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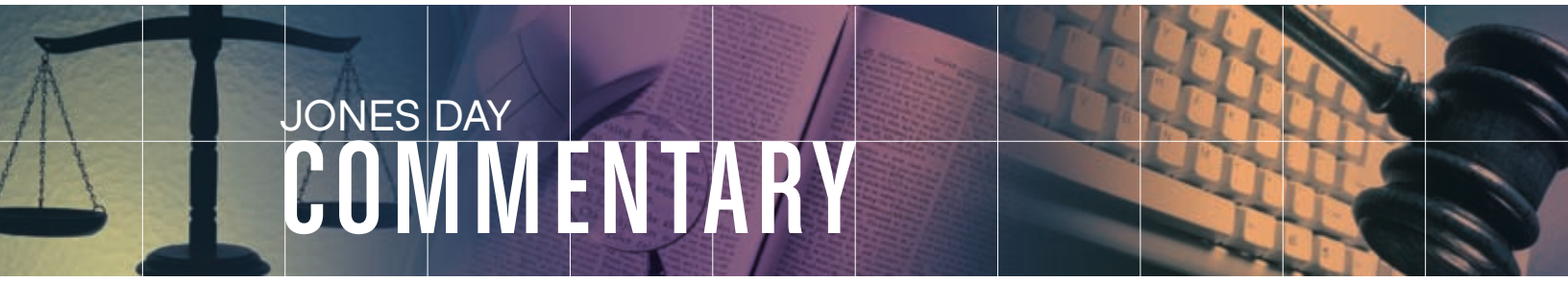

HAS DEALING IN CONSUMER TRANSACTIONS BECOME RISKIER IN OHIO?

What happens when a $16,400 truck turns into a $470,000 verdict? You catch the eye of one governor, incur the ire of a second, and in the process create a constitutional law question worthy of any bar examination. Moreover, if you sell to consumers, the ability to assess your litigation risks virtually disappears.

This is exactly the situation Ohio businesses now face because the extent to which a consumer may recover noneconomic damages under Ohio's Consumer Sales Practices Act ("CSPA") remains unresolved. The CSPA exists to provide consumers with legal recourse when they feel they are victims of unfair or deceptive consumer sales practices. In November of last year, the Ohio Supreme Court, in *Whitaker v. M.T. Automotive, Inc.*, allowed noneconomic damages to be awarded so long as the consumer proved a CSPA violation. The end result was that a $16,400 truck purchased by Mr. Whitaker netted a $470,000 verdict, $315,000 of which related to noneconomic damages. But more on that later. The Ohio General Assembly, reacting to the *Whitaker* decision, passed a bill that limited noneconomic damages to $5,000 for CSPA violations. Had this been the law, Whitaker's damages would have been limited to $5,000, subject to trebling, which would have dramatically decreased his damages from $315,000 to only $15,000. Despite several objections to the General Assembly's $5,000 limit, including his own, then-Governor Bob Taft allowed the limitation to become law without his signature on January 5, 2007—or at least he thought he did.

After being sworn in on January 8, 2007, the current governor, Ted Strickland, took the unusual action of asking the secretary of state to return the bill. Upon receipt, Governor Strickland vetoed the bill. This series of events gives rise to the constitutional questions of whether a new governor can request the return of a bill and how the 10 days are counted when the governor decides to allow the bill to become law without signature. Those questions are beyond the scope of this *Commentary*. To answer those questions, however, the Ohio General Assembly filed suit to overturn the veto, creating lengthy litigation before

Ohio businesses learn the full extent of potential liability related to noneconomic damages under the CSPA.

HOW WE GOT HERE

In the past few years, the CSPA has become a weapon used by both plaintiff's counsel and the Ohio attorney general. To further the CSPA's reach, the General Assembly passed, and the governor signed, Senate Bill 185, which brought mortgage transactions under the purview of the CSPA. Despite all the activity related to the CSPA, the Ohio Supreme Court had never addressed the scope of damages available under that act. That opportunity came in *Whitaker v. M.T. Automotive, Inc.,* 2006-Ohio-5481, 111 Ohio St. 3d 177 (Nov. 8, 2006).

