Understanding and Defending State Consumer Protection Actions

INSURANCE AND FINANCIAL SERVICES LITIGATION – WEBCAST SERIES
Introductions

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Consumer Protection Law: Origins

Many Names

- Consumer Protection Acts
- Consumer Sales Acts
- Unfair Trade Practices Acts
- Deceptive and Unfair Trade Practices Acts
- Deceptive Consumer Sales Acts
- Consumer Fraud Acts
- Little “FTCs”
Consumer Protection Law: Origins

- Federal Trade Commission Act
  - Section 5(a)(1) prohibits "unfair or deceptive acts or practices." 15 U.S.C. § 45(a)(1).
State Statutes

50 States and the District of Columbia
- Generally provide a private right of action to consumers
Consumer Protection Law: Overview

True “Little FTC”

- “Unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.” 15 U.S.C. § 45.

vs.

- “[U]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce” are unlawful.” Florida Deceptive and Unfair Trades Practices Act § 501.204(1).
Consumer Protection Law: Overview

Laundry List Approach

- Provide a laundry list of prohibited conduct with a catch-all. Unfair or deceptive practices include
  - advertising goods or services with intent not to sell them as advertised;
  - falsely representing or designating the geographic origin of goods or services;
  - knowingly making false or misleading statements concerning the need for parts, replacement, or repair service;
  - Disparaging the goods, services, or business of another by false or misleading representation of facts;

Examples: Alaska, Tennessee, Texas
Typical Elements

(1) An unfair or deceptive act;

(2) That occurs within trade or commerce;

(3) Causing injury to the litigant.
Consumer Protection Law: Overview

What is “unfair”?

Cigarette Rule (1964)

- (1) Whether the practice...offsends public policy as it has been established by statutes, the common law or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory or other established concept of unfairness;
- (2) Whether the practice is immoral, unethical, oppressive or unscrupulous; and
- (3) Whether the practice causes substantial injury to consumers.
Consumer Protection Law: Overview

What is “unfair”?

The Unfairness Policy (1980)

- The Cigarette Rule Heavily Revised
  - Focused and elaborated on substantial injury
  - Disavowed second prong – the requirement that the practice be immoral, unethical, oppressive or unscrupulous
  - Limited public policy prong to policies that were “clear and well established”
Consumer Protection Law: Overview

What is “unfair”?

- Majority of states continue to follow the Cigarette Rule or a hybrid form of it:

- Follow the Unfairness Policy or something similar:
  Iowa, Maine, Maryland, Ohio, Tennessee

- No conclusive standard articulated:
  Georgia, Mississippi, Nebraska, West Virginia, Wisconsin, and Wyoming
What is “deceptive”?  

- Under the FTCA, a practice is deceptive if it has the **likelihood or propensity to mislead**. Many states have followed this standard.
  
- Massachusetts – Rascality standard.
  
- Examples of what is “deceptive.”
Consumer Protection Law: Overview

STANDING:

- **Who can bring suit?**
  - State or Consumer

- **What can be sued for?**
  - Some states restrict the subject matter to which their consumer protection statutes apply.

- **Who can be sued?**
  - Not everyone is fair game in every state.
STANDING: Who can bring suit?

- Not every consumer protection statute provides a private right of action.
- Other states allow for a private right of action with respect to either unfair practices or deceptive practices, but not both.
- In the absence of a private right of action enforcement of the consumer protection statutes is generally delegated to the attorney general or other state agency.
Consumer Protection Law: Overview

STANDING: Private Right of Action

- 48 States and the District of Columbia have adopted consumer protection statutes that provide a private right of action to consumers to sue for either deceptive or unfair acts.

- Iowa and Texas have adopted statutes that prohibit deceptive acts but only permit the attorney general to bring an enforcement action:
  - When it appears to the **attorney general** that a person has engaged in, is engaging in, or is about to engage in any practice declared to be unlawful by this section or when the attorney general believes it to be in the public interest that an investigation should be made to ascertain whether a person in fact has engaged in, is engaging in or is about to engage in, any such practice, the attorney general may… Iowa Code Ann. § 714.16(3) (emphasis added)
STANDING: Private Right of Action

- “Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal... may bring an action at law in the court.” Miss. Code Ann. § 75-24-15.

- “Any person who purchases or leases merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by section 407.020, may bring a private civil action...” Mo Stat. Ann. § 407.025.

