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States' Divergent Approaches to Unfair, Deceptive, and Abusive Acts and Practices Reveal Consumer Protection Priorities

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Until recently, legal principles surrounding unfairness, deception, and abusiveness have been defined primarily at the federal level, yet with perceived federal retrenchment from consumer protection, states have increasingly taken a hard look at their roles in protecting their citizens from unfair, deceptive, or abusive acts or practices (UDAP/UDAAP). Recent legislative changes in Maryland and Arkansas highlight the different approaches states are taking in how they regulate UDAP/UDAAP and through those changes are choosing to either prioritize consumer protection or protect industry from perceived overreach.

MARYLAND

On May 15, 2018, Maryland enacted House Bill 1634 and Senate Bill 1068, effective October 1, 2018, which substantively amended the Maryland Consumer Protection Act

(the MCPA).[1] Before the amendment, the MCPA generally prohibited “unfair or deceptive trade practices” in addition to prohibiting certain specific practices.[2] The amendments to the MCPA increased the scope of the statute, which now generally prohibits “unfair, abusive or deceptive trade practices.”[3]

The amended MCPA now also specifically provides that violations of the federal Military Lending Act and the federal Servicemembers Civil Relief Act will be considered unfair, abusive, or deceptive trade practices in violation of the MCPA.[4] In addition, the amended MCPA now provides for significantly increased penalties. Before the amendments, the MCPA provided for penalties of up to \$1,000 for an initial violation and \$2,500 for subsequent violations. These penalties have been increased to \$10,000

and \$25,000, respectively.[5]

The increased scope of the MCPA aligns with the Consumer Financial Protection Bureau’s authority to pursue enforcement actions related to “unfair, deceptive and abusive acts or practices” under Dodd-Frank. Maryland House Bill 1634 and Maryland Senate Bill 1068 added a new provision to the Miscellaneous Consumer Protection Provisions Title[6] that encourages the Office of the Attorney General and the Commissioner of Financial Regulation to assert their authority to bring actions for “unfair, abusive or deceptive trade practices” under Dodd-Frank. House Bill 1634 and Senate Bill 1068 also added another new provision[7] to the Miscellaneous Consumer Protection Provisions Title that increases appropriations to both the Office of the Attorney General and the Commissioner of

Financial Regulation for the purposes of enforcement of financial consumer protection laws. Consumers continue to have a private right of action for both damages and attorney's fees for violation of the MCPA under its expanded coverage.[8]

Overall, the amendments to the MCPA and the related amendments to the Miscellaneous Consumer Protection Provisions Title favor consumers by increasing the scope of MCPA protections, promoting enforcement of existing standards by state regulators, and increasing the penalty for violations of the consumer protection statutes.

ARKANSAS

In contrast to Maryland's efforts to expand consumer protection under the MCPA, Arkansas has taken steps to restrict consumer protection, particularly private rights of action.

The Arkansas Deceptive Trade Practice Act (ADTPA)[9] generally prohibits and makes unlawful "deceptive and unconscionable trade practices." [10] The ADTPA also designates certain specific practices as unlawful.[11] On April 7, 2017, Arkansas enacted House Bill 1742 (now Act 986), effective August 1, 2017, which substantively amended the ADTPA.

Before the amendment, the ADTPA allowed a private right of action for any "person who suffers actual damage or injury as a result of an offense or violation" of the ADTPA.[12] A claimant could recover actual damages.[13] A suc-

cessful claim under the ADTPA did not require a showing of monetary damages or reliance on the practice that violated the ADTPA.

