



ELLIS & WINTERS LLP

THE LAW OF UNFAIR TRADE PRACTICES

Practical tips for dealing
with UTP statutes

Is this unfair?

- Price of roses on Valentine's Day:
 - 42% increase (NYC Dep't of Consumer Affairs)
 - Raleigh area: price increases of \$10 - \$30 (Informal WRAL survey)



Agenda

- Key features of the law on unfair trade practices
- The pivot points in UTP lawsuits
- Important new North Carolina decisions: *Bumpers* and *Torrence*
- Tips for living with UTP statutes

“Unfair Trade Practices” Statutes

- Burgeoning source of litigation
- Risk for businesses
- Opportunities for plaintiffs
 - Including business plaintiffs in most states (including N.C.)

“Unfair Trade Practices” Statutes

- Consumer-protection statutes enacted in 1960s and early 1970s
- Inspired by section 5 of the Federal Trade Commission Act



- Section 5 has no private right of action
- FTC encouraged the states to pass UTP statutes

“Unfair Trade Practices” Statutes

- Every state now has a UTP statute of some type
 - All states allow private parties to sue under some circumstances
 - A majority (including N.C.) allow recovery by non-consumers

A Powerful Weapon

- Treble damages (25 states, including N.C.)
- Plaintiffs can recover attorney fees (46 states, including N.C.)
- Class actions (41 states, including N.C.)

How do you define “unfair” and “deceptive”?

- 2 basic approaches:
 - Open-ended statutes, modeled on FTC Act
 - “Laundry list” of unfair or deceptive acts

Open-ended: The “Little FTC Acts”

- Many states have modeled their UTP statutes on section 5 of the FTC Act
 - “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.” 15 U.S.C. § 45.
 - “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.” N.C. Gen. Stat. § 75-1.1(a).

The “Little FTC Acts”

- In 32 states, courts look to FTC decisions and federal case law under section 5 as a guide
 - Many UTP statutes have express cross-references
 - In other states (including N.C.), the courts have decided to refer to these sources

Laundry Lists

- Five states *restrict* claims to an enumerated list of practices
 - Maryland – detailed, multi-part definition, with examples
 - Oregon – claims restricted to acts listed in statute or rules issued by Attorney General

Laundry Lists

- Maryland's UTP statute defines "unfair or deceptive trade practices" as including, among other things:

(10) Solicitations of sales or services over the telephone without first clearly, affirmatively, and expressly stating:

- (i) The solicitor's name and the trade name of a person represented by the solicitor;
- (ii) The purpose of the telephone conversation; and
- (iii) The kind of merchandise, real property, intangibles, or service solicited.

Exemptions

- Many UTP statutes exempt one or more industries
 - Creditors
 - Insurance
 - Utilities
 - Debt collection / repossession
 - Real estate



North Carolina Exemptions

- Lawyers and other “learned professions”
- Carriers of advertising
- Activity not “in or affecting commerce” – e.g.,
 - Securities and commodities
 - Actions “within a single business”

Types of UTP Claims

- Per se violations
- Deception
- Aggravated breaches of contract
- “Direct unfairness” claims
- Unfair methods of competition



Per Se Violations

- Sometimes, a violation of a separate statute or regulation automatically supports a UTP claim
 - 45 N.C. statutes have express cross-references to UTP statute
 - Examples: statutes on identity theft, customer records, and confidential information
- Courts have also found per se liability based on sources *without* an explicit cross-reference

California's Section 17200

- Created private claim for violations of virtually any statute or regulation – even ones with no private right of action of their own:
 - Disclosures in wrong font size
 - Item with a few foreign-made components advertised as “Made in the USA”
 - Bathroom mirror an inch higher than disability regulations required

California's Section 17200

- N.D. Cal. = “Food Court”: recent wave of class actions alleging technical violations of federal / Cal. food labeling laws
 - “Sugar free,” “sugarless” but fail to disclose trivial amounts
 - “Natural source of antioxidants” but fails to specify which nutrients
 - Private right of action under section 17200 because “unlawful”

Deception

- Fraud with fuzzier elements
- Major goal of UTP statutes was to relax the elements of fraud so consumers could recover more often
 - Most states require only that a practice have “the capacity or tendency to deceive”
 - No intent to deceive is required

Deception

- *Connick v. Suzuki Motor Co.* (Illinois Supreme Court 1996)
 - Plaintiffs alleged that car manufacturer failed to disclose risk of roll-overs. Plaintiffs sought damages for reduced resale value.
 - Fraud claim failed, but UTP claim survived.
 - “An omission or concealment of a material fact in the conduct of trade or commerce [violates the statute].”

