Arkansas Association of Defense Counsel

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A DECEPTIVE TRADE-OFF

How ADTPA defendants got the old "bait and switch" under Act 986 of 2017

The June 12, 2017 edition of *Arkansas Business* portrays recent changes to the Arkansas Deceptive Trade Practices Act under Act 986 of 2017 as making plaintiffs' lawyers "cringe." The article quotes a class-action defense attorney praising the Act as "reasonable and balanced" because it is intended to prevent private class-action lawsuits for violations of the ADTPA.

I offer a dissenting view: Act 986 of 2017 is a bad deal for defendants.

The bar on private ADTPA class actions will almost certainly be held ineffective in state court under Amendment 80 and in federal court under the *Erie* doctrine. In exchange for this ineffectual class-action prohibition, the Act cripples the ADTPA's "safe harbor" beyond all usefulness and offers a minor clarification of the elements of a claim. The result is a cringe-worthy outcome for *defendants*.

Summary of Act 986

Act 986 makes four changes to the Arkansas Deceptive Trade Practices Act, Ark. Code Ann. §§ 4-88-101 to -115:

- narrows the "safe harbor" to only cover actions or transactions "specifically permitted" under a state or federal regulation;
- limits damages under the Act to "actual financial loss," proximately caused by reliance on a deceptive trade practice, that is, the difference between the amount paid by a plaintiff for goods and services and the actual market value;
- purports to prohibit private class actions for violations of the ADTPA unless the claim is for a violation of the usury limits under Amendment 89 of the Arkansas Constitution; and
- specifically grants the right to a jury trial for an ADTPA claim.

Of these four changes, the last (right to a jury trial) was not seriously in question prior to Act 986. *See, e.g.*, AMI 2900 to 2903 (ADTPA jury instructions). This article discusses the other three changes to the Act and concludes that, on balance, plaintiffs got the better end of the deal due to the narrowing of the safe harbor that had been a strong line of defense for ADTPA defendants.

Narrowing the Safe Harbor

Section 1 of Act 986 weighs in on the plaintiffs' side of the "general activity" or "specific conduct" controversy that the Arkansas Supreme Court recently took up on a certified question from the United States District Court for the Eastern District of Arkansas, *Air Evac EMS, Inc. v. USABLE Mutual Insurance Co.*, Case No. CV-17-103 (Ark. Sup. Ct.). In *Air Evac*, Chief Judge Brian S. Miller of the United States District Court for the Eastern District of Arkansas

asked the Arkansas Supreme Court to consider whether the ADTPA's safe harbor applies broadly to the "general activity" regulated, or narrowly to the "specific conduct" authorized by the regulatory agency. (*Air Evac v. USABLE*, Order certifying question, pp. 11-12, Feb. 7, 2017). Defendants strongly prefer the "general activity" rule because it calls for the dismissal of an ADTPA claim so long as the business's activities are generally subject to state or federal regulation, without pointing to a specific statute or regulation that authorizes the activity that is the basis for the claim.

Interestingly, Chief Judge Miller's certification order concedes that the Arkansas Supreme Court appeared to favor the "general activity" rule in *Arloe Designs, LLC v. Ark. Capital Corp.*, 2014 Ark. 21, 431 S.W.3d 277, and that Arkansas federal courts have almost universally applied *Arloe* to dismiss ADTPA claims where the general activity (such as insurance, banking, or nursing homes) is regulated by a state or federal agency. *See, e.g., Tuohey v. Chenal Healthcare, LLC*, 173 F. Supp. 3d 804, 810-11 (E.D. Ark. 2016) (dismissing ADTPA claim against nursing home, owners, and administrators because it is regulated by Arkansas DHS Office of Long Term Care and United States DHS Centers for Medicare and Medicaid Services); *Gabriele v. ConAgra Foods, Inc.*, No. 5:14-CV-05183, 2015 WL 3904386, at *7 (W.D. Ark. Jun. 25, 2015) ("In other words, 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.").

Under *Arloe* and the cases following it, the ADTPA safe harbor was a powerful weapon for the defense. Yet Act 986 eliminates this defense-favorable rule and replaces it with the narrower "specific conduct" rule favored by ADTPA plaintiffs and sought in the *Air Evac* case.

Perhaps this sort of concession could be justified as a political trade-off in support of the bigger goal of eliminating class actions. But it will go down in history as a bad trade for the defense.

