

New Cure Provision will Impact Ohio Consumer Sales Practices Act Litigation

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On July 3, 2012 a statutory provision that has the potential to greatly impact the **Consumer Sales Practices Act (“CSPA”)** took effect. The new provision, Ohio Revised Code § 1345.092, was signed into law by **Governor John Kasich** on April 2, 2012 and allows “suppliers” in consumer transactions to make a cure offer to consumers who have filed a claim under the CSPA. If a legally sufficient cure offer is filed and served, but rejected by a consumer who is not awarded something greater by a judge, jury, or arbitrator, the consumer is not entitled to an award of treble damages, court costs, or attorneys’ fees that he or she may have otherwise been able to recover. In other words, this new provision provides for an “offer of judgment” type of mechanism to balance aggressive consumers and their counsel from “overlitigating” a matter despite receiving a reasonable settlement offer. The statute is also intended to incentivize businesses to be realistic about liability exposure and offer early meaningful resolutions to consumers.

The new statute states that within 30 days after service of process is completed upon a supplier by a consumer, the supplier may deliver a cure offer to the consumer or to the consumer’s attorney. The cure offer must be made by certified mail, with return receipt requested, and must include language that explains the resolution being offered, and must clearly separate the offer into the following components:

1. A supplier’s offer that consists solely of monetary compensation to resolve alleged violations of the CSPA claim;
2. Reasonable attorney’s fees necessary to filing the original complaint not to exceed \$2,500; and,
3. Court costs incurred by the consumer that are related to the filing of the initial complaint.

The cure offer must also contain a prominent notice that clearly and conspicuously contains the disclosure listed in O.R.C. § 1345.092(D)(2).

A consumer has 30 days after the date the consumer or the consumer’s attorney receives a cure offer to notify the supplier or the supplier’s attorney of acceptance or rejection of the offer. The consumer must file a response with the court in which the action was commenced and serve the

notice to the supplier. Failure to respond within 30 days will serve as a rejection of the offer.

If the consumer does not accept a cure offer and a court or arbitrator awards the consumer actual economic damages that are not greater than the value of the remedy included in the cure offer, then the consumer is prohibited from recovering the following under the CSPA:

1. Treble damages;
2. Court costs incurred after receipt of the cure offer; and,
3. Attorney's fees incurred by the consumer after receipt of the cure offer.

Given that the statute compares the "actual economic damages" at the time of the cure offer and at the time a judgment is awarded, the cure offer need not contain treble damages under the statute.

If the consumer accepts the cure offer, then he or she is required to request an amount, up to \$2,500, from the supplier to pay attorney's fees. However, the request for attorneys' fees must be accompanied by bills or other documents evidencing these amounts. If the supplier finds the requested amounts to be reasonable, then it should pay that amount. However, the supplier may seek, within 10 days of the consumer accepting the cure offer, a ruling from the court appointed to the case for a determination of reasonable fees, if it wants to contest the reasonableness of the fee demand.

The provisions of the cure offer statute provide a much-needed balancing mechanism to defendants who are willing to offer a reasonable early resolution to a CSPA action. Prior to the effectiveness of this Act, a consumer or consumer's attorney knew that treble damages and attorneys' fees were available for a successful claim, so consumers could be emboldened to demand unreasonably high damages and attorneys' fees in settlement negotiations if they were confident that they had a successful claim. This approach left defendants with the unenviable choice of either paying an unreasonably high settlement demand at the outset or litigate the claim against the backdrop of increasing plaintiffs' attorneys' fees. The cure offer statute, however, takes away the incentive for a consumer to turn down a reasonable offer, much like an "offer of judgment" mechanism. The Act also creates a strong incentive for a supplier to make a reasonable offer within 30 days of the consumer filing suit.

What is left to be determined is how this provision will impact the frequency of actions under the CSPA and how it will impact other concurrently oft-asserted causes of action, such as Ohio's Lemon Law or other consumer protection statutes.

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