- “The refund of moneys herein provided for may be recovered in a private action or by such persons authorized to initiate actions pursuant to P.L.1975, c. 376.” N.J. Stat Ann. § 56.8-2.12
STANDING: Private Right of Action

- General Requirements:
  1. A person
  2. Purchases (including leasing or renting)
  3. Goods or services
  4. Suffers an injury
  5. As a result of a deceptive or unfair act or practice

- Some states also require reliance:
  - "A person relying upon an uncured or incurable deceptive act may bring an action for the damages actually suffered as a consumer as a result of the deceptive act…” Ind. Code Ann. § 24-5-0.5-4.
  - Georgia, Louisiana, Texas, Virginia, and Wyoming all require a shoring of reliance on the deceptive act to bring a private action.
Consumer Protection Law: Overview

STANDING: What can be sued for?

- **General:**
  - The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in section 407.453, in or from the state of Missouri, is declared to be an unlawful practice. Mo. Stat Ann. § 402.025

- **Limited:**
  - Colorado’s Consumer Protection Act proscribes 62 specific acts that constitute “deceptive trade practices.”
  - Indiana and Oregon’s consumer protection statutes employ a similar list of acts to define what constitutes a deceptive trade practice.
STANDING: Who can be sued?

- Generally consumer protection laws apply to a business engaged in trade and commerce, either directly or indirectly, with consumers.
- States use different terminology:
  - Supplier
  - Merchant
  - Person
  - Individual
- Some consumer protection laws, however, specifically exclude certain industries.
Consumer Protection Law: Overview

STANDING: Who can be sued?

- **Kansas Consumer Protection Act:** (Kansas Stat Ann § 50-624)
  - "’Supplier’ means a manufacturer, distributor, dealer, seller, lessor, assignor, or other person who, in the ordinary course of business, solicits, engages in or enforces consumer transactions, whether or not dealing directly with the consumer. **Supplier does not include any bank, trust company or lending institution which is subject to state or federal regulation with regard to disposition of repossessed collateral by such bank, trust company or lending institution.**"

- **Missouri Merchandising Practices Act:** (Mo. Stat. Ann. § 407.020)
  - Nothing contained in this section shall apply to... Any institution, company, or entity that is subject to chartering, licensing, or regulation by the director of the department of insurance, financial institutions and professional registration under chapter 354 or chapters 374 to 385, the director of the division of credit unions under chapter 370, or director of the division of finance.
STANDING: Who can be sued?

- Consumer protection laws in 25 states do not apply to insurers:

- Alabama
- Arkansas
- Arizona
- Delaware
- Florida
- Georgia
- Idaho
- Indiana
- Kansas
- Louisiana
- Maryland
- Michigan
- Minnesota
- Missouri
- New Hampshire
- Ohio
- Oklahoma
- Oregon
- Rhode Island
- South Carolina
- Utah
- Vermont
- Virginia
- Wisconsin
- Wyoming
STANDING: Who can be sued?

- Issuers of credit are exempted from consumer protection laws in 9 states:
  - Alabama
  - Florida
  - Louisiana
  - Michigan
  - Nebraska
  - New Hampshire
  - Ohio
  - Rhode Island
  - Virginia
STANDING: Who can be sued?

- Utility providers are excluded in 26 states

- Louisiana
- Maryland
- Michigan
- Montana
- Nebraska
- New Hampshire
- New Jersey
- Ohio
- Oklahoma
- Oregon
- Rhode Island
- South Carolina
- Utah
- Virginia
- Washington
Consumer Protection Law: Overview

Damages and Attorneys’ Fees

- What damages are available?
  - Compensatory
  - Statutory
  - Punitive
  - Treble
- Are attorneys’ fees awarded?
- Can a plaintiff recover costs?
Consumer Protection Law: Overview

Damages and Attorneys’ Fees: Compensatory and Statutory

- Almost all consumer protection statutes that provide a private right of action allow for the recovery of compensatory damages.
  - Plaintiffs can recover the amount actually lost as a result of the deceptive or unfair conduct.

- Some statutes also provide a statutory award to encourage consumers to pursue actions that involve lower value disputes:
  - “in a private civil action, is found to have engaged in or caused another to engage in any deceptive trade practice listed in this article shall be liable in an amount equal to the sum of: (a) The greater of (I) The amount of actual damages sustained; or (II) Five hundred dollars.” Colo. Rev. Stat. Ann. § 6-1-113
Damages and Attorneys’ Fees: Punitive Damages

- Punitive damages are designed to punish a defendant for wrongful conduct
  - Generally require some form of willfulness or reckless disregard
- Consumer protection laws vary regarding their treatment of punitive damages
  - Some affirmatively provide for punitive damages and/or indicate that they can be recovered
  - Others are silent with respect to punitive damages leaving the issue to the courts or other law
  - A handful of states specifically prohibit punitive damages in consumer protection actions
Damages and Attorneys’ Fees: Punitive Damages

- Punitive damages are recoverable, either explicitly or otherwise, under multiple consumer protection laws, including:
  - Alaska
  - Alabama
  - Arizona
  - Connecticut
  - California
  - Delaware
  - Idaho
  - Illinois
  - Kansas
  - Kentucky
  - Maryland
  - Missouri
  - Oregon
  - Rhode Island
Damages and Attorneys’ Fees: Punitive Damages

