

“DJUSTICE” UNCHAINED

How the Reach of NRS 598 Protects Nevada Consumers

BY LUCAS TUCKER, ESQ.

You probably guessed from the title that I have an affinity for the films of Quentin Tarantino, but the inscription has significance as well. Attorney General Aaron Ford often reminds all deputies that our mission is justice, and I often think of NRS 598 as the Nevada Legislature’s Decree of Justice for Nevada consumers. Hence, “DJustice;” the “D” is silent.

As an enforcer of Nevada’s Deceptive Trade Practices Act (NDTPA), I am delighted by several of its benefits. Opening NRS 598 is like opening Marcellus Wallace’s briefcase in *Pulp Fiction*. First, our office has the authority to conduct pre-complaint discovery that assists our investigations of alleged deceptive trade practices.¹ Second, deceptive conduct goes

far beyond the 14 specific categories of conduct listed in the statutes, and it includes a wide range of “deceptive trade practices” defined in the NDTPA’s General Provisions.²

In addition, in *Poole v. Nev. Auto Dealership Inv.*, the Nevada Supreme Court recently ruled that, in most cases, a “knowing” violation under the NDTPA’s General Provisions does not require that a defendant act with specific intent, or even know of the prohibition against its alleged act or omission.³ While each of these benefits could be the subject of its own article, I will focus on a final advantage: the nexus between NRS 598 and other Nevada laws. The NDTPA’s application and use, by both the attorney general and private citizens, is untethered from the confines of NRS 598.

Claims of Consumer Fraud for Individuals

Some might argue that NRS 598.0977 limits private rights of action under the NDTPA to only elderly or disabled persons. Well, allow me to retort with an analysis of NRS 41.600. Subsection 1 of that statute provides the right for an action to be brought by any person who is a victim of consumer fraud. Among the several acts defined as consumer fraud, NRS 41.600(2) (e) includes any of the deceptive trade practices described in the NDTPA’s General Provisions.

Multiple federal courts have recognized the validity of an action for consumer fraud that is based on alleged violations of the NDTPA’s General



Provisions.⁴ Thus, a private right of action for violation of the NDTPA's General Provisions is expressly allowed if brought in the form of an action for consumer fraud under NRS 41.600. If such claimant is the prevailing party, subsection 3 provides that it may recover damages, appropriate equitable relief, costs and reasonable attorneys' fees. In addition, an elderly or disabled person who brings an action, either under NRS 41.600 or NRS 598.0977, can seek heightened penalties under NRS 598.0973(1). Finally, private plaintiffs in a consumer fraud action should plead their claims with the particularity required under Nev. R. Civ. P. 9(b) and/or Fed. R. Civ. P. 9(b).

Claims of Consumer Fraud for Businesses

NRS 598.0953(1) provides another expansion of the NDTPA that benefits businesses. Pursuant to this statute, "[e]vidence that a person has engaged in a

deceptive trade practice is prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition." No reported decisions have construed whether this provision establishes a direct tie between the NDTPA and Nevada's antitrust laws in NRS 598A. However, the District of Nevada found this provision instrumental to allowing a business competitor to bring an action for consumer fraud.

In *Southern Service Corp. v. Excel Bldg. Services*, District Judge Larry Hicks found that, under NRS 598.0953(1), "a business shown to be engaged in deceptive trade practices is presumed to intend for those practices to injure its competitors and destroy competition."⁵ Judge Hicks found this presumption compelling in light of the consumer fraud statute in NRS 41.600. Ultimately,

he concluded that, "[b]y creating a presumption that deceptive trade practices harm competitors, then making those same deceptive trade practices into acts of consumer fraud, the Nevada Legislature impliedly defines competitors harmed by deceptive trade practices as victims of consumer fraud."⁶

After the District of Nevada opened this door, the Ninth Circuit took a Hattori Hanzo sword to any remaining limitations on the ability of businesses to bring actions for consumer fraud. In *Del Webb Communities, Inc. v. Partington*, the Ninth Circuit clarified that the holding in *Southern Service* did not limit consumer fraud actions to only competitors, and that a "victim of consumer fraud" could include any "person" or "victim."⁷ All forms of business are considered "persons" under the definition of NRS 0.039, and the Ninth Circuit's decision allows any business that is a victim of consumer fraud to bring an action under NRS 41.600 regardless of whether the defendant is the plaintiff's competitor.

