COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

PUBLIC
(as of Jan 21, 2004)

File No. CT-2002-004
Commissioner of Competition vs Sears Canada Inc.

Exhibit No.: R115

Filed on: November 3, 2003

Registrar: Jon LaRose

Tribunal File No.: CT-2002-004

THE COMPETITION TRIBUNAL

IN THE MATTER OF THE *COMPETITION ACT*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an inquiry pursuant to subsection 10(1)(b)(ii) of the *Competition Act* relating to certain marketing practices of Sears Canada Inc.;

AND IN THE MATTER OF an Application by the Commissioner of Competition for an order pursuant to section 74.10 of the *Competition Act*;

AND IN THE MATTER OF Sears Canada Inc.'s opposition to the Application and Sears Canada Inc.'s request for certain relief from the Competition Tribunal;

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

SEARS CANADA INC.

Respondent

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE
FILED / PRODUIT
OCT 14 2003
REGISTRAR — REGISTRAIRE
OTTAWA, ONT. #0077

AFFIDAVIT OF STEPHEN PAUL MAHINKA
(sworn September 22, 2003)

I, STEPHEN PAUL MAHINKA, Attorney, of the City of Great Falls, in the Commonwealth of Virginia, in the United States of America, SWEAR THAT:

A. INTRODUCTION

1. I am a partner in and the manager of the Antitrust Practice Group of the Washington, D.C. office of the law firm of Morgan, Lewis & Bockius LLP. The Antitrust Practice Group is involved in counselling on and litigation of all aspects of U.S. federal and state antitrust and trade regulation matters, including matters related to pricing, marketing, advertising, and consumer protection.

2. I obtained a Bachelor of Arts from Johns Hopkins University in 1971, and a Juris Doctor from Harvard Law School in 1974. I am an attorney licensed to practice in the District of Columbia, and my practice regularly calls for me to evaluate and provide legal counsel regarding U.S. federal law and the laws of the states, as described more fully below.

3. During my 28 years as a lawyer, I have provided counselling and litigation services on pricing, marketing, advertising and consumer protection matters involving the Federal Trade Commission ("FTC" or "the Commission"), officials representing various states within the United States, and private parties.

4. I have been retained by clients to provide advice regarding compliance with price comparison requirements under U.S. and state laws. I have also been retained to draft the pricing and price comparison guidelines used by sellers of products in the U.S. who sell in multiple states, both through physical store locations and Internet sales.

5. I have defended clients regarding state Attorney General investigations of pricing and advertising activities, including Philips Lighting Co. before the New York Attorney General. I have also acted for clients proposing the initiation of investigations of competing companies by state Attorneys General regarding price comparisons. Further, I have acted as counsel in private litigation asserting violations of state comparative pricing requirements, as in the pending case of Starcrest Products of California, Inc. v. Publishers Clearing House, (C.D. Cal.), on behalf of the defendant/counterclaim plaintiff.

6. I have published numerous articles concerning U.S. antitrust law and consumer protection issues.

7. A detailed description of my background and qualifications is set out in my *curriculum vitae*, attached to this affidavit as Exhibit A.

B. SCOPE OF THIS REPORT

Assistance Requested

8. Ogilvy Renault, the solicitors for the Respondent Sears Canada Inc., have requested that I set out the state of the law in the United States governing price advertisements that contain a comparison between a seller's former and current offering price. In responding to this request, I have also described relevant legal factors, criteria, and standards to be considered by sellers when making such comparisons and by those entrusted with enforcement of the law.

Material Reviewed

9. In preparing this opinion, I have reviewed United States federal law relating to the advertising of comparison prices promulgated by the FTC, as well as the laws of various states within the United States. My review of these laws, in addition to my training, experience, research and written work, have provided me with the necessary information for this affidavit.

Background

10. The FTC Act prohibits unfair acts and deceptive practices.[1/] Under this authority, the FTC promulgated "Guides Against Deceptive Pricing," ("FTC Guides" or "the Guides") which are codified in the FTC's regulations at 16 C.F.R. pt. 233. The FTC's regulations have the force of law. Three principal types of comparative pricing claims are addressed in the FTC's Guides: (1) former price comparisons; (2) comparisons based on competitor's prices; and (3) comparisons to manufacturer's suggested retail prices or list prices. For the purposes of this affidavit, I have limited my review to former price comparisons. True copies of the FTC Act and the FTC's regulations are attached to this affidavit as Exhibit B.

