

CONSUMER FRAUD AND PRODUCT LIABILITY

Capabilities

Consumer Fraud
Product Liability
Product Misrepresentation
Product Defects
False Advertising and Deception
Disclosure Practices
Privacy and Identity Protection

Cases in the Following Industries Are Discussed

Pharmaceuticals and Healthcare
Financial Institutions
High Technology
Manufacturing
Other Consumer Products

Cornerstone Research staff and experts have substantial experience in both class actions and individual actions involving allegations of consumer fraud, product liability, product misrepresentation, product defects, false advertising and deception, disclosure practices, and privacy and identity protection. We have worked on a wide range of such cases in several industries, including pharmaceuticals and healthcare, financial institutions, high technology, manufacturing, consumer products, energy, and real estate.

To these cases we have brought our broad network of academic, in-house, and industry experts and our expertise in economics, marketing, finance, econometrics, and accounting. Our faculty experts, from the nation's leading business schools, economics departments, marketing departments, and law schools, are at the forefront of academic research and have experience in a wide range of industries. Many of these experts also have regulatory experience at governmental organizations, such as the Department of Justice and the Federal Trade Commission. Several of our senior staff have served as testifying experts in these cases as well. The experience of our industry experts has allowed them to offer insights that bring to bear the specific conditions and practices in the industry at issue.

The following pages summarize some of Cornerstone Research's consumer fraud and product liability case experience.

CLASS ACTIONS

Cornerstone Research has substantial experience in class actions in which we have addressed issues of class certification, exposure, reliance, impact, and damages. Key questions in these cases may include whether common evidence can be used to prove that certain challenged conduct caused each member of the proposed class to make a purchase and whether the challenged conduct injured each member of the proposed class. An additional consideration is whether each proposed class member's damages, if any, can be determined by common proof. In several cases, we have designed, implemented, and rebutted surveys of market participants to determine consumer behavior, attitudes, and preferences. In other cases, we have been able to draw inferences from company and public data about the factors driving consumers' decisions.

We have also worked on several class actions involving allegations of demand and price inflation that plaintiffs have argued caused class-wide impact, even for consumers who were not exposed to or influenced by the challenged conduct. Class certification in these cases frequently turns on the particulars of the challenged conduct, the overall structure of the industry and the market, and the characteristics of individual transactions. The overarching question is whether common evidence could be used to prove that the challenged conduct shifted demand and, if so, whether such a demand shift caused the prices paid by all proposed class members to increase. Cornerstone Research recognizes the importance of evaluating these issues through empirical research within a framework of sound economic concepts.

INDIVIDUAL ACTIONS

Cornerstone Research also has extensive experience in individual actions involving allegations of fraud and misrepresentation, which many times are brought by a defendant's competitors. These cases may require a focus on the relevant market, quantification of the effect of the challenged conduct on demand and prices for competing products, and estimation of damages suffered by competitors due to the defendant's alleged fraud or misrepresentation. In addition to lost sales and price erosion, some plaintiffs may also seek reputational damages and punitive damages. We have substantial experience analyzing these specific types of claims, applying our expertise in economics, marketing, finance, econometrics, and accounting.

Survey Capabilities and Large Database Analyses

Analyses in cases involving allegations of consumer fraud and product liability often require the ability to conduct surveys, analyze company and/or public data, and work with large data-sets. Cornerstone Research has the experience and technological capability to meet the demanding requirements of such matters. Our capabilities include:

- A staff of economics, marketing, finance, and accounting Ph.D.s with expertise in advanced modeling and statistical techniques.
- A broad network of academic, in-house, and industry experts with expertise in economics, marketing, finance, econometrics, and accounting.
- Experience creating and critiquing surveys to address individual issues.
- Knowledge of efficient, reliable sampling techniques.
- Experience analyzing company and/or public databases and broad practical knowledge of many large public datasets.
- Experience working with data-sets with millions—sometimes hundreds of millions—of observations that are often compiled from disparate sources in many different formats.
- State-of-the-art computing facilities.

