This Can't Be Fair! How Vague Legal Standards Can Fuel Big Damages Against Consumer-Goods Companies

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I. Introduction

Manufacturers, distributors, and retailers of consumer goods are prime targets for state-law claims of unfair or deceptive trade practices. These statutory claims usually combine two explosive ingredients: (1) a private right of action for enhanced damages, including treble damages, and (2) an open-ended conduct standard.

Given these features, statutory claims of unfairness and deception have become ubiquitous in consumer-goods litigation, including product-liability cases.

This manuscript first provides an overview of the history and characteristics of these statutes—statutes found in the laws of all fifty states. The manuscript then takes a closer look at two questions about claims for unfairness and deception that might be of special interest for consumer-goods companies:

1. When, if ever, can high prices alone violate these statutes?
2. When can a breach of an express warranty violate these statutes?

II. What Are These Statutes?

A. Overview

In the 1960s and early 1970s, states began to enact consumer-protection statutes, commonly referred to as "unfair or deceptive trade practices" statutes. Most of these statutes are loosely based on section 5 of the FTC Act.

Every state has some type of unfair-trade-practices statute. All states have a statute that prohibits deceptive trade practices, such as false or misleading advertisements. Most of those statutes also prohibit unfair or unconscionable acts or practices. Those statutes have the following key features:

- All states allow private parties to sue under some circumstances.
- The majority of states allow recovery by non-consumers.
- Plaintiffs can recover treble damages in twenty-five states.
- Plaintiffs can recover attorney fees in forty-six states.
- Plaintiffs can file class actions in forty-one states.

B. Approaches to Defining "Unfair" and "Deceptive"

State unfair-trade-practices statutes take two basic approaches to defining "unfair" and "deceptive" conduct:

1. Open-ended statutes modeled after the FTC Act, and
2. Statutes with a "laundry list" of unfair or deceptive acts.

1. Open-ended Statutes

Many states have modeled their statutes on section 5 of the FTC Act. Section 5 states the following: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." 15 U.S.C. §45(a)(1) (2012).

The following are examples of state statutes modeled after section 5:

- Connecticut: "No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Conn. Gen. Stat. §42-110b(a).
- North Carolina: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. §75-1.1(a).
- Florida: "Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." Fla. Stat. §501.204(1).
- South Carolina: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." S.C. Code Ann. §39-5-20(a).

At least thirty-two states look to FTC decisions and federal caselaw under section 5 as a guide. *See* 1 Dee Pridgen & Richard M. Alderman, *Consumer Protection and the Law* app. 3B (2017-2018 ed.) (listing states whose unfair-trade-practices statutes expressly refer to section 5 of the FTC Act).

2. "Laundry List" Statutes

Some states also use a "laundry list" of conduct to define specific types of unfair or deceptive practices. These statutes typically enumerate certain prohibited practices and then *also* generally prohibit "any other practice that is unfair or deceptive." For example:

- Michigan's statute defines "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce" to include, among other things, acts "[c]ausing a probability of confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services." Mich. Comp. Laws §445.903(1)(a).
- Maryland's statute defines "[u]nfair or deceptive trade practices" to include, among other things, a "[f]alse or misleading representation of fact which concerns . . . [a] price in comparison to a price of a competitor or to one's own price at a past or future time." Md. Code Ann., Com. Law §13-301(6)(ii).
- Texas's statute aims "to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty," and includes, among other things, "representing that a guaranty or warranty confers or involves rights or remedies which it does not have or involve." Tex. Bus. & Com. Code Ann. §§17.44(a), .46(b)(20).
- California's statute includes a complex structure that creates a private claim for violations of nearly any statute or regulation—even ones with no private right of action of their own. Cal. Bus. & Prof. Code §17200.