THE CSPA'S DAMAGE PROVISIONS

Section 1345.09 of the Ohio Revised Code provides private remedies for CSPA violations. Section 1345.09(A) allows the consumer to rescind the transaction or to recover damages. The consumer may also receive treble damages under Section 1345.09(B) if the violation was deemed unconscionable by either rule or a published court decision, with a minimum statutory award of $200. Treble damages, however, do not apply when the case is a class action.[1]

Until *Whitaker*, no clear definition of "damages" under Section 1345.09(A) or "actual damages" under Section 1345.09(B) existed. Because of this lack of clear definitions, questions remained regarding whether noneconomic damages were included in "damages" or "actual damages." The definitions clearly include economic damages, which are those damages that relate to the actual loss suffered by the consumer. Noneconomic damages, such as mental anguish, embarrassment, or inconvenience, cannot be directly proven and were thought by many to be excluded from recovery under the CSPA. The *Whitaker* decision held otherwise.

THE *WHITAKER* DECISION

The *Whitaker* case involved a consumer's failed attempt to lease a truck from Montrose Toyota, an automobile dealership in northeastern Ohio. Craig Whitaker attempted to purchase a used Dodge Dakota pickup truck from Montrose but could not afford the payments.[2] Montrose suggested that he lease the Dakota instead. Based on the suggestion, Whitaker approached his credit union regarding lease financing.[3] The credit union did not provide financing for leasing used vehicles, so Montrose offered to arrange a lease for Whitaker.[4] The agreed-upon lease payment was $230 per month, subject to a spot-delivery agreement.[5] Under the spot-delivery agreement, Whitaker took the Dakota subject to financing.[6] He paid Montrose a $1,537 deposit on the $16,400 truck.[7] Just before taking possession of the Dakota, Whitaker sold his old truck and had a new radio installed in the Dakota.[8]

The deal, however, did not work out as Whitaker had planned. Just before signing the financing agreement, Whitaker dropped the truck off to have some scratches repaired.[9] When he returned to pick up the truck, Whitaker was informed that he would need a cosigner to obtain the lease financing.[10] His father agreed to cosign but later informed his son that the documents he signed referenced a monthly payment of $240 per month, not $230 as originally agreed.[11] Whitaker went to Montrose for an explanation, and the salesperson tried to get Whitaker to sign the new lease agreement with the increased payments.[12] Whitaker refused. Montrose kept the truck and told Whitaker that he forfeited his deposit because he had broken the contract.[13]

After Whitaker rejected Montrose Toyota's revised agreement, the dispute between the parties escalated. Whitaker returned the factory radio and asked Montrose to return his new radio and his deposit.[14] Montrose refused to return the deposit and stated that the radio was missing.[15] After repeated letters from both Whitaker and his attorney failed to obtain the return of his deposit, Whitaker sued Montrose for fraud, conversion, breach of contract, and violations of the CSPA.[16] After the suit was filed, Montrose returned Whitaker's deposit.[17]

The case went to trial, and Whitaker ultimately proved his CSPA claims against Montrose. At the completion of a jury trial, the court directed a verdict against Whitaker's fraud claims, and Whitaker voluntarily dismissed his breach-of-contract claim.[18] As a result, only the CSPA and conversion claims went to the jury.[19] The jury returned a verdict in Whitaker's favor on both claims, finding 11 separate CSPA violations.[20] The jury further stated that Montrose had acted knowingly and that the violations were not the result

of error.[21] Without delineating the basis for its damages, the jury awarded Whitaker $105,000 on the CSPA claim and a few hundred dollars on the conversion claim.[22] Because the violations were unconscionable, CSPA-related damages were trebled to $315,000. Moreover, the jury awarded Whitaker $155,056.70 in attorney's fees.[23] The end result was a $470,056.70 verdict against Montrose for violating the CSPA in a deal involving a $16,400 truck.

Montrose appealed and the appellate court reversed. The Ninth District Court of Appeals held that the CSPA allowed for economic damages only and that Whitaker had not proved any economic damages.[24] Accordingly, the court of appeals awarded Whitaker $200. The court also held that the trial court failed to state how it had determined attorney's fees and therefore remanded the case to the trial court to address the attorney's fees calculation.[25] Whitaker filed a discretionary appeal to the Ohio Supreme Court, which was granted, asking the court to reverse the court of appeals' decision that only economic damages were available under the CSPA.

THE SUPREME COURT'S HOLDINGS IN *WHITAKER*

The Ohio Supreme Court reversed the Ninth District Court of Appeals in a 5-1 decision, with Justice O'Donnell dissenting without opinion and Justice O'Connor not participating. The Supreme Court had never addressed the meaning of "damages" with respect to private actions under the CSPA.[26] In *Whitaker*, the Supreme Court resolved three damages-related issues.

