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Deceptively Simple: the Arkansas Deceptive Trade Practices Act

Margaret E. Rushing
University of Arkansas, Fayetteville

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Deceptively Simple: the Arkansas Deceptive Trade Practices Act*

INTRODUCTION

In the 2017 legislative session, the Arkansas General Assembly significantly changed the Arkansas Deceptive Trade Practices Act (“ADTPA”).¹ These changes now prohibit private class actions under the ADTPA and require plaintiffs to prove additional elements of reliance and actual financial loss when bringing a claim.² The changes appear to limit the ability of a consumer to bring a private action under the ADTPA.³ With these changes, Arkansas joins a minority of jurisdictions with deceptive trade practices acts that increase a plaintiff’s burden and restrict private class actions.⁴

Part I of this paper examines the history and purpose behind consumer protection statutes. Specifically, it will discuss how the federal consumer protection movement encouraged states to create their own consumer protection statutes. Part I also provides a history of the consumer protection act in Arkansas and the purposes behind the changes made in 2017.

Part II compares the changes to the ADTPA with jurisdictions that have the same elemental requirements. By looking to other states, Arkansas plaintiffs, defendants, and

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1. H.B. 1742, 91st Gen. Assemb., Reg. Sess. (Ark. 2017); *see also* Megan Hargraves, *Changes To Deceptive Trade Practices Act Will Make Arkansas More Business-Friendly*, TALK BUS. & POL. (May 7, 2017, 8:32 PM) <https://talkbusiness.net/2017/05/changes-to-deceptive-trade-practices-act-will-make-arkansas-more-business-friendly/> [<https://perma.cc/4C4T-T5PD>].

2. H.B. 1742, 91st Gen. Assemb., Reg. Sess. (Ark. 2017)

3. *See* Hargraves, *supra* note 1.

4. *See* DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 6.4 (2017).

courts can see how these requirements have been judicially interpreted and practiced.

Finally, Part III examines a consumer's ability to bring a class action in a federal court under diversity jurisdiction. Also, Part III analyzes the possibility the class action prohibition will be ruled a violation of the separation-of-powers doctrine in Arkansas due to the Arkansas Supreme Court's rulemaking authority in Constitutional Amendment 80.

I. BACKGROUND

At common law consumers had limited remedies, such as fraud and misrepresentation claims, for what are now called unfair and deceptive trade practices.⁵ These remedies required plaintiffs to prove elements of justifiable reliance and intent, which was difficult.⁶ With the creation of the Federal Trade Commission, Congress created an enforcement agency and outlawed deceptive trade practices.⁷ Arkansas, and every other state, soon followed Congress' lead and created state consumer protection acts to provide consumers with protection from deceptive trade practices.⁸

A. FEDERAL CONSUMER PROTECTION

In 1914, Congress passed the Federal Trade Commission Act ("FTC Act") and created the Federal Trade Commission ("FTC") to regulate "false advertising and deceitful commercial schemes."⁹ The FTC was originally concerned with antitrust and trade violations.¹⁰ Congress later passed the Wheeler-Lea Act of 1938 which made unfair or deceptive acts unlawful and gave the FTC power to "prohibit unfair or deceptive acts."¹¹ Under the FTC Act, the Commission may only pursue action if

5. Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 6-7 (2005).

6. *Id.*

7. *Id.*

8. Dee Pridgen, *Wrecking Ball Disguised as Law Reform: ALEC's Model Act on Private Enforcement of Consumer Protection Statutes*, 39 N.Y.U. REV. L. & SOC. CHANGE 279, 283 (2015).

9. Schwartz & Silverman, *supra* note 5, at 7.

10. *Id.* at 8.

11. *Id.*

it is in the “public interest and affects interstate commerce.”¹² Although remedies for violations are typically injunctive forms of relief, the FTC may seek some types of equitable relief such as freezing assets.¹³

A private right of action is not available under the FTC Act, only the Commission has the right to enforce deceptive trade violations.¹⁴ According to the legislative history of the FTC Act, Congress wanted an agency to “educate businesses, seek voluntary compliance, and issue prospective remedies”¹⁵ Also, a concern existed that a private action under the FTC Act would result in state court judges not being “constrained by the overall enforcement goals of the FTC”¹⁶

B. STATES ADOPT DECEPTIVE TRADE PRACTICES ACTS

Following Congress’ enactment of the FTC, state legislatures began creating state deceptive trade practices acts.¹⁷ These state statutes primarily emulated the FTC Act, however, many statutes allow for a private right of action.¹⁸ Every state now has a deceptive trade practices act and nearly every state allows consumers to bring a private right of action.¹⁹ A goal of these state consumer protection statutes was to provide additional enforcement of deceptive trade practice violations through private actions.²⁰ The creation of these private right of actions was a direct result of Congress’ refusal to promulgate a federal private right of action.²¹

A second goal of the state deceptive trade statutes was to give citizens access to the court system.²² Before the rise of consumer protection statutes, the common law remedies were

12. Pridgen, *supra* note 8, at 282.

13. Schwartz & Silverman, *supra* note 5, at 11-12.

14. *Id.* at 12.

15. Pridgen, *supra* note 8, at 282.

16. *Id.* See also *Holloway v. Bristol-Meyers Corp.*, 485 F.2d 986, 997-98 (D.C. Cir. 1973).

17. Schwartz & Silverman, *supra* note 5, at 15.

18. *Id.* at 15-16.

19. *Id.* at 16.

20. Pridgen, *supra* note 8, at 284

21. *Id.* at 284-85.

22. *Id.* at 285.

limited and difficult to prove.²³ For example, the common law theory of fraud required the consumer plaintiff to prove justifiable reliance, which was difficult.²⁴ Other remedies such as unconscionability proved to be just as difficult to succeed on as fraud.²⁵ The cost of litigation prior to these consumer protection statutes also deterred consumers from bringing claims.²⁶

Although state statutes differ on what qualifies as a deceptive trade practice, there are some commonalities. For example, many state consumer protection statutes prohibit sellers from making false or misleading statements as to the quality of goods offered.²⁷ False or misleading representations about the benefits of goods offered for sale are also common deceptive trade practices.²⁸ In addition, making false or misleading statements about the price of goods typically deemed in a deceptive trade practice.²⁹

C. ARKANSAS ADOPTION

In 1971, Arkansas followed the majority of states and adopted a consumer protection statute.³⁰ The statute is now codified at Ark. Code Ann. § 4-88-113.³¹ The original statute did not provide for a private cause of action and it was not until 1999 that the Arkansas legislature codified a private right of

23. *Id.*

24. *Id.* at 286.

25. *See* Pridgen, *supra* note 8, at 285-86.

26. David Benjamin Lee, *The Colorado Consumer Protection Act: Panacea or Pandora's Box*, 70 DENV. U. L. REV. 141, 144 (1992).

27. Donald M. Zupanec, *Practices Forbidden by State Deceptive Trade Practice and Consumer Protection Acts*, 89 A.L.R. 3d 449 (1979) (providing extensive list of deceptive trade practices).

28. *Id.* at § 12(a).

29. *Id.* at § 15. The Arkansas Deceptive Trade Practices Act provides a list of general acts considered to be deceptive and unconscionable trade practices which includes actions such as "advertising the goods or services with the intent not to sell them as advertised" and "knowingly failing to identify flood, water, fire, or accidentally damaged goods as to such damages." ARK. CODE ANN. § 4-88-107 (a)(1)-(11) (2018). The remainder of the ADTPA provides numerous actions which may be deceptive and unconscionable trade practices and ensures unfair trade practices actionable at common law are still available under the act. ARK. CODE ANN. §§ 4-88-107 to 4-88-109 (2018).

30. *See* Hargraves, *supra* note 1.

31. 1990 Ark. Acts 3662 (codified as amended at ARK. CODE ANN. § 4-88-113).

action for a deceptive trade practice violation.³² The 1999 statute provided that “any person who suffers actual damage or injury as a result of an offense or violation as defined in this chapter has a cause of action to recover actual damages, if appropriate, and reasonable attorney’s fees.”³³

Following the creation of the private right of action, several individual and class action suits were brought under the ADTPA. Two cases specifically garnered much media attention and were discussed by the co-sponsors of the changes to the ADTPA.³⁴ The first case began in January 2013 when Vincent Gotter filed a complaint against Doctor’s Associates, the corporation that franchises Subway, for a violation of the ADTPA.³⁵ Gotter purchased a footlong sandwich from Subway and discovered the sandwich was shorter than the one-foot length advertised.³⁶ The case was soon transferred to the Eastern District of Wisconsin and joined with nine other similar cases for a class action against Subway.³⁷ The court determined the claims were “factually deficient” because the nature of baking bread is unpredictable.³⁸ Because of this, class counsel re-filed the complaint seeking injunctive instead of compensatory relief.³⁹ A settlement was reached outlining Subway’s four-year “commitment” including placing warnings

32. See Hargraves, *supra* note 1.

33. 1990 Ark. Acts 3662 (codified as amended at ARK. CODE ANN. § 4-88-113(f)).

