

NORTH CAROLINA UNFAIR AND DECEPTIVE TRADE PRACTICES ACT (UDTPA)

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Business Cases*

BLUEPRINT

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HISTORY

- § 75-1 of North Carolina's General Statutes, the equivalent of the federal Sherman Act, was enacted in 1913. *“Consumer Protection and Unfair Competition in North Carolina – The 1969 Legislation,”* 48 N.C.L. Rev. 896 (1970).
- Scope of 75-1, however, is narrow (focusing on contracts or combinations in restraint of trade) and thus does not provide effective remedy for other forms of unfair business practices.

HISTORY

- UDTPA § 75-1.1 was enacted on June 14, 1969
- In its current version: **Declares unlawful “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.”**
- § 75-1.1 (a) is reproduced verbatim from the federal Trade Commission Act (FTCA), and NCGA adopted this section to parallel and supplement the FTC Act. *Hageman v. Twin City Chrysler-Plymouth, Inc.*, 681 F. Supp. 303 (M.D.N.C. 1988).

HISTORY

- § 75-16 was also amended to extend the possibility of treble-damages recoveries to consumers. It specifically provides for statutory relief to any person who is injured by the acts of another in violation of Chapter 75.

PURPOSE

- “[T]o declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business and between persons engaged in business and the consuming public within this State to the end that good faith and fair dealings between buyers and sellers at all level[s] of commerce be had in this State.”

Bhatti v. Buckland, 328 N.C. 240, 400 S.E.2d 440 (1991).

PURPOSE

- Originally enacted as a consumer protection statute
 1. Established a private cause of action for aggrieved customers
 2. Necessary because common law remedies for fraud and deception often proved ineffective.

Bhatti v. Buckland, 328 N.C. 240, 400 S.E.2d 440 (1991); *Brinkman v. Barrett Kays & Assocs., P.A.*, 155 N.C. App. 738, 575 S.E.2d 40 (2003).

PURPOSE

- Now clear, however, that the statute applies to all transactions in commerce (unless otherwise excepted).

Stolfo v. Kernodle, 118 N.C. App. 580, 455 S.E.2d 869 (1995) (holding that § 75 applies to buyers and sellers at all levels of commerce).

- Applies to indirect purchasers, who may sue without regard to privity of contract. *Hyde v. Abbott Labs*, 123 N.C. App. 572, 584, 423 S.E.2d 680, 688 (1996).
- The remedy is a creature of the statute – neither wholly tortious nor wholly contractual in nature.

Page v. Lexington Ins. Co., 628 S.E.2d 427 (N.C. Ct. App. 2006).

- UDTPA claims may not be assigned. *Horton v. New South Ins. Co.*, 122 N.C. App. 265, 468 S.E.2d 856 (1996).

WHAT ACTIVITY IS COVERED?

- Private sale by homeowner of residential property not covered

Willen v. Hewson, 622 S.E.2d 187 (N.C. Ct. App. 2005). Narrow and uncertain exemption. See *Bhatti v. Buckland*, 328 N.C. 240, 400 S.E.2d 440 (1991)(exemption did not apply where individual sold two lots for residential construction).

- But renting residential property is

Stolfo v. Kernodle, 118 N.C. App. 580, 455 S.E.2d 869 (1995)

- Exception for professional services rendered by learned professionals, including debt collection activities by attorneys § 75.1-1(b); *Reid v. Ayers*, 138 N.C. App. 261, 531 S.E.2d 231 (2000). See also *Burgess v. Busby*, 142 N.C. App. 393, 544 S.E.2d 4 (2001)(doctor not liable for UDTPA for “blackballing” jurors, but may be liable based on common law obstruction of justice).

WHAT ACTIVITY IS COVERED?

- Advertising mediums (i.e. newspapers, TV, radio, etc.) when disseminating ads, provided publisher, owner, etc., does not have knowledge of false or misleading character of advertisement **and** medium does not have direct financial interest in sale or distribution of advertised product or service.

§ 75.1-1 (c)

WHAT ACTIVITY IS COVERED?

- The State or any agency thereof, including cities, may not be sued under UDTPA

Rea Constr. Co. v. City of Charlotte, 121 N.C. App. 369, 465 S.E.2d 342 (1996).

- But the State may sue under the Act

State ex rel. Cooper v. NCCS Loans, Inc., 624 S.E.2d 371 (N.C. Ct. App. 2005); *F. Ray Moore Co., v. State*, 80 N.C. App. 139, 341 S.E.2d 371 (1986).

WHAT ACTIVITY IS COVERED?