11. The United States FTC promulgated regulations in 1967 addressing comparisons by sellers between current and former prices, which regulations are general in scope and do not provide specific guidance. However, in recent decades,

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1/ FTC Act, § 5; 15 U.S.C. § 45(a)(1).

enforcement actions for comparative pricing claims have been undertaken primarily by the states, under state statutory authority typically modelled after the FTC Act. Because state enforcement actions of this type are ordinarily settled through a negotiated consent order or other type of voluntary agreement, there are few reported judicial decisions. Therefore, the relevant state statute and/or regulation typically contains all applicable guidance to sellers regarding price comparison advertising.

12. Since state authorities primarily enforce state statutes and regulations addressing the use of price comparisons in product advertisements, the bulk of this opinion summarizes the factors, criteria, and standards set out in selected state statutes and/or regulations as they relate to product advertisements containing price comparisons between a seller's former and current prices.

13. This affidavit does not contain a description of every state statute relating to comparative price advertisements. Instead, the relevant state statutes and/or regulations of a selected number of key states within the United States have been described. These states have been chosen based on population and geographic distribution. Specifically, states within the U.S. have been selected that cumulatively represent the majority of the U.S. population. The relevant law from additional states has been included to ensure that the review is geographically reflective of the U.S. The laws of New York, California and Texas are described, as they have the highest populations of the 50 states, and each contributes significantly to the United States' GNP. Based on my experience, this approach is typical of the type of survey which companies operating within most or all 50 states would undertake when evaluating state laws in this area, as it is responsive to practical considerations of time and expense attendant on a 50-state survey.

14. Because the law varies among the states as noted below, it has been my experience and has formed the basis of advice provided to clients in this area, that sellers will commonly seek to comply with a more specific, relevant state statute

or regulation governing price comparisons as this practice can be expected to result in compliance with more general state statutes.

15. As reflected in the descriptions of state law that follow, it is common for state statutes and regulations to incorporate time-related standards, criteria or definitions for comparative price advertising. In many states, however, no requirement exists as to the volume or percentage of product which must be sold at either the higher, former price or the lower, advertised price.

C. THE LAW

Federal Regulation

16. The FTC Guides, which form the basis for United States federal law on pricing representations, permit a comparison of an advertiser's current price to its former price if the former price is the actual, *bona fide* price at which the article was offered to the public on a regular basis for a reasonably substantial period of time.[2/] The former price must be a price at which the advertiser actually intended to sell the merchandise, and cannot be a merely fictitious price set only for the purpose of advertising reductions from it later.[3/] A former price is not necessarily fictitious merely because no sales were made at the advertised price.[4/] In this instance, the FTC Guides instruct advertisers to be "especially careful" that "the price is one at which the product was openly and actively offered for sale, for a reasonably substantial period of time, in the recent, regular course of his business,

2/ 16 C.F.R. § 233.1(a). A "reasonably substantial period of time" is not further defined in FTC's regulations.

3/ 16 C.F.R. § 233.1(c).

4/ 16 C.F.R. § 233.1(b).

honestly and in good faith."[5/] Advertisers should also "scrupulously avoid any implication that a former price is a selling, not an asking price."[6/]

17. The FTC Guides also set forth an example of an improper price comparison, based on a fictitious former price.[7/] The Guides provide other examples of fictitious prices, such as when an advertiser uses a price at which it never offered the article at all; when an advertiser uses a price which was not used in the recent past but at some remote period in the past, without disclosure of that fact; and when an advertiser uses a price that was not openly offered to the public, or that was not maintained for a reasonable length of time, but was immediately reduced.[8/] The Guides further provide that, even when a former price is not stated, but an advertiser merely advertises a "Sale," the advertiser must take care to ensure that the amount of price reduction is not so insignificant as to be meaningless.[9/] Instead, the price reduction should be sufficiently large that the consumer, if he or she knew the former price, would believe that a genuine bargain was being offered.[10/] The Guides state that: "An advertiser who claims that an item has been 'Reduced to $9.99,' when the former price was $10.00, is misleading the consumer, who will understand the claim to mean that a much greater, and not merely nominal, reduction was being offered."[11/]

5/ 16 C.F.R. § 233.1(b). The meaning of "openly and actively" is also not further defined, however, as discussed below, some states have provided more precise guidance by setting forth a number of days or percentage of time during which the product must have been offered at the higher price.

6/ Id.

7/ "John Doe is a retailer of Brand X fountain pens, which cost him $5 each. His usual markup is 50 percent over cost; that is, his regular retail price is $7.50. In order subsequently to offer an unusual 'bargain', Doe begins offering Brand X at $10 per pen. He realizes that he will be able to sell no, or very few, pens at this inflated price. But he doesn't care, for he maintains that price for only a few days. Then he 'cuts' the price to its usual level -- $7.50 -- and advertises: 'Terrific Bargain: X Pens, Were $10, Now Only $7.50!' This is obviously a false claim. The advertised 'bargain' is not genuine." 16 C.F.R. § 233.1(c).