34. See, e.g., *Hearing on H.B. 1742 Before the House*, 91st. Gen. Assemb., Reg. Sess. (Ark. 2017) (statement of Rep. Michelle Gray) (March 13, 2017) (3:16:21 PM) <http://www.arkansashouse.org/video-library> [https://perma.cc/77DB-QYV]; *Hearing on H.B. 1742 Before the House*, 91st. Gen. Assemb., Reg. Sess. (Ark. 2017) (statement of Rep. Laurie Rushing) (March 13, 2017) (3:33:52 PM) <http://www.arkansashouse.org/video-library> [https://perma.cc/77DB-QYV]; John Lynch, *Lawyers Awarded \$1.9M in Expenses in Arkansas Marlboro Case*, ARK. DEMOCRAT-GAZETTE (Jan. 26, 2017, 4:40 AM), <http://www.arkansasonline.com/news/2017/jan/26/lawyers-awarded-1-9m-in-expenses-201701/?news-arkansas> [https://perma.cc/N7JY-JKKS]; Robert Loerzel, *Food Fight: Subway Sandwich Suit Raises Class Action Questions*, ABA J. (Feb. 2017), http://www.abajournal.com/magazine/article/subway_sandwich_class_action [https://perma.cc/K5QV-C96Q].

35. See Class Action Complaint, *Gotter v. Doctor’s Assocs., Inc.*, No. CIV-2013-240-5 (Ark. Cir. Ct. 2013).

36. See *id.*

37. See *In re Subway Footlong Sandwich Mktg. and Sales Practices Litg.*, 869 F.3d 551, 553 (7th. Cir. 2017).

38. *Id.* at 554

39. *Id.* at 557.

stating bread size may vary.⁴⁰ The parties also agreed to a cap of \$525,000 for attorney's fees.⁴¹ The district court judge found the settlement fair, certified the class, and approved the settlement.⁴² On appeal, the certification was reversed because the class members did not benefit from the settlement and the attorneys were the only ones to get monetary relief.⁴³

The second case, *Philip Morris v. Miner*, was a class action involving the ADTPA and was argued before the Arkansas Supreme Court in 2015.⁴⁴ In *Philip Morris*, the Arkansas Supreme Court upheld a class certification for customers who bought cigarettes from Philip Morris Companies.⁴⁵ Plaintiffs argued defendants falsely advertised their cigarettes as being "healthier and contained less tar and nicotine than regular cigarettes"⁴⁶ Defendants argued that the court should not certify the class because the prerequisites of predominance and superiority were not met.⁴⁷ Specifically Philip Morris argued that these prerequisites could not be met because the ADTPA required plaintiffs to prove reliance on the false advertising.⁴⁸ However, the Supreme Court found that reliance was not a requirement, and even if it was a requirement, "individual class plaintiff[']s reliance on a defendant's misrepresentation does not destroy predominance."⁴⁹ Because the court found predominance and superiority, the class certification was upheld.⁵⁰ In her dissent, Justice Hart pointed to the "actual damage" requirement of the ADTPA as a reason the class should not have been certified.⁵¹ Justice Hart accepted Philip Morris' argument that injury can only be shown under the statute if "purchasers did not receive less tar and nicotine and they would have spent less money on cigarettes in the absence of the alleged

40. *Id.* at 553.

41. *Id.* at 557.

42. *In re Subway Footlong Sandwich Mktg. and Sales Practices Litg.*, 869 F.3d at 557.

43. *Id.*

44. *See Philip Morris Co., Inc. v. Miner*, 2015 Ark. 73, 462 S.W.3d 313.

45. *See id.*

46. *Id.* at 1, 462 S.W.3d at 315.

47. *Id.* at 4, 462 S.W.3d at 316.

48. *Id.* at 9, 462 S.W.3d at 318-19.

49. *Phillip Morris Co., Inc.*, 2015 Ark. 73, at 10, 462 S.W.3d at 319.

50. *Id.* at 1, 462 S.W.3d 313.

51. *Id.* at 3, 462 S.W.3d at 316.

misrepresentation.”⁵² Plaintiffs eventually settled with Philip Morris in a \$45 million settlement agreement.⁵³

D. 2017 CHANGES TO ARK. CODE ANN. § 4-88-113 (ADTPA)

In the 2017 legislative session, the Arkansas Legislature amended the ADTPA in three significant ways.⁵⁴ The first major change to the ADTPA is the new requirement that a plaintiff must rely on the deceptive trade practice.⁵⁵ The second is that a plaintiff must have an actual financial loss in order to bring a claim under ADTPA.⁵⁶ The amendment 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 or services and the actual market value of the goods or services provided to a person.”⁵⁷ Perhaps the most dramatic change to the ADTPA is the third: the amendment prohibited private class actions, except those brought for violation of the usury rate under Arkansas Constitution Amendment 89.⁵⁸

According to the bill’s co-sponsor, Representative Michelle Gray, the purpose of the bill was to “limit class actions that can be brought under deceptive trade practice.”⁵⁹ Representative Gray pointed to the fact that class actions were easy to certify in the state of Arkansas and this amendment was a way to get

52. *Id.* at 3, 462 S.W.3d at 324.

53. Suevon Lee, *Phillip Morris Strikes \$45M Deal In Ark. Marlboro Lights Suit*, Law360 (Sept. 2, 2016, 10:22 PM) <https://www.law360.com/articles/836422/philip-morris-strikes-45m-deal-in-ark-marlboro-lights-suit> [<https://perma.cc/6UQP-KAZZ>].

54. H.B. 1742, 91st Gen. Assemb., Reg. Sess. (Ark. 2017).

55. ARK. CODE ANN. § 4-88-113(f)(1)(A) (2017).

56. ARK. CODE ANN. § 4-88-113(f)(1)(A) (2017).

57. ARK. CODE ANN. § 4-88-102(9) (2017).

58. ARK. CODE ANN. § 4-88-113(f)(1)(B) (2017) (The Attorney General is still allowed to bring a class action for any deceptive trade violation). The 2017 amendment also added the word “specifically” into ARK. CODE ANN. § 4-88-101(3) (2017). The effect of this addition is to adopt the “specific-conduct rule” which exempts certain conduct that is permitted or authorized by state law. See Nathan Price Chaney, *The Arkansas Deceptive Trade Practices Act: The Arkansas Supreme Court Should Adopt the Specific-Conduct Rule*, 67 Ark. L. Rev. 299, 300 (2014) (describing what the specific-conduct rule is and the effects of such a rule). This note focuses only on the changes in ARK. CODE ANN. § 4-88-113 and § 4-88-103; for guidance on the specific-rule see *id.*

59. *Supra* note 34, at 3:16:21 PM (statement of Rep. Michelle Gray).

better control on the class actions.⁶⁰ During Committee and House meetings, the general purpose behind the bill appeared to be the proliferation of class actions in Arkansas.⁶¹ In addition to class certification a discussion emerged that, in these class actions, trial lawyers were the only people to receive money.⁶² Representative Laurie Rushing⁶³, another co-sponsor of the amendment, argued that under the old ADTPA “no one here wins except the trial lawyers.”⁶⁴ According to the amendment’s supporters, in ADTPA class actions trial lawyers were walking away with large amounts of money while consumers were simply getting coupons in the mail.⁶⁵

At several points during discussions of the amendment, members of the House challenged the amendment as a limitation on a private consumer’s right to bring a claim under ADTPA.⁶⁶ Representative Rushing’s response, in defense of the amendment, assured the House that consumers had “other venues where they can pursue legal action besides the deceptive trade act.”⁶⁷ In committee, when a speaker explained that “deceptive trade practice is usually one of about five legal theories . . .” brought with a class action.⁶⁸ Neither in committee nor during the House debates was there significant discussion of the new requirements of a plaintiff’s actual financial loss or reliance.⁶⁹ It appeared that the requirement of “actual financial loss” was based on the litigation surrounding if a consumer suffered actual damage.⁷⁰ The class action exception for violation of Amendment 89 was added after the amendment failed to pass due to the worries of payday lenders returning to

60. *Hearing on H.B. 1742 Before the H. Comm. On Ins. & Com.*, 91st. Gen. Assemb., Reg. Sess. (Ark. 2017) (statement of Rep. Michelle Gray) (March 8, 2017) (10:07:00 AM) <http://www.arkansashouse.org/video-library> [<https://perma.cc/77DB-QYV>].

