

Preliminary Analysis of Calculation of the Number of Violations under State Consumer Protection Acts



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Question Presented

- (1) How do other states define a “violation” for purposes of calculating civil penalties under their consumer protection statutes?
- (2) How do other states define “a related series of violations” for purposes of calculating civil penalties under their consumer protection statutes?

Brief Answer

- (1) In those states in which the term has been defined by statute or case law, “violation” is defined as either (i) a consumer affected by an unfair trade practice or (ii) a misrepresentation made to a consumer. Two states assess civil penalties per defendant rather than per violation.
- (2) Vermont is the only state other than Colorado that imposes a cap on penalties for a “related series of violations.” Unfortunately, I was unable to find any Vermont case law discussing the penalty cap.

Discussion

(1) “Violation” is generally defined as either (i) a consumer affected by an unfair trade practice or (ii) a misrepresentation made to a consumer.

Most state consumer protection statutes allow the State to seek civil penalties for violation of the statute. *But see* R.I. Gen. Laws §§ 6-13.1-1 *et seq.* (providing for civil penalties only after violation of an injunction). Of the states that

¹ This preliminary analysis was prepared by staff of the Colorado Attorney General’s Office. It does not constitute an exhaustive survey of State laws on this subject, nor is it intended as a statement or opinion on the state of the law on this subject by the Colorado Attorney General’s Office or any of its staff. With questions or comments, please contact Mark Bailey, Senior Assistant Attorney General, mark.bailey@coag.gov, 720-508-6202.

allow for civil penalties, all but two assess penalties for each violation of the statute. Seven states define a violation as a consumer affected by a deceptive or unfair trade practice, while ten states define a violation as a misrepresentation made to a consumer. I was unable to find any discussion of what constitutes a violation for thirty states.² Two states assess civil penalties per defendant rather than per violation.

i. “Violation” as a consumer affected by an unfair trade practice.

Arizona, California, Maryland, Nebraska, Nevada, New Jersey, and Texas all hold that, for purposes of determining civil penalties arising from their consumer protection statutes, the number of violations should reflect the number of consumers affected by the unfair trade practice alleged. *See State ex rel. Corbin v. United Energy Corp. of Am.*, 725 P.2d 752, 759 (1986) (“one violation of the consumer fraud act for each consumer, regardless of the number of misrepresentations made to each consumer.”); *People v. Superior Court*, 9 Cal. 3d 283, 289 (1973) (“the Legislature intended that the number of violations is to be determined by the number of persons to whom the misrepresentations were made.”); *T-UP, Inc. v. Consumer Prot. Div.*, 145 Md. App. 27 (2002); *State ex rel. Stenberg v. Am. Midlands, Inc.*, 244 Neb. 887, 894 (1994); *Landex, Inc. v. State ex rel. List*, 94 Nev. 469, 480 (1978); *Chiesa v. Levine*, No. A-4055-11T3, 2013 WL 3284131, at *2 (2013); *Molano v. State*, 262 S.W.3d 554, 562 (2008). In these states,

² The Appendix contains a chart with the penalty amounts and method of assessing the number of violations for all states other than Colorado. District of Columbia is included as a state.

for example, a letter with five different misrepresentations that is sent to ten consumers would result in ten violations of the relevant consumer protection act.

ii. “Violation” as a misrepresentation made to consumers.