- Securities transactions are not covered. *Sterner v. Penn*, 159 N.C. App. 626, 583 S.E.2d 670 (2003).
- But political advertisements made during a campaign are
Boyce & Isley, PLLC v. Cooper, 153 N.C. App. 25, 568 S.E.2d 893 (2002).
- Employer-employee relationships generally not covered by UDTPA unless conduct involves egregious activities outside the scope of assigned employment duties, and otherwise qualifies as unfair or deceptive practices that were in or affecting commerce.
Dalton v. Camp, 353 N.C. 647, 548 S.E.2d 704 (2001). *Cf. Sara Lee Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308 (1999) (where court affirmed liability as to employee engaged in direct unfair competition against employer).

THE CHOICE OF LAW PROBLEM

- Often hotly contested because it will determine whether action survives.
- Traditionally in tort actions, the choice of law is determined by the place where the injury occurred. *Andrew Jackson Sales v. Bi-Lo Stores, Inc.*, 68 N.C. App. 222, 314 S.E.2d 797 (1984).
- Choice of law in UDTPA actions does not follow this traditional rule.

THE CHOICE OF LAW PROBLEM

- **One view:** In UDTPA actions, the choice of law is determined by the state with the most significant relationship to the occurrence that gave rise to the cause of action. *Id.* (requiring examination of various factors).
- **Alternate view:** The law of the State where the last act occurred that gave rise to defendant's injury governs. *United Virginia Bank v. Air-Lift Associates*, 79 N.C. App. 315, 339 S.E.2d 90 (1986).
 - This can be difficult to discern in multi-state commercial relationships, i.e. does injury occur where business is lost (in the customer's state) or where the profits are lost (in plaintiff's principal place of business)?

THE CHOICE OF LAW PROBLEM

- Choice of law provision in a contract will not govern as to UDTPA claim arising from same set of facts. *United Dominion Indus. Inc., v. Overhead Door Corp.*, 762 F. Supp. 126 (W.D.N.C. 1991).

STATUTE OF LIMITATIONS

- The statute of limitations for any civil action brought under Chapter 75 is four years (§ 75-16.2)
- §75-16.2 tolls running of the statute of limitations in certain circumstances
 1. In a state proceeding to punish a violation of Chapter 75
 2. When the party raising the statute of limitations as a defense has committed a fraudulent concealment

STATUTE OF LIMITATIONS

- Accrual of Cause of Action
 - Accrues from the date of violation
 - When an action is based on fraud, the action does not accrue until the fraud is discovered.
Hunter v. Guardian Life Ins. Co. of Am., 162 N.C. App. 477, 593 S.E.2d 595 (2004).
 - When an action more closely resembles a claim for breach of contract, statute of limitations runs on the date of the breach. *Drug Co. v. Carolina Medicorp Enter.*, 96 N.C. App. 277, 385 S.E.2d 801 (1989), overruled on other grounds in *Crossman v. Moore*, 341 N.C. 185, 459 S.E.2d 715 (1995).

STATUTE OF LIMITATIONS

- When an action is continuing in nature, following the first violation, each week the violation continues is a separate offense for the purpose of the statute of limitations (N.C. Gen. Stat. §75-8).

See Medicare Rentals, Inc., v. Advanced Services, 119 N.C. App. 767, 460 S.E.2d 361 (1995)(summary judgment reversed where complaint alleged continuous UDTPA violations and did not show on its face that the claims were time barred).

ELEMENTS

- Bottom Line: What is sufficient to make out UDTPA claim will depend on the facts of each case.
- Elements:
 - (1) An unfair or deceptive act or practice;
 - (2) In or affecting commerce; which
 - (3) Proximately caused actual injury to the claimant or his business

Furr v. Fonville Morisey Realty, 130 N.C. App. 541, 503 S.E.2d 401 (1998).

ISSUE OF VIOLATION

- An act or practice is unfair under the meaning of §75-1.1 if it:

- Violates industry standards

Compare Melton v. Family First Mortg. Corp., 156 N.C. App. 129, 576 S.E.2d 365 (2003)(SJ for defendant proper with respect to handling of mortgage documents where plaintiff failed to show that any of the allegedly unfair or deceptive acts violated industry standards or caused actual injury), with *Walker v. Fleetwood Homes of North Carolina, Inc.*, 627 S.E.2d 629 (N.C. Ct. App. 2006)(holding that a violation of regulatory statutes regarding warranty repairs for manufactured homes makes out a UDTPA claim).

- Offends established public policy

Compare McInerney v. Pinehurst Area Realty, Inc., 162 N.C. App. 285, 590 S.E.2d 313 (2004)(claim properly dismissed where developer acted in conformance with restrictive covenants), with *Morgan, A/K/A Owen v. AT&T Corp.*, 168 N.C. App. 534, 608 S.E.2d 559 (2005)(UDTPA claim should have survived SJ where phone company persisted in billing plaintiff for charges after she cancelled contract and forwarded account to collection agency).