61. *See id.* at 10:07:00 AM (statement of Rep. Michelle Gray).

62. *Supra* note 34, at 3:33:52 PM (statement of Rep. Laurie Rushing).

63. Representative Laurie Rushing is of no relation to author.

64. *Supra* note 34, at 3:33:52 PM (statement of Rep. Laurie Rushing).

65. *Id.* at 3:33:52 PM (statement of Rep. Laurie Rushing).

66. *Id.* at 3:36:52 PM (statement of Rep. Douglas House).

67. *Id.* at 3:34:22 PM (statement of Rep. Laurie Rushing).

68. *Supra* note 60, at 10:07:00 AM (statement of Mr. Kevin Crass).

69. *See id.* at 10:07:00 AM; *supra* note 34, at 3:17:25 PM, 3:33:52 PM.

70. *Supra* note 60, at 10:09:20 AM (statement of Rep. Michelle Gray).

Arkansas.⁷¹ The amendment eventually passed both the House and Senate and went into effect August 1, 2017.⁷²

The changes to the ADTPA were discussed by supporters and opponents of the bill outside the legislature. According to some, the changes to the ADTPA made Arkansas a more “business-friendly climate.”⁷³ The previous ADTPA language made deceptive trade a “go-to claim in lawsuits against companies doing business in Arkansas.”⁷⁴ With the changes, supporters claim, a remedy is still available to those who have been harmed but it limits “unnecessary and expensive litigation” on behalf of people who have not been harmed.⁷⁵ Representative Gray claimed the bill would eliminate “frivolous suits that are filed with the intention of forcing a business to settle.”⁷⁶

However, many opponents saw the changes to the ADTPA as harmful to consumers because they eliminated an “effective deterrent” against companies who engage in deceptive trade practices.⁷⁷ Because a class action can be a benefit for a group of people that have not suffered large financial losses, the prohibition would prevent consumers from seeking remedies.⁷⁸ Trial attorneys who opposed the amendment argued the “change takes the consumer protection out of what was a consumer protection statute.”⁷⁹ According to one opponent, class actions are a way to “stop misconduct,” not a way for attorneys to make

71. *Id.* at 10:16:45 AM.

72. SUMMARY OF GEN. LEGIS., 91ST GEN. ASSEMBLY OF THE STATE OF ARK., BUREAU OF LEGIS. RES. at 177 (May 2017), <http://www.arkleg.state.ar.us/assembly/2017/2017R/Documents/2017R%20and%202017%20S1%20Legislative%20General%20Summary.pdf> [<https://perma.cc/BW5J-LN5R>].

73. *See* Hargraves, *supra* note 1.

74. *Id.*

75. *Id.*

76. John Lyon, *House OKs Bill to Limit Class-Action Suits*, BOONEVILLE DEMOCRAT (March 22, 2017, 11:28 AM), <http://www.boonevilledemocrat.com/news/20170322/house-oks-bill-to-limit-class-action-suits> [<https://perma.cc/45NS-6ETB>].

77. Todd Turner, *Deceptive Trade Practices Act Changes Will Harm Arkansas Consumers*, TALK BUS. & POL. (May 7, 2017, 8:32 PM) <https://talkbusiness.net/2017/05/deceptive-trade-practices-act-changes-will-harm-arkansas-consumers/> [<https://perma.cc/7ZQX-L6YW>].

78. Mark Friedman, *Trial Lawyers Cringe at Changes in Deceptive Trade Practices Act*, ARK. BUS. 12-13 (June 12-June 18, 2017).

79. *Id.*

a large fee, and “[n]obody has to worry about this unless they’re engaged in deceptive practices.”⁸⁰ Members of the Arkansas Association of Defense Counsel were also concerned that the changes to the ADTPA caused “cringe-worthy outcome[s] for defendants” and that the prohibition of class actions would be over-turned by the Arkansas Supreme Court based on its authority under Amendment 80.⁸¹ Although these changes have yet to be litigated before an Arkansas court, the debate surrounding them demonstrate these changes could have dramatic effects on ADTPA litigation.

II. CHANGES COMPARED TO OTHER STATE STATUTES

A. RELIANCE

Under the new requirement of reliance, a consumer must now rely on the deceptive trade practice in order to bring a claim.⁸² Requiring reliance in deceptive trade practice claims has been a source of significant commentary.⁸³ Some commentators believe a reliance requirement goes against the purpose of deceptive trade practices acts⁸⁴, while others see it as an effective way to stop the increase in class actions.⁸⁵ The addition of reliance into the ADTPA makes a plaintiff’s claim for a deceptive trade practice violation more similar to a fraud claim.⁸⁶ With this similarity, plaintiffs will be faced with the question—does the reliance have to be reasonable or justified as typically required in fraud claims? Guidance from other states

80. *Id.*

81. Andrew King, *A Deceptive Trade-Off*, ARK. ASS’N OF DEF. COUNS. (July 17, 2017) <http://www.arkansasdefensecounsel.net/newsletters/AADC-v3.27-071717.pdf> [<https://perma.cc/5GXV-4SDV>].

82. ARK. CODE ANN. § 4-88-113(f) (2017).

83. *See, e.g.*, Shelia B. Scheuerman, *The Consumer Fraud Class Action: Reining In Abuse By Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 HARV. J. ON LEGIS. 1 (2006).

84. *See, e.g.*, Pridgen, *supra* note 8, 285-87.

85. *See generally* Scheuerman, *supra* note 83.

86. *Supra* notes 5-28 and accompanying text (discussing fraud as the foundation for unfair and deceptive trade practices acts).

suggests the answer to this question is likely found in the origin of reliance in the deceptive trade practice statute.⁸⁷

The reliance requirement is added to unfair and deceptive trade claims in two ways: (1) through judicial interpretation or; (2) by legislative amendment to a statute.⁸⁸ When reliance is added through judicial interpretation, the reliance typically must be reasonable or justified.⁸⁹ However, when reliance is statutorily created courts typically do not require the reliance to be reasonable.⁹⁰

1. *Reliance by Judicial Interpretation*

Courts in Georgia and Pennsylvania have both required a plaintiff to show reasonable or justifiable reliance when bringing a deceptive trade claim. In Georgia the statute proscribing a deceptive trade claim, known as the Fair Business Practices Act (“FBPA”), does not on its face require a plaintiff to show reliance on the FBPA violation.⁹¹ The FBPA only requires that a consumer “suffers injury or damages as a result of a violation”⁹² However, Georgia courts have “incorporat[ed] the ‘reliance’ element of the common law tort of misrepresentation” into the FBPA because the statute requires a plaintiff to provide notice to the defendant of the “unfair or deceptive act or practice relied upon”⁹³

87. *Infra* notes 91-137 and accompanying text.

88. *Infra* notes 91-137 and accompanying text.

89. *See* *Tiisman v. Linda Martin Homes Corp.*, 637 S.E.2d 14 (Ga. 2006); *Weinberg v. Sun Comp., Inc.*, 777 A.2d 442 (Pa. 2001). Unlike Georgia and Pennsylvania, Arizona courts have judicially interpreted an element of reliance but the reliance does not have to be reasonable. *But see* *Parks v. Macro-Dynamics, Inc.*, 591 P.2d 1005 (Ariz. Ct. App. 1979); *Peery v. Hansen*, 585 P.2d 574 (Ariz. Ct. App. 1978). This difference may be attributable to the fact that Arizona’s consumer protection act does not provide for an individual right of action and the private right of action has been interpreted by the courts. *See* ARIZ. REV. STAT. ANN. §§ 44-1521 to 44-1534 (West 2018); *Sellinger v. Freeway Mobile Home Sales, Inc.*, 521 P.2d 1119, 1122 (Ariz. 1974).

90. *Infra* notes 110-137 and accompanying text.

91. GA. CODE ANN. § 10-1-399 (West 2018) (creating private actions under Fair Business Practices Act).

92. GA. CODE ANN. § 10-1-399 (West 2018) (creating private actions under Fair Business Practices Act).

93. *Zeeman v. Black*, 273 S.E.2d 910, 915 (Ga. Ct. App. 1980) (internal citations omitted) (interpreting GA. CODE ANN. § 10-1-399).