8/ 16 C.F.R. § 233.1(d).

9/ 16 C.F.R. § 233.1(e).

10/ Id.

11/ Id.

Selected State Laws/Regulations

Alaska

18. It is an unfair or deceptive act or practice in Alaska for a seller to advertise the same merchandise as being "on sale" or reduced from the seller's regular price if, in fact, the "on sale" price is the price for which the goods are actually sold for more than six months out of any 12-month period, or, in the case of seasonal merchandise, for more than one-half the time it is offered by the seller unless the price is permanently reduced to clear the merchandise.[12/] A true copy of Alaska's statute, which became effective in April 1980, is attached to this affidavit as Exhibit C.

California

19. Section 17501 of the California Business and Professions Code prohibits the advertisement of a former price for an article, "unless the alleged former price was the prevailing market price . . . within three months next immediately preceding the publication of the advertisement or unless the date when the alleged former price did prevail is clearly, exactly and conspicuously stated in the advertisement."[13/] The statute also states that "the worth or value of any thing advertised is the prevailing market price . . . . at the time of publication of [the] advertisement in the locality wherein the advertisement is published."[14/] A true copy of California's Business and Professions Code, which was originally passed in 1941, is attached to this affidavit as Exhibit D.

12/ Alaska Admin. Code tit. 9, § 05.020(d) (2003).

13/ Cal. Bus. & Prof. Code § 17501 (Deering 2003).

14/ Id.

Colorado

20. Under Colorado law, a person engages in a deceptive trade practice when such person "makes false or misleading statements of fact concerning the price of goods, services, or property or the reasons for, existence of, or amounts of price reductions."[15/] At least one business has been found liable for violating this statute when it set its retail price for an item artificially higher for a short period of time and then discounted the item and used the artificially higher price as a basis for a price comparison advertisement.[16/] A true copy of Colorado's revised statute, which was enacted in 1987, is attached to this affidavit as Exhibit E. A true copy of the Woodard decision is attached to this affidavit as Exhibit F.

Connecticut

21. Connecticut requires adherence to one of the four following standards to properly use a last previous, customary price for advertising purposes. A seller can use a price at which: (1) the product was actually sold in the last 90 days immediately preceding the date on which the price comparison is stated in the advertisement, or (2) the product was actually sold during any other period, and the advertisement discloses with the price comparison the date, time or season period when such sales were made;[17/] if the seller uses a price at which the product has been offered for sale but no sales have been made, then the price must be: (3) a price at which the product has actually been offered for sale for at least four weeks during the last 90 days immediately preceding the date the price comparison is stated in the advertisement, or (4) a price at which the product was actually offered for sale for at least four weeks during any other 90-day period as is clearly disclosed in the advertisement.[18/] Further, Connecticut mandates that if

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15/ Colo. Rev. Stat. § 6-1-105(1)(l) (2003).

16/ Colorado ex rel. Woodard v. May Dep't Stores, Co., 849 P.2d 802 (Colo. Ct. App. 1992).

17/ Conn. Agencies Regs. § 42-110b-12a(a) (2003).

18/ Conn. Agencies Regs. § 42-110b-12a(b) (2003).

a seller uses the term "original" or "originally" in a price comparison, if the comparative price is not the last selling price, that fact shall be disclosed by stating the last previous selling price, (e.g., "Originally $25.00, Formerly $20.00, Now $15.00,") or indicating "intermediate markdowns taken."[19/] A true copy of Connecticut's regulations, which became effective in 1986, is attached to this affidavit as Exhibit G.

Florida

22. Florida's Deceptive and Unfair Trade Practices law generally prohibits unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.[20/] Regulations implementing these provisions have been repealed on the basis that it is neither possible nor necessary to codify every conceivable deceptive and unfair trade practice prohibited by the statute.[21/] A true copy of Florida's Deceptive and Unfair Trade Practices law, which was originally enacted in 1973, is attached to this affidavit as Exhibit H.

Georgia

23. It is unlawful in Georgia to make false or misleading statements concerning the reasons for, existence of, or amounts of price reductions.[22/] Georgia's regulations, which became effective in 1977, repeat the same standard and provide no specific guidance regarding price comparison advertisements.[23/] True copies of Georgia's statute and regulations are attached to this affidavit as Exhibit I.

19/ Conn. Agencies Regs. § 42-110b-12a(g) (2003).

20/ Fla. Stat. ch. 501.204 (2002).

21/ Fla. Admn. Code Ann. r. 2-2.001 (2003).

22/ Ga. Code Ann. § 10-1-393(b)(11) (2002).

23/ GA. Comp. R. & Regs. r. 122-1-.04(1)(k) (2003).