A few states, in contrast, restrict private causes of action to a list of specifically enumerated practices contained in the laundry list. These states do not employ a generalized standard for unfairness or deception. For example:

- Maryland's statute includes a detailed, multi-part definition, with examples. Md. Code Ann., Com. Law §13-301.
- Oregon's statute is restricted to acts listed in the statute or rules issued by the state's attorney general. Or. Rev. Stat. §§646.607, .608.
- Indiana's statute is restricted to acts and statutory violations listed in the statute. Ind. Code §§24-5-0.5-3, -10, -12.

- Mississippi's statute is restricted to a list of thirteen prohibited acts. Miss. Code Ann. §75-24-5(2). The attorney general has discretion to enforce conduct outside of that list. *Id.* §75-24-9.
- South Dakota's statute is restricted to acts listed in the statute, and expressly requires knowledge as an element of every deceptive practice. S.D. Codified Laws §§37-24-6 to -8.

III. When Can High Prices Violate These Statutes?

A. Unconscionably High Prices

The vague standard of "unfair" conduct might lend itself to the argument that a consumer-goods manufacturer or retailer is charging a price to consumers that is unfairly high.

Do courts entertain this type of claim?

As a general matter, courts appear to be reluctant to conclude that charging high prices—without more—is unfair. After all, attempts to control consumer prices under an unconscionability theory go against the free-market philosophy.

With that said, many state unfair-trade-practices statutes prohibit *unconscionable* pricing, or unconscionable practices in general. While there are variations in how states define "unconscionable," an unconscionable practice typically is described as one that shows no regard for conscience or offends the sense of justice, decency, or reasonableness. *Unconscionable*, *Black's Law Dictionary* (10th ed. 2014).

Courts have applied these laws in a variety of situations.

Some courts have concluded that charging unreasonably high prices to low-income or disadvantaged consumers is an unfair practice:

- A Connecticut court invalidated a lease-to-buy arrangement when a consumer agreed to pay $1,268 for a television with a retail price of $499. *Murphy v. McNamara*, 416 A.2d 170, 193–94 (Conn. Super. Ct. 1979). The court held that "an agreement for the sale of consumer goods entered into with a consumer having unequal bargaining power, which agreement calls for an unconscionable purchase price, constitutes an unfair trade practice under [Connecticut's unfair-trade-practices statute]." *Id.* at 193.
- The Supreme Court of New Jersey concluded that a company violated the state's unfair-trade-practices statute by engaging in door-to-door sales in low-income neighborhoods of an "educational package" of books and related materials at an unfairly high price. *Kugler v. Romain*, 279 A.2d 640, 652–53 (N.J. 1971). The court found that the "seller's price was not only roughly two and one half times a reasonable market price" but also that the books were "practically worthless" for their represented purpose. *Id.* at 653. The court explicitly did not hold that the high price in and of itself was deceptive; rather, the court based its holding on the price combined with the circumstances—the buyers were "disadvantaged and poorly educated people, who [were] wholly devoid of expertise and least able to understand or to cope with the 'sales oriented,' 'extroverted' and unethical solicitors bent on capitalizing upon their weakness." *Id.* at 648.

Claims for high pricing, however, are not limited to low-income consumers. In fact, some courts have extended protections to middle-class and even wealthy consumers:

- A California court held that, as a pleading matter, a car-rental company's charge of $6 a day for collision-damage waivers could conceivably constitute an unconscionable charge under California's unfair-trade-practices law. *Truta v. Avis Rent A Car Sys., Inc.*, 238 Cal. Rptr. 806, 820 (Ct.

App. 1987). The court concluded that the driver's allegation that the price for the waiver was "far in excess of a price that would be determined in a competitive business environment" was "sufficient to raise a colorable claim of substantive unconscionability." *Id.* at 820–21.