The Supreme Court of Georgia upheld incorporation of the reasonable reliance element from the tort of misrepresentation into the FBPA in *Tiismann v. Linda Martin Homes Corp.*⁹⁴ In *Tiismann*, the defendant agreed to build a house for plaintiff, and the building contract contained a clause that defendant would complete construction in accordance with all building codes.⁹⁵ However, the contract also contained a clause limiting warranty based on code violations.⁹⁶ Plaintiff brought suit alleging defendant had violated the Georgia FBPA because of the conflicting language in the contract limiting liability.⁹⁷ Plaintiff acknowledged “he knew when he signed the contract that the clause disclaiming responsibility for building to code was legally invalid.”⁹⁸ Because plaintiff knew the clause was unenforceable, the court found plaintiff could not have reasonably relied on the clause.⁹⁹

The Pennsylvania Unfair Trade Practices and Consumer Protection Law (“UTPCPL”) does not contain the word reliance.¹⁰⁰ But, similar to Georgia’s FBPA, the Pennsylvania Supreme Court has found that reliance is an element of a UTPCPL claim.¹⁰¹ Plaintiffs must not simply show reliance—the reliance must be justifiable.¹⁰² The Pennsylvania Supreme Court interpreted the statute as including a reliance requirement because the UTPCPL’s “underlying foundation is fraud prevention” and there was no evidence the legislature wanted to “do away with the traditional common law elements” of fraud, including reliance.¹⁰³

The Pennsylvania Supreme Court upheld this justifiable reliance requirement in *Yocca v. Pittsburgh Steelers Sports, Inc.*¹⁰⁴ In *Yocca*, the plaintiffs brought a class action against the Pittsburgh Steelers football team for violation of the UTPCPL

94. *Tiisman*, 637 S.E.2d 14.

95. *Id.* at 16.

96. *Id.*

97. *Id.*

98. *Id.* at 18 (quotations and citation omitted) (emphasis added).

99. *Tiismann*, 637 S.E.2d at 16.

100. See 73 PA. STAT. AND CONS. STAT. ANN. § 201-9.2 (West 2018).

101. See 73 PA. STAT. AND CONS. STAT. ANN. § 201-9.2 (West 2018); *Weinberg*, 777 A.2d 442.

102. *Yocca v. Pittsburgh Steeler Sports, Inc.*, 854 A.2d 425 (Pa. 2004).

103. *Weinberg*, 777 A.2d at 446.

104. *Yocca*, 854 A.2d at 438-39.

when the plaintiffs' season tickets were in a different location than illustrated in a brochure.¹⁰⁵ Defendants sent out brochures illustrating the new Pittsburgh Steelers football stadium and diagramming seats that were available for season ticket purchase.¹⁰⁶ The plaintiffs eventually signed a contract for the sale of the seats and the contract included an integration clause that "supersede[d] any representations or agreements previously made"¹⁰⁷ Plaintiffs claimed the brochures were misrepresentations of the actual seats, and they relied on the misrepresentation in deciding to purchase the seats.¹⁰⁸ Because the court found Plaintiffs were required to justifiably rely on the misrepresentation and the contract "disclaimed reliance" the Plaintiffs could not show justifiable reliance.¹⁰⁹

2. *Reliance Through Statutory Amendments*

The other way states require reliance in deceptive trade practice claims is through legislative amendments to the underlying statutes. States such as Texas¹¹⁰, Vermont¹¹¹, Wyoming¹¹², and Indiana¹¹³ have specific statutory provisions that require plaintiff's reliance on the deceptive or unfair trade practice. Courts in such states have found plaintiffs must show reliance, but there is no discussion on the necessity of the reliance to be reasonable or justified.¹¹⁴

For example, the Texas Deceptive Trade Practice and Consumer Protection Act ("DTPA") provides consumers with a private right of action that requires consumers to show detrimental reliance as an element to the claim.¹¹⁵ Specifically, a consumer can bring a claim under the DTPA where "the use or employment by any person of a false, misleading or deceptive act or practice that is . . . specifically enumerated. . . and *relied*

105. *Id.* at 427.

106. *Id.* at 427-28.

107. *Id.* at 431.

108. *Id.*

109. *Yocca*, 854 A.2d at 438-39.

110. *See* TEX. BUS. & COM. CODE ANN. § 17.50 (West 2018).

111. *See* VT. STAT. ANN. tit. 9, § 2461 (West 2018).

112. *See* WYO. STAT. ANN. § 40-12-108 (West 2018).

113. *See* IND. CODE ANN. § 24-5-0.5-4 (West 2018).

114. *See infra* 115-137 and accompanying text.

115. *See* TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)(A)-(B) (West 2018).

on by a consumer to the consumer's detriment."¹¹⁶ The Texas Supreme Court has upheld the reliance requirement and stated that "a consumer loses without proof that he relied to his detriment on the deceptive act."¹¹⁷

For example, in *McLeod v. Gyr*, the Texas Court of Appeals found that a plaintiff did not have to use the word "rely" or "reliance" in a DTPA claim in order to prove detrimental reliance.¹¹⁸ Alfred Gyr was a citizen of Switzerland residing in the United States, seeking American citizenship.¹¹⁹ Gyr sought counsel of attorney Bruce McLeod to help with the naturalization process.¹²⁰ McLeod told Gyr he "specialized in immigration matters . . . including the . . . application to become naturalized United States citizens"¹²¹ Upon McLeod's assertions that he represented people in becoming naturalized, Gyr retained McLeod to handle the naturalization process.¹²² Despite McLeod's claims to be experienced in immigration matters, Gyr's naturalization application was filed and denied four times.¹²³ Eventually Gyr sought the help of another attorney and became naturalized "within three months of filing the application."¹²⁴ Gyr sued McLeod for deceptive trade practice.¹²⁵ At trial, Gyr succeeded on his claims under the DTPA.¹²⁶ McLeod appealed claiming Gyr failed to "testify that he relied upon any alleged misrepresentation."¹²⁷ Because Gyr testified that he told McLeod he was seeking naturalization and McLeod said he "specialized in immigration" the court found Gyr retained McLeod based on this representation.¹²⁸ According to the court a "reasonable inference" existed that Gyr

116. See TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)(A)-(B) (West 2018) (emphasis added).

117. *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 823 (Tex. 2012) (finding plaintiff could not succeed on DTPA claim when a finding of reliance is not present).

118. *McLeod v. Gyr*, 439 S.W.3d 639, 648 (Tex. Ct. App. 2014) (quotations and citations omitted).

119. *Id.* at 643.

120. *Id.*

121. *Id.*

122. *Id.* at 643-44.

123. *McLeod*, 439 S.W.3d at 644.

124. *Id.* at 644.

125. *Id.*

126. *Id.* at 645.

127. *Id.* at 648.

128. *McLeod*, 439 S.W.3d at 648.

hired McLeod because of the belief in McLeod's "expertise in handling immigration matters" ¹²⁹ Although Gyr did not testify that he had relied on McLeod's representation, the court found Gyr satisfied the element of detrimental reliance because it was clear McLeod's services were retained based on his claim to be an expert in immigration. ¹³⁰

Vermont's deceptive trade practices act also requires a plaintiff to show reliance. ¹³¹ Vermont Statute title 9, § 2461 allows a consumer who "contracts for goods and services in *reliance* upon false or fraudulent representations or practices prohibited" to bring a claim. ¹³² The Vermont Supreme Court has upheld the reliance requirement in the deceptive trade practices statute, but did not discuss how a reasonable consumer must prove their reliance. ¹³³ In *Russel*, the court found plaintiffs could not show reliance on defendant's threat of eviction because plaintiffs had sought, and were awarded, declaratory relief from the threat of eviction. ¹³⁴ Although the court in *Russel* required the plaintiffs to show there was reliance on the deceptive trade violation, the court did not explicitly state that the reliance had to be reasonable. ¹³⁵

Arkansas plaintiffs hoping to bring a claim under the ADTPA will have to show reliance on the deceptive trade violation, ¹³⁶ but it is unlikely that the reliance will be the same as is required in the common law fraud claims. Guidance from Texas and Vermont, states with similar deceptive trade statutes, demonstrates statutory reliance need not be reasonable or justified. ¹³⁷ However, if Arkansas courts do make the connection between ADTPA claims and fraud, plaintiffs may have to show the reliance was justified or reasonable and the pathway to a successful ADTPA claim will be that much more difficult.

129. *Id.*

130. *Id.* at 648-49.

131. VT. STAT. ANN. tit. 9, § 2461 (West 2018).

132. VT. STAT. ANN. tit. 9, § 2461(b) (West 2018) (emphasis added).

133. *See Russel v. Atkins*, 679 A.2d 333, 335-36 (Vt. 1996).

134. *See id.*

135. *See id.*

136. ARK. CODE ANN. § 4-88-113(f)(2) (2017)

137. *See discussion supra* Part II(A)(2).

