

How DC Became A Consumer Protection Pioneer

By **Katie Buehler**

Law360 (December 20, 2022, 3:54 PM EST) -- The District of Columbia attorney general made headlines last month by filing a novel consumer protection lawsuit aimed at holding the Washington Commanders and the NFL liable for covering up toxic workplace allegations at the franchise, but the case is just the latest of a series spanning eight years that has catapulted D.C. to the forefront of consumer protection law.

Attorney General Karl A. Racine and his office have filed hundreds of lawsuits and recovered more than \$125 million in penalties and restitution since 2015 under the district's broad consumer protection law, the Consumer Protection Procedures Act, according to his office's website.

The lawsuit against the Commanders — which claims that district residents were harmed when the team and the NFL lied about their willingness to cooperate with an investigation into sexual harassment allegations to protect profits — followed lawsuits filed against payday loan companies for charging exorbitant interest rates, real estate companies and landlords for discriminating against certain tenants, and pharmaceutical companies for misleading consumers about the risks of opioids, among others.

While some attorneys have doubts about the viability of Racine's consumer protection claims against the Commanders, all who were interviewed by Law360 agreed that the lawsuit fit into the his pattern of testing the limits of the law.

"It's definitely a unique theory," said Kelley Drye & Warren LLP partner Paul Singer. "It highlights the breadth of the consumer protection act generally."

Racine took office in 2015 as D.C.'s first elected attorney general and quickly got to work expanding his office's staffing and legal endeavors, chief among them consumer protection.

He launched a consumer protection division and increased his workforce to a level that rivals those of much larger jurisdictions, Singer said. He also used the consumer protection act to its fullest extent and made a name for the office nationwide.

Racine, who was not made available for an interview with Law360, released a report this month highlighting the accomplishments during his tenure and commented on his approach to lawsuits.

"I vowed to fulfill the statutory mandate that the Office of the Attorney General be independent, use the law in the public interest, represent the district zealously in court and defend D.C. values," he said in

the report. "Perhaps the most significant change that came with becoming an independent office is the opportunity to creatively use the law to stand up for vulnerable residents. With the able and energetic assistance of my colleagues, I've done this in several areas over the last eight years."

Consumer protection attorney Brendan Klaproth of Klaproth Law PLLC said Racine filled a gap in consumer protection litigation that had been left open by the U.S. Department of Justice's relative inaction.

"DOJ has been asleep at the wheel, there's been no federal enforcement action," Klaproth said. "And consumers have very little recourse on their own. It's a powerful tool ... I think his use has been very effective."

Racine did not seek reelection this year, and will leave office Jan. 2. But even as his tenure comes to an end, he continues to make creative use of the district's consumer protection law.

He announced two lawsuits against the Commanders in two weeks: the toxic workplace claims and allegations that the team misled fans about their season ticket security deposit refund policy. He also sued Amazon.com Inc. for allegedly pocketing tips customers thought were going to delivery drivers.

"Like any person leaving an office he built, he wants to see the fruits of his work bloom," said Crowell & Moring LLP partner Toni Michelle Jackson, former deputy attorney general for the Public Interest Division. "He's going out with a bang."

Here, Law360 examines the rise of the D.C. Attorney General's Office as a leader in consumer protection litigation.

D.C.'s Statute Among Strongest

The district's consumer protection law is one of the broadest in the country and includes a growing list of possible causes of action, allowing for lawsuits against individuals or entities accused of violating the district's consumer protection laws as well as those governing immigration services, interest calculations, housing and price-gouging.

Enacted in 1980, the Consumer Protection Procedures Act has been amended about every three years since. In September, for example, the act was amended to include price-gouging violations related to the nationwide infant formula shortage earlier in the year.

Consumers can bring individual or class actions under the act to recover damages — including punitive and triple ones — and injunctive relief. The attorney general can also pursue damages on behalf of consumers, as well as civil penalties of up to \$5,000 per violation, or up to \$10,000 per violation if the defendant has previously been fined for the same actions.

Amendments pending before the D.C. City Council would clarify that a "merchant" under the law includes businesses offering free services — a loophole companies like Facebook Inc. have tried to use to duck legal action.

The council is also considering changes that would prohibit businesses from retaliating against consumers who report consumer protection violations, and allow lawsuits against political action committees and charitable organizations that misrepresent their use of donations, among other things.

"The Consumer Protection Procedures Act is one of the most effective legal tools our city has available to protect consumers from a large array of deceptive and unfair conduct of businesses," Councilmember Brooke Pinto wrote in a February letter introducing the pending amendments.