Idaho

24. It is unfair and deceptive in the state of Idaho to compare a present price to a former price if the seller establishes a fictitious or inflated former price for a short period of time and for the purpose of subsequently offering a reduction.[24/] This provision became effective in 1979. A seller also may not reference a former price if it was merely an asking price and not a *bona fide*, regular price at which the goods were openly, actively, and actually offered or sold.[25/] This provision became effective in 1993. Savings or value claims made by an advertiser in connection with the use of terms such as "originally," "formerly," "regularly," "usually," "compare at," "list price," or other similar terms must be based on facts provable by the seller, using the seller's own records or by reasonably substantial comparative sales in the trade area where the claims are made, under conditions represented or implied by the claims.[26/] A true copy of the Idaho statute is attached to this affidavit as Exhibit J.

Illinois

25. In Illinois, it is a deceptive trade practice to make false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions.[27/] Illinois regulations under this statute governing price comparisons, which became effective in 1989, further provide that a seller may make a comparison to its former price if one of the following criteria are met: (1) the former price is equal to or below the price(s) at which the seller made a substantial number of sales of such products in the recent regular course of its business; or (2) the former price is equal to or below the price(s) at which the product was offered for a reasonably substantial period of time in the recent regular course of business, openly and

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24/ Idaho Code § 04.02.01.062 (2002).

25/ Id.

26/ Idaho Code § 04.02.01.061 (2002).

27/ 815 Ill. Comp. Stat. Ann. 510/2(a)(11) (2003).

actively in good faith, with an intent to sell the product at that price(s).[28/] The regulation further provides that if a range of prices or fractional discounts are advertised (e.g., "Save from 1% to 50% off"), the ad will be unfair or deceptive unless the highest price or lowest discount in the range is clearly and conspicuously disclosed in the advertisement, and a reasonable number of the items are offered for sale with at least the largest advertised discount.[29/] If at least five percent of the items are offered with at least the largest advertised discount, a rebuttable presumption is created that a reasonable number were offered with at least the largest advertised discount.[30/] A true copy of the Illinois provisions discussed above is attached to this affidavit as Exhibit K.

Massachusetts

26. Under Massachusetts law, if a seller makes a comparison between its current and former price, the former price must be either: (1) equal to or below the price(s) at which the seller made at least 30% of its sales in the state in the 12 month period immediately preceding the advertisement; or (2) the comparison is made during a 180-day period immediately following the establishment of the former price and the product is not offered at a lower price for more than 45% of that 180-day period.[31/] A former price is established under Massachusetts regulations by offering the product for sale at such price or a higher price openly and in good faith on each business day for at least 14 consecutive calendar days immediately preceding the initial price comparison advertisement.[32/]

27. The regulations further provide that the burden is on the seller in Massachusetts to show that its former price is not an inflated or exaggerated price. The following

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28/ Ill. Admin. Code tit. 14, § 470.220 (2003).

29/ Ill. Admin. Code tit. 14, § 470.240 (2003).

30/ Id.

31/ Mass. Regs. Code tit. 940, § 6.05(3)(a) (2003).

32/ Mass. Regs. Code tit. 940, § 6.05(3)(1)(2) (2003).

factors will be considered to determine whether the seller has met such burden: (1) whether the seller compares its current price to its former price when the seller knows at the time it sets the former price that no sales, or very few sales, will be made at such former price; (2) whether the former price substantially exceeds the price at which a reasonable number of non-discount sellers sell the product in the seller's trade area; (3) where a manufacturer's suggested retail price or list price exists, whether the former price exceeds such price and by what amount; (4) whether the product was openly and actively offered in the recent, regular course of business, such as by devoting reasonable display space to the product during the period(s) in which it was at the former price, maintaining reasonable inventory during former price periods, advertising the product at the former price; or (5) the former price is equal to or below the price(s) at which the seller has offered the product for sale in Massachusetts for less than 14 days, and the seller clearly and conspicuously discloses in all advertisements for the product the specific period during which the seller offered the product at the former price.[33/] A true copy of these provisions is attached to this affidavit as Exhibit L.

Missouri

28. Under Missouri law, a price comparison may only be made if the comparative price is an actual, *bona fide* price at which reasonably substantial sales of the product were made in the regular course of business and on a regular basis during a reasonably substantial period of time in the immediate, recent period prior to the advertisement.[34/] A rebuttable presumption that a seller has not complied with this requirement exists unless the seller can demonstrate that the percentage of unit sales of the product at the comparative price or higher is 10% or more of the total unit sales of the product, for no less than 30 days nor more than 12 months.[35/] A price comparison may also be made in Missouri if the comparison

33/ Mass. Regs. Code tit. 940, § 6.05(3)(1)(2) (2003).

