doctor's recommendation of it, and relied on her doctor's recommendation in deciding to begin using the drug. As for her doctor, the plaintiff did not allege that he was actually deceived by any of Bayer's advertisements or statements. The trial court denied Bayer's summary judgment motion. The court, however, certified three questions for interlocutory review:

> Whether an Illinois consumer who purchases a pharmaceutical product, later withdrawn from the market because it was deemed unsafe, can maintain an action under the Illinois Consumer Fraud Act, even though the pharmaceutical company did not engage in direct communication or advertising to the consumer.
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> Whether the Defendant's offering for sale of a product in Illinois is a representation to prospective customers that the product is reasonably safe for its intended purpose such that proof of a defendant's failure to disclose safety risks associated with the product to consumers is a violation of the Illinois Consumer Fraud Act.
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> Whether fraudulent statements or omissions made by a defendant to third parties, other than the consumer, with the intent that they (1) reach the plaintiff and (2) influence plaintiff's action and (3) plaintiff relies upon the statements to his detriment, can support an action under the Illinois Consumer Fraud Act.

The Illinois Supreme Court answered the first two questions in the negative and the third in the affirmative.

With respect to the first question, the Court initially reiterated what it had held many times before[1] — that by its terms the CFA requires that the plaintiff in a private cause of action must prove that he suffered actual damages "as a result" of the defendant's deceptive acts, and that this requirement imposes on the plaintiff the duty to prove proximate causation. That is, the plaintiff must prove that the false or misleading statement or omission "induced him to purchase" the product. As the Court stated:

> The basic principle in each of the foregoing cases is that to maintain an action under the Act, the plaintiff must actually be deceived by a statement or omission that is made by the defendant. If a consumer has neither seen nor heard any such statement, then she cannot have relied on the statement and, consequently, cannot prove proximate cause.

The Court likewise rejected the plaintiff's attempt to distinguish these cases on the ground that she was relying on alleged omissions by Bayer:

> [W]e have repeatedly emphasized that in a consumer fraud action, the plaintiff must actually be deceived by a statement or omission. If there has been no communication with the plaintiff, there have been no statements and no omissions. In such a situation, a plaintiff cannot prove proximate cause. We therefore answer the first certified question in the negative. A consumer cannot maintain an action under the Illinois Consumer Fraud Act when the plaintiff does not receive, directly or indirectly, communication or advertising from the defendant.

Turning to the third question — whether a consumer fraud claim may be based on an "indirect deception" theory — the Court answered in the affirmative. The Court, however, went on to order that summary judgment be entered in Bayer's favor because the plaintiff "fail[ed] to allege that her particular doctor was actually deceived by any of Bayer's advertisements or statements." Rather, she alleged the "general deception of 'consumers, the medical community, the health care insurance industry, and the public,'" an allegation that was insufficient because it was "based on the market theory that this court has consistently rejected."

Finally, because the answer "may depend on the nature of the product being sold," the Court limited its consideration of the remaining question to "whether offering prescription drugs for sale in Illinois is a representation that the drug is safe for its intended use ... such that a failure to disclose risks is a violation of the [CFA]." In answering this question in the negative, the Court emphasized the uniqueness of pharmaceutical mediations:

> The risks associated with pharmaceuticals are a large part of the reason why a doctor's prescription is required for these medications. A drug often can affect different patients differently, causing adverse side effects in one but not another. The Restatement [(Second) of Torts, § 402A, Comment k, at 353 (1965)] approach reflects the reality that even in their intended and ordinary use, prescription drugs may nonetheless cause harmful side effects in some patients. A drug manufacturer cannot say with complete certainty that its product, when used as intended, will be reasonably safe for all patients.

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[1] *Barbara's Sales, Inc.*, 227 Ill.2d 45, 76 (2007); *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill.2d 100, 119 (2005); *Shannon v. Boise Cascade Corp.*, 208 Ill.2d 517, 524 (2004); *Oliveira v. Amoco Oil Co.*, 201 Ill.2d 134, 149 (2002); *Zekman v. Direct Am. Marketers, Inc.*, 182 Ill.2d 359, 373 (1998). *See also Price v. Phillip Morris, Inc.*, 219 Ill.2d 182, 268-71 (2005).

> As a result, the mere sale of a prescription medication cannot be a representation which serves as the basis for a consumer fraud claim.

As noted above, this is a significant decision. The plaintiffs' bar has been turning more and more to state consumer fraud statutes as a basis for class certification of so-called "no injury" cases in which it is alleged that the manufacturer made misleading statements or omissions that injured others, but not the class members, and that therefore the class members should get a refund on the theory that, due to the misrepresentations and omissions, the product was not worth what it was sold for. By requiring that the plaintiff establish that she was directly or indirectly misled by the alleged misrepresentations or omissions, the Illinois Supreme Court has erected a substantial, if not insurmountable, barrier to class certification of such claims. Moreover, even as to product liability claims — in which the plaintiff alleges that she suffered bodily injury as a result of the misrepresentations or omissions — the Court's decision will make it more difficult for the plaintiff to succeed because she will have to present affirmative evidence that her physician, in fact, saw and was deceived by the alleged misrepresentations or omissions. Finally, two issues were left open by the Court's decision: whether the patient can maintain a CFA claim where, unlike in *DeBouse*, (1) the patient saw and was deceived by the pharmaceutical manufacturer's misrepresentations or omissions, but the prescribing physician did not see the misrepresentations or omissions, was not deceived by them, or made his prescribing decision based on factors other than the misrepresentations or omissions, and (2) the physician was deceived, but failed to pass on the deceptive statement to the patient.

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