Private attorney general run amok?

- New Jersey lawyer Harold Hoffman has filed dozens of UTP putative class actions for alleged deceptive advertising, with himself as named plaintiff
 - Dietary supplements – Ginkgo Biloba
 - Male enhancement pills – Erection MD
 - Time Warner Cable (failure to carry channel during negotiations)
 - Sometimes sues before he even receives the product in question
- Many cases have been removed under CAFA

Patent Infringement → UTP Class Action?

Dang v. Samsung (N.D. Cal. filed 2014):

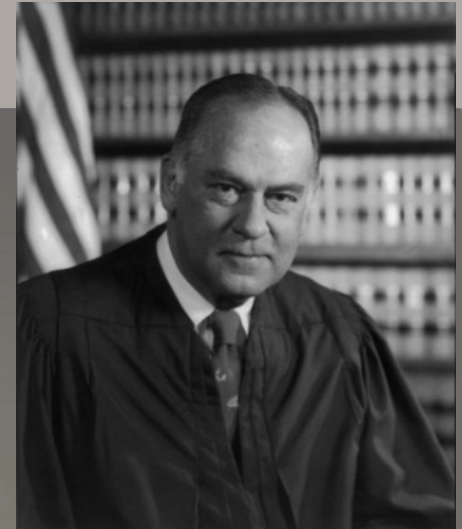
- UTP class action alleges that Samsung deceived consumers by concealing its infringement of Apple patents
- Any consumer harm? Allegation is that infringement finding decreased resale value of mobile phones

Aggravated Breaches of Contracts

- Breach of contract + something else = treble damages
 - N.C. and Connecticut require “substantial aggravating circumstances”
 - Examples: intentional misrepresentations; multiple breaches over time
- Federal courts and business courts read this theory more strictly than other courts do

Direct Unfairness

- Arises from open-ended definitions of “unfair”
- Courts have struggled to announce rules that would generate predictable results
 - N.C. Supreme Court: padlocking an apartment for unpaid rent is not unfair
 - N.C. Court of Appeals: collecting rent on an unfit dwelling is unfair



Unfair Methods of Competition

- Fuzzy antitrust
- Can enable end runs around antitrust case law
 - *LaChance v. U.S. Smokeless Tobacco Co.* (N.H. 2007): Indirect purchasers lack standing under antitrust law, but do have standing to sue for unfair methods of competition under UTP statute

State Attorney General Enforcement

- State attorneys general increasingly hire outside counsel to pursue UTP claims for a contingent fee
 - South Carolina recovered \$327 million based on off-label marketing of the anti-psychotic drug Risperdal
 - U.S. Supreme Court recently rejected an attempt to remove a state's *parens patriae* claim to federal court under Class Action Fairness Act.

Common “Business v. Business” Scenarios

- Departing-employee cases
- Cases over competitive tactics
- IP claims
- Indirect-purchaser antitrust cases
- Deception claims

UTP Claims in Personal-Injury Cases

UTP claims can provide an alternate route to recovery in tort disputes

- *Howerton v. Arai Helmet* (N.C. 2013) – deceptive to apply safety certification sticker to helmet without clarifying which parts of helmet were certified?
- *Klaimont v. Gainsboro Restaurant* (Mass. 2013) – maintaining restaurant stairs in unsafe condition was unfair and deceptive conduct

Major Pivot Points Under UTP Statutes

- Availability of treble / punitive damages
- Whether non-consumers can bring claims
- Whether class actions are allowed
- Whether winning plaintiffs, and winning defendants, can recover attorney fees

Other Major Pivot Points

- Relationship with FTC rules / federal case law
- How open-ended are the conduct standards?
- In deception cases, is reliance required?