34/ Mo. Code Regs. Ann. tit. 15, § 60-7.060(2)(B)(1) (2003).

35/ Id.

price is one at which the product was openly and actively offered for sale to the public by the seller in the regular course of the seller's business, and on a regular basis during a reasonably substantial period of the time in the immediate, recent period preceding the advertisement.[36/] A rebuttable presumption exists that the seller has not complied with this requirement unless the seller can show that the product was offered for sale at the comparative price, or at prices higher than the comparative price, 40% or more of the time during a period of time not less than 30 days or more than 12 months which includes the advertisement.[37/]

29. Missouri regulations also provide that a price comparison may be made to a price at which reasonably substantial sales of the product were made to the public in the regular course of the seller's business, and on a regular basis during a reasonably substantial period of time in any period preceding the advertisement, and the advertisement clearly discloses the date, time, or seasonal period of that offer.[38/] A rebuttable presumption exists that the seller has not complied with this requirement unless the seller can show that the percentage of unit sales of the product at the comparative price or higher is 10% or more of the total unit sales of the product during the disclosed date, time, or seasonal period.[39/] Further, a price comparison advertisement may be made to a price at which the product was openly and actively offered for sale to the public in the regular course of the seller's business and on a regular basis during a reasonably substantial period of time in any period preceding the advertisement, and the advertisement with the price comparison clearly discloses the date, time, or seasonal period of that offer.[40/] A rebuttable presumption exists that the requirement has not been complied with if the seller cannot show that the product was offered for sale at the comparative price or higher 40% or more of the time during a period of time not

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36/ Mo. Code Regs. Ann. tit. 15, § 60-7.060(2)(B)(2) (2003).

37/ Id.

38/ Mo. Code Regs. Ann. tit. 15, § 60-7.060(2)(B)(3) (2003).

39/ Id.

40/ Mo. Code Regs. Ann. tit. 15, § 60-7.060(2)(B)(4) (2003).

less than 30 days or more than 12 months during the disclosed date, time, or seasonal period.[41/] A true copy of Missouri's regulatory requirements, which became effective in 1990, is attached to this affidavit as Exhibit M.

New Jersey

30. In New Jersey, for products offered at retail prices of $100.00 or more, the former price must be in effect for at least 28 days out of the 90 days prior to the effective date of the advertisement or during such other period as disclosed.[42/] "A former price or price range or amount of reduction will be deemed fictitious if it cannot be substantiated, based on proof" that: (1) "a substantial number of sales of the advertised or comparable merchandise . . . [were] made [in] the advertiser's trade area in the regular course of business at any time within the most recent 60 days during which the advertised merchandise was available for sale prior to, or which were in fact made in the first 60 days during which the advertised merchandise was available for sale following the effective date of the advertisement;" (2) the merchandise or comparable merchandise "was actively and openly offered for sale at that price within the advertiser's trade area in the regular course of business during at least 28 days of the most recent 90 days before or after the effective date of the advertisement;" or (3) "that the price does not exceed the supplier's cost plus the usual and customary mark-up used by the advertising merchant in the actual sale of advertised merchandise or comparable merchandise in the recent regular course of business."[43/] A true copy of New Jersey's regulations, which became effective in 1996, is attached to this affidavit as Exhibit N.

41/ Id.

42/ N.J. Admin. Code tit. 13, 13:45A-9.4(a)(6) (2003).

43/ N.J. Admin. Code tit. 13, 13:45A-9.6(b) (2003).

New York

31. Section 350 of New York's General Business Law makes false advertising in the conduct of any business, trade or commerce, or in the furnishing of any service, unlawful.[44/] Section 350-a of New York's General Business Law defines false advertising as advertising, including labeling, that is misleading in a material respect, and states that representations made by statement, word, design, device, sound or any combination thereof, but also omit any material facts, can cause an advertisement to be misleading.[45/] Finally, Section 396 of New York's General Business Law prohibits unlawful sales practices, including the offer for sale of any merchandise with the intent, purpose, or design not to sell the merchandise at the price stated in the advertisement.[46/] A company has been held to have violated this section of the law when, among other things, it advertised goods using 'fictitious bargain claims.'"[47/] A true copy of the relevant New York statutes are attached to this affidavit as Exhibit O. A true copy of the Lefkowitz decision is attached to this affidavit as Exhibit P.

Nevada

32. In Nevada, a seller may not make an assertion of price in an advertisement unless the price comparison is based on a reliable and trustworthy survey, the price of the products at the time of comparison can be substantiated, and each product of the competitor being compared in the survey is the same or comparable in all material respects.[48/] An advertisement containing a price comparison must clearly and distinctly disclose the date on which the prices being compared were used, the method used to determine the prices being offered, and the name of the seller or

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44/ N.Y. Gen. Bus. Law § 350 (2003).

