**A** **SENATE RESOLUTION**

TO EXPRESS THE INTENT OF THE SENATE THAT THE GENERAL ASSEMBLY INTENDED THAT S.C. CODE ANN. § 39‑5‑20(b) (1985) REQUIRES THAT THE FEDERAL TRADE COMMISSION ACT DEFINITION OF “UNFAIR” BE CHARGED TO THE JURY ON THE MEANING OF “UNFAIR” IN THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT.

Whereas, the South Carolina Supreme Court recently issued ~~the~~ an opinion in the case of State of South Carolina ex. rel. Alan Wilson, in his capacity as Attorney General of the State of South Carolina, Respondent, v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc., f/k/a Janssen Pharmaceutical, Inc., and/or Janssen, L.P., and Johnson & Johnson, Inc., Defendants, Opinion No. 27502, February 25, 2015;

Whereas, in this decision, the Court affirmed more than $136 million in statutory penalties against Janssen based on the contents of one of its medicine’s drug labels and because of a letter Janssen disseminated to South Carolina physicians, while at the same time, the Court found that no one has suffered any injury in fact or that there was even a likelihood of harm as a result of the drug labels or the letters to physicians.

Whereas, the Court in its majority opinion held, among other things, that the General Assembly did not intend S.C. Code Ann. § 39‑­5‑20(b) (1985) to require that the Federal Trade Commission Act definition of “unfair” be charged to the jury on the meaning of “unfair” in the South Carolina Unfair Trade Practices Act.

Whereas, the Court recognized in its majority opinion that the South Carolina Unfair Trade Practices Act was “[m]odeled after the language of the Federal Trade Commission Act.”

Whereas, the Court further provided in its majority opinion that the South Carolina Unfair Trade Practices Act “does not define the terms ‘unfair’ and ‘deceptive’; rather, the legislature intended the courts to be guided by federal interpretations of those terms.”

Whereas, the Court provided in its majority opinion that “[a]lthough SCUTPA refers to the FTCA for guidance, we find that the language of section 39‑5‑20(b) of the South Carolina Code reveals that federal interpretations are persuasive but not binding authority.”

Whereas, the Court stated in its majority opinion that “[o]ur appellate courts have amassed a strong and consistent body of case law defining ‘unfair’ under SCUTPA. In the absence of a legislative response, it would be inappropriate for this Court to depart from settled South Carolina precedent.”

Whereas, the Court in its majority opinion thus declined to hold that the definition of the term “unfair” should be consistent with the FTCA definition of the term, namely that “the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” 15 U.S.C. § 45(n) (2012).

Whereas, by ignoring the directive of the South Carolina Unfair Trade Practices Act to “be guided by the interpretations” of the Federal Trade Commission and the Federal Courts, which interpretations hold that the defendants conduct must be an “act or practice (which) causes or is likely to cause substantial injury to consumers which is not reasonably avoidable”, the South Carolina Supreme Court was thus able to award $136 million in a case in which there was no harm or injury in fact nor was the conduct even “likely to cause harm”;

Whereas, the South Carolina Unfair Trade Practices Act specifically directs the Court to look to standards adopted by the FTC for guidance. S.C. Code Ann. § 39‑5‑20(b) (“[T]he courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to § 5(a)(1) of the Federal Trade Commission Act . . . .”)(emphasis added).

Now, therefore, be it resolved by the Senate:

The General Assembly did not and does not intend that federal interpretations of the term “unfair” under the South Carolina Unfair Trade Practices Act are merely “persuasive;” rather, such federal interpretations of the term “unfair” are plainly mandatory under the language of the statute, quoted above.

The Court should thus have, under the South Carolina Unfair Trade Practices Act, applied the federal interpretations of the term “unfair,” and thus should have ruled that the State was required in the matter to prove a tendency to deceive physicians or, for unfairness, a likelihood of substantial injury to consumers that was not reasonably avoidable.

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