Pinto, who joined the City Council in 2020, had worked as an assistant attorney general and tax attorney in the attorney general's office.

Jackson, the Crowell & Moring partner, said she saw the consumer protection law as giving her "the opportunity to sue anyone for anything."

"It has very broad enforcement powers," said Jackson, who worked for the office from 2015 to 2021. "When used to protect people, residents, workers, it's a great tool to leverage."

Expanding List of Potential Defendants

In the first year of his tenure, Racine opened the Office of Consumer Protection, establishing his commitment to pursuing litigation for the benefit of district residents and consumers. Jackson said the office originally focused on suing landlords over discriminatory housing practices.

Since then the office's list of potential defendants has expanded and ranges from big technology companies to individual attorneys who've misled clients about their ability to provide certain services. Jackson said it was clear from the beginning that Racine was going to use the consumer protection law to its fullest extent.

And he's done just that, said Ira Rheingold, executive director of the National Association of Consumer Advocates.

"He's aggressive and engaged," Rheingold said. "He is not the only attorney general asserting consumer rights, but he is certainly someone acting exactly how an attorney general should."

Klaproth, the private practice consumer protection attorney, said Racine's enforcement of consumer rights had filled a gap left open by the constraints private attorneys like himself often face due to arbitration clauses in consumer contracts or jurisdictional issues.

"There's a lot of hurdles we have that prevent us from vindicating clients' rights," Klaproth said. "He's filling that gap, filling a necessary role."

Georgetown University Law Center Professor David Vladeck said he believed that the fact that Racine was D.C.'s first elected attorney general served as a catalyst for his office's dominance in the consumer protection area. Not only did the change in the attorney general selection process provide Racine with more leverage to request additional funding, it incentivized him to pursue litigation that mattered to his constituents, Vladeck said.

Before Racine was elected in 2014, the district's attorney general was appointed by the city's mayor and approved by the City Council. Racine's predecessors pursued consumer protection litigation, but not to the same extent he has, attorneys told Law360.

Racine won reelection in 2018 but announced in October 2021 that he would not seek a third term.

"If you face the public and you're subject to election, you want to demonstrate your interest in protecting consumers," Rheingold said.

Racine Pushes Consumer Protection Law Limits

Along with amping up the number of consumer rights lawsuits filed by his office, Racine has also consistently pushed the boundaries of the consumer protection law by arguing novel legal theories. He's led the country, for example, in pursuing claims against gig-economy businesses for misleading users to believe that their delivery drivers were receiving all their tips.

Racine sued DoorDash Inc. in November 2019, claiming that the company misled users to believe their tips went into delivery drivers' pockets when, in reality, they were being used to subsidize their standard wages. DoorDash settled the lawsuit in November 2020 and agreed to pay \$1.5 million to its drivers, \$750,000 to the attorney general's office and \$250,000 to two local charities.

In August 2020, Racine sued Mapbear Inc., which does business as Instacart, for tricking users into thinking they were tipping delivery drivers when they were actually paying a service fee that the drivers never saw. Instacart settled the claims in August, agreeing to pay \$1.8 million in restitution to drivers and duped customers and to dismiss the company's challenge of a \$740,000 D.C. tax bill.

Beth Chun, a senior associate at Kelley Drye & Warren LLP, said Racine had also led the nationwide fight against so-called drip pricing, in which retailers hide the actual price of their services by not advertising fees and charges added to the bill.

Racine sued Marriott International Inc. over its drip pricing in July 2019, and the case is pending.

His office has "taken a really close look at fees that may have been deceptive," Chun said. "They've taken a big lead and a lot of other states and agencies are following suit."

Singer of Kelley Drye said Racine had also made waves in data privacy by suing Google LLC in January 2022 over its location tracking. The lawsuit, which has survived a motion to dismiss, accuses the technology giant of misleading consumers into believing that their location data wouldn't be stored if they turned off "location history" in certain applications and services.

Similar to his gig-economy lawsuits, Racine's lawsuit against Google has shepherded the issue of geolocation tracking practices into the national spotlight, Singer said.

He added that the recent lawsuits against the Commanders could have a similar effect. Other attorneys general will view the lawsuit as a trial run for just how far consumer protection laws can be stretched.

"How successful those are remains to be seen," Singer said. "But if you see success, you'll see other states try to use their authority in a similarly broad way."

--Editing by Karin Roberts.