First, the Supreme Court held that the term "damages," as used in Section 1345.09(A), means "all forms of compensatory relief, including noneconomic damages."[27] The Supreme Court based its analysis on the "usual, normal or customary" meaning of the word "damages."[28] To have held that only economic damages were available, the Supreme Court stated that it would have to read words into the statute, such as "pecuniary," "monetary," or "out-of-pocket expenses," which it refused to do.[29]

Second, the Supreme Court held that "actual damages," as used in Section 1345.09(B) for purposes of determining what should be trebled, includes economic and noneconomic damages, but not punitive damages.[30] The Supreme Court stated that the term "actual damages" means the same as compensatory damages.[31] Because compensatory damages include both economic and noneconomic damages, then "actual damages" also includes both types of damages. As a result, both economic and noneconomic damages can be trebled pursuant to Section 1345.09(B).[32]

To reconcile the use of the phrase "actual damages" in Section 1345.09(B) with its absence from Section 1345.09(A), the court stated that the term "damages" in Section 1345.09(A) allows "for an award of punitive damages for a CSPA violation committed with actual malice."[33] For purposes of trebling, however, punitive damages may not be trebled "because punitive damages are not 'actual damages.' "[34]

Third, with respect to Montrose's argument that the CSPA prohibited recovery for personal injuries, the Supreme Court decided that Section 1345.12(C) bars only claims that require proof of personal injury.[35] If the personal injury, such as mental anguish or emotional distress, is a consequence of actions that violate the CSPA, then the recovery for those injuries is included as noneconomic damages.[36]

Typically, a plaintiff must show that "a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case" to recover for "serious emotional distress."[37] A physical injury does not have to be shown, but the "emotional injuries sustained must be found to be both serious and reasonably foreseeable, in order to allow a recovery."[38] Examples of serious emotional distress include "traumatically induced neurosis, psychosis, chronic depression, or phobia."[39] The Supreme Court, however, rejected that standard of proof to recover damages for emotional distress in connection with a CSPA claim. The court held that a plaintiff may "recover under certain circumstances for emotional distress without having suffered a contemporaneous physical injury."[40] Therefore, if "the evidence shows intentional or malicious actions on the part of [the defendant]," the plaintiff "may recover damages for mental anguish or emotional distress as part of his CSPA remedy" without proving those damages, as would be required for the tort of emotional distress.[41]

After delineating the different definition of "damages," the Supreme Court then remanded the case back to the Ninth

District Court of Appeals to determine whether the evidence supports an award for noneconomic damages.[42] It will be interesting to see whether the judgment survives the remand.

WHITAKER'S POTENTIAL IMPACT

The potential loss associated with a transaction may now greatly exceed the value of that transaction if the plaintiff can prove a known CSPA violation. If a violation is found, those transactions could cost the total value of the transaction plus noneconomic damages, all multiplied by three. For example, in a transaction valued at no more than $16,400, Montrose Toyota suffered a judgment worth more than 28 times that amount, not to mention incurring all the legal fees and costs associated with defending itself. Because of the CSPA's broad scope, plaintiffs will continue to include a CSPA claim in actions alleging other claims, such as violations of the Lemon Law, FTC violations, and fraud claims. And now that the CSPA applies to the mortgage industry, expect to see CSPA claims included within actions against both mortgage lenders and mortgage servicers.

THE AFTERMATH OF THE *WHITAKER* DECISION

The *Whitaker* decision sent shock waves throughout the business community. Conventional wisdom believed that the CSPA did not provide for noneconomic damages. Once the Supreme Court held otherwise, fear of runaway damages became prevalent. Considering that Montrose Toyota was facing almost $500,000 in damages over a $16,400 truck, that was a reasonable fear.