Attorney General Actions Based on Separate Laws

Under NRS 598.0923(3), a person engages in a deceptive trade practice when, in the course of his or her business or occupation, he or she knowingly violates a state or federal statute or regulation relating to the sale or lease of goods or services. In *Trejo de Zamora v. Auto Gallery, Inc.*, a private right of action, the District Court of Nevada found a company liable under NRS 598.0923(3) based solely on the violation of another statute not contained in the NDTPA.⁸ Likewise, the Nevada Attorney General's Bureau of Consumer Protection has used this provision to its benefit in several investigations.

NRS 598.0923(3) does not give the Attorney General's office free reign to bring enforcement actions based on immaterial violations. Pursuant to NRS 598.0955, a defendant is exempt from NDTPA liability if its conduct complies with the orders or rules of, or a statute administered by, a federal, state or local government agency. However, the bureau's investigations have often found that the

conduct at issue is not in compliance with said orders, rules or statutes. When that conduct leads to consumer harm, NRS 598.0923(3) provides the bureau another tool when it investigates and attempts to correct deceptive practices. Prime examples are cases involving a defendant's violation of Nevada's personal information security laws in NRS 603A, or privacy laws under The Health Insurance Portability and Accountability Act.⁹

Consumer Protection and Parens Patriae

Parens what? Parens patriae. Do you speak it? Even if you don't, federal courts are well versed in the doctrine of parens patriae, which is a state's quasi-sovereign interest in the health and well-being, both physical and economic, of its residents in general. While the NDTPA does not mention parens patriae, NRS 598A.160 recites the parens patriae authority of the attorney general to bring actions for violations of Nevada's antitrust laws. Both the NDTPA and antitrust laws in NRS 598A are among the consumer protection laws enforced by the Attorney General's Consumer Advocate, pursuant to NRS 228.380(1).

Like other jurisdictions, the District of Nevada has recognized the attorney general's standing under parens patriae to prevent injury to those who cannot protect themselves.¹⁰ Thus, even when a company's conduct may not fit neatly within the definitions of various "deceptive trade practices," the parens patriae doctrine allows the attorney general to take action when the conduct directly or indirectly has an adverse economic impact on a significant segment of the state's population.

Closing Remarks

While the attorney general always welcomes information about companies that may be engaged in deceptive trade practices, the Bureau of Consumer Protection cannot represent individual consumers. Accordingly, many cases focus on companies whose conduct

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deceives consumers across the state, region or country. Yet, private rights of action remain available to individuals and businesses that use the proper tools. The scope of the NDTPA offers our state’s consumers unchained “DJjustice,” and through both public and private enforcement, the NDTPA provides Nevada consumers a refuge from the tyranny of evil businessmen.

1. NRS 598.0964.
2. NRS 598.0915 - 598.0925.
3. 135 Nev. Adv. Op. 39, pp. 7 – 9 (Nev. 2019). In this opinion, the court also provides guidance for when a fact is considered “material” to the defendant’s conduct.
4. *See In re DDAVP Indirect Purchaser Antitrust Litig.*, No. 05-cv-2237, 2012 WL 4932158, at **21-22 (S.D.N.Y. Oct. 17, 2012); *Trejo de Zamora v. Auto Gallery, Inc.*, No. 2:12-cv-01357-APG-CWH, 2014 WL 1685925, at *7 (D. Nev. Apr. 28, 2014).
5. 617 F.Supp.2d 1097, 1099 (D. Nev. 2007).
6. *Id.*
7. 652 F.3d 1145, 1152-53 (9th Cir. 2011).
8. *Trejo de Zamora v. Auto Gallery, Inc.*, *supra* note iv. In this case, the court found that a defendant’s violation of NRS §§ 97.185(1)(e) and 97.299(2) (d) also constituted a deceptive trade practice under NRS § 598.0923(3).
9. *See generally* Press Release, Nev. Att’y Gen., Attorney General Ford Joins

Multistate Settlement Against Premera for Failure to Protect Sensitive Data of Millions Nationwide (July 11, 2019); Press Release, Nev. Att’y Gen., Attorney General Ford, 49 AGs Announce \$600 Million Equifax Data Breach Settlement (July 22, 2019).

10. *Zimmerman v. GJS Group, Inc.*, No. 2:17-cv-00304-GMN-GWF, 2017 WL 4560136, at **5-8 (D. Nev. Oct. 11, 2017).

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