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Businesses Should Re-examine Consumer Contracts After Pennsylvania Supreme Court Allows Unfair Trade Practices Claim By Out-of-State Plaintiff

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The Pennsylvania Supreme Court has unanimously held that the language of the Unfair Trade Practices and Consumer Protection Law (UTPCPL) does not preclude its being invoked by out-of-state plaintiffs alleging out-of-state injuries caused by out-of-state conduct. See Danganan v. Guardian Prot. Servs., No. 36 WAP 2017 (Pa. Feb. 21, 2018). The decision is notable not only because it diverges from federal decisions that had addressed the issue, but also because it warrants re-examining choice-of-law and forum-selection provisions in consumer contracts.

The Case

The *Danganan* case concerns fees for home-security services in Washington, D.C. The Plaintiff unsuccessfully tried to cancel his home-security contract before its initial term expired, and filed suit because the Defendant continued to charge him after he had sold and vacated the home. But the Plaintiff did not allege that the Defendant's conduct amounted to a breach of his contract, which apparently "authorized ongoing charges through the contract's term, regardless of cancellation attempts." *Id.* at 2. Instead, he alleged that it amounted to an unfair business practice.

Citing his contract's forum-selection provision (which required that the party filing suit do so where the other party was located) and choice-of-law provision (which stated that his agreement was "governed by the laws of Pennsylvania"), the Plaintiff filed suit in Pennsylvania state court and asserted a claim under the UTPCPL (as well as another statutory claim not relevant here). Because the Plaintiff purported to represent not only himself but also a nationwide class of other customers, the Defendant removed the case to federal court pursuant to the Class Action Fairness Act. *Id.* at 2-3.

The case proceeded in the United States District Court for the Western District of Pennsylvania, which ultimately dismissed the UTPCPL claim with prejudice. It held that there was no "nexus" between the Plaintiff (a current resident of California and former resident of Washington, D.C.), the challenged conduct (charging fees for home-security services in Washington, D.C.), and Pennsylvania (the location of the Defendant's headquarters) that would allow the Plaintiff to invoke

the Pennsylvania statute. It cited other federal court decisions that had held that the UTPCPL cannot be invoked by out-of-state plaintiffs, and found that the result should not change merely because the Defendant was headquartered in Pennsylvania and the contract had been drafted in Pennsylvania. *Id.* at 3-4.

The Plaintiff then took an appeal to the United States Court of Appeals for the Third Circuit, which certified two questions to the Pennsylvania Supreme Court. The certified questions can be paraphrased as: (1) can an in-state defendant be sued under the UTPCPL by an out-of-state plaintiff alleging out-of-state injuries caused by out-of-state conduct; and (2) if such a plaintiff cannot normally assert such a claim, can it do so if the parties' contract calls for Pennsylvania law to apply? *Id.* at 4-5.

The Decision

The Pennsylvania Supreme Court answered the first question in the affirmative and, having done so, did not reach the second question. Its analysis focused almost exclusively on the text of the statute, which: (1) allows any "person" to file suit; (2) prohibits any unfair or deceptive practices "in the conduct of any trade or commerce"; and (3) defines "trade" and "commerce" as advertising, offering, selling or distributing "any services and any property . . . wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth." 73 P.S. §§ 201-2(2), 201-2(3), 201-3, 201.9.2(a). The Plaintiff argued that that language extends to any "person" without reference to where he may have resided or been injured, and to any "trade or commerce" without reference to where it may have originated or caused injury.

The Pennsylvania Supreme Court agreed, relying primarily on two passages in the statutory text. The court first found that the "plain language definitions of 'person' and 'trade' and 'commerce' evidence no geographic limitation or residency requirement relative to the Law's application." Opinion at 12. It then concluded that, by defining "trade" and "commerce" by reference to "any services and any property . . . **wherever situate** . . . **includ[ing]** any trade or commerce directly or indirectly affecting the people of this Commonwealth," the General Assembly had chosen to enact broad legislation that was not limited geographically. *Id.* at 13. Those textual hooks—taken in concert with the court's belief that the UTPCPL is a "remedial" statute that should be given a "liberal" reading, *id.* at 13, and that "the people of this Commonwealth" can be "affected" even if conduct is "aimed at non-residents and occur[s] wholly outside the state's borders," *id.* at 14—ultimately persuaded the court to reject the Defendant's more cabined interpretation and adopt the Plaintiff's more expansive one.

