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## **The Arkansas Deceptive Trade Practices Act's Safe-Harbor Provision: Safer than You May Realize**

**By David C. Jung**

Recently, Arkansas federal and state courts have interpreted the ADTPA's safe-harbor provision to apply broadly to all actions or transactions regulated by state or federal agencies. When faced with an ADTPA claim involving a regulated industry, defendants should argue applicability of the safe-harbor provision.

The ADTPA confers a private cause of action when a person suffers injury as a result of any "unconscionable, false, or deceptive act or practice in business, commerce, or trade." *See* Ark. Code Ann. § 4-88-107(a)(10). However, a safe-harbor provision prohibits plaintiffs from bringing suit in certain instances. Ark. Code Ann. § 4-88-101. One such instance is where the conduct complained of is regulated:

This chapter does not apply to . . . [a]ctions or transactions permitted under laws administered by the Insurance Commissioner, the Securities Commissioner, the State Highway Commission, the Bank Commissioner, or other regulatory body or officer acting

under statutory authority of this state or the United States. . . .

Ark. Code Ann. § 4-88-101(3).

In *Gabriele v. ConAgra Foods, Inc.*, the plaintiff brought a putative class action in the Western District of Arkansas, alleging violations of the ADTPA, among other claims. No. 5:14-CV-05183-TLB, 2015 WL 3904386, at \*1 (W.D. Ark., June 25, 2015). Specifically, plaintiff alleged that ConAgra's labeling on its Hunts tomato products were deceptive and misleading because the products were not "100% Natural" and "free of artificial ingredients" as advertised.

Judge Tim Brooks granted ConAgra's motion for judgment on the pleadings with respect to the plaintiff's ADTPA claim, holding that Arkansas law applies the "general-activity" rule to the ADTPA's safe-harbor provision and exempts all regulated conduct. In reaching this holding, Judge Brooks outlined the two prevailing rules applied to similar deceptive trade practice acts of other jurisdictions. Under the "specific-conduct" rule, courts look to "whether state law permits or prohibits the conduct at issue and only exempts expressly permitted conduct from DTPA claims."

In contrast, states following the "general-activity" rule only look "to

whether a state agency regulates the conduct.” If so, “a regulated actor enjoys full exemption from the DTPA.”

Looking to *Arloe Designs, LLC v. Arkansas Capitol Corp*, 2014 Ark. 21, at 6, Judge Brooks noted that “[t]he Arkansas Supreme Court upheld the dismissal of the plaintiff’s claim under the ADTPA because the alleged deceptive conduct of the banks were subject to the control of regulatory agencies.” In *Arloe Designs*, the court held “the safe-harbor provision exempts regulated conduct by regulated actors regardless of whether substantive state law explicitly authorizes or prohibits the precise conduct at issue.” (emphasis added).

Accordingly, Judge Brooks concluded that the ADTPA safe-harbor provision applies if the defendant’s actions are regulated, regardless of whether the activity in question is specifically permitted. Because the plaintiff’s claims against ConAgra (alleged mislabeling) were regulated by the FDA and Arkansas Board of Health, Judge Brooks held that the safe-harbor provision applied and that the plaintiff had no private right of action.

Judge Brooks’s opinion in *Gabriele* helps to fill in some significant gaps in the *Arloe* opinion. *Arloe*, a contract case, involved a construction financing dispute. Although the court affirmed the trial court’s grant of summary judgment on the ADTPA claim, it did not address whether substantive state law explicitly authorized or prohibited the conduct at issue. Instead, it merely stated that the defendants

were regulated by the Arkansas State Bank Commissioner, Arkansas State Board of Finance, Office of the Comptroller of Currency, and the Federal Deposit Insurance Commission, and by the plain-language of the ADTPA, fell within the safe-harbor provision.

The absence of discussion about whether any state or federal law permitted or precluded the conduct at issue left open the possibility of plaintiffs in subsequent cases to muddy the water on the holding in *Arloe*, even though appellate briefing and the trial court’s order clearly show that the issue was whether the defendants were regulated at all, which the trial court found to be the case, triggering the safe-harbor provision. The Supreme Court affirmed that ruling.

Fortunately, Judge Brooks’s opinion in *Gabriele*, though not binding authority, helps to clear up the oversight and should help foreclose at least two related arguments often made by plaintiffs: (1) Arkansas law follows the “specific-conduct” rule; and (2) the Arkansas Supreme Court’s holding in *Arloe* involved conduct that was specifically authorized by substantive state law.

Armed with the *Gabriele v. ConAgra Foods, Inc.* opinion, defendants facing an ADTPA claim should closely examine whether a good-faith basis exists to argue that the asserted conduct is regulated by a state or federal agency and move for dismissal

pursuant to the ADTPA's safe-harbor provision.

**The thanks of the AADC go out to David C. Jung of Wright, Lindsey & Jennings.**



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