Abstracts

Reliance, Causation and Harm in Consumer Fraud Class Actions

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A fundamental principle in the law of consumer fraud and misrepresentation postulates that damages can be recovered only upon a showing of *reliance.* A consumer must have acted on the false information conveyed, and she must establish a causal relation between that reliance and her injury. As held in the case of **Barazani v. Bezeq**, this principle applies to individual suits and to class actions alike.

Despite the intuitive appeal of this principle, we argue that the reliance requirement ought to be abandoned. Contrary to common perception, consumers may sustain substantial harm regardless of reliance, and such harm ought to be subject to liability. A misrepresentation by a firm typically induces a rise in its product's price. The inflated price is an injury sustained by *all* consumers, including those who have not relied on the misrepresentation. Hence, by barring non-relying consumers from recovery, the reliance requirement precludes liability for an injury caused-in-fact by the tortuous act. Restricting liability in this manner spawns under-deterrence, which in turn engenders social harm in the form of inefficient transactions, inefficient reliance investments, and wasteful expenditures in the production of fraud. Additionally, it allows firms' unjust enrichment to continue unabated.

The reliance requirement also dilutes deterrence in another way, namely through its impeding effect on consumer class actions. A class representative seeking to satisfy the reliance requirement must identify the percentage of consumers exposed to the misrepresentation and, among those exposed, the percentage of those who have relied upon it. This is often a challenge she cannot realistically meet. Therefore, relinquishing the reliance requirement would also facilitate optimal deterrence by eliminating unnecessary barriers to class certification and litigation.

In the final part of the paper we discuss an exception to the reliance requirement, recently recognized under Israeli law. When a consumer's action is predicated on an "infringement of autonomy" claim, it has been held that recovery is not conditioned on a showing of reliance. We posit that this exception is overly broad and considerations of optimal deterrence actually support its restriction.