The amended ADTPA now limits a private right of action to a person that suffers "an actual financial loss as a result of his or her reliance on the use of a practice declared unlawful under [the ADTPA]." [14] The claimant may only recover "his or her actual financial loss proximately caused by the offense or violation, as defined under the [the ADTPA]." [15] The amended ADTPA further provides that "[t]o prevail on a claim brought under Ark. Code Ann. § 4-88-113(f) (1), a claimant must prove individually that he or she suffered an actual financial loss proximately caused by his or her reliance on the use of a practice declared unlawful under [the ADTPA]." [16] The amended ADTPA defines "actual financial loss" as "an ascertainable amount of money that is equal to the difference between the amount paid by a person for goods and services and the actual market value of the goods or services provided." [17] Accordingly, the amended ADTPA now requires a claimant to show actual monetary damages or injury. Furthermore, a claimant must now also show that the damages or injury were "proximately caused by his or her reliance on the use of a practice declared unlawful under [the ADTPA]." [18]

The Arkansas Court of Appeals found that reliance was not necessarily required for a successful claim under the prior version of the ADTPA.[19] Courts applying

Arkansas law have held that the amended ADTPA requirements for showing monetary damages and reliance are therefore substantive in nature and not procedural.[20] Accordingly, the courts have held that these requirements are not retroactive and will not apply to purchases made before August 1, 2017.[21]

The amended ADTPA also now prohibits private class-action claims under the ADTPA, with the exception of claims asserting violations of the Arkansas Constitution, Amendment 89, which provides the maximum interest rates a lender may impose.[22] Before the amendment, the ADTPA did not expressly limit private class-action claims.

CONSUMER PROTECTION VERSUS PROTECTION FROM FRIVOLOUS LAWSUITS

Maryland and Arkansas demonstrate divergent approaches to consumer protection through application of UDAP/UDAAP statutes. Maryland has adopted an expansive view of what constitutes a violation of the MCPA, going beyond even UDAAP standards derived from the Dodd-Frank Act by codifying MLA and SCRA violations as per se unfair, deceptive, or abusive acts. Coupled with increased funding for enforcement by the Maryland Attorney General and its already robust private right of action, the recent MCPA amendments send a strong message that Maryland will be at the forefront of consumer protection in the coming years.

Arkansas reflects a separate priority: concern that malleable concepts of unfairness and deception may be used to justify frivolous lawsuits and class actions where no monetary injury exists. Similarly, at the federal level, “reliance” is not an element of an unfairness, deception, of abusiveness claim. This additional requirement makes proving an ADTPA violation materially more difficult—even where monetary injury exists, consumers must prove that they understood and relied on a representation to their detriment.[23]

These approaches represent opposite ends of the pro-consumer versus pro-industry approach to state UDAP/UDAAP laws. As consumer protection shifts to states, the current reality for both consumers and industry may be this patchwork approach.

ENDNOTES

[1] Md. Code Ann., Com. Law §§ 13-101 et seq.

[2] Id. §§ 13-303(k), 13-101 et seq.

[3] Id. § 13-303(k) (emphasis added).

[4] Id. § 13-301(14)(xxxi), (xxxii).

[5] Id. § 13-410(a), (b).

[6] Id. § 14-4103.

[7] Md. Code Ann., Com. Law

§ 14-4104.

[8] Id. § 13-408.

[9] Ark. Code Ann. §§ 4-88-101 et seq.

[10] Id. § 4-88-107.

[11] Id. § 4-88-108.

[12] Id. § 4-88-113.

[13] Id. § 4-88-113.

[14] Id. § 4-88-113(f)(1).

[15] Ark. Code Ann. § 4-88-113(f)(1).

[16] Id. § 4-88-113(f)(2).

[17] Id. § 4-88-102(9).

[18] Id. § 4-88-113(f)(2).

[19] *Pleasant v. McDaniel*, 550 S.W.3d 8, 12 (Ark. Ct. App. 2018).

[20] See *Mounce v. CHSPSC, LLC*, 2017 WL 4392048, at *7 (W.D. Ark. Sept. 29, 2017); *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litigation*, 2018 WL 5928143 at *4 (E.D. Ny. Nov. 13, 2018).

[21] Id.

[22] Ark. Code § 4-88-113(f).

[23] The related concept of materiality is presumed under federal deception law. See FTC Policy Statement on Deception (1983).