Massachusetts, Mississippi, New Hampshire, Ohio, South Carolina, Washington, and Wisconsin all hold that the number of violations of the consumer protection statute should reflect the number of misrepresentations made to consumers. *See Com. v. Fall River Motor Sales, Inc.*, 409 Mass. 302, 313-14 (1991); *In re Mississippi Medicaid Pharm. Average Wholesale Price Litig.*, 190 So. 3d 829, 847 (2015); N.H. Rev. Stat. § 358-A:4(III)(b) (“the court shall determine the number of unlawful acts or practices which have occurred without regard to the number of persons affected thereby”); *United States v. Dish Network LLC*, 256 F. Supp. 3d 810, 968 (2017); *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc.*, 414 S.C. 33, 86 (2015); *State v. Ralph Williams' N. W. Chrysler Plymouth, Inc.*, 87 Wash. 2d 298, 325 (1976) (“A single advertisement may include a number of misrepresentations . . . [e]ach of these acts is a separate violation”); *State v. Going Places Travel Corp.*, 362 Wis. 2d 414, 442 (2015) (violations calculated by multiplying the number of misrepresentations by the number of consumers). In these states, for example, a letter with five different misrepresentations that is sent to ten consumers would result in fifty violations of the relevant consumer protection act.

Hawaii’s consumer protection statute provides that every day that an unfair trade practice occurs constitutes a separate violation. Haw. Rev. Stat. § 480-3.1. The Attorney General can, however, elect to tally violations by counting the number of

consumers affected instead. *See In re Cabebe*, No. 15-01446, 2016 WL 5844484, at *7 (2016).

Iowa’s consumer protection statute imposes a civil penalty “not to exceed forty thousand dollars per violation,” but clarifies that “a course of conduct shall not be considered to be separate and different violations merely because the conduct is repeated to more than one person.” Iowa Code § 714.16(7).

Kansas’ consumer protection statute provides that “any act or practice declared to be a violation of this act not identified to be in connection with a specific identifiable consumer transaction but which is continuing in nature shall be deemed a separate violation each day such act or practice exists.” Kan. Stat. § 50-636. Violations that *are* connected to a specific transaction are generally tallied on the basis of the number of misrepresentations made to consumers. *See e.g. Lynd v. Brickie*, No. CIV. A. 89-4193-S, 1991 WL 158041, at *4 (1991).

iii. Penalties assessed per defendant, rather than per violation.

The consumer protection statutes in Minnesota and Michigan both assess civil penalties per defendant, irrespective of the number of violations. *See* Minn. Stat. § 8.31(3) (civil penalties capped at \$25,000 per defendant); Mich. Comp. Laws Ann. § 445.905(1) (civil penalties capped at \$25,000 per defendant).

(2) Vermont is the only state that imposes a similar cap on penalties for a “related series of violations,” however, there is no case law elaborating on the meaning of the phrase.

Vermont’s consumer protection act provides for civil penalties of up to \$10,000 per violation, capped at “not more than \$100,000.00 for an individual or \$1,000,000.00 for any other person for each unfair method of competition in

commerce.” Vt. Stat. Ann. tit. 9, § 2458(b)(1). The phrase “each unfair method of competition” would appear to function the same as “any related series of violations” does in C.R.S. § 6-1-112(1)(a). Unfortunately, I was unable to locate any Vermont cases discussing the civil penalties cap. No other state imposes a similar cap on civil penalties.

Appendix

State	Civil Penalties Statute	Penalty Amount	Penalty Cap	Definition of a violation
Alabama	Ala. Code § 8-19-11(b)	\$2K per violation	No cap	No case law defining violation
Alaska	Alaska Stat. § 45.50.551	\$5K per violation	No cap	No case law defining violation
Arizona	Ariz. Rev. Stat. § 44-1531	\$10K per violation	No cap	<i>State ex rel. Corbin v. United Energy Corp. of Am.</i> , 725 P.2d 752, 759 (1986) (“one violation of the consumer fraud act for each consumer, regardless of the number of misrepresentations made to each consumer.”)
Arkansas	Ark. Code § 4-88-113	\$10K per violation	No cap	No case law defining violation
California	Cal. Bus. & Prof. Code § 17206	\$2.5K per violation	No cap	Violation defined as customer affected. See <i>People v. Superior Court (Olson)</i> , 96 Cal. App. 3d 181, 198, (1979).

