Consumer law is a growing and evolving practice area in Minnesota. Last year the Minnesota State Bar Association formed the consumer litigation section. In the last five years, most plaintiff-side employment firms began consumer class action practices. Over the past few years, multimillion-dollar cases have surfaced concerning violations in the handling of consumer data and the false advertising of consumer goods. There has also been a significant uptick in consumer credit litigation under federal laws like the Telephone Consumer Protection Act, the Fair Credit Reporting Act and the Fair Debt Collection Practices Act.

Why the rise of consumer protection litigation? The practice has boomed for many reasons; but three milestones in the development of the practice are most prominent: 1) changes in legislation; 2) the adaptation of consumer protection litigation as class action lawsuits; and 3) diversification of private class action practices. While consumer law remains a relatively small practice area, its rapid expansion and development means we should all be prepared to have more informed conversations about the practice.

States pass consumer legislation
By the 1980s, nearly every state had passed its own Consumer Protection Act. This largely stemmed from years of public dissatisfaction with the lack of enforcement by the Federal Trade Commission and a demand for increased regulation of business. Many of the state laws authorized the state attorney general to seek injunctive relief and some allowed for restitution to injured customers. At present, most state laws have been amended to broaden consumer rights. These amendments aim to motivate consumers to bring suit by allowing for private civil actions or class actions. While there is variation in the content of the amendments from state to state, the overall impact of the changes tilts toward plaintiffs’ rights.

In Minnesota, the Legislature has adopted two statutory fraud laws: the Consumer Fraud Act and the Uniform Deceptive Trade Practices Act. The Minnesota CFA prohibits the “act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice.” In contrast, the UDTPA specifies 12 prohibited acts and prohibits business conduct that “creates a likelihood of confusion or misunderstanding.” In addition to the two fraud statutes, Minnesota has a number of consumer protection laws that specifically address particular industries: homeowners in foreclosure, do-not-call lists, financing the purchase of a motor vehicle and other transactions.

One reason for the growth of litigation in Minnesota is that consumers have faced lower barriers to proving statutory consumer misrepresentation claims in court. Minnesota’s consumer fraud statutes do not require pleading and proving common law reliance as an element of a statutory misrepresentation in sales action. In other words, consumer plaintiffs are not required to establish individual reliance on the defendant’s conduct. Instead, consumer plaintiffs must establish a causal nexus between the defendant’s alleged conduct and their claimed damages. A plaintiff establishes a causal nexus by direct or circumstantial evidence of the relationship between the alleged conduct and the claimed damages.

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statutes form an increasingly large role in the practice. Historically, the Federal Trade Commission lacked power for several reasons: It provides no private right of action, includes reliance in its definition of unfair and deceptive practices and employs a cost-benefit standard in determining what constitutes legally actionable unfair practices. While that is changing in recent years with the formation of the Consumer Financial Protection Bureau Public and increased enforcement activity by the FTC’s Bureau of Consumer Protection, enforcement of federal consumer protection laws remains largely in the hands of private litigants pursuing actions under a handful of federal consumer laws.

Federal consumer protection statutes are more focused than state consumer protection laws. They typically relate to a particular industry or mode of commerce. Some of the most frequently litigated federal consumer protection statutes relate to the regulation of financial services—the Fair Credit Reporting Act and the Fair Debt Collection Practices Act are perhaps the most-well known of the statutes. Other statutes regulate modes of interstate communication: the CAN-SPAM Act of 2003 prohibits certain kinds of bulk email messages and the Telephone Consumer Protection Act prohibits the use of specific types of “robocalls” without the express written consent of consumers. One of the most generally applicable federal consumer protection statutes is the Magnuson-Moss Warranty Act, which has a purpose of making consumer warranties more readily understood and enforceable both in court and through alternative dispute resolution procedures.

Diversification of practices

Another factor contributing to the increase of consumer class action cases is the diversification of plaintiff-side law firms. Recent United States Supreme Court decisions have led to a dramatic decrease in employment discrimination class actions. Specifically, the 2011 case of Wal-Mart Stores, Inc. v. Dukes had a chilling effect on plaintiffs bringing employment discrimination class action claims because the Supreme Court held that certification under Rule 23 requires more than an allegation that all class members suffered under a violation of the same law. The court held that commonality requires common questions that have common answers.

On the securities litigation side, heightened pleading requirements for scienter under Section 10(b) and Rule 10b-5 have limited plaintiffs’ ability to survive motions to dismiss. Addition-
ally, a decrease in merger and acquisition activity in recent years has reduced the number of transactions that are subject to potential litigation. The decline in employment discrimination and securities fraud class actions has led law firms and attorneys practicing in those areas to diversify their practices to include consumer fraud claims. Firms that traditionally practiced in either of those areas are now filing consumer fraud class actions and contributing to the development of the rapidly evolving practice area.

Litigating consumer protection laws under Rule 23

An increase in consumer class action cases has also resulted in more Minnesota lawyers practicing in this area. Plaintiffs have adapted their legal theories to the requirements of Rule 23. Consumer class actions typically focus on the defendant’s conduct — marketing representations or compliance with industry standards — to establish the predominance of common issues. Any other trend among consumer plaintiffs to avoid individual reliance is to plead claims involving a businesses’ concealment of material information regarding its product or service. Consumer claims predicated on concealment may allow a plaintiff to sidestep reliance because proving reliance on an omission is impossible. Still, defendants — often successfully — argue that the causal nexus presented an individualized issue that would predominate the litigation.

In response to trial and appellate court decisions declining to certify consumer classes due to individualized causation, plaintiffs began avoiding the predominance requirement of Federal Rule of Civil Procedure 23(b)(3) by seeking certification of “issues classes” pursuant to Rule 23(c)(4). With issue certification, plaintiffs ask the court to certify isolated issues within a claim for class treatment, and then resolve the remaining issues on an individualized basis. For example, a plaintiff in a product liability case may seek certification of an issues class for common issues of whether the manufacturer conformed to recognized industry standards, whether the manufacturer tested the product according to established procedures, or whether the manufacturer’s failure to properly manufacture or test the product caused the product to fail.

The intersection of Rules 23(b)(3) and 23(c)(4) has not been well defined by courts, and the treatment of issues classes varies among the circuits. We expect to see continued use of issues classes in consumer class actions, and the legal standard will continue to evolve as cases proceed through appellate courts.

Whether on an individual plaintiff basis, or a class action, consumer protection litigation is on the rise. State and federal laws are evolving to provide more causes of action, and enterprising attorneys are diversifying their practice areas to include consumer protection. As the practice grows, we expect to see development in the substantive law as well as class action procedural law, all of which will affect our clients.

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Federal Rules of Civil Procedure 23(b)(3) and 23(c)(4)

(b) Types of class actions. A class action may be maintained if [class prerequisites are met] and if:

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members’ interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification order; notice to class members; judgment; issues classes; subclasses

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.