ALLEGED FRAUDULENT OFF-LABEL MARKETING OF A DRUG

In a class action lawsuit seeking billions of dollars in damages, the plaintiffs alleged that the defendant had engaged in fraudulent off-label marketing of a prescription drug. Defense counsel retained Dr. Michael Keeley, a senior vice president of Cornerstone Research, to evaluate opinions offered by the plaintiffs' economic experts on causation, injury, and damages. The court denied the plaintiffs' motion for class certification.

The plaintiffs' experts claimed damages based in part on an econometric model that sought to relate a particular promotion practice to off-label prescriptions. The plaintiffs' causation expert assumed that virtually all of the promotion practice at issue was off-label and claimed that the model showed that this promotion practice caused virtually all prescriptions that were written for certain off-label indications. Dr. Keeley explained that the promotion practice at issue was not the only or even the primary factor causing patients to take the prescription drug for off-label indications and that there was no basis for the assumption that virtually all of this promotion practice was off-label. Dr. Keeley noted that the promotion practice at issue could not be the only factor causing prescriptions to be written because many physicians had not been subject to this promotion practice. Dr. Keeley showed that the plaintiffs' econometric model was flawed and that it produced results that had no scientific validity. The court found the plaintiffs' analysis insufficient to certify any of the indication-specific consumer subclasses.

ALLEGED MISREPRESENTATION OF HEALTHCARE PRODUCTS AND SERVICES

In a class action against a large manufacturer and retailer of consumer healthcare products and services, the plaintiffs alleged that the defendant's everyday discounting of prices misled consumers about the magnitude of the "true" discount that members of the proposed class received. In addition, the plaintiffs alleged that some members of the proposed class did not receive the full value of certain discounts that had been negotiated by insurance companies. Cornerstone Research worked with Professor Dominique Hanssens, a marketing professor at UCLA's Anderson School of Management, to evaluate whether common evidence could be used to determine if the challenged conduct misled consumers. Professor Hanssens's analysis involved examining the different factors that influence consumers' purchasing decisions and determining whether a common method could be used to evaluate whether the decisions were affected by an everyday discount. Professor Hanssens analyzed the defendant's range of promotions and marketing materials used to advertise these programs. He demonstrated that proposed class members were offered different discounts and would have been exposed to different information about these discounts. He also analyzed a wide array of public information on prices and showed the variety of pricing information available to different members of the proposed class. This analysis showed that most proposed class members were unlikely to have been misled as the plaintiffs had alleged. Professor Hanssens also noted that the level of discount implied by the plaintiffs would result in below-cost pricing.

ALLEGED MISREPRESENTATION OF PHARMACEUTICAL PRODUCTS

The plaintiffs in a class action against a large pharmaceutical company alleged that the company provided false and misleading information about the efficacy and safety of its products, resulting in all class members paying higher prices and consuming more products. The defendant retained Dr. Michael Keeley, a senior vice president of Cornerstone Research, to determine whether common evidence could be used to determine if the challenged conduct caused the price of any given product to be higher or if individual inquiry would be required. Dr. Keeley's empirical analysis of the pharmaceutical market showed that there could not be a class-wide impact. He also showed there could not be a presumption that any allegedly false and misleading information affected all prices. In addition, Dr. Keeley showed that many class members were not harmed. The case settled.

ALLEGED DECEPTIVE ADVERTISING BY A BROKERAGE COMPANY

In a class action involving a brokerage company, the plaintiffs alleged that they had experienced delays in accessing the brokerage system and executing trades. They alleged that the defendant engaged in deceptive advertising about its commission rates, capabilities of executing trades, and accessibility. The plaintiffs further claimed that their experts could determine damages on a class-wide basis.

Dr. Allan Kleidon, a senior vice president of Cornerstone Research, analyzed these claims and concluded that it would be impossible to determine on a class-wide basis whether the plaintiffs had suffered damages or to determine damages without knowing each individual's trading intentions. The court found that individual issues predominated and denied certification of the proposed class.