ISSUE OF VIOLATION

- An act or practice is also unfair under the meaning of §75-1.1 if it:
 - Is immoral, unethical, oppressive, unscrupulous, or substantially injurious to customers (*Id.*)
 - Amounts to an inequitable assertion of the party's power or position (*Id.*)

ISSUE OF VIOLATION

- An act or practice is deceptive under the meaning of §75-1.1 if it has the capacity or tendency to deceive.

RD&J Props. v. Lauralea-Dilton Enters., LLC, 165 N.C. App. 737, 600 S.E.2d 492 (2004)(SJ for defendant affirmed even though it failed to disclose alleged defect in property, where it was sold “as is” and with right of inspection, because the defendant’s acts did not have a tendency to deceive an average businessman).

ISSUE OF VIOLATION

- Mere breach of contract without more is not enough

Southeastern Shelter Corp. v. Btu, Inc., 154 N.C. App. 321, 572 S.E.2d 200 (2002);
Broussard v. Meineke Disc. Muffler Shops, 155 F.3d 331 (4th Cir. 1998).

- On the other hand, actual fraud is not required. The relevant question is whether the act had the tendency or capacity to mislead, or created a likelihood of deception.

Melton v. Family First Mortg. Corp., 156 N.C. App. 129, 576 S.E.2d 365 (2003).

ISSUE OF VIOLATION

- Intent of the defendant and good faith are irrelevant

Hageman v. Twin City Chrysler-Plymouth, Inc., 681 F. Supp. 303 (M.D.N.C. 1988).

- Contributory negligence is not a defense to UDTPA claim.

Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 331 S.E.2d 677 (1985).

- Bottom line – **party must allege and prove attendant aggravating circumstances surrounding a breach of contract claim to make out UDTPA violation.** *See Meineke*

ISSUE OF COMMERCE

- Commerce is defined as “all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.”
- N.C. Gen. Stat. § 75-1.1(b) encompasses broad swath of commercial activity.
- Plaintiff must allege substantial effect on **in-state** business operations and UDTPA will not apply merely because defendant is a North Carolina entity, where injury has negligible effect on NC trade or commerce. *The ‘In’ Porters v. Hanes Printables, Inc.*, 663 F. Supp. 494 (M.D.N.C. 1987).

ISSUE OF COMMERCE

- “Matters of internal corporate management, such as the manner of selection and qualifications for directors, do not affect commerce and therefore do not make out UDTPA claim.”

Wilson v. Blue Ridge Elec. Mbrshp. Corp., 157 N.C. App. 355, 578 S.E.2d 692 (2003).

ISSUE OF PROXIMATE CAUSE

- The allegedly unfair or deceptive act or practice must have proximately caused actual injury to the claimant, or to his business.

Bob Timberlake Collection, Inc. v. Edwards, 626 S.E.2d 315 (N.C. Ct. App. 2006);
Old Salem Foreign Car Serv., Inc. v. Webb, 159 N.C. App. 93, 582 S.E.2d 673 (2003).

ISSUE OF DAMAGES

- § 75-16 provides for mandatory recovery of treble damages if the court finds a violation of the statute. This provision is intended to encourage private enforcement actions.

Page v. Lexington Ins. Co., 628 S.E.2d 427 (N.C. Ct. App. 2006); *Morgan v. AT&T Corp.*, 168 N.C. App. 534, 608 S.E.2d 559 (2005).

- NCGS § 75-16 is both punitive and remedial in nature
 - Encourages private enforcement
 - Makes it more economically feasible to bring an action in cases where possible money damages are limited
 - Increases the incentive for settlement

Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981).

ISSUE OF DAMAGES

- To recover damages, party must present evidence from which a jury could reasonably calculate damages.

Castle McCulloch, Inc. v. Freedman, 169 N.C. App. 497, 610 S.E.2d 416 (2005).

- Actual injury should be determined by the “out of pocket loss suffered by the plaintiff.”

Jacobs v. Physicians Weight Loss Ctr. of Am., Inc., 620 S.E.2d 232 (N.C. Ct. App. 2005).

- The jury should not be told that damages may be trebled.

Mapp v. Toyota World, Inc., 81 N.C. App. 421, 344 S.E.2d 297 (1986) (trial judge properly sustained objection to reference in opening statement to treble damages).

ACTS THAT AMOUNT TO UDTPA

- False representation of condition of a product

DaimlerChrysler Corp. v. Kirkhart, 148 N.C. App. 572, 561 S.E.2d 276 (2002).

- Systematic overcharging for product or services

Adams v. Aventis, S.A., 2003 NCBC 7, 2003 NCBC LEXIS 10 (August 26, 2003)(holding that the full amount of the overcharge can be recovered, and trebled).

- Failing to maintain rental property and insisting on full rent

Dean v. Hill, 171 N.C. App. 479, 615 S.E.2d 699 (2005); *Stolfo v. Kernodle*, 118 N.C. App. 580, 455 S.E.2d 869 (1995).