B. ACTUAL FINANCIAL LOSS

The second change to the ADTPA is the requirement that the plaintiff suffered an “actual financial loss.”¹³⁸ Actual financial loss is defined as “an ascertainable amount of money that is equal to the difference between the amount paid by a person for goods or services and the actual market value of the goods or services provided to a person.”¹³⁹ This new language eliminates the actual damage measure that was previously in the ADTPA.¹⁴⁰ This addition to the ADTPA appears to be a codification of the Arkansas “out-of-pocket” measure of damages. There are two main measures of damages in Arkansas, “out-of-pocket” and “benefit-of-the-bargain.”¹⁴¹ Benefit-of-the-bargain is measured by the difference in the product as represented and the actual value.¹⁴² The Arkansas Supreme Court has defined the out-of-pocket measure as the “difference between the purchase price and the actual value of the goods received.”¹⁴³ The court has “indicated an apparent preference for the benefit-of-the-bargain approach.”¹⁴⁴ Benefit-of-the-bargain gives the purchaser his expectation which “may achieve more complete justice.”¹⁴⁵

Nationwide, benefit-of-the-burden is the measure of damages generally applied.¹⁴⁶ With the new actual financial loss requirement, Arkansas joins a minority of jurisdictions that measure deceptive trade damages under the out-of-pocket test.¹⁴⁷

138. ARK. CODE ANN. § 4-88-113(f) (2017).

139. ARK. CODE ANN. § 4-88-102(9) (2017).

140. 1990 Ark. Acts 3662.

141. *Interstate Freeway Servs., Inc. v. Houser*, 310 Ark. 302, 309, 835 S.W.2d 872, 875 (1992).

142. *Dixon Ticonderoga Co. v. Winburn Title Mfg. Co.*, 324 Ark. 266, 920 S.W.2d 829 (1996).

143. *Interstate Freeway Services, Inc.*, 310 Ark. at 309, 835 S.W.2d at 875. For further explanation of the out-of-pocket measure, see HOWARD W. BRILL & CHRISTIAN H. BRILL, *ARKANSAS LAW OF DAMAGES* § 33.8 (2018); JOHN WESLEY HALL, JR., *TRIAL HANDBOOK FOR ARKANSAS LAWYERS* § 88.19 (2017-2018 ed.).

144. BRILL & BRILL, *supra* note 143, at § 33.8.

145. *Id.*

146. See, e.g., PRIDGEN & ALDERMAN, *supra* note 4, at § 6.4; *Gastaldi v. Sunvest Resort Communities LC*, 709 F. Supp. 2d 1299 (S.D. Fla. 2010) (applying Florida law); *Follo v. Florindo*, 185 Vt. 390 (Vt. 2009).

147. PRIDGEN & ALDERMAN, *supra* note 4, at § 6.4.

Of those states that allow for the out-of-pocket measure, consumers are typically allowed to choose between the two.¹⁴⁸

For example, under the Texas DTPA, a consumer can recover damages in either the benefit-of-the-bargain or out-of-pocket measures, whichever is greater.¹⁴⁹ In *Blackstock v. Dudley*, the Texas Court of Appeals found that a consumer could recover under either measure of damages, but not both.¹⁵⁰ Plaintiffs brought suit for violation of DTPA after defendants did not disclose serious plumbing problems in the course of selling a house to plaintiffs.¹⁵¹ After the house was purchased for \$90,000, plaintiffs had “numerous floods” and made repairs.¹⁵² Plaintiffs were awarded the “difference between the value of the home at the time of sale and the price paid for it” and the “reasonable and necessary” out-of-pocket expenses.¹⁵³ Defendants appealed on the basis that plaintiffs could not receive double recovery.¹⁵⁴ The court found that although plaintiffs were entitled to choose between benefit-of-the-bargain and out-of-pocket expenses, plaintiffs could not also recover the repair expenses.¹⁵⁵

With the new requirement of actual financial loss in Arkansas, consumers will only be able to recover damages if the purchase price was different than the market value of the product purchased.¹⁵⁶

C. CLASS ACTION PROHIBITION

The third change to the ADTPA is the elimination of the right to a private class action.¹⁵⁷ Now, the only class actions that may be brought under the ADTPA are those brought by the Attorney General or class actions maintained for violation of the usury rates under Amendment 89 of the Arkansas

148. *See id.*

149. *W.O. Bankston Nissan, Inc. v. Walters*, 754 S.W.2d 127, 128 (Tex. 1988).

150. *Blackstock v. Dudley*, 12 S.W.3d 131, 135 (Tex. Ct. App. 1999).

151. *Id.* at 133.

152. *Id.*

153. *Id.* at 135.

154. *Id.*

155. *Blackstock*, 12 S.W.3d at 135.

156. ARK. CODE ANN. § 4-88-102(9) (2017).

157. ARK. CODE ANN. § 4-88-113(f)(1)(B) (2017).

Constitution.¹⁵⁸ Many states, unlike Arkansas, allow private parties to bring class actions under deceptive trade practices acts.¹⁵⁹ Some states, such as Massachusetts, even loosen the typical class action requirements to make it easier for plaintiffs to bring class actions.¹⁶⁰ The underlying justification of these reduced class action requirements is a policy choice to protect consumers.¹⁶¹ Despite this policy concern, Arkansas joins a growing handful of states that restrict class actions in deceptive trade practice violations.¹⁶²

For example, Georgia¹⁶³, Montana¹⁶⁴, Mississippi¹⁶⁵, and South Carolina¹⁶⁶ have outright bans on class actions in their respective deceptive trade practices acts.¹⁶⁷ In these states a private class action cannot be maintained for violation of the deceptive trade practices act.¹⁶⁸ State courts have upheld these outright restrictions.¹⁶⁹ In *Dema v. Tenent Physician Services-Hiton Head, Inc.*, the Supreme Court of South Carolina upheld a motion to dismiss because plaintiffs brought a class action and the South Carolina deceptive trade practice act did not allow plaintiffs to bring a class action.¹⁷⁰ In its analysis, the court pointed to other states such as Georgia and Louisiana who have upheld the outright ban on class action lawsuits.¹⁷¹

158. ARK. CODE ANN. § 4-88-113(f)(1)(B) (2017).

159. PRIDGEN & ALDERMAN, *supra* note 4, at § 6:29

160. *Id.*

161. *See id.*

162. *See id.* (explaining very few states restrict class actions).

163. GA. CODE ANN. § 10-1-399(a) (West 2018) (prohibiting private right of action in representative capacity).

164. MONT. CODE ANN. § 30-13-133(1) (West 2018) (prohibiting consumer from bringing class action).

165. MISS. CODE ANN. § 75-24-15(4) (West 2018) (prohibiting class actions, although Mississippi does not permit class action in any context, *see* JAMES W. SHELSON, MISSISSIPPI CHANCERY PRACTICE § 4:19 (2018 ed.)).

166. S.C. CODE ANN. § 39-5-140(a) (West 2018).

167. *See* GA. CODE ANN. § 10-1-399(a) (West 2018); MISS. CODE ANN. § 75-24-15(4) (West 2018); MONT. CODE ANN. § 30-13-133(1) (West 2018); S.C. CODE ANN. § 39-5-140(a) (West 2018).

168. *See* GA. CODE ANN. § 10-1-399(a) (West 2018); MISS. CODE ANN. § 75-24-15(4) (West 2018); MONT. CODE ANN. § 30-13-133(1) (West 2018); S.C. CODE ANN. § 39-5-140(a) (West 2018).

169. *See, e.g., Dema v. Tenent Physician Services-Hilton Head, Inc.*, 678 S.E.2d 430, 434 (S.C. 2009); *Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.3d 301, 311 (Tenn. 2018).

170. *See Dema*, 678 S.E.2d at 434.

171. *See id.*

Connecticut and New Hampshire provide a less restrictive approach to limiting class actions in deceptive trade practice statutes.¹⁷² In these states, the statutes allow private parties to bring a class action suit so long as certain residency requirements are met.¹⁷³ In Connecticut, a class action may be maintained only if the plaintiffs are residents of Connecticut or if the plaintiffs were injured in Connecticut.¹⁷⁴ This residency requirement has the effect of limiting the class action mechanism without completely eliminating the option for plaintiffs to bring class actions.