- Punitive damages are specifically prohibited under some consumer protection statutes, including:
  - Florida
  - Hawaii
  - Maine
  - Minnesota
  - Nebraska*
  - Nevada
  - New Jersey
  - New Mexico
  - North Carolina
  - North Dakota
  - West Virginia
  - Wisconsin
Consumer Protection Law: Overview

Damages and Attorneys’ Fees: Treble Damages

- Some consumer protection laws provide for the doubling or tripling of actual damages based on a violation of law.
  - Double or treble damages are, however, capped in many jurisdictions at relatively low values.
- Consumer protection laws that provide for treble damages can be found in:
  - Alaska - Colorado - Hawaii
  - Idaho - Indiana - New Hampshire
  - New Jersey - New Mexico
  - New York - North Carolina
  - Ohio - Texas
The majority of consumer protection laws provide authority to courts, in their discretion, to award attorney fees and costs to consumers who prevail in their suit.
- Encourages consumers to bring suits to vindicate their rights
- Boon to Plaintiffs bar and encourages high volume of litigation

A handful of consumer protection laws in various states however, do not provide for the award of attorneys’ fees or costs:
- Arizona
- Delaware
- Iowa
- Mississippi
- South Dakota
- Wyoming
Consumer Protection Law: Overview

Consumer Protection Class Actions

- Can a consumer protection action be brought as a class action?
  - Generally the answer is yes. Most consumer protection laws explicitly allow for the maintenance of private suits as class action or are silent on the issue.

- Some laws do explicitly prohibit class actions:
  - Alabama
  - Georgia
  - Iowa*
  - Louisiana
  - Montana
  - South Carolina
  - Tennessee
  - Virginia
New York’s Consumer Protection Law – GBL Section 349
New York Consumer Protection Law

GBL 349: Background

- Expand authority beyond the Attorney General
- Intent is to empower consumers; level the playing field
- Aim is to secure an honest market place
- Intentionally broad to cover virtually all economic activity
New York Consumer Protection Law

GBL 349: Definition

- 349(a): “Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful”
New York Consumer Protection Law

GBL 349: Standing

- New York Attorney General
- Any “person” who has been injured
  - A person can be a corporation
  - A person can be a corporate competitor if there is also harm to the public at large and a competitor can prove injury
- Deceptive acts or practices must occur in New York
- Suit must be brought within three years of the injury
  - Fraudulent concealment tolls
New York Consumer Protection Law

GBL 349: Elements

- (1) Act or practice was consumer-oriented
- (2) Act or practice was misleading in a material way
- (3) Injury

Pleading:
- GBL 349 claims are not subject to a heightened pleading requirement in state or federal court
New York Consumer Protection Law

GBL 349: Consumer Oriented

- Must be broad impact on consumers
  - No “magic number” of consumers that must be deceived
- Does not require repetition or pattern of deceptive conduct
- Private contract disputes unique to the parties are not consumer-oriented
New York Consumer Protection Law

GBL 349: Deception

- What is a “deceptive act”?  
  - Representation or omission likely to mislead a reasonable consumer acting reasonably under the circumstances
- Must be misleading in a material way
- Omissions may form the basis of a claim
- Does not need to rise to the level of fraud
- Intent not necessary
- Reliance not necessary
New York Consumer Protection Law

GBL 349: Injury

- No indirect or derivative injuries
  - A derivative injury is when the loss arises solely as a result of injuries sustained by another

- Claimed deception cannot be the only injury
  - Actual harm necessary, but not pecuniary harm

- Cannot be duplicative of injury for breach of contract
New York Consumer Protection Law

GBL 349(h): Damages

- Actual damages or $50, whichever is greater, or both
  - Court may increase this amount up to three times the actual damages up to $1,000 per violation if the defendant acted willfully or knowingly
- Court may award reasonable attorneys’ fees and costs
- Injunctive relief
- Punitive damages?
GBL 349: Data Privacy

  - Putative class action alleging health care providers failed to adequately protect confidential medical records and personal information
  - Alleged failure to protect despite privacy notices and policies asserting they would
  - Court dismissed 349 claim finding that privacy statements do not constitute a guarantee; no material deception
New York Consumer Protection Law

GBL 349: Potential Defenses

- Statute of limitations
- Elements
- Derivative claim
- Preemption
Common Defenses

- The state statute does not provide for a private right of action.
- Nothing to enjoin because the practice at issue has ceased.
- Propriety of the practice has already been decided by a regulator.
- No misrepresentation; just puffery.
Consumer Protection Laws

Practice Tips

- Removal
- Pleading standard
- Defenses
- Expert(s)
Questions?