Codification of Case Law Limiting Damages to Actual Financial Loss Proximately Caused by Reliance

Sections 2 and 3 of the Act tighten up the elements of an ADTPA claim by requiring evidence of an actual financial loss proximately caused by reliance on a deceptive trade practice. For the most part, case law over the years already required these elements.

The narrowing of a plaintiff's damages to "actual financial loss" is, in large part, a codification of the "actual damage or injury" jurisprudence set forth in *Wallis v. Ford Motor Co.*, 362 Ark. 317, 327-28, 208 S.W.3d 153, 161 (2005). Conceivably Act 986 further narrows damages further than the scope set forth in *Wallis* by eliminating any argument for consequential or other special damages.

As for the addition of the reliance and proximate causation elements, most courts to consider the issue have required evidence of both. *See* AMI 2900 (requiring proximate causation); *Jarrett v. Panasonic Corp. of N. Am.*, 8 F. Supp. 3d 1074, 1089 (W.D. Ark.

2013) (requiring proof of reliance); *Skalla v. Canepari*, 2013 Ark. 415, at 14, 430 S.W.3d 72, 82 (requiring an "injury resulting" from a deceptive act).

Where a plaintiff cannot show reliance or actual financial loss, it helps a defendant to have a clear statutory provision rather than a handful of case citations that can be argued or distinguished. But unlike the strong general-activity safe harbor defense, a plaintiff will have an easier time meeting the newly-clarified elements on a dispositive motion through artful pleading and self-serving testimony.

Given a choice between the strong safe-harbor defense and a tightening of the reliance and damages elements, most defendants would rationally choose to maintain the broad safe harbor defense.

But the challenge of defending an ADTPA class action is rarely the merits of the actual claim. It is getting to the merits in the first place, given that an Arkansas court is not required to address a dispositive motion on the merits before certifying a class. *See Phillip Morris Cos. v. Miner*, 2015 Ark. 73, at 12 n.4, 462 S.W.3d 313, 320 n.4 (refusing to address whether ADTPA class action states a cause of action because "it is totally immaterial whether the [claim] will succeed on the merits"). In federal court, on the other hand, these elements have limited the likelihood of class certification. *See Jarrett*, 8 F. Supp. 3d at 1089.

That brings us to Act 986's big-ticket item: the purported elimination of private ADTPA class actions.

Eliminating Private Class Actions: an Illusory Trade-Off

Coming back around to that *Arkansas Business* article: defendants look forward to the newly "business-friendly environment" in which there are no ADTPA class actions and plaintiffs are left to "contact the Better Business Bureau or bring a lawsuit as an individual plaintiff." *Ark. Business* p. 12 (Jun. 12, 2017).

Wishful thinking, I am afraid.

We are all familiar with Amendment 80, which the Arkansas Supreme Court holds grants it plenary authority over all matters of "pleading, practice, and procedure." Ark. Const. amend. 80, § 3; *Mendoza v. WIS Int'l, Inc.*, 2016 Ark. 157, at 8, 490 S.W.3d 298, 303-04 (holding that statutory rule regarding admissibility of seat-belt use is an unconstitutional intrusion into the Arkansas Supreme Court's procedural authority); *Johnson v. Rockwell Automation*, 2009 Ark. 241, at 6, 308 S.W.3d 135, 140-41 (striking down non-party fault statute as an impermissible rule of procedure).

It does not stretch the imagination to expect that the Arkansas Supreme Court will take the same course of action with a statute that is in direct conflict with Rule 23 of the Arkansas Rules of Civil Procedure. To the extent it needs support, the Court need look no further than the United States Supreme Court's decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, which addressed the same issue in the context of the *Erie* doctrine. 559 U.S. 393 (2010).

In *Shady Grove*, the United States Supreme Court held that a state prohibition on class actions does not prevent a class action based on the same claim from going forward in a United States District Court. 559 U.S. at 415 (acknowledging that "the federal-court door [is] open to class actions that cannot proceed in state court"). Under the *Erie* doctrine, the state's prohibition on class actions was deemed "procedural," which is the same analysis that controls whether an act of the Arkansas General Assembly violates Amendment 80. *Johnson*, 2009 Ark. 241, at 6, 308 S.W.3d at 140-41.

Conclusion

In summary, Act 986 traded away a strong "general activity" version of the ADTPA safe harbor for a minor clarification of the elements of an ADTPA claim and a prohibition on class actions that will almost certainly be struck down under Amendment 80 (in state court) and the *Erie* doctrine (in federal court).

If anyone has reason to "cringe" about Act 986, it's the defense bar.

The AADC wishes to thank Andrew King of Kutak Rock LLP for writing this article.

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