

Mortgage Crisis-Related Cases

Arizona Consumer Fraud Act as Possible Legal Claim

The Arizona Consumer Fraud Act ("Act") prohibits a variety of deceptive and fraudulent practices in connection with the sale or advertisement or merchandise:

The act, use or employment by any person of any deception, deceptive act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.

A.R.S. § 44-1522(A). The definition of "advertisement" includes "the attempt by publication, dissemination, solicitation or circulation, oral or written, to induce directly or indirectly any person to enter into any obligations or acquire any title or interest in any merchandise." Id. § 44-1521(1). The Act defines "sale" as "any offer for sale, or attempt to sell any merchandise for any consideration, including sales, leases and rentals of any real estate subject to any form of deed restriction imposed as part of a previous sale." Id. § 44-1521(7). Additionally, the definition of "merchandise" includes real estate. Id. § 44-1521(5).

There is an implied private cause of action for damages caused by a violation of the Act. E.g., Mauerer v. Cerkenik-Anderson Travel, Inc., 181 Ariz. 294, 297, 890 P.2d 69, 72 (1994); Sellinger v. Freeway Mobile Home Sales, Inc., 110 Ariz. 573, 576, 521 P.2d 1119, 1122 (1974). The elements for establishing a private cause of action for damages caused by consumer fraud are: (1) a deception, deceptive act, false pretense, fraud, false promise, misrepresentation or concealment, (2) of a material fact, (3) made in connection to the sale or advertisement of merchandise, (4) upon which a consumer relies, and (5) is consequently and proximately injured. E.g., Correa v. Pecos Valley Dev. Corp., 126 Ariz. 601, 605, 617 P.2d 767, 771 (Ct. App. 1980). Injury occurs when the consumer relies on the misrepresentation, however, unlike common law fraud, the reliance need not be reasonable. Id.

Consumer fraud claims are created by statute and therefore fall within A.R.S. § 12-541(3), which provides the applicable limitations period for all statutory claims. See Alface v. Nat'l Inv. Co., 181 Ariz. 586, 591 (App. 1995). The statute of limitations runs one year after the cause of action accrues. A.R.S. § 12-541(3). Similar to common law fraud, a consumer fraud claim accrues when "the defrauded party discovers or with reasonable diligence could have discovered the fraud." Alface, 181 Ariz. at 591. (finding plaintiffs' cause of action accrued when he learned the "who" and "what" elements of their consumer fraud claim).

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44-1521. Definitions

In this article, unless the context otherwise requires:

1. "Advertisement" includes the attempt by publication, dissemination, solicitation or circulation, oral or written, to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in any merchandise.
2. "Attorney general" means the attorney general of Arizona or his authorized delegate.
3. "Authorized delegate" means any attorney, investigator or administrative personnel employed by the attorney general and so designated, and, when requested by the county attorney and authorized by the attorney general may include similar personnel employed by the several county attorneys of this state.
4. "Examine" means the inspection, study or copying of any account, book, document, merchandise, paper or record.
5. "Merchandise" means any objects, wares, goods, commodities, intangibles, real estate, or services.
6. "Person" means any natural person or his legal representative, partnership, domestic or foreign corporation, any company, trust, business entity, or association, any agent, employee, salesman, partner, officer, director, member, stockholder, associate, or trustee.
7. "Sale" means any sale, offer for sale, or attempt to sell any merchandise for any consideration, including sales, leases and rentals of any real estate subject to any form of deed restriction imposed as part of a previous sale.

44-1522. Unlawful practices; intended interpretation of provisions

- A. The act, use or employment by any person of any deception, deceptive act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.
- B. The violation of chapter 9, article 16 or chapter 19, article 1 of this title is declared to be an unlawful practice and subject to enforcement under this article.
- C. It is the intent of the legislature, in construing subsection A, that the courts may use as a guide interpretations given by the federal trade commission and the federal courts to 15 United States Code sections 45, 52 and 55(a)(1).

44-1523. Exemptions

Nothing contained in this article shall apply to the owner or publisher of a newspaper, magazine, or other publication of printed matter wherein such advertisement appears, or to the owner or operator of a radio or television station which disseminates such advertisement when the owner, publisher, or operator has no knowledge of the intent, design, or purpose of the advertiser. Further, nothing contained in this article shall apply to any advertisement

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which is subject to and complies with the rules and regulations of, and the statutes administered by the federal trade commission.