45/ N.Y. Gen. Bus. Law § 350-a (2003).

46/ N.Y. Gen. Bus. Law § 396(1) (2003).

47/ Lefkowitz v. Levinson, 199 N.Y.S.2d 625, 629 (N.Y. Sup. Ct. 1960).

48/ Nev. Admin. Code ch. 598, § 598.270 (2003).

other person who surveyed the prices and who will substantiate the price comparison assertion upon request by the State.[49/] The price of a product being used in a comparison must not be temporarily lowered to distort the survey results required. A rebuttable presumption that the product's price was temporarily lowered for the purpose of distorting a survey's results will exist if the product has been offered for sale for less than 21 days immediately preceding the date of the comparison.[50/] A true copy of Nevada's statutory provisions, which became effective in 1993, is attached to this affidavit as Exhibit Q.

Ohio

33. Under Ohio law, if a price is not the selling price of the goods for at least 31 days out of the immediately preceding 60 days, or if it was offered for less than 30 days preceding such advertised price comparison and substantial sales of the goods were not made during such period, this will provide prima facie evidence that the offered price is not the regular price.[51/] If a supplier makes a comparison to its own price using terms such as "regularly . . ., now. . .," ". . . percent off," "reduced from . . . to . . .," "save $ . . .," then the comparison must be to the supplier's regular price or clear disclosures must be made to the other price used for comparison.[52/] If a supplier uses language indicating a range of savings or reduction, it is deceptive if the goods or services offered at the savings do not contain a reasonable number of items priced at the maximum reduction or lower, unless this fact is clearly and conspicuously disclosed.[53/] A true copy of Ohio's regulations, which became effective in 1975, is attached as Exhibit R to this affidavit.

49/ Nev. Admin. Code ch. 598, § 598.260(1) (2003).

50/ Nev. Admin. Code ch. 598, § 598.260(5) (2003).

51/ Ohio Admin. Code § 109:4-3-12(B)(6) (2003).

52/ Ohio Admin. Code § 109:4-3-12(E)(1) (2003).

53/ Ohio Admin. Code § 109:4-3-12(E)(2) (2003).

Oregon

34. Oregon law makes it unlawful to make false or misleading representations of fact concerning the reasons for, existence of, or amounts of price reductions.[54/] Oregon's regulations provide that a person engages in unfair or deceptive trade or commerce when he or she represents that goods are available at an offering price less than a reference price, unless the reference price is stated or readily ascertainable and is a price at which the person, in the regular course of business, made good faith sales of the same or similar goods or, if no sales were made, offered in good faith to make sales of the same or similar good either: (1) within the preceding 30 days; or (2) at any other identified time in the past.[55/] Good faith will not be found if the seller raises the price in order to subsequently make reductions.[56/] The statute also provides that a chain store may reduce its price in one or two retail outlets to meet local competition, and the price throughout the rest of the chain may be used as the reference price.[57/] A true copy of Oregon's regulations, which became effective in 1976, is attached to this affidavit as Exhibit S.

Pennsylvania

35. Pennsylvania law provides that "unfair methods of competition" or "unfair or deceptive acts or practices" include "making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions."[58/] Further, a person is deemed to commit an offense, if in the course of business, such person "makes a false or misleading statement in any advertisement addressed to the public or to a substantial segment thereof for the purpose of

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54/ Or. Rev. Stat. § 646.608(1)(j) (2002).

55/ Or. Admin. R. 137-020-0010(6) (2003).

56/ Id.

57/ Id.

58/ Pa. Stat. Ann. tit. 73, § 201-2(4)(xi) (2003).

promoting the purchase or sale of property or services."[59/] No further clarifications of these provisions are provided. A true copy of these Pennsylvania laws is attached to this affidavit as Exhibit T.

South Dakota

36. It will be considered deceptive in South Dakota for any person to advertise price reductions without either: (1) disclosing in the advertisement the specific basis for the price reduction claim; or (2) offering the merchandise at the higher price for at least seven consecutive business days during the 60 day period prior to the advertisement.[60/] A true copy of the South Dakota provisions is attached to this affidavit as Exhibit U.

Texas

37. Under Texas law, false, misleading or deceptive acts or practices in the conduct of trade or commerce are unlawful and include, among others, making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions.[61/] Further, "[t]he use of words such as 'discount, sale, special, or similar words which impliedly compare the selling price to a regular or prevailing price or which suggest that real savings are being offered are unlawful if there is no regular or prevailing price or if the reduced price is only nominally lower than the regular or prevailing price."[62/] A true copy of the Texas statute is attached to this affidavit as Exhibit V.