ALLEGED FRAUD AND MISREPRESENTATION BY AN INSURANCE COMPANY

The plaintiffs in this class action alleged that an insurance company had engaged in fraud and misrepresentation in its sales of a certain insurance product. The plaintiffs' experts claimed that the defendant foresaw or could have foreseen changes in economic factors that had an effect on the terms of insurance policies, and, as a result, the defendant should have informed prospective clients about these changes.

The defendant retained Dr. Michael Keeley, a senior vice president of Cornerstone Research, to evaluate the claims of the plaintiffs' experts regarding how the terms of the insurance policies related to economic factors and whether changes in the terms of the policies caused by changes in economic factors could have been foreseen by the insurance company. Dr. Keeley explained that market efficiency prevented even the most sophisticated investors from systematically predicting future changes in the economic factors based on public information. Dr. Keeley's empirical analysis showed that changes in the terms of the policies were not foreseeable. The court did not certify a class based on the fraud claims.

ALLEGED INADEQUATE DISCLOSURE OF TRANSACTION FEES

In multiple class actions against a large financial institution, the plaintiffs alleged that the defendant failed to disclose adequate information regarding the fees it charged on certain types of transactions. The defendant retained Cornerstone Research and a marketing professor to analyze whether common issues predominated. Cornerstone Research reviewed customer agreements, public information about the fees at issue, and the type of information class members relied upon in making their purchase decisions. This analysis showed that there was pervasive disclosure of the fees in customer agreements and in the press and that an individualized inquiry would be necessary to determine which, if any, members of the proposed class did not sufficiently understand the fees. The analysis also showed that many proposed class members did not consider the fees in making their purchase decisions and that these individuals would not have changed their purchase behavior absent the challenged conduct.

ALLEGED FALSE ADVERTISING AND PRICE INFLATION OF SOFTWARE

The plaintiffs in a class action against a software company alleged that its marketing campaign misled consumers into purchasing certain products. The plaintiffs further alleged that the challenged conduct improperly increased potential purchasers' demand for these products and thereby inflated the prices of these products. Defense counsel retained Cornerstone Research and academic experts after a class had been certified to assess the plaintiffs' "price inflation" claims.

Our analysis showed that a mix of information was available to customers, that not all customers could have been misled, and that the fraction of customers in the class that could have been misled and induced to buy the products was very small. We further showed that an analysis of allegations of price inflation could not be conducted on a class-wide basis. Given information available in the market, consumers' preferences concerning characteristics of the products at issue, and the economic characteristics of the manufacturing and retailing industries, common evidence could not be used to determine whether the challenged conduct caused the price of any given product to be higher. Moreover, we showed that the plaintiffs' experts had failed to demonstrate that the challenged conduct caused price inflation. The court decertified the class.

ALLEGED MISREPRESENTATION BY A COMPUTER HARDWARE MANUFACTURER

In several class actions involving a computer hardware manufacturer, the plaintiffs alleged that the manufacturer had misrepresented one of the product's features. Cornerstone Research was retained to analyze class certification issues. Cornerstone Research worked with Professor Carol Scott, a marketing professor at UCLA's Anderson School of Management, to design a survey to analyze the factors important to consumers in their purchase decisions and the sources of information used by consumers when purchasing the product. The survey and related analysis showed that impact could not be demonstrated on a class-wide basis. Cornerstone Research also worked with Professor David Schmittlein, a marketing professor at the MIT Sloan School of Management, to analyze relevant market conditions and market research on consumer choice. This analysis confirmed that common evidence could not be used to determine whether the challenged conduct harmed class members. Motions to certify a national class, as well as several state-level classes, were all denied.