44-1524. Powers of attorney general

- A. If the attorney general has reasonable cause to believe that a person has engaged in, is engaging in or is about to engage in any practice or transaction which is in violation of this article or order or assurance of discontinuance entered under this article, he may:
1. Require such person to file on such forms as he prescribes a statement or report in writing, under oath, as to all the facts and circumstances concerning the sale or advertisement of merchandise by such person, and such other data and information as he may deem necessary.
 2. Examine under oath any person in connection with the sale or advertisement of any merchandise.
 3. Examine any merchandise or sample thereof, or any record, book, document, account or paper as he may deem necessary.
 4. Pursuant to an order of the superior court, impound any record, book, document, account, paper, or sample or merchandise material to such practice and retain the same in his possession until the completion of all proceedings undertaken under this article or in the courts.
- B. This section does not prohibit the attorney general from investigation of violations of this article including requesting a person to respond to a complaint filed against him. A person cannot be compelled to comply with a request to respond to a complaint except in accordance with section 44-1527.

44-1525. Confidentiality of information or evidence

All information or evidence provided to the attorney general shall be confidential and shall not be made public unless in the judgment of the attorney general the ends of justice and the public interest will be served by the publication thereof, provided that the names of the interested parties shall not be made public.

44-1526. Subpoena; hearing; rules and regulations

- A. To accomplish the objectives and to carry out the duties prescribed in this article, the attorney general, in addition to other powers conferred upon him by this article, may:
1. Issue subpoenas to any person.
 2. Administer an oath or affirmation to any person.
 3. Conduct hearings in aid of any investigation or inquiry.
 4. Prescribe such forms and promulgate such procedural rules and regulations as may be necessary to enforce the provisions of this article, which rules and regulations shall have the force of law. Such rules and regulations shall not be inconsistent with the provisions of this article.
- B. The attorney general shall serve a demand or subpoena in accordance with one of the following:

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1. Service within or without this state in the manner provided under applicable law or rules of procedure for the service of a summons and complaint in a civil action.
2. On a natural person by delivering the demand or subpoena or by mailing the demand or subpoena by registered mail to the person at his last known place of business, residence, or both, within or without this state.
3. On any person other than a natural person by delivering the demand or subpoena or by mailing the demand or subpoena by registered mail to the person authorized or permitted by law to receive service of a complaint and a summons in a civil action.
4. Service as the superior court may direct.

44-1527. Failure to supply information or obey subpoena; hearing

- A. If any person fails or refuses to fully comply with a demand or any subpoena issued by the attorney general under sections 44-1524 or 44-1526, the attorney general may file a petition with the superior court and, after notice and hearing on the petition, request the following orders until the person complies with the demand or the subpoena:
1. Adjudging such person in contempt of court.
 2. Granting injunctive relief, restraining the sale or advertisement of merchandise by such person which is the subject of the investigation.
 3. Granting such other relief as the court may deem proper.
- B. If the court determines that the attorney general has reasonable cause to believe that the respondent has engaged in, is engaging in or is about to engage in any act, practice or transaction which is in violation of this article or order or assurance of discontinuance entered under this article, the court shall grant the appropriate relief.
- C. If the attorney general determines that disclosure to the respondent of the evidence relied on to establish reasonable cause would not be in the best interests of the investigation, he may request and the court may examine the evidence in camera and thereafter make its determination.

44-1528. Remedies; injunction; other reliefs; receiver

- A. Following an investigation made pursuant to section 44-1524 and when it appears to the attorney general that a person has engaged in or is engaging in any practice declared to be unlawful by this article, he may seek and obtain in an action in the superior court an injunction prohibiting such person from continuing such practices or engaging in the practice or doing any acts in furtherance of the practice after notice as is required by the rules of civil procedure. The court may make such orders or judgments as may be necessary to:
1. Prevent the use or employment by a person of any unlawful practices.
 2. Restore to any person in interest any monies or property, real or personal, which may have been acquired by means of any practice in this article declared to be unlawful, including the appointment of a receiver.
 3. Prohibit a person found to have violated this article from engaging in a specified trade or occupation.

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- B. Following an investigation made pursuant to section 44-1524 and when it appears to the attorney general that a person has engaged in or is engaging in a practice declared to be unlawful by this article and that such person is about to conceal his assets or his person or leave the state, the attorney general may apply to the superior court, ex parte, for an order appointing a receiver of the assets of such person. Upon a showing made by affidavit or other evidence that such person has engaged in or is engaging in a practice declared to be unlawful by this article and that such person is about to conceal his assets or his person or leave the state, the court may order the appointment of a receiver to receive the assets of such person.