Counter-Revolution?

- Scholars and state supreme courts are increasingly interested in UTP issues
- Will class action counter-revolution reach state UTP cases?
 - U.S. Supreme Court: *Twombly*; *Wal-Mart*; *Concepcion*
 - North Carolina: *Bumpers*; *Torrence*

Bumpers v. Community Bank (N.C. 2013)

- Plaintiffs paid high fees, including “loan discount” fees and closing fees, on second mortgages
- Plaintiffs testified:
 - Overall deal was acceptable
 - Paid no attention to the titles of the fees
- Offensive summary judgment: (1) closing fees were excessive and (2) discounted interest rate was not provided

Key Issues in *Bumpers*

1. Does UTP allow unfairness claim on the theory that a price was “excessive”?
2. Does a deception claim require reliance?
 - Plaintiffs admitted that they did not pay attention to or rely on names of fees

Bumpers: Key Holdings

1. “In most cases, there is nothing unfair or deceptive about freely entering a transaction on the open market.”
 - Caveat: *These* fees, under these circumstances, did not allow a UTP claim



Bumpers: Key Holdings

2. A deception claim requires actual and reasonable reliance

- When the alleged wrong is a statement, it proximately causes harm only if someone relies on it
- “Section 75-1.1 has long encompassed conduct tantamount to fraud, which requires reliance, and we see no reason for departure from that requirement.”

AT&T Mobility LLC v. Concepcion (2011)

- AT&T's customer agreements required arbitration and precluded class action arbitrations
- California Supreme Court: Arbitration clause and class action ban were unconscionable
- U.S. Supreme Court: Federal Arbitration Act preempts state unconscionability doctrine

Torrence v. Nationwide Budget Finance (2014)

- In *Tillman* (2008), N.C. Supreme Court had held an arbitration clause in a small loan agreement unconscionable
- *Torrence: Concepcion* and later Supreme Court decision trump *Tillman*
- Federal Arbitration Act preempts unconscionability doctrine
- N.C. Court of Appeals compelled arbitration of UTP claims

Tips for Business Defendants

- Be sensitive to acts that seem “unfair” without being deceptive
 - General pro-plaintiff thrust of UTP statutes
 - E.g., Closing fees in *Bumpers*
 - E.g., Apple App Store password feature: 20-year consent decree + \$32.5 million in refunds

Tips for Business Defendants

- In non-reliance states, beware liability for deceptive acts “in the forest”
 - Review documents for potential collateral misrepresentations
 - Dangerous to rely on disclaimers or fine print



Tips for Business Defendants

- Consider arbitration clauses in consumer contracts
- Arbitration in “business vs. business” cases involves much harder tradeoffs
 - No dispositive motions
 - Little discovery
 - Split-the-difference decisions
 - Virtually no appeal

Tips for Business Defendants

- Potential preemption arguments in heavily regulated industries
 - E.g., federal regulations allowing banks to issue “convenience checks” preempted UTP statute and defeated claims that the bank deceptively failed to disclose the consequences of use of the checks. *Rose v. Chase Bank* (9th Cir. 2008).

Tips for Business Plaintiffs

- Adding a UTP claim to a contract claim can add great tactical and substantive benefits
 - Treble damages / attorney fees
 - Can avoid contract-law hurdles like the parol evidence rule and the statute of frauds

Tips for Business Plaintiffs

- UTP claims are especially common in “departing employee” claims
 - Theft of trade secrets
 - Be aware of “labor” exemption: Elastic scope

Tips for Business Plaintiffs

- In some states and some cases, a UTP-only strategy could be rational
- The open-ended standards can be your friend
- But assess all the case law up front
- You might also see your briefing again in other cases

Tips for Everyone: Forum is Crucial

- Removal
 - Fraudulent joinder
 - CAFA
 - Complete preemption
- Business Courts
- There is something worse than a series of circuit-riding judges



ELLIS & WINTERS LLP

Thank you!

Matt Sawchak

matt.sawchak@elliswinters.com

919.865.7004