But that does not necessarily mean that any plaintiff—or even this Plaintiff, for that matter—will necessarily be able to invoke the UTPCPL on behalf of every other consumer in the country. On the contrary, the court acknowledged that the trial court's "sufficient nexus" test had merit as a matter of "policy," and took care to reject the notion that "any person around the globe" can file a UTPCPL action "without any connection to the Commonwealth." *Id.* at 14. Although it found that the "sufficient nexus" test had no "textual basis" in the statute, it also explained that limits can be found in "other legal precepts" such as "jurisdictional principles and choice-of-law rules," which it left for the trial court to address in the first instance. *Id.* at 14-15.

That part of the court's opinion is undoubtedly correct, as due process requires that a state "must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981); *see also Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 540-41 (1935) (explaining that the Due Process Clause prohibits states from "control[ling] the legal

consequences of a tortious act committed elsewhere"). Indeed, the unconstitutionality of applying state law extraterritorially has been well-established for more than a hundred years. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996) ("[N]o single State could . . . impose its own policy choice on neighboring States."); *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 335 (1989) (explaining that the Constitution has a "special concern . . . with the autonomy of the individual States within their respective spheres"); *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends."); *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the [S]tate which enacts them, and can have extra-territorial effect only by the comity of other States."); *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction."). Although the court could have obviated the need to address these and other constitutional questions by employing standard principles of constitutional avoidance and adopting the narrow reading proposed by the Defendant, the lower courts will now need to grapple with those questions in this case and many others.

The Takeaway

One of the other "legal precepts" that the court recognized as limiting the application of the UTPCPL is "choice-of-law" rules. Opinion at 14. That counsels strongly in favor of giving a fresh look to choice-of-law and forum-selection provisions in customer-facing contracts.

In business-to-business contracts it makes abundant sense to agree that all claims be resolved in one forum under the laws of one state. But business-to-consumer contracts must account for the very real possibility that a business may one day find itself opposing an attempt to certify a nationwide class. In that context, having consumers file suit in their own states under their own states' laws is not only consumer-friendly but also business-friendly, as the need to conduct plaintiff-by-plaintiff choice-of-law analyses and then apply the laws of 50 different states makes many nationwide classes unmanageable—and hence uncertifiable. *See, e.g., In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995) (reversing certification and rejecting proposal to conduct "a single trial before a single jury instructed in accordance with no actual law of any jurisdiction—a jury that will receive a kind of Esperanto instruction, merging the negligence standards of the 50 states and the District of Columbia").

Agreeing that one state's law will govern every contract—and, plaintiffs will argue, every claim—of every customer in the country takes those arrows out of a defendant's quiver. And it can undermine extraterritoriality objections by creating the appearance of a catch-22. In *Danganan*, for example, the Plaintiff argued that the Defendant was trying to avoid liability to out-of-state customers by requiring that they invoke the law of a state (Pennsylvania) that the Defendant thought they could not invoke—something he colorfully called a "tough noogies" defense.

Finally, having customers file suit in and under the law of the state where they reside is already widely practiced and generally accepted in the consumer-contracting space. Indeed, applying the law of such states is the default rule for consumer protection cases, see Restatement (Second) of Conflicts § 148, and allowing customers to file suit where they reside is generally the preference of arbitration organizations such as the AAA and JAMS. Businesses that leverage these defaults—either by relying on them implicitly or incorporating them explicitly—should still have strong defenses to the certification of nationwide class actions under the UTPCPL. As should businesses that have consumer-friendly arbitration agreements with class action waivers, which were not at issue in

the *Danganan* decision.

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