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Causation element tips consumer fraud case to the defendant

A 7th U.S. Circuit Court of Appeals panel has split over whether a plaintiff in a consumer deception case must allege that the deceptive practice or act caused her to purchase the product or service at issue.

According to Judge William J. Bauer's majority opinion in *Haywood v. Massage Envy Franchising LLC*, No. 17-2402 (April 10, 2018), such an allegation is necessary to state a claim.

Kathy Haywood and Lia Holt separately booked what they thought would be a one-hour massage at franchisees of Massage Envy Franchising LLC. Haywood's decision was prompted by a \$75 gift card, which she received from her daughter.

Before booking, Haywood and Holt went to Massage Envy's website. On the website (and in some other marketing materials), Massage Envy referenced "one-hour massage sessions."

Customers who made it to the end of a "complex series of fingerprint links" could learn from a disclaimer that the 60-minute sessions included not only the time spent getting a massage but also the time spent in consultation and dressing.

Haywood and Holt did not stumble across the disclaimer before scheduling their massages. Unsurprisingly, neither was happy when she received a massage that was at least 10 minutes shorter than expected. To "verify" that the short massage was not just a one-off, Haywood booked a second one-hour massage and she again received 50 or fewer minutes of relaxation.

Haywood and Holt then brought a class action against Massage Envy for unfair and deceptive business practices. Haywood, an Illinois resident, asserted claims under the Illinois

Consumer Fraud and Deceptive Business Practices Act, and Holt relied on a materially similar statute from her home state of Missouri.

Massage Envy moved to dismiss the complaint for failure to state a claim, and the district courts granted the motion with prejudice, finding that the plaintiffs failed to sufficiently plead causation or damages under the two statutes and further finding that Holt failed to satisfy Rule 9's heightened pleading standards for her claims.

On appeal, Bauer's majority opinion made quick work of the claims that were based on Haywood's second massage. Because Haywood booked the session "to verify" that massages did not last 60 minutes, she was not expecting to receive a full hourlong massage and she was, therefore, not deceived by anything Massage Envy did.

Judge Diane S. Sykes did not take any issue with this analysis in her dissent.

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other massages that Haywood and Holt received. The basic requirement was not in dispute: The deception must be the but-for cause of the injury.

In the majority's view, the plaintiffs had to allege that the deception caused them to make a purchase — "make the appointment," "book [the] massage" or "pay for something [they] did not receive."



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Haywood's decision to get a massage, though, was driven solely by her receipt of the gift card. Likewise, Holt did not allege she would have forgone the massage if she knew it would be only 50 minutes. Therefore, the majority determined that neither plaintiff adequately alleged causation.

Sykes disagreed, saying the majority misunderstood the cau-

less than she expected. In this case, Haywood and Holt thought they were going to get 60-minute massages because of Massage Envy's advertisements, and they got less than that.

In Sykes' view, that was enough to plead that the deception caused the gap between expectation and reality.

Sykes' causation analysis was informed by her understanding of the injury element. Fraud injuries, she said, can be measured either as a loss of the benefit of the bargain or as an out-of-pocket loss.

This was an "unusual" case because both plaintiffs alleged an injury under the former and neither did under the latter. While the majority said it "need not settle [the parties'] debate" about the proper measure, Sykes addressed the matter and concluded the benefit-of-the-bargain approach should have been used, clarifying a prior 7th Circuit decision in the process.

It seems apparent that Sykes' understanding of the injury element ultimately informed her conclusion that the causation inquiry should focus on the gap between the plaintiffs' expectations and reality, rather than on their purchasing decisions.

The majority and the dissent also parted ways over whether Holt satisfied the heightened pleading standard under Rule 9 of the Federal Rules of Civil Procedure, which applies to consumer deception claims sounding in fraud.

Although the plaintiffs' complaint was lengthy, stretching to roughly 70 pages, only six sentences alleged facts unique to Holt. The main allegation of relevance here was that Holt went to Massage Envy's website "to research" prices. The rest of the complaint was largely devoted to detailing, with incredible

specificity, the information contained on the website.

Bauer said that the “what” and “how” of the alleged deception were missing because Holt did not plead what her research revealed: What she actually saw on Massage Envy’s website that was deceptive.

Sykes, though, criticized the majority for reading the Holt-specific allegations in isolation. Considering Holt’s “research” within the context of the prior description of the site, Sykes said a court could reasonably infer she saw the deceptive content.

The majority also knocked Holt on the injury element. The majority pointed out that Holt did not say exactly how much she paid for the massage and concluded that, because of this omission, she did not adequately plead an ascertainable

loss of money.

Again, Sykes disagreed.

As an initial matter, she noted the exact amount was “immaterial” under the benefit-of-the-bargain approach. She also indicated it potentially could be reasonable to infer Holt paid \$50 because the plaintiffs alleged \$50 was the introductory price for a massage.

In any event, Sykes said it was entirely reasonable to infer Holt did not get the massage for free, meaning she must have paid some ascertainable amount of money.

One final aspect of the majority’s analysis is worthy of note. Haywood and Holt argued on appeal that the district court abused its discretion by dismissing the case with prejudice, rather than allowing them to replead. As Bauer noted, though,

courts have the discretion to dismiss a complaint with prejudice where a party does not request leave to amend or suggest to the court how the pleading defects may be cured.

Based on this principle, the 7th Circuit held the district court did not err because Haywood and Holt did not, at the district court level, ask for leave to amend or say how they would fix their problems with their complaint. This holding serves as a valuable reminder regarding the importance of asking for leave to amend when confronted with a motion to dismiss for failure to state a claim.

Haywood has something to offer practitioners representing either plaintiffs or defendants bringing suit under the Illinois Consumer Fraud Act or a similar statute from another state.

Defendants can cite *Haywood* for the majority’s understanding of the causation inquiry, while plaintiffs can cite Sykes’ dissent, which many district court judges may find persuasive, to argue that a benefit-of-the-bargain measure of damages should be used.

The full implications of *Haywood*, though, may not be evident yet.

While Sykes characterized the majority as fundamentally altering the causation analysis, the majority did not respond to her assessment or even discuss the causation issue at length.

It may be that the majority did not see its holding as significantly altering the contours of a consumer deception claim. Whether other judges interpret *Haywood* to be transformative remains to be seen.