Connecticut	Conn. Gen. Stat. § 42-110o(b)	\$5K per violation	No cap	No case law defining violation
D.C.	D.C. Code § 28-3909(b)	\$1K per violation	No cap	No case law defining violation
Delaware	Del. Code Ann. tit. 6, § 2522(b)	\$10K per violation	No cap	No case law defining violation
Florida	Fla. Stat. Ann. § § 501.2075	\$10K per violation	No cap	No case law defining violation, but violation is not to be defined per diem. <i>See 3B TV, Inc. v. State, Office of Atty. Gen.</i> , 794 So. 2d 744, 750 (2001).
Georgia	Ga. Code § 10-1-397(a)(2)(B)	\$5K per violation	No cap	No case law defining violation
Hawaii	Haw. Rev. Stat. § 480-3.1	\$500 - \$10K per violation	No cap	By statute, each day that violation continues is a separate violation. Can be substituted for per-customer violations. <i>See In re Cabebe</i> , No. 15-01446, 2016 WL 5844484, at *7 (2016).
Idaho	Idaho Code § 48-606(1)(e)	\$5K per violation	No cap	No case law defining violation
Illinois	815 ILCS 505/7	\$50K against each violator, \$50K per violation	No cap	No case law defining violation

		with intent to defraud		
Indiana	Ind. Code § 24-5-0.5-4(g); 24-5-0.5-8	\$5K per violation	No cap	No case law defining violation
Iowa	Iowa Code § 714.16(7)	\$40K per violation	No cap	By statute: “a course of conduct shall not be considered to be separate and different violations merely because the conduct is repeated to more than one person.”
Kansas	Kan. Stat. § 50-636	\$10K per violation	No cap	Violation is a misrepresentation made to a consumer. <i>See e.g. Lynd v. Brickie</i> , No. CIV. A. 89-4193-S, 1991 WL 158041, at *4 (1991). Per statute: “Any act or practice declared to be a violation of this act not identified to be in connection with a specific identifiable consumer transaction but which is continuing in nature shall be deemed a separate violation each day such act or practice exists.”
Kentucky	Ky. Rev. Stat. § 367.990	\$2K per violation	No cap	No case law defining violation
Louisiana	La. Stat. Ann. § 51:1407(B)	\$5K per violation	No cap	No case law defining violation

Maine	Me. Rev. Stat. Ann. tit. 5 § 209	\$10K per violation	No cap	No case law defining violation
Maryland	MD Code Comm. Law § 13-410	\$1K per violation, 5K per violation for repeat offenders	No cap	Violations counted by consumer affected. <i>See T-UP, Inc. v. Consumer Prot. Div.</i> , 145 Md. App. 27, (2002). <i>See also Consumer Prot. Div. v. Morgan</i> , 387 Md. 125, (2005)
Massachusetts	Mass. Gen. Laws Ch. 93A, § 4	\$5K per violation	No cap	Violations defined as misrepresentations made to customers. <i>See Com. v. Fall River Motor Sales, Inc.</i> , 409 Mass. 302, 313-14 (1991).
Michigan	Mich. Comp. Laws Ann. § 445.905(1)	\$25K for “persistent and knowing violation”	No cap	No case law defining violation
Minnesota	Minn. Stat. § 8.31(3)	\$25K capped penalty	\$25K cap	No case law defining violation
Mississippi	Miss. Code § 75-24-19(1)(b)	\$10K per violation	No cap	Violation based on def. conduct. <i>See In re Mississippi Medicaid Pharm. Average Wholesale Price Litig.</i> , 190 So. 3d 829, 847 (Miss. 2015).
Missouri	Mo. Rev. Stat. § 407.100(6)	\$1K per violation	No cap	No case law defining violation