- The Texas Court of Appeals awarded damages to the purchaser of a $55,000 Mercedes-Benz with title problems under Texas's prohibition on unconscionable practices resulting in "gross disparity between the value received and the consideration paid in a transaction involving transfer of consideration." *Jim Stephenson Motor Co. v. Amundson*, 711 S.W.2d 665, 670 (Tex. Ct. App. 1986). The court found sufficient evidence of unconscionability, noting that the plaintiffs' acts caused the purchaser to pay for a car that was not in deliverable condition and for which he was not reimbursed. *Id.*
- The Supreme Court of Connecticut held that excessive charges to a customer's credit card for rental-car repairs were an unfair trade practice. *Votto v. Am. Car Rental, Inc.*, 871 A.2d 981, 985 (Conn. 2005). Specifically, the court found that the defendant's use of the customer's signature on a blank credit-card slip to charge the customer more than twice the amount of the estimated repair cost was "without question unscrupulous, immoral and oppressive." *Id.*

In most cases, however, courts have continued to reject unfair-trade-practices claims based on unconscionably high prices.

In *Batson v. Live Nation Entertainment, Inc.*, for example, the United States Court of Appeals for the Seventh Circuit observed that "charging an unconscionably high price generally is insufficient to establish a claim of unfairness." 746 F.3d 827, 833 (7th Cir. 2014) (quoting *Robinson v. Toyota Motor Credit Corp.*, 775 N.E.2d 951, 961 (Ill. 2002)); *see also Saunders v. Mich. Ave. Nat'l Bank*, 662 N.E.2d 602, 608 (Ill. App. Ct. 1996) ("[C]harging an unconscionably high price generally is insufficient to establish a claim for unfairness under the Consumer Fraud Act." (citing *People ex rel. Hartigan v. Knecht Servs., Inc.*, 575 N.E.2d 1378 (Ill. App. Ct. 1991))).

These cases implicitly—or, in some cases, expressly—rest on the reasoning that "[i]n most cases, there is nothing unfair or deceptive about freely entering a transaction on the open market." *Bumpers v. Cmty. Bank of N. Va.*, 747 S.E.2d 220, 228 (N.C. 2013).

On that note, a New Jersey state court explained that "[w]e live in a capitalist society in which prices are ordinarily established by the marketplace rather than by a government agency or the courts." *Quigley v. Esquire Deposition Servs., LLC*, 975 A.2d 1042, 1048 (N.J. Super. Ct. App. Div. 2009) (citing *Turf Lawnmower Repair, Inc. v. Bergen Record Corp.*, 655 A.2d 417, 429 (N.J. 1995)). Thus, the court continued, "[s]ellers of goods and services generally may charge whatever the market will bear so long as they do not engage in deceptive or other unfair sales practices." *Id.*

B. Deceptive Pricing

Claims for high pricing commonly show up not as claims for unfairness, but as claims about *deceptive* pricing.

Deceptive pricing is regulated by both the FTC and state statutes.

The relevant FTC regulation provides that discount and sale prices must have been "openly and actively offered for sale, for a reasonably substantial period of time, in the recent, regular course of [the advertiser's] business, honestly and in good faith—and, of course, not for the purpose of establishing a fictitious higher price on which a deceptive comparison might be based." 16 C.F.R. §233.1(b).

Caselaw reveals two significant categories of deceptive-pricing claims: (1) discount and sales pricing, and (2) price comparisons.

1. Discount and Sales Pricing

Claims relating to discount and sales pricing sometimes are brought under state unfair-trade-practices statutes. These claims arise when a retailer "marks down" an item from the retailer's former price. These claims are especially common under California's deceptive-pricing law. *See* Cal. Bus. & Prof. Code §17501.

For example, J.C. Penney was sued in the Central District of California for allegedly falsely advertising "original" prices on sales merchandise to make the sales merchandise appear to have a deeper discount. *See Spann v. J.C. Penney Corp.*, 307 F.R.D. 508, 513–14 (C.D. Cal. 2015). The plaintiff alleged that J.C. Penney's original price should have been equal to the prevailing market price, but instead was higher than that price. *Id.* at 524. After the court denied J.C. Penney's motions to dismiss and motion for summary judgment and granted the plaintiff's motion for class certification, the parties reached a $50 million settlement. *See Spann v. J.C. Penney Corp.*, 314 F.R.D. 312, 317 (C.D. Cal. 2016) (describing the settlement).

