

# ANTITRUST & TRADE PRACTICES

## *Alert*

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## Tennessee Supreme Court Says No To Class Action Claims Brought Under the Tennessee Consumer Protection Act

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### Key Points

- Private litigants cannot file class action claims for alleged violations of the Tennessee Consumer Protection Act.
- The issue is now closed in Tennessee unless the state legislature decides to reopen it.

### Background

Every business knows the risks involved with defending a class action lawsuit. A class action can aggregate the claims of hundreds, thousands or even millions of people in a single case. Once a class is certified, the magnitude of a potential loss can make it extremely difficult for a defendant to take a case to trial, even if the plaintiff's case is weak or the defendant's defenses are strong.

In recent years, the courts in Tennessee have seen numerous class action lawsuits brought under the Tennessee Consumer Protection Act (TCPA).<sup>1</sup> The TCPA prohibits the use of "unfair or deceptive acts or practices," and lists 33 specific practices that are deemed to be unlawful along with a catch-all section that prohibits any other unfair or deceptive act or practice.<sup>2</sup> Tennessee courts have construed the TCPA liberally and have found it to apply to a wide range of practices. The TCPA allows a person or business that has suffered a loss of money or property from the use of unfair or deceptive acts or practices by another person or business to bring an action "individually" to recover actual damages.<sup>3</sup> A successful plaintiff may also be entitled to recover attorney's fees and up to three times the actual damages.<sup>4</sup>

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<sup>1</sup> TENN. CODE ANN. §§ 47-18-101 to -125 (2001 & Supp. 2006).

<sup>2</sup> TENN. CODE ANN. § 47-18-104 (2001 & Supp. 2006).

<sup>3</sup> TENN. CODE ANN. § 47-18-109(a)(1) (2001).

<sup>4</sup> TENN. CODE ANN. § 47-18-109(a)(3), (e)(1) (2001).

Though numerous class action lawsuits have been filed alleging violations of the TCPA, until last Wednesday Tennessee courts had not resolved whether the TCPA authorizes such class action claims.<sup>5</sup> In its February 13, 2008 opinion in *Walker v. Sunrise Pontiac-GMC Truck, Inc.*,<sup>6</sup> the Tennessee Supreme Court held that the TCPA does not permit private claimants to bring class action suits for alleged violations of the Act.

## Synopsis

The plaintiff, Bill Walker, bought a car from the defendant, Sunrise Pontiac-GMC Truck, Inc. Nine months later, Mr. Walker filed a class action lawsuit against Sunrise Pontiac, alleging that Sunrise Pontiac violated the TCPA and the common law by charging him "Dealer Incurred Costs" (DIC) as a part of the vehicle's price while fraudulently misrepresenting the nature of these costs. Mr. Walker requested that the trial court certify a class of all individuals in Tennessee who purchased motor vehicles from Sunrise Pontiac and paid DIC. Sunrise Pontiac moved to have the TCPA claims dismissed, contending that class actions are not permitted by the TCPA. The trial court denied Sunrise Pontiac's motion, but the case was appealed to the Tennessee Supreme Court.

The court agreed with Sunrise Pontiac. The opinion focuses on the interpretation of the statutory language authorizing private suits for violations of the TCPA. Prior to 1991, this language permitted a suit by a person "individually, but not in a representative capacity."<sup>7</sup> In 1991, the Tennessee legislature amended the statute to omit the phrase "but not in a representative capacity."<sup>8</sup> The *Walker* plaintiff argued that the legislature intended for this amendment to remove a prohibition of class action claims under the TCPA. Sunrise Pontiac countered that the plain meaning of the word "individually" precludes the use of class actions and that looking to the legislative history of the amendment is legally improper because the language of the statute is unambiguous. The Supreme Court agreed with Sunrise Pontiac and concluded that the actual language in the Act prohibits the use of class actions for TCPA claims.

## What Is Next?

It is significant that the Supreme Court found the phrase "may bring an action individually to recover actual damages" unambiguous because it precluded the Court from examining the legislative intent of the 1991 amendment. Plaintiff's counsel, arguing that the purpose of the 1991 amendment was to strengthen the Act, pointed to statements made by the amendment's sponsor on the floor of the House of Representatives that the amendment "would allow for, in effect, what's called a class action." So, while the Tennessee Supreme Court has settled whether a TCPA claim can be brought in a class action under the statute as currently written, the fact that the comments of the amendment's sponsor suggest a contrary intent by the legislature could mean that this issue might be revisited by

<sup>5</sup> In a non-class-action case, the Tennessee Court of Appeals stated in a footnote that "the [TCPA] limits private actions to 'individual claims' and, "[a]ccordingly, class actions cannot be maintained under the TCPA." *Tucker v. Sierra Builders*, 180 S.W.3d 109, 115 n.9 (Tenn Ct. App. 2005). However, because this statement was not the holding of the case, it did not bind other courts. Two federal courts have also concluded that the TCPA does not authorize class action claims. See *Thomas v. LG Elecs. U.S.A., Inc.*, No. 3:07-0444, 2007 WL 4293043, at\*4 (M.D. Tenn. Dec. 6, 2007); *Durant v. ServiceMaster Co.*, 208 F.R.D. 229, 233 (E.D. Mich. 2002).

<sup>6</sup> *Walker v. Sunrise Pontiac-GMC Truck, Inc.*, No. W2006-01162-SC-S09-CV, 2008 WL 375257 (Tenn. Feb. 13, 2008). The case may be retrieved at <http://www.tsc.state.tn.us/OPINIONS/tsc/PDF/081/WalkerbOPN.pdf>

<sup>7</sup> TENN. CODE ANN. § 47-18-109(a)(1) (1998).

<sup>8</sup> See Act of June 3, 1991, 1991 Tenn. Pub. Acts Ch. 468.

that body in the future. The Supreme Court having spoken, only the General Assembly now has the power to revive class actions in Tennessee under the TCPA.

*Feel free to contact any of our attorneys listed below regarding these developments.*

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