Montana	MCA 30-14-142	\$10K per violation	No cap	No case law defining violation
Nebraska	Neb. Rev. Stat. § 59-1614	\$2K per violation	No cap	Violation calculated by number of consumers affected. <i>See State ex rel. Stenberg v. Am. Midlands, Inc.</i> , 244 Neb. 887, 894 (1994).
Nevada	Nev. Rev. Stat. § 598.0999(2)	\$5K per violation	No cap	One violation per consumer affected. <i>See Landex, Inc. v. State ex rel. List</i> , 94 Nev. 469, 480 (1978).
New Hampshire	N.H. Rev. Stat. § 358-A:4(III)(b)	\$10K per violation	No cap	By statute: “the court shall determine the number of unlawful acts or practices which have occurred without regard to the number of persons affected thereby.”
New Jersey	N.J. Stat. Ann. § 56:8-13	\$10K for first offense, \$20K for subsequent offenses	No cap	Violations calculated by consumers affected. <i>See Chiesa v. Levine</i> , No. A-4055-11T3, 2013 WL 3284131, at *2 (2013).
New Mexico	N.M. Stat. Ann. § 57-12-11	\$5K per violation	No cap	No case law defining violation
New York	N.Y. Gen. Bus. Law § 350-d	\$5K per violation	No cap	No case law defining violation
North Carolina	N.C. Gen. Stat. § 75-15.2	\$5K per violation	No cap	No case law defining violation

North Dakota	NDCC, 51-15-11	\$5K per violation	No cap	No case law defining violation
Ohio	R.C. § 1345.07	\$25K per violation (per violation read in to statute by case law)	No cap	Violation enumerated by the number of calls and misrepresentations made to consumers. <i>See United States v. Dish Network LLC</i> , 256 F. Supp. 3d 810, 968 (2017).
Oklahoma	Okla. Stat. Ann. tit. 15, § 761.1(C)	\$10K per violation	No cap	No case law defining violation
Oregon	Or. Rev. Stat. § 646.642	\$25K per violation	No cap	No case law defining violation
Pennsylvania	73 Pa. Stat. § 201-8(b)	\$1K per violation	No cap	No case law defining violation
Rhode Island	No civil penalties	-	-	-
South Carolina	S.C. Code § 39-5-110(a)	\$5K per violation	No cap	Violation based on misrepresentations, not consumers affected. <i>State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc.</i> , 414 S.C. 33, 86 (2015).
South Dakota	S.D. Codified Laws § 37-24-27	\$2K per violation	No cap	No case law defining violation
Tennessee	Tenn. Code § 47-18-108(b)(3)	\$1K per violation	No cap	No case law defining violation

Texas	Tex. Bus. & Com. Code § 17.47(c)	\$20K per violation	No cap	Violations based on number of consumers affected. <i>See Molano v. State</i> , 262 S.W.3d 554, 562 (2008).
Utah	U.C.A. 1953 § 13-11-17	\$2.5K per violation	No cap	No case law defining violation
Vermont	Vt. Stat. Ann. tit. 9, § 2458(b)(1)	\$10K per violation	\$100K cap for an individual or \$1M cap for any other person	No case law defining violation
Virginia	Va. Code Ann. § 59.1-206	\$2.5K per violation	No cap	No case law defining violation
Washington	Wash. Rev. Code § 19.86.140	\$2K per violation	No cap	One violation per deceptive act. <i>See State v. Ralph Williams' N. W. Chrysler Plymouth, Inc.</i> , 87 Wash. 2d 298, 325 (1976).
West Virginia	W. Va. Code § 46A-7-111(2)	\$5K per violation	No cap	No case law defining violation

Wisconsin	Wis. Stat. Ann. § 100.26	\$100-\$10K per violation	No cap	Violations calculated by multiplying the number of misrepresentations by the number of consumers, <i>see State v. Going Places Travel Corp.</i> , 362 Wis. 2d 414, 442 (2015), including misrepresentations made by third parties. <i>See State v. Abbott Labs.</i> , 341 Wis. 2d 510, 573 (2012).
Wyoming	Wyo. Stat. Ann. § 40- 12-113	\$10K per violation	No cap	No case law defining violation.