59/ 18 Pa. Cons. Stat. § 4107(a)(5) (2003).

60/ S.D. Codified Laws § 37-24-6(2) (2003).

61/ Tex. Bus. & Com. Code § 17.46(b)(11) (2003).

62/ Enterprise-Laredo Assoc. v. Hachar's, Inc., 839 S.W.2d 822, 830 n.6 (Tex. App. 1992) (citing Texas Consumer Litigation § 3.05.011 (2d ed. 1983)).

Washington

38. Washington law makes it unlawful to engage in "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."[63/] Further, any person that makes an advertisement that contains an assertion, representation or statement of fact that is untrue, misleading, or deceptive, is guilty of a misdemeanor under Washington law.[64/] It is also unlawful to display, disseminate, or publish any false, deceptive or misleading advertisement with knowledge of the facts that render such advertisement false, misleading or deceptive, or which is likely to induce the public to purchase such merchandise.[65/] A true copy of Washington's requirements is attached as Exhibit W to this affidavit.

Wisconsin

39. In Wisconsin, a price comparison based on a price at which a seller has offered for sale but not sold any merchandise may not be made unless: (1) the price is one at which the goods were offered for sale for at least four weeks during the last 90 days immediately preceding the date on which the price comparison is stated in the advertisement; or (2) the price is one at which the goods were offered for sale for at least four weeks during any other 90 day period and the advertisement clearly discloses such other period.[66/] Similarly, if sales of the goods were actually made, then the former price must be one at which the goods were actually sold in the last 90 days immediately preceding the date on which the price comparison is stated in the advertisement, or the price is one at which the goods

63/ Wash. Rev. Code § 19.86.020 (2003).

64/ Wash. Rev. Code § 9.04.010 (2003).

65/ Wash. Rev. Code § 9.04.050 (2003).

66/ Wis. Admin. Code § 124.05 (2003).

were actually sold in any other period, so long as that time period is disclosed in the advertisement.[67/]

40. A Wisconsin court has further clarified that, "[a]n advertisement, however, must be considered in the context of (1) whether a seller or competitor has actually sold goods or services at the prices compared, (2) within a specified period of time, and (3) within the trade area that the price comparison is made."[68/] A true copy of Wisconsin's provisions, which became effective in 1974, is attached as Exhibit X to this affidavit.

Virginia

41. Under Virginia law, a former price may not be advertised unless: (1) it is the price at or above which a substantial number of sales were made in the recent regular course of business; (2) the former price was the price at which such goods or services or substantially similar goods or services were openly and actively offered for sale for a reasonably substantial period of time in the recent regular course of business honestly, in good faith and not for the purpose of establishing a fictitious higher price on which a deceptive comparison might be based; (3) the former price is based on a markup that does not exceed the supplier's cost plus the usual and customary markup used by the supplier in the actual sale of such goods or services in the recent, regular course of business; or (4) the date on which substantial sales were made or the goods were openly and actively offered for sale is advertised in a clear and conspicuous manner.[69/] "Substantial sales" are further defined in Virginia's statute as "a substantial aggregate volume of sales of identical or comparable goods or services at or above the advertised comparison

67/ Wis. Admin. Code § 124.04 (2003).

68/ Wisconsin v. Menard, Inc., 358 N.W.2d 813, 815 (Wis. Ct. App. 1984).

69/ Va. Code Ann. § 59.1-207.41 (2003).

in the supplier's trade area."[70/] A true copy of Virginia's statute, enacted in 1992, is attached as Exhibit Y to this affidavit.

D. CONCLUSION

42. As indicated at the outset of this affidavit, the law relating to comparative price advertising varies from state to state in the United States.

43. In my lengthy career assisting U.S.-based sellers on pricing, marketing and advertising issues, and specifically, in advising sellers how best to ensure compliance with the laws on price comparisons nation-wide, I have looked to the U.S. state statutes and/or regulations which incorporate specific standards, criteria, or definitions concerning comparative price advertising.

SWORN before me
at the City of Washington,
in the District of Columbia
on September 22, 2003

Hélène Bouchard
Consular Program Officer
Agent Consulaire

Consular Section Consulaire
Canadian Embassy
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501 Pennsylvania Avenue, N.W.
Washington, D.C. 20001

STEPHEN PAUL MAHINKA

70/ Va. Code Ann. § 59.1-207.40 (2003).

EXHIBIT A

Certified true copy of Exhibit A.