ACTS THAT AMOUNT TO UDTPA

- Libel/slander regarding business dealings

Boyce & Isley, PLLC v. Cooper, 153 N.C. App. 25, 568 S.E.2d 893 (2002).

- Failing in good faith to settle insurance claims

Page v. Lexington Ins. Co., 628 S.E.2d 427, 2006 N.C. App. LEXIS 862 (N.C. Ct. App. 2006).

REMEMBER

- WHEN THROWN INTO DEEP WATER, BEFORE TRYING TO SWIM TO SHORE, FIRST BE SURE TO GET OUT OF THE BURLAP SACK!

TRIAL OF A UDTPA CLAIM

- **THE ROLE OF THE JURY**
 - The jury decides the factual issues relevant to the case
 - Whether the defendant did what was alleged;
 - Whether the defendant's conduct was in or affected commerce;
 - Generally, not in dispute, unless the conduct is specifically excluded by statute or case law. If sufficient facts are admitted or stipulated to permit the court to find that the defendant's conduct was "in commerce" or "affected commerce," the court may find as a matter of law that this issue is proven. *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975).
 - Whether the defendant's actions were the proximate cause of the plaintiff's injuries; and
 - The actual damages.

TRIAL OF A UDTPA CLAIM

- **THE ROLE OF THE JUDGE**

- The court determines, as a matter of law, whether the facts established by the jury amount to a violation of Chapter 75.

Hageman v. Twin City Chrysler-Plymouth, Inc., 681 F. Supp. 303 (M.D.N.C. 1988); *McInerney v. Pinehurst Area Realty, Inc.*, 162 N.C. App. 285, 590 S.E.2d 313 (2004).

- **TREBLE DAMAGES**

- If the judge so finds, he/she must award treble damages.

Pinehurst, Inc., v. O'Leary Bros. Realty, 79 N.C. App. 51, 338 S.E.2d 918 (1986).

PUNITIVE DAMAGES

- If facts also support recovery for punitive damages, the plaintiff may allege both, but the recovery is limited to one or the other.

Compton v. Kirby, 157 N.C. App. 1, 577 S.E.2d 905 (2003).

- Plaintiff elects its remedy either prior to jury instructions or after return of the jury verdict.

State ex. Rel. Easley v. Rich Food Servs. Inc., 139 N.C. App. 691, 535 S.E.2d 84 (2000).

ATTORNEYS' FEES

- In his/her discretion, the judge may award reasonable attorney fees to the attorney representing the prevailing party when:
 - The party charged with violation willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit;
Willen v. Hewson, 622 S.E.2d 187 (N.C. Ct. App. 2005); **or**
 - The party instituting the action knew, or should have known, the action was frivolous and malicious.
Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981).

ATTORNEYS' FEES

- Even when all of the requirements have been met, judge may properly decide not to award attorney's fees.

Castle McCulloch, Inc. v. Freedman, 169 N.C. App. 497, 610 S.E.2d 416 (2005).

- The court must make specific findings of fact on these issues, to include findings as to the time and labor expended, the skill required to perform the services rendered, the customary fee for like work, and the experience and ability of the attorney.

PRACTICAL POINTERS

- Pay attention to the scope of *voir dire* questions regarding UDTPA claims, or to arguments regarding trebling in front of the jury. The jury should not be advised of trebling provisions of UDTPA statute.
- Jury decides whether alleged acts were committed, whether they arise in commerce, proximate cause, and damages. The court then determines as a matter of law whether the alleged acts amount to a violation of the statute.

PRACTICAL POINTERS

- Have parties submit special interrogatories for each alleged violation and bifurcate the factual issues from legal determination as to whether proven facts amount to a violation of the statute.
- Also remember bifurcation of punitive damages phase, if any.
- Be on lookout for UDTPA claims thrown in to gain leverage for what is really a breach of contract case. A not-uncommon practice. Potential sanctions. *See Mieneke.*
- Make specific findings of fact regarding any award of attorney's fees.

PRACTICAL POINTERS

- When considering UDTPA claim in commonly-seen default setting:
 - Plaintiff still has burden of proving actual damages before trebling.
 - Be cautious in proceeding without evidentiary inquiry – trebling in “sum certain” cases. Related considerations in punitive damages cases.
 - Election of remedies by plaintiff still required when pleadings raise issues of punitive and treble damages. Strategy considerations in face of low compensatory damages, collectibility of judgment issues, threat of bankruptcy, etc.
 - What if jury trial has been demanded by plaintiff? Or, more problematically, by non-appearing defendant who made earlier appearance? Can plaintiff unilaterally waive jury trial?

Consider *Frissel v. Frissel*, 47 N.C. App. 149, 266 S.E.2d 866 (1980).

QUESTIONS??