Utah restricts the use of class actions restriction in its consumer protection statute based on the type of violation.¹⁷⁵ Consumers may only bring a class action in three circumstances under the Utah Consumer Sales Practices Act.¹⁷⁶ The violation must either be, (1) a violation that is prohibited in the statute; (2) an act ruled to be a violation by a final judgement of a court or; (3) an act prohibited by the terms of a consent judgment which is final.¹⁷⁷

Alabama's class action restriction is most similar to the restriction found in the ADTPA.¹⁷⁸ The Alabama Deceptive Trade Practices Act ("ALDTPA") provides that a "consumer or other person bringing an action under this chapter may not bring an action on behalf of a class."¹⁷⁹ Similar to Arkansas, the Alabama Attorney General may bring a class action under the deceptive trade practices act.¹⁸⁰ However, Alabama provides no exception for usury violations.¹⁸¹

Consumer protection class actions make up around one-third of the class actions brought against business defendants.¹⁸² Due to the high number of consumer class actions, some

172. See CONN. GEN. STAT. ANN. § 42-110g(b) (West 2018); N.H. REV. STAT. ANN. § 358-A:10-A(I) (West 2018).

173. See CONN. GEN. STAT. ANN. § 42-110g(b) (West 2018); N.H. REV. STAT. ANN. § 358-A:10-A(I) (West 2018).

174. See CONN. GEN. STAT. ANN. § 42-110g(b) (West 2018).

175. UTAH CODE ANN. § 13-11-19 (West 2018).

176. See UTAH CODE ANN. § 13-11-19(4)(a) (West 2018).

177. See UTAH CODE ANN. § 13-11-19(4)(a) (West 2018).

178. ALA. CODE § 8-9-10(f) (West 2018).

179. See ALA. CODE § 8-9-10(f) (West 2018).

180. See ALA. CODE § 8-9-10(g) (West 2018).

181. See generally ALA. CODE § 8-9-10 (West 2018).

182. See Scheuerman, *supra* note 83, at 3-4.

commentators have suggested placing restrictions on a plaintiff's ability to bring a class action in both federal and state court.¹⁸³ Although Arkansas is not alone in placing restrictions on the availability of class actions, the outright ban of private class actions makes Arkansas one of the most restrictive states. While consumers may fear business will be left unaccountable for deceptive trade violations, there is a modicum of protection in the Attorney General's authority to bring class actions under the new ADTPA.¹⁸⁴

III. PROSPECTIVE LOOK AT THE ADTPA CLASS ACTIONS RESTRICTIONS

A. POSSIBILITY OF A ADTPA IN FEDERAL COURT THROUGH DIVERSITY JURISDICTION

Because class actions are now prohibited under the ADTPA,¹⁸⁵ plaintiffs will likely seek to maintain class actions in federal court through diversity jurisdiction. Class actions in federal court are controlled by Rule of Federal Procedure 23 ("Rule 23"), which provides a class action "may be maintained" if certain conditions are met.¹⁸⁶ Unlike the ADTPA, Rule 23 does not prohibit a class action for a deceptive trade practice violation.¹⁸⁷ This conflict poses an interesting dilemma for federal courts presented with the issue of certifying an ADTPA class action—should the court apply Rule 23 to certify the class or apply Ark. Code Ann. § 4-88-113(f)(2)(B) which would prohibit the class action? This issue leads into the murky waters the Supreme Court established in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*¹⁸⁸ and the difficulty

183. See generally Stacey M. Lantagne, *A Matter of National Importance: The Persistent Inefficiency of Deceptive Advertising Class Actions*, J. BUS. & TECH. L. 117 (2013).

184. See ARK. CODE ANN. § 4-88-113(a) (2017).

185. See ARK. CODE ANN. § 4-88-113(f)(1)(B) (2017).

186. FED. R. CIV. P. 23.

187. Compare FED. R. CIV. O. 23, with ARK. CODE ANN. § 4-88-113(f)(1)(B) (2017).

188. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 410 (2010).

lower federal courts have had in interpreting the plurality opinion issued by the Court.¹⁸⁹

Before 2010, a federal court hearing a claim in diversity based on a state law action when faced with the issue of applying state or federal law had a fairly simple test to run through. If there was a federal rule of procedure that conflicted with a state rule of procedure the court would follow a two-step test.¹⁹⁰ First, the court would determine if the federal rule and the state rule really clashed or if the two could operate together.¹⁹¹ If the two rules could operate together the analysis ended and both rules applied.¹⁹² However, if the two could not be reconciled, the second step was to determine if the federal rule violated the Rules Enabling Act.¹⁹³ The Rules Enabling Act provided the Supreme Court with the power to create rules of practice and procedure as long as they do not modify, abridge or enlarge a state substantive right.¹⁹⁴ The Supreme Court interpreted the Rules Enabling Act to mean a federal rule was valid as long as it really regulated procedure.¹⁹⁵ Under this test, no federal rule had ever been deemed to violate the Rules Enabling Act by the Supreme Court.¹⁹⁶ This two-step approach provided general guidance for courts in determining whether to apply federal rules or state rules in federal court, and under this original framework it is likely Rule 23 would control instead of the class action prohibition in the ADTPA.

However this framework was altered in 2010 when the Supreme Court issued its opinion in *Shady Grove*.¹⁹⁷ In *Shady Grove*, the Court considered whether a New York class action prohibition trumped Rule 23 when certifying a class action in federal court.¹⁹⁸ The New York statute in question prohibited class actions for those plaintiffs seeking penalties or statutory

189. See *infra* notes 220-44 and accompanying text.

190. See *Hanna v. Plumer*, 380 U.S. 460, 462-65 (1965) (finding a conflict between service of process rules and determining if the federal rule really regulated procedure).

191. *Id.*

192. *Id.*

193. *Id.* at 464.

194. *Id.*

195. See *Hanna*, 380 U.S. at 464; *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 14 (1941).

196. See *Shady Grove*, 559 U.S. at 407.

197. See *id.*

198. See *id.* at 397.

minimum damages.¹⁹⁹ While a majority of justices agreed that Rule 23 was controlling, no majority was reached on the test to determine which rule applied in federal court.²⁰⁰

Justice Scalia, in his plurality opinion, and Justice Stevens, in his concurrence, both agreed the first step in the analysis was to determine if Rule 23 and the New York statute conflicted.²⁰¹ Because both Rule 23 and the New York statute provided an answer to the question of class certification, five justices agreed there was a conflict between the two rules.²⁰² Due to this conflict, the next step in the analysis was to examine Rule 23 to see if it violated the Rules Enabling Act.²⁰³ However, Justices Scalia and Stevens disagreed on how to determine if Rule 23 was authorized under the Rules Enabling Act.²⁰⁴

Under the plurality approach, opined the determination of a violation of the Rules Enabling Act was based on if the rule “really regulate[d] procedure.”²⁰⁵ In other words, if the rule “governs only ‘the manner and the means’ by which the litigants’ rights are ‘enforced,’ it is valid; if it alters ‘the rules of decisions by which [the] court will adjudicate [those] rights,’ it is not.”²⁰⁶ Because Rule 23 only altered *how* claims are processed, Justice Scalia found Rule 23 “really regulate[d] procedure” and, therefore, was valid under the Rules Enabling Act.²⁰⁷ Under Justice Scalia’s analysis, Rule 23 was controlling for the federal court class action certification.²⁰⁸

199. *See id.* at 396.

200. *See id.* at 395-96. Chief Justice Roberts and Justices Stevens, Thomas, Sotomayor and Chief Justice Roberts joined Justice Scalia’s opinion in Parts I and II-A. *See Shady Grove*, 559 U.S. at 395-96. Part II-A found Rule 23 conflicted with NY statute. *See id.* at 398-406. Chief Justice Roberts and Justices Thomas and Sotomayor joined Justice Scalia in Parts II-B (finding it is the federal rule’s procedural nature that is significant) and II-D (explaining forum shopping may be inevitable). *See id.* at 406-16. Part II-C, an answer to the concurrence finding conflict with *Sibbach*, was joined by Justices Scalia and Thomas and Chief Justice Roberts. *See id.* at 410-15. Justice Stevens concurred in part and concurred with the judgment. *See id.* at 410-11. Justice Ginsburg’s dissent was joined by Justices Kennedy, Breyer, and Alito. *See Shady Grove*, 559 U.S. at 436.

201. *Id.* at 398, 421.

202. *Id.* at 397-407.

203. *Id.* at 406-10.

204. *Id.* at 424.

205. *Shady Grove*, 559 U.S. at 410 (internal quotations and citations omitted).

206. *Id.* at 407 (internal quotations and citations omitted).

207. *Id.* at 408-10. According to Justice Scalia, the court looks to the federal rule to see if the federal rule really regulated procedure; there is no need to look at the state law.

208. *Id.* at 408.