ALLEGED DECEPTION BY AN ONLINE MERCHANT

In a class action against an online merchant, the plaintiffs alleged that the merchant's website was misleading and deceived its customers into enrolling in an Internet-based program without their knowledge or consent. The defendant retained Dr. Michael Keeley, a senior vice president of Cornerstone Research, to assess whether common evidence could be used to show that the proposed class members were misled and suffered economic harm as a result of the challenged conduct or whether individual inquiry would be required. Dr. Keeley and Cornerstone Research performed a statistical analysis of a complex database with millions of records related to the enrollment behavior of the merchant's customers. Analysis of these data showed that the vast majority of the customers who were offered the online program were not misled because these customers chose not to enroll. The analysis showed that the overwhelming majority, if not all, of the online merchant's customers understood the enrollment process, and were not misled. Dr. Keeley also showed that if there were any customers who were misled, individual proof would be required to identify these customers. The court denied the plaintiffs' motion for class certification.

ALLEGED MISREPRESENTATION BY A HIGH-TECHNOLOGY COMPANY

In a nationwide class action involving a high-technology manufacturer, the plaintiffs alleged that the defendant misrepresented the benefits offered by early versions of a new product. The plaintiffs further alleged that the claimed misrepresentation resulted in a market-wide shift in demand, which increased prices for all class members. Defense counsel retained Cornerstone Research to work with Professor A. Mitchell Polinsky of Stanford University and Professor Steven Shavell of Harvard University in determining whether common evidence could be used to address the plaintiffs' allegations, or whether individual inquiry would be required. Professors Polinsky and Shavell described how product performance in this industry is evaluated differently by each individual consumer depending on that consumer's usage. Additionally, they showed that the relative performance of the product compared to the previous technology differed depending on each of these potential individual uses. Professors Polinsky and Shavell also identified several flaws in the opinion of the plaintiffs' expert that both the demand and the price of the product at issue would have been inflated even if only a subset of class members were allegedly misled. Their analysis showed that prices may actually have been lower for some class members, in particular for early adopters, if the alleged demand inflation accelerated the price decline due to economies of mass production.

Professors Polinsky and Shavell concluded that individual inquiry would be necessary to determine whether the challenged representations regarding product performance were in fact false for any individual purchasers and whether any given proposed class member was misled by the alleged misrepresentations. Even assuming that some proposed class members were misled, Professors Polinsky and Shavell showed that individual inquiry would be needed to determine whether a given purchaser was affected. The trial court denied the plaintiffs' motion for class certification, finding that individual issues predominated.

ALLEGED DEFECT OF FIBER-REINFORCED COMPOSITE MATERIALS

A recreational vehicles manufacturer sued a large manufacturer of fiber-reinforced composite materials for producing allegedly defective materials. The plaintiff alleged that the defendant's product caused the plaintiff to suffer damages including repair costs, lost sales and profits, and reputational damage. Defense counsel retained George Strong, a managing director of Cornerstone Research, to identify factors that could affect the plaintiff's sales, market share, and profitability and to assess the damages analysis of the plaintiff's expert. Mr. Strong's analysis showed that the plaintiff's expert had failed to account for the plaintiff's weak historical financial performance, a slowing economy, and the small number of RVs shipped to dealers and customers. In addition, Mr. Strong showed that the stock market's lack of reaction to the announcement of the allegedly defective product was inconsistent with the magnitude of the damages estimated by the plaintiff's expert. The jury awarded no punitive damages and awarded only a small amount in compensatory damages, substantially less than the damages estimate of the plaintiff's expert.

ALLEGED FALSE ADVERTISING OF VISION IMPROVEMENT PRODUCTS

In a false advertising case, a manufacturer of vision improvement products brought suit against one of its competitors alleging that the defendant made false statements in advertising materials related to the launch of its new product. The defendant retained Dr. Matthew Lynde, a vice president of Cornerstone Research, to provide testimony on damages. Dr. Lynde identified several flaws in the opposing expert's analysis of lost profits. He also showed that the plaintiff's expert had failed to establish causation. Finally, Dr. Lynde examined reputational damages and found that these were not quantifiable in this matter. The jury rejected the plaintiff's damages claim, returned a verdict consistent with Dr. Lynde's estimates of lost profits, and awarded no reputational damages.