The General Assembly quickly introduced an amendment to an existing bill—Senate Bill 117 ("SB 117")—that created a $5,000 cap on any noneconomic damages awarded as the result of a CSPA violation. Consumer groups and others—including then-Governor Taft and then-Attorney General Jim Petro—opposed the amendment. The amendment passed on December 14, 2006, despite those objections. The General Assembly adjourned on December 26, 2006, and the bill was sent to the governor on December 27. Governor Taft supported SB 117's limitation on lawsuits against lead-paint manufacturers but opposed the limits on noneconomic damages under the CSPA. As a result, he neither signed nor vetoed the bill. Instead, he allowed the bill to become law without signature pursuant to Article 2, Section 16, of the Ohio Constitution. That section allows a bill to become law without signature as follows:

> If a bill is not returned by the governor within ten days, Sundays excepted, after being presented to him, it becomes law in like manner as if he had signed it, unless the general assembly by adjournment prevents its return; in which case, it becomes law unless, within ten days after such adjournment, it is filed by him, with his objections in writing, in the office of the secretary of state. The governor shall file with the secretary of state every bill not returned by him to the house of origin that becomes law without his signature.

Governor Taft believed the 10 days expired on January 5, 2007, which is when he sent SB 117 to the secretary of state.

THE VETO

Governor Strickland replaced Governor Taft on January 8, 2007. After consulting with both Ohio's new attorney general, Marc Dann, and its new secretary of state, Jennifer Brunner, Governor Strickland decided that the 10-day period referenced in Article 2, Section 16, of the Ohio Constitution did not expire until January 8, 2007.

Accordingly, Governor Strickland requested the secretary of state to return SB 117 to him. Upon receipt, the governor vetoed the bill, stating, in part, that SB 117 "weakens both consumer protections and corporate accountability, and I will not allow it to go into law, in its current form, during my administration."[43] He further stated that he did not consider the $5,000 cap high enough to discourage bad behavior.[44]

Ohio House leaders protested after Strickland's veto, and the Ohio Senate's clerk refused to accept the veto. On February 2, 2007, the General Assembly filed a *mandamus* action in the Ohio Supreme Court, asking the court to order the secretary of state to ignore the veto. Meanwhile, as businesses attempt to manage risk, set reserves, and guide their employees, the ultimate liability related to CSPA actions remains unknown.

WHAT CAN BE DONE IN THE INTERIM?

Despite the current uncertainty of noneconomic damages, businesses with potential exposure to CSPA claims, which cover almost every transaction involving a consumer sale, including mortgages, need to reevaluate their potential exposure. Identifying how one does business in Ohio and whether those actions could violate the CSPA is a first step. Businesses should conduct a CSPA audit to (1) identify how they are conducting business; (2) determine if any of those actions may violate the CSPA; and (3) modify that conduct or attempt to contractually address the exposure. Otherwise, a blind eye could lead to a large judgment.

LAWYER CONTACTS

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NOTES

1. *Id.*
2. *Whitaker*, 2006-Ohio-5481 at ¶ 2.
3. *Id.*
4. *Id.* at ¶ 3.
5. *Id.*
6. *Id.* at n. 1.
7. *Id.* at ¶ 4. The value of the truck came from appellee Montrose Toyota's merit brief.
8. *Id.*
9. *Id.* at ¶ 5.
10. *Id.*
11. *Id.*
12. *Id.* at ¶ 6.
13. *Id.*
14. *Id.* at ¶¶ 6–7.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at ¶ 8.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Whitaker v. M.T. Automotive, Inc.* (9th Dist. App. 2004), 9th Dist. App. No. 21836, 2004-Ohio-7166 at ¶ 19.
25. *Id.* at ¶ 30.
26. *Whitaker*, 2006-Ohio-5481 at ¶ 10.
27. *Id.* at Item 1 of Syllabus, ¶ 15.
28. *Id.* at ¶ 15.
29. *Id.*
30. *Id.* at Item 2 of Syllabus, ¶ 22.
31. *Id.* at ¶¶ 18, 22.
32. *Id.* at ¶ 22.
33. *Id.* at ¶ 23.
34. *Id.*
35. *Id.* at ¶¶ 29–30.
36. *Id.* at ¶ 31.
37. *Paugh v. Hanks*, 6 Ohio St. 3d 72, 78, 451 N.E.2d 759 (Ohio 1983).
38. *Id.* at 77–78.
39. *Id.* at 78.
40. *Whitaker*, 2006-Ohio-5481 at ¶ 31.
41. *Id.*
42. *Id.* at ¶ 33.
43. Press release dated January 8, 2007, by Governor Ted Strickland, located online at http://governor2.ohio.gov/News/January2007/tabid/103/Default.aspx.
44. Gongwer News Service, Ohio Report, Vol. 76, Report 8, Article 1 (Jan. 11, 2007).