44-1529. Powers of receiver

When a receiver is appointed by the court pursuant to this article, he shall have the power to sue for, collect, receive, or take into his possession all the goods, and chattels, rights and credits, monies and effects, lands and tenements, books, records, documents, papers, choses in action, bills, notes and property of every description, including property with which such property has been mingled if it cannot be identified in kind because of such commingling, and to sell, convey, and assign the same and hold and dispose of the proceeds thereof under the direction of the court. Any person who has suffered damages as a result of the use or employment of any unlawful practice, and submits proof to the satisfaction of the court that he has in fact been damaged, may participate with general creditors in the distribution of the assets to the extent he has sustained out-of-pocket losses. The court shall have jurisdiction of all questions arising in such proceedings and may make such orders and enter such judgments therein as may be required.

44-1530. Assurance of discontinuance of unlawful practice

In the enforcement of the provisions of this article, the attorney general may accept an assurance of discontinuance of any act or practice deemed in violation of the provisions of this article from any person engaging in, or who has engaged in, such act or practice. Such assurance may include a stipulation for the payment by such person of reasonable expenses incurred by the attorney general or as restitution to aggrieved persons, or both. Any such assurance shall be in writing and shall be filed with and subject to the approval of the superior court of the county in which the alleged violator resides or has its principal place of business or in Maricopa County. A violation of such assurance within six years of the filing thereof shall constitute prima facie proof of a violation of the provisions of this article. Such assurance of discontinuance shall not be considered an admission of a violation for any purpose.

44-1531. Violations; civil penalties

- A. If a court finds that any person has willfully violated section 44-1522, the attorney general upon petition to the court may recover from the person on behalf of the state a civil penalty of not more than ten thousand dollars per violation.

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- B. For purposes of this section, a willful violation occurs when the party committing the violation knew or should have known that his conduct was of the nature prohibited by section 44-1522.

44-1531.01. Consumer protection-consumer fraud revolving fund; use of fund

- A. The consumer protection-consumer fraud revolving fund is established to be administered by the attorney general under the conditions and for the purposes provided by this section. Monies in the fund are subject to legislative appropriation. Monies in the fund are exempt from the lapsing provisions of section 35-190.
- B. Any investigative or court costs, attorney fees or civil penalties recovered for the state by the attorney general as a result of enforcement of either state or federal statutes pertaining to consumer protection or consumer fraud, whether by final judgment, settlement or otherwise, shall be deposited in the fund established by this section, except that such costs, penalties or fees recovered by a county attorney shall be retained in such county and utilized for investigative operations for consumer protection in such county.
- C. The monies in the fund shall be used by the attorney general for operating expenses, including any cost or expense associated with the tobacco master settlement agreement arbitration, consumer fraud education and investigative and enforcement operations of the consumer protection division.
- D. On or before January 15, April 15, July 15 and October 15, the attorney general shall cause to be filed with the governor, with copies to the director of the department of administration, the president of the senate and the speaker of the house of representatives, a full and complete account of the receipts and disbursements from the fund in the previous calendar quarter.
- E. On or before January 15, April 15, July 15 and October 15, each county attorney who retains monies pursuant to subsection B of this section shall provide the county board of supervisors with a full and complete account of the receipts and disbursements of such monies in the previous calendar quarter.

44-1532. Violation of order or injunction; penalty

A person who violates any order or injunction issued pursuant to this article shall forfeit and pay to the general fund of the state of Arizona a civil penalty of not more than twenty-five thousand dollars per violation. For the purpose of this section, the superior court in the county issuing any order or injunction shall retain jurisdiction, and the cause shall be continued. In such cases, the attorney general acting in the name of the state may petition for the recovery of civil penalties.

44-1533. Cumulative remedies

- A. The provisions of this article are in addition to all other causes of action, remedies and penalties available to this state.

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- B. The provisions of this article shall not bar any claim against any person who has acquired any monies or property, real or personal, by means of any practice declared to be unlawful by this article.

44-1534. Costs recoverable

In any action brought under the provisions of this article, the attorney general is entitled to recover costs, which in the discretion of the court may include a sum representing reasonable attorney's fees for the services rendered, for the use of the state.