ALLEGED DEFECT IN WINDOWS

In a class action suit brought on behalf of California homeowners against a national window manufacturer, the plaintiffs alleged that the manufacturer's windows were susceptible to certain types of leaks, which resulted in water damage to the windows and framing around the windows. Counsel for the manufacturer retained Professor Peter Reiss, an economics professor at Stanford University, Professor John Hauser, a marketing professor at the MIT Sloan School of Management, and Cornerstone Research.

With Cornerstone Research's assistance, Professor Reiss performed extensive statistical analysis of the manufacturer's sales and service records to show that the actual incidence of possible window deficiencies was far below that alleged by the plaintiffs. Professor Hauser worked with Cornerstone Research to create a representative sample of homeowners and conducted an independent customer satisfaction survey. This survey showed that homeowners were satisfied with their windows and that those few homeowners who reported problems with their windows were satisfied with the service they received under the manufacturer's warranty program. The court rejected the plaintiffs' motion for class certification.

ALLEGED FALSE ADVERTISING OF A CONSUMER PRODUCT

In this alleged false advertising and unfair competition matter, the plaintiff alleged that the defendant included false and misleading statements in a product launch campaign. Plaintiff counsel retained Dr. Matthew Lynde, a vice president of Cornerstone Research, to provide damages testimony at trial. Dr. Lynde provided detailed analyses of launch and advertising timing and differential market segment changes in order to distinguish between the impact of the false statements and the impact of normal competitive entry. In finding for the plaintiff, the jury adopted Dr. Lynde's analysis of damages in its entirety.

ALLEGED DEFECT IN WEATHERPROOFING PRODUCTS

In a nationwide class action against a leading manufacturer of weatherproofing products, the plaintiffs alleged that the manufacturer's products were not effective in protecting against adverse weather conditions and that purchasers of these products were not satisfied with the performance of the products. Defense counsel retained Cornerstone Research and Professor John Hauser, a marketing professor at the MIT Sloan School of Management, to design and implement multiple regional, national, and international customer satisfaction surveys to assess whether purchasers of these products were satisfied and how the experiences of these purchasers compared to the experiences of purchasers of competing products. An analysis of the data using discrete choice regression models showed that a majority of these purchasers were satisfied and that their experiences were comparable to experiences of purchasers of other similar products. Working with Professor Peter Reiss, an economics professor at Stanford University, Cornerstone Research analyzed the manufacturer's customer service database. This analysis of millions of records showed that the actual incidence of complaints regarding the effectiveness of the defendant's products was small and, when customers were not satisfied with the products, their concerns were sufficiently resolved by the defendant. The case settled.

Selected Consumer Fraud and Product Liability Experts

Arnold I. Barnett Massachusetts Institute of Technology	Mark W. Frankena Cornerstone Research	Vandy M. Howell Cornerstone Research	Gregory L. Rosston Stanford University
Eric T. Bradlow University of Pennsylvania	Daniel M. Garrett Cornerstone Research	Christopher M. James University of Florida; Cornerstone Research	David T. Scheffman Cornerstone Research
Timothy F. Bresnahan Stanford University	Paul A. Gompers Harvard University	Michael C. Keeley Cornerstone Research	David C. Schmittlein Massachusetts Institute of Technology
Randolph E. Bucklin University of California, Los Angeles	Henry G. Grabowski Duke University	Allan W. Kleidon Cornerstone Research; University of Queensland	Carol A. Scott University of California, Los Angeles
Michelle M. Burtis Cornerstone Research	Robert E. Hall Stanford University	Gordon Klein University of California, Los Angeles	Steven M. Shavell Harvard University
David Card University of California, Berkeley	Christine M. Hammer Cornerstone Research	Donald R. Lehmann Columbia University	David W. Stewart University of California, Riverside
Iain M. Cockburn Boston University	Ward A. Hanson Stanford University	Matthew R. Lynde Cornerstone Research	George G. Strong, Jr. Cornerstone Research
Ravi Dhar Yale University	Dominique M. Hanssens University of California, Los Angeles	A. Mitchell Polinsky Stanford University	Michael D. Topper Cornerstone Research
Aaron S. Edlin University of California, Berkeley	John R. Hauser Massachusetts Institute of Technology	Peter C. Reiss Stanford University	Joel Waldfogel University of Pennsylvania
Henry S. Farber Princeton University	Lorin M. Hitt University of Pennsylvania		Mark I. Weinstein University of Southern California