Claims relating to former pricing also have been brought under state unfair-trade-practices statutes. For instance, consumers of "tween" merchandise sued Justice Stores in the Eastern District of Pennsylvania under multiple state unfair-trade-practices statutes for allegedly falsely advertised sales, such as "40 percent off entire store" in signs, catalogues, and on the store's website, even though the products were never offered at the purported regular price. *See Rougvie v. Ascena Retail Grp.*, No. 15-cv-724, 2016 WL 4111320, at *1 (E.D. Pa. July 29, 2016). Justice Stores agreed to create a $50.8 million settlement fund for the claims of class members who bought products advertised at the falsely discounted rate. *Id.*

2. Price Comparisons

Deceptive price comparisons sometimes trigger pricing-based claims for unfair or deceptive trade practices. Price comparisons are price tags that include a purchase price and a "compare at" market price. For example, a consumer might claim that she no longer wanted her purchase once she realized that the original price on the tag was not indicative of the actual market value of the item.

Courts generally reject this induced-purchase theory of injury, despite its inherent appeal.

For example, in *Shaulis v. Nordstrom, Inc.*, a consumer brought a putative class action against Nordstrom arising out of the department store's advertising of "outlet store" pricing. 865 F.3d 1, 4 (1st Cir. 2017). The plaintiff bought a sweater at a Nordstrom Rack outlet store. *Id.* at 5. The price tag on the sweater listed a purchase price of $49.97 and a "compare at" price of $218—a 77 percent markdown. *Id.* The plaintiff claimed that the price tag was deceptive because the "compare at" price represented a bona fide price at which Nordstrom or another retailer formerly sold the sweater, but in reality, no store ever sold or intended to sell the sweater at the "compare at" price. *Id.*

The United States Court of Appeals for the First Circuit held that the plaintiff had no claim under the Massachusetts Consumer Protection Act because there was no injury. *Id.* at 13. The First Circuit explained that "Massachusetts courts [have] declined to find injury under [the state's unfair-trade-practices statute] where the plaintiff relies entirely on her subjective belief as to the value received," and that "federal courts also have routinely rejected claims of injury under [that statute] that were not grounded in any objective measure." *Id.*

In another case, QVC was hit with a class action for its allegedly deceptive price comparisons under Illinois's unfair-trade-practices statute. In *Mulligan v. QVC, Inc.*, the plaintiffs claimed that QVC's listed "retail value" overstated the prevailing market price for certain products and caused customers to falsely believe that they were receiving a bargain by purchasing at lower QVC prices. 888 N.E.2d 1190, 1192 (Ill. App. Ct. 2008). The Illinois Appellate Court held that the lead plaintiff failed to prove that she was actually deceived by QVC's alleged misrepresentations. *Id.* at 1199. Notably, the plaintiff did not dispute that she continued to purchase products from QVC even after filing the lawsuit, and "acknowledge[d] that a consumer could not legitimately

claim to be actually deceived by QVC's listed retail values if the consumer continued to purchase the products after suing QVC." *Id.* at 1193.

C. Can High Prices *Ever* Violate These Statutes?

As discussed above, in most instances, high prices alone do not violate state unfair-trade-practices statutes.

Some state statutes, however, have statutory definitions or carve-outs that allow a claim for unfair or deceptive trade practices based on pricing alone.

For example, Michigan's Consumer Protection Act includes this broad language in its laundry list of "[u]nfair, unconscionable, or deceptive" conduct: "Charging the consumer a price that is grossly in excess of the price at which similar property or services are sold." Mich. Comp. Laws §445.903(1)(z). Many states have a similar provision that applies only during a declared state of emergency or disaster. Michigan's statute applies even when there are no emergency conditions.