In his concurrence, Justice Stevens declared that the second step in determining if the rule violated the Rules Enabling Act was to see if the federal rule displaced a state law that was “so intertwined with a state right or remedy that it functions to define the scope of the state-created right.”²⁰⁹ According to Justice Stevens, because the bar for finding an Enabling Rules Act conflict is high, “in order to displace a federal rule, there must be more than just a possibility” the state law is substantive.²¹⁰ Because the New York law was procedural and did not define any rights, Justice Stevens found Rule 23 did not violate the Rules Enabling Act and Rule 23 was controlling in the case.²¹¹ Although the court did not reach a majority on why Rule 23 did not violate the Rules Enabling Act, the majority in the case found Rule 23 to be controlling in determining if a class action could be brought in federal court.²¹²

Justice Ginsburg, joined by three other justices, dissented because of the belief that there was not a direct conflict between the New York class action statute and Rule 23.²¹³ According to Justice Ginsburg, the court should interpret Federal Rules with sensitivity to important state interests.²¹⁴ The purpose of the New York statute was to “prevent the exorbitant inflation of penalties.”²¹⁵ Because of this, Justice Ginsburg argued there was no direct conflict with Rule 23 as Rule 23 only proscribed the considerations relevant to class certification but not the remedy for class actions as the New York statute did.²¹⁶ The dissent argued it was clear Rule 23 governed procedure because it still left open a state’s ability to control class action remedies.²¹⁷ Ginsburg found the New York law to be substantive and therefore disagreed with decision to find Rule 23 controlling.²¹⁸ The dissent also pointed to Congress’ decision to limit class actions through the Class Action Fairness Act of

209. *Id.* at 423.

210. *Shady Grove*, 559 U.S. at 436.

211. *Id.*

212. *Id.*

213. *Id.* at 446.

214. *Id.* at 437, 442.

215. *Shady Grove*, 559 U.S. at 445.

216. *Id.* at 447.

217. *Id.* at 447-48.

218. *Id.* at 458.

2005 as a way to illustrate the additional wrongs of the Court's decision.²¹⁹

After the divided opinions in *Shady Grove*, many courts have struggled with how to determine if state law or federal law should apply in diversity jurisdiction actions.²²⁰ Some courts have applied Justice Stevens' approach, while other courts look to Justice Scalia's plurality opinion.²²¹ When courts have applied Justice Scalia's approach the federal rules tend to trump state law.²²² In contrast, courts that have applied Justice Stevens' test tends to find the state law applies.²²³ Although most courts have used Justice Stevens' approach²²⁴, courts have yet to reach a consensus on which test to follow. Therefore, it is unclear which approach is controlling in federal court, and it is likely the Supreme Court will have to take up this issue again.²²⁵

Some federal district courts have examined whether a state class action restriction in a state consumer protection law was controlling in federal court.²²⁶ Relying on Justice Stevens' approach, these courts found that when a class action restriction was placed in a consumer protection statute the restriction was substantive and, therefore, controlling over Rule 23.²²⁷ However, if a restriction was in the state's civil procedure rules, Rule 23 would be controlling over class certification.²²⁸ By using Justice Stevens' approach, these district courts determined the location of the class action prohibition to be the deciding factor in finding a restriction to be substantive or procedural.²²⁹

The only circuit court to examine a class action restriction in a state deceptive trade practice statute is the Eleventh Circuit

219. *Id.* at 458-59.

220. See Jack E. Pace III & Rachel J. Feldman, *Looking for Sunlight in Shady Grove: The Fate of State Law in Federal Diversity Cases Remains Unclear*, 30 ANTITRUST 86 (2016).

221. *Id.*

222. *Id.* at 87.

223. *Id.*

224. *Id.*

225. 19 CHARLES ALAN WRIGHT ET. AL, FEDERAL PRACTICE & PROCEDURE § 4509 (3d ed. 2016).

226. See Pace & Feldman, *supra* note 220, at 86.

227. See Leonard v. Abbott Labs., Inc., 2012 WL 764199 (E.D.N.Y. 2012); In re Dig. Music Antitrust Litig., 812 F. Supp. 2d 390 (S.D.N.Y. 2011).

228. See *id.*

229. See *id.*

in *Lisk v. Lumber One Wood Preserving, LLC*.²³⁰ In *Lisk*, plaintiffs brought a class action for violation of the ALDTPA in federal district court.²³¹ On appeal, the Eleventh Circuit reversed the district court's finding that the class action restriction in Alabama's deceptive trade statute applied instead of Rule 23.²³² The Eleventh Circuit found the plain terms of the Rules Enabling Act showed a federal rule would apply as long as the rule did not "abridge, enlarge or modify any substantive right."²³³ The Eleventh Circuit compared the case to *Shady Grove* and found the Alabama statute was a "stronger case" for applying Rule 23 because, unlike the New York statute which prohibited *all* class actions, the Alabama statute allowed class actions but only prohibited who could bring the class.²³⁴ According to the Eleventh Circuit, if Rule 23 did not "abridge, enlarge or modify any substantive right" under the statute prohibiting *all* class actions, it could not "abridge, enlarge or modify any substantive right" when a statute only prohibited *some* class actions.²³⁵ The court ultimately found the fact that the Alabama class action restriction is a "statutorily created penalty" to be immaterial to the analysis.²³⁶

The Eleventh Circuit also determined Rule 23 to be controlling because the Alabama class action restriction was not substantive.²³⁷ Because the class action restriction only determined if a plaintiff must bring individual actions or if a plaintiff could bring a representative action it was not about the substantive right plaintiffs had to bring an action under the deceptive trade practices act.²³⁸ Unlike other courts, the

230. *Lisk v. Lumber One Wood Preserving, LLC*, 792 F.3d 1331 (11th Cir. 2015).

231. *See id.* at 1333.

232. *See id.*

233. *See id.* at 1335 (quoting 28 U.S.C. § 2072).

234. *See id.* at 1335-36.

235. *See Lisk*, 792 F.3d at 1335-36. After the decision in *Lisk*, the Alabama Legislature changed the deceptive trade practice statute to include language that the class action prohibition was a substantive limitation. Most likely this was in order to avoid further issues like in *Lisk*. *See* Gregory C. Cook & Steven C. Corhern, *The Alabama Legislature Solves Problem Created by the Eleventh Circuit*, SE. FIN. LITIG. MONITOR (May 18, 2016), <https://www.sefinanciallitigation.com/2016/05/the-alabama-legislature-solves-problem-created-by-the-eleventh-circuit/> [<https://perma.cc/6FLC-BR5X>].

236. *See Lisk*, 792 F.3d at 1335.

237. *Id.* at 1336.

238. *Id.* at 1337-38.

Eleventh Circuit in *Lisk*, did not choose to follow Justice Stevens's or Justice Scalia's interpretation in *Shady Grove*.²³⁹ Instead, the court pointed to the idea that the Court had reached a majority in *Shady Grove* and the holding was that Rule 23 controlled.²⁴⁰

The Eleventh Circuit's interpretation of *Shady Grove* seems to provide plaintiffs an avenue to bring class actions in federal court even when a state statute prohibits such class actions. While some district courts have followed the Eleventh Circuit's rationale²⁴¹ others have rejected it on the grounds that the location of the class action restriction in a statutory scheme should determine if a prohibition was substantive.²⁴² What this means for plaintiffs hoping to bring a class action under the ADTPA in federal court is uncertain. The Eighth Circuit has yet to interpret *Shady Grove*,²⁴³ it is unclear how they would rule on a class action prohibition in federal court. Although a recent case in the Eastern District of Arkansas found the class action prohibition to be procedural, the analysis was performed while determining retroactivity of the statute, so the finding may not apply in a *Shady Grove* context.²⁴⁴

It will be interesting to see how federal district courts in Arkansas and the Eighth Circuit, will rule on this issue. Will they follow the Eleventh Circuit and the district courts who have ruled that similar prohibitions are state substantive law? Or will the courts find the prohibition to be procedural, preventing plaintiffs from pursuing a class action in federal court? If the courts find the prohibition to be substantive, the ADTPA will do exactly what its proponents envisioned—eliminate a consumer's ability to bring a private class action under the statute.

239. *Id.* at 1336.

240. *Id.* at 1335.

241. *Suchanek v. Sturm Foods, Inc.*, 311 F.R.D 239, 263-64 (S.D. Ill. 2015) (finding *Lisk*'s analysis to be determinative in finding Rule 23 controlled instead of class action restrictions located in state deceptive trade practice statutes).

242. *See Fejzulai v. Sam's West, Inc.*, 205 F. Supp. 3d 723, 728-29 (D. S.C. 2016).

243. *See Davenport v. Charter Commc'ns., LLC*, 35 F. Supp. 3d 1040, 1050 (E.D. Mo. 2014).

244. *Mounce v. CHSPSC*, No. 5:15-CV-05197, 2017 WL 4392048, at *6-7 (W.D. Ark. Sept. 29, 2017) (but this was in a different context, determining if the statute retroactively applied).