Selected Client Law Firms

Akin Gump Strauss Hauer & Feld	Dorsey & Whitney	King & Spalding	Quinn Emanuel Urquhart Oliver & Hedges
Alston & Bird	Drinker Biddle & Reath	Kirkland & Ellis	Reed Smith
Arnold & Porter	Farella Braun + Martel	K&L Gates	Richards, Layton & Finger
Axinn, Veltrop & Harkrider	Fenwick & West	Latham & Watkins	Robins, Kaplan, Miller & Ciresi
Baker Botts	Finnegan, Henderson, Farabow, Garrett & Dunner	Manatt, Phelps & Phillips	Schulte Roth & Zabel
Baker & Hostetler	Fitzpatrick, Cella, Harper & Scinto	Mayer Brown	Shartsis Friese
Baker & McKenzie	Folger Levin & Kahn	McDermott Will & Emery	Shearman & Sterling
Bartlit Beck Herman Palenchar & Scott	Fried, Frank, Harris, Shriver & Jacobson	McKenna Long & Aldridge	Sheppard Mullin Richter & Hampton
Bingham McCutchen	Fulbright & Jaworski	Milbank, Tweed, Hadley & McCloy	Sidley Austin
Boies, Schiller & Flexner	Gibson, Dunn & Crutcher	Mintz Levin Cohn Ferris Glovsky and Popeo	Simpson Thacher & Bartlett
Cadwalader, Wickersham & Taft	Goodwin Procter	Mitchell Silberberg & Knupp	Skadden, Arps, Slate, Meagher & Flom
Cahill Gordon & Reindel	Harkins Cunningham	Montgomery, McCracken, Walker & Rhoads	Snell & Wilmer
Chadbourne & Parke	Haynes and Boone	Morgan, Lewis & Bockius	Sonnenschein Nath & Rosenthal
Choate Hall & Stewart	Hogan & Hartson	Morris, Nichols, Arsht & Tunnel	Stroock & Stroock & Lavan
Cleary Gottlieb Steen & Hamilton	Holland & Hart	Morrison & Foerster	Sullivan & Cromwell
Clifford Chance	Howrey	Munger, Tolles & Olson	Thompson & Knight
Cooley Godward Kronish	Hunton & Williams	O'Melveny & Myers	Vinson & Elkins
Covington & Burling	Husch Blackwell Sanders	Orrick, Herrington & Sutcliffe	Vorys, Sater, Seymour and Pease
Cravath, Swaine & Moore	Irell & Manella	Patton Boggs	Wachtell, Lipton, Rosen & Katz
Davis Polk & Wardwell	Jenner & Block	Paul, Hastings, Janofsky & Walker	Weil, Gotshal & Manges
Debevoise & Plimpton	Jones Day	Paul, Weiss, Rifkind, Wharton & Garrison	Wiley Rein
Dechert	Katten Muchin Rosenman	Pepper Hamilton	Williams & Connolly
Dewey & LeBoeuf	Kaye Scholer	Perkins Coie	Willkie Farr & Gallagher
Dickstein Shapiro	Kelley Drye & Warren	Pillsbury Winthrop Shaw Pittman	Wilmer Cutler Pickering Hale and Dorr
DLA Piper	Kilpatrick Stockton	Proskauer Rose	Wilson Sonsini Goodrich & Rosati
			Winston & Strawn

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