In Illinois, regulations on deceptive pricing trigger a violation of the state's unfair-trade-practices statute. For instance, one regulation states that "[i]t is an unfair or deceptive act for a seller to compare his price with the price at which he or any other seller is offering a comparable product" unless (1) "[t]he comparable product is currently being offered at the stated higher comparative price by the seller or by a reasonable number of other sellers in the sellers' trade area," and (2) "[t]here are no substantial differences in quality, grade, materials, or craftsmanship between the comparable product and the product offered by the seller." Ill. Admin. Code tit. 14, §470.270(a)–(b).

IV. When Can a Breach of an Express Warranty Violate These Statutes?

A. Examples of State Approaches

In the majority of states, breaching an express warranty—without more—is not unfair or deceptive. Courts treat warranties like contracts; in most states, a contract claim alone does not give rise to a claim for unfair or deceptive trade practices.

North Carolina and Connecticut, for example, require "substantial aggravating circumstances" for a breach-of-contract claim to violate an unfair-trade-practices statute. *See, e.g.*, *Ellis v. La.-Pac. Corp.*, 699 F.3d 778, 787–88 (4th Cir. 2012) (holding that under North Carolina law, a breach of warranty alone—even an intentional breach—is not an unfair or deceptive trade practice unless there are substantial aggravating circumstances attendant to the breach); *City of Bridgeport v. Aerialscope, Inc.*, 122 F. Supp. 2d 275, 277 (D. Conn. 2000) (stating that, for a breach of contract also to serve as an unfair trade practice, a plaintiff must show substantial aggravating circumstances surrounding the breach).

In Massachusetts, a plaintiff must "invoke something more than a mere breach of warranty to plead a plausible [unfair-trade-practices] claim . . . [the plaintiff] must allege a breach of warranty 'plus.'" *Utica Nat'l Ins. Grp. v. BMW of N. Am., LLC*, 45 F. Supp. 3d 157, 161 (D. Mass. 2014); *see also Sharp v. Hylas Yachts, LLC*, 872 F.3d 31, 50 (1st Cir. 2017) ("We agree . . . that the Massachusetts Attorney General's regulation does not require us to find that any and all breaches of warranty are necessarily violations of [Massachusetts's unfair-trade-practices statute].").

Some states, however, have statutes that make a breach of an express warranty a per se unfair or deceptive trade practice. Texas is an example of such a state. *See* Tex. Bus. & Com. Code Ann. §17.44(a).

B. Examples of Warranty-based Claims for Unfair or Deceptive Trade Practices

1. Deceptive Labeling

When a warranty breach can give rise to a claim for unfair or deceptive trade practices, a leading theory for that type of claim—especially related to consumer goods—is based on the packaging or labeling of the goods. This type of claim has become an especially popular method of attacking the labeling or packaging of food products.

For instance, in *In re 100 percent Grated Parmesan Cheese Marketing & Sales Practices Litigation*, the plaintiffs claimed that they were misled by parmesan-cheese labels because the products actually contain ingredients (like preservatives) other than cheese. No. 16 C 5802, MDL 2705, 2017 WL 3642076, at *8 (N.D. Ill. Aug. 24, 2017). The court concluded that the plaintiffs' "express warranty claims suffer[ed] from the same fatal flaw as their consumer protection claims: A reasonable consumer would not understand Defendants' labels to warrant that the products contain only cheese." *Id.*

As additional illustrative examples, consider the following:

- *Sugawara v. PepsiCo, Inc.*, No. 2:08-cv-01335-MCE-JFM, 2009 WL 1439115 (E.D. Cal. May 21, 2009). The plaintiff claimed that the manufacturer of Cap'n Crunch Crunchberries cereal breached an express warranty and committed an unfair or deceptive trade practice by using the word "berry" in the product name when there are no real berries in the cereal. *Id.* at *1. Both claims failed because, as the court observed, "there is no such fruit growing in the wild or occurring naturally in any part of the world." *Id.* at *5. The manufacturer therefore did not promise the plaintiff that the product contained fruit.
- *Williams v. Gerber Prods. Co.*, 552 F.3d 934 (9th Cir. 2008). The plaintiffs sued Gerber for deceptively marketing its Fruit Juice Snacks by, among other things, displaying images of fruit on the product packaging when in fact the product did not contain fruit. *Id.* at 936. The Ninth Circuit agreed that the packaging violated California's unfair-competition statute because the product could likely deceive a reasonable consumer. *Id.* at 939.
- *Sheeley v. Wilson Sporting Goods Co.*, No. 17-cv-3076, 2017 WL 5517352 (N.D. Ill. Nov. 17, 2017). The plaintiffs filed a putative class action against Wilson Sporting Goods for breach of warranty and unfair and deceptive trade practices, alleging that Wilson falsely labeled some of its baseball bats as USSSA compliant. *Id.* at *1. The court dismissed the plaintiffs' fraud-based unfair-trade-practices claim on the ground that the plaintiffs did not "allege the who, what, when, where, and how of the allegedly fraudulent misrepresentation." *Id.* at *3. The court allowed one plaintiff's breach-of-warranty claim (governed by Illinois law) to proceed, but dismissed the other plaintiff's warranty claim because the claim was governed by Texas law, which requires direct privity for breach-of-express-warranty claims. *Id.* at *4.
- *Gabriele v. ConAgra Foods, Inc.*, No. 5:14-CV-05183, 2015 WL 3904386 (W.D. Ark. June 25, 2015). The plaintiffs sued ConAgra Foods based on labeling used in ConAgra's marketing and advertising of Hunt's tomato products as "100 percent Natural" and "free of artificial ingredients and preservatives." *Id.* at *1. The court held that, because the alleged mislabeling of products is conduct that is regulated by the FDA and the Arkansas Board of Health, there is no private right of action under Arkansas's unfair-trade-practices statute. *Id.* at *7. The court allowed the claim for breach of express warranty to proceed on the ground that the plaintiff identified affirmative statements that she alleged to be false. *Id.* at *8.

2. Other Examples

Claims for unfair or deceptive trade practices based on breaches of express warranties can show up outside of the labeling context, too.

For example, in *Boyd v. TTI Floorcare North America*, the United States District Court for the Northern District of Alabama explored the question whether a product's name alone can create an express warranty under Alabama law. 230 F. Supp. 3d 1266, 1276 (N.D. Ala. 2011), *aff'd per curiam sub nom. Green v. Bissell Homecare, Inc.*, 476 F. App'x 238 (11th Cir. 2012). The plaintiffs argued that TTI and Bissell, by naming their vacuum cleaners SteamVac or PowerSteamer, expressly warranted that the vacuums would use or produce steam when cleaning. *Id.* at 1278. The court held that no warranty was created based merely on the names of the vacuums. *Id.* At the hearing on the defendants' motions to dismiss, the plaintiffs asserted a new theory—for unfair or deceptive trade practices. *Id.* at 1279. The court refused to "fashion a remedy for a claim" that the plaintiffs had not alleged, but was careful to note that the court "stop[ped] short of holding that the names" of the vacuums were not misleading. *Id.*

When a breach of express warranty is pleaded as a claim for unfair or deceptive trade practices, some courts have held that lack of privity is no defense.

For instance, in *Utah v. GAF Corp.*, the Supreme Court of Utah held that the State could recover from a manufacturer under Utah's unfair-trade-practices statute for damages to consumers caused by defective shingles, and for breach of express warranty based on promotional materials provided by the manufacturer to retailers. 760 P.2d 310, 313–14 (Utah 1988); *see also Jacobs v. Yamaha Motor Corp., U.S.A.*, 649 N.E.2d 758, 762–63 (Mass. 1995) (holding that a consumer could sue a manufacturer for both unfair or deceptive trade practices and breach of express warranty for an allegedly defective motorcycle).

V. Conclusion

In sum, state-law claims of unfair or deceptive trade practices against consumer-goods manufacturers, distributors, and retailers are pervasive in consumer-goods and product-liability litigation. The private right of action and open-ended conduct standards in these statutes demand attention. This is particularly true for unfair-trade-practices claims based on high prices and warranty violations, as the law in these areas continues to evolve.