B. ARKANSAS CONSTITUTIONAL AMENDMENT 80

Plaintiffs may also seek to challenge the prohibition on class action under Arkansas Constitution Amendment 80.²⁴⁵ In 2000, Arkansas voters gave exclusive authority to the Arkansas Supreme Court to create “rules of pleading, practice and procedure for all courts.”²⁴⁶ Due to this amendment, the Arkansas General Assembly is prohibited from making procedural rules, however, the General Assembly may create or modify substantive rules and rights.²⁴⁷ Thus, when a statute promulgated by the legislature is procedural and “bypasses [the] rules of pleading, practice and procedure,” it is a violation of the separation-of-powers doctrine.²⁴⁸

The court defines procedural law as “the rules that proscribe the steps for having a right or duty, judicially enforced”²⁴⁹ Law is substantive when it “creates, defines, and regulates the rights, duties, and powers of parties.”²⁵⁰ The Arkansas Supreme Court has found statutes to be substantive when the provision creates a privilege, such as an opportunity to refuse to testify.²⁵¹ A statute is also substantive when the provision creates or modifies the plaintiff’s burden of proof. Statutes are procedural when the legislature attempts to establish its own procedure or create a rule of evidence.²⁵² For example, when a statute defines how an action is commenced, the statute is procedural in nature.²⁵³ If a rule of pleading, practice or procedure already exists and the statute adds requirements or changes the rule, it is likely to be a violation of the separation-

245. See ARK. CONST. of 1874, amend. 80, § 3 (2018).

246. See *id.*; DAVID NEWBERN ET AL., ARKANSAS CIVIL PRACTICE & PROCEDURE § 1:3 (5th. ed. 2017).

247. See *Cato v. Craighead Cty. Cir. Ct.*, 2009 Ark. 334, at 7-8, 322 S.W.3d 484, 487-89.

248. See *id.* at 8-9, 322 S.W.3d at 489 (citing *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, at 7-10, 308 S.W.3d 135, 140-41).

249. See *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, at 8, 308 S.W.3d 135, 141 (citations and quotations omitted).

250. See *id.* (citations omitted).

251. See *Bedell v. Williams*, 2012 Ark. 75, at 17, 386 S.W.3d 493, 504-05.

252. See *Johnson*, 2009 Ark. at 7-10, 308 S.W.3d at 140-41.

253. See *Summerville v. Thrower*, 369 Ark. 231, 253 S.W.3d 415 (2007).

of-powers doctrine.²⁵⁴ However, the statute does not need to be in conflict with a rule of procedure in order to violate the separation-of-powers doctrine.²⁵⁵

The class action prohibition in the ADTPA is in direct conflict with Arkansas Rule of Civil Procedure Rule 23, which provides that a class action may be maintained if certain prerequisites are satisfied.²⁵⁶ Because this statutory provision creates a rule on when class actions may be brought, in conflict with Rule 23, it is likely the law will be considered procedural. In *Broussard*, where the court found a statute to be procedural when the statute created additional requirements for expert witness framework already established in Arkansas Rule of Evidence 702.²⁵⁷

Currently, the Arkansas Supreme Court has the power to make the procedural rules under Amendment 80.²⁵⁸ However, there has been an attempt by the General Assembly to change the exclusive rulemaking authority.²⁵⁹ This change was attempted by a constitutional amendment, Senate Joint Resolution 8, which was slated to be on the November 2018 ballot as “Issue 1.”²⁶⁰ Issue 1 amendment had four sections.²⁶¹ Part one was a thirty-three and one-half percent limitation on attorney contingency fees.²⁶² Part two placed a \$500,000 limit on a plaintiff’s ability to recover non-economic damages, a limit on punitive damages, and gave the General Assembly power to

254. See *Broussard v. St. Edward Mercy Health System, Inc.*, 2012 Ark. 14, 386 S.W.3d 385 (finding violation of separation-of-powers when the statute added a requirement to a rule of evidence already in existence).

255. See *Johnson*, 2009 Ark. at 8, 308 S.W.3d at 141.

256. ARK. R. CIV. P. 23(b). (requiring a class to prove numerosity, commonality, typicality, adequacy, predominance, and superiority).

257. See *Broussard*, 2012 Ark. at 7-8, 386 S.W.3d at 389-90.

258. *Id.* at 5-6, 386 S.W.3d at 389.

259. John Moritz, *Plans Set by Group to Oppose Ballot Bid*, ARK. DEMOCRAT-GAZETTE, (Mar. 9, 2018, 1:01 AM), <http://www.arkansasonline.com/news/2018/mar/09/plans-set-by-group-to-oppose-ballot-bid/> [https://perma.cc/97VM-HM6G].

260. Aric Mitchell, *Issue 1 Supporters Look to the Arkansas Supreme Court for Decision by ‘Mid-October’*, TALK BUS. & POL. (Sept. 7, 2018, 12:29 PM) <https://talkbusiness.net/2018/09/issue-1-supporters-look-to-the-arkansas-supreme-court-for-decision-by-mid-october/> [https://perma.cc/D23S-QEM6].

261. S.J. Res. 8, 91st Gen Assemb., Reg. Sess. (Ark. 2017).

262. See *id.*

enact additional rules regarding part two.²⁶³ Part three changed Amendment 80, giving the General Assembly the power to adopt, amend, and repeal the rules of pleading, practice and procedure for the Arkansas Judiciary.²⁶⁴ Lastly, part four made additional changes to Amendment 80 which amend the Supreme Court's determination of jurisdiction.²⁶⁵

Although Issue 1 was to be on the ballot, the Arkansas Supreme Court upheld a declaratory judgment to effectively remove Issue 1 from the ballot because Issue 1 violated Article 19, section 22 of the Arkansas Constitution.²⁶⁶ Article 19, section 22 provides that the General Assembly may submit up to three amendments to the voters.²⁶⁷ The three amendments allowed must be separate and the court has found amendments are separate if all parts of the amendments are "reasonably germane to each other and to the general subject of the amendment."²⁶⁸ Germane has been interpreted to mean "'relevant; pertinent' or 'having a close relationship.'"²⁶⁹

The court found that the four parts of issue one are not germane to each other because part one limits legal services contracts of private parties while parts three and four "broaden and diversify the legislature's ability to exert influence over judicial rule-making authority."²⁷⁰ Neither part one or parts three and four of Issue 1 "support, develop, clarify, or otherwise aid the function of [the other sections] in any meaningful way."²⁷¹ The court also found there was no "general subject" to which the parts were reasonably germane because part one dealt with private agreements between attorney and client while the other sections involved the courts and the judiciary or judicial power.²⁷² Because the various parts of Issue 1 were not germane

263. *See id.*

264. *See id.*

265. *See id.*

266. *See generally* Martin v. Humphrey, 2018 Ark. 295; John Moritz, *Arkansas Supreme Court Yanks Issue 1, Calls it Overly Broad*, ARK. DEMOCRAT-GAZETTE (Oct. 19, 2018, 4:30 AM), <https://www.arkansasonline.com/news/2018/oct/19/justices-yank-issue-1-call-it-overly-br/> [<https://perma.cc/5MLW-7ML3>].

267. *Martin*, 2018 Ark. 295, at 7-8.

268. *See id.* at 8. (emphasis, citation, and quotations omitted).

269. *See id.* (citation and quotations omitted).

270. *See id.* at 9.

271. *See id.*

272. *Martin*, 2018 Ark. 295, at 9-10.

to each other the court upheld a declaratory judgment preventing the Arkansas Secretary of State from counting, canvassing, or certifying votes for or against Issue 1.²⁷³

By taking Issue 1 off the ballot, the Supreme Court has ensured plaintiffs hoping to challenge the class action prohibition in the ADTPA as unconstitutional under Amendment 80. Despite the elimination of Issue 1, there could always be proposed amendments in the future dealing with the exclusive rule making authority of the Arkansas Supreme Court.

CONCLUSION

The changes to the ADTPA will likely cause a decrease in the number of cases brought under the ADTPA.²⁷⁴ Because of the additional requirements of reliance and actual financial loss, consumers will find it more difficult to succeed on a claim.²⁷⁵ The class action prohibition will also eliminate the ability of a group of consumers, all with damages too small to support an individual cause of action, to bring a cause of action against a business for multiple violations.²⁷⁶ A class action by the Attorney General is now the best avenue for consumers hoping to recover.²⁷⁷ ADTPA defendants will need to be cognizant of the possibility of a constitutional challenge to these changes in state court, as well as the likelihood of an attempt to bring a class action in federal court under Rule 23 of the Federal Rules of Civil Procedure.²⁷⁸ As the landscape of consumer protection in Arkansas shifts into a more business-friendly environment, it will be intriguing to see how consumers will adjust their litigation strategies to bring claims based on the Arkansas Deceptive Trade Practices Act.

MARGARET E. RUSHING

273. *See id.* at 14.

274. *See supra* Part I.D.

275. *See supra* Part II.A, Part II.B.

276. *See supra* Part II.C.

277. *See supra* notes 178-84 and accompanying text.

278. *See supra* Part III.A.