[signature], PARTNER, MORGAN LEWIS 9/22/03

CERTIFIED AT THE CANADIAN EMBASSY
FOR LEGALIZATION OF THE FOREGOING
SIGNATURE OF: STEPHEN PAUL MAHINKA
CERTIFIE A L'AMBASSADE DU CANADA
AUX FINS DE LEGALISER LA SIGNATURE
CI-DESSUS DE:

[signature]
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Honors and Affiliations
Former Trustee, Johns Hopkins University
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Executive Editor, *Harvard International Law Journal*
Former Chair, American Bar Association, Antitrust Law Section, Committee on Labor Exemptions

Stephen Paul Mahinka is a partner in the Washington, D.C. office, manager of the Antitrust Practice, one of the nation's largest, chair of the firm's Life Sciences Interdisciplinary Practice Group, a member of the FDA/Healthcare Regulation Practice, and a member of the firm's Advisory Board. Mr. Mahinka is involved in counseling on and litigation of antitrust and trade regulation matters, and food and drug and healthcare regulation.

Mr. Mahinka's practice includes counseling and litigation concerning mergers and joint ventures; protecting market exclusivity of drug products; product development and FDA approval or clearance of prescription and OTC drugs and dietary supplements; pricing and price discrimination; marketing and advertising; licensing and product promotion and distribution agreements; and Department of Justice (DOJ), Federal Trade Commission (FTC), Food and Drug Administration (FDA) and state investigations.

Mr. Mahinka has published nearly 60 articles on antitrust and FDA/healthcare regulation matters, including FDA and antitrust issues in pharmaceutical industry protection of market exclusivity, energy mergers and joint ventures, multistate antitrust and consumer protection investigations, and pricing, mergers, and vertical relationships in regulated and deregulated industries. He has presented nearly 60 speeches on antitrust and FDA/ healthcare regulatory matters at programs sponsored by such groups as the American Bar Association's Section of Antitrust Law and the Food and Drug Law Institute.

Mr. Mahinka served as a law clerk to the Chief Justice of the Massachusetts Appeals Court.

Publications Available Online

Article:	Pharmaceutical Licensing In Product Lifecycle Management: Litigation and Settlement Under the Hatch-Waxman Act: Parts One and Two (March and April 2003), April 2003
Article:	FDA Must Clarify Drug Makers' Ability to Publicly Defend Products, 02/28/03
Speech:	FDA Approval of Drugs Under Section 505(b)(2): Potential Expansion and Legal Concerns, October 2002
Article:	FDA Challenges to Pharmaceutical Company Control of Product Lifecycle Management, 08/01/02
Speech:	Oustanding Issues for FDA's Center for Drug Evaluation and Research Affecting Pharmaceutical Product Lifecycle Management, 04/17/02
News Articles:	Legal Times: A Beautiful Space, 03/18/02
Article:	Pharmaceutical Pricing: System Changes and Global Effects, 03/01/02
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White Paper:	The Microsoft Ruling, 10/01/01
Article:	US Pharmaceutical Pricing: System Changes and Global Effects, 08/01/01
Article:	Preclosing Cooperation in Energy Mergers: Antitrust Issues and Practical Concerns, 05/01/01
Article:	It's Worse Than You Think: US Regulatory Changes Require Pharmaceutical Company Attention, January 2001
Article:	Preclosing Cooperation in Energy Mergers: Antitrust Issues and Practical Concerns, 11/01/00
Article:	Expect Big Change in Drug Pricing System, 09/04/00
Speech:	Antitrust Issues in Electronic Banking: The Search for Market Power, 11/10/99
Speech:	Legal Considerations in Pricing and Distribution of Consumer Health Products in the U.S., 11/08/99
Speech:	FDA and Antitrust Issues in Protecting Exclusivity in the Product Life Cycle, 10/04/99
Speech:	Antitrust Issues Regarding Pre-Closing Coordination and Exchange of Information, 09/17/99
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Speech:	The Dominance of Managed Care Organizations as Buyers of Drugs and Medical Devices Raises Regulatory Concerns Over Development and Marketing Practices, 09/16/97
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Article:	Strategies to Adopt and Pitfalls to Avoid in Obtaining Patent Term Extension Under U.S. Law, 05/01/97
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Speech:	FDA and Health Policy Under the Clinton Administration, 07/20/93
Speech:	Product Liability Considerations in the Development, Marketing, and Distribution of FDA Regulated Products, 07/13/93
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Article:	Entering the U.S. Pharmaceutical Market: Strategies for Introducing Drug Products, 06/01/91
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Article:	Summary of U.S. Intellectual Property Law and Overlap of U.S. Patent and Food & Drug Law, 03/01/91
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Article:	U.S. FDA Regulation of Generic Drugs and the Drug Price Competition and Patent Term Restoration Act, 01/01/91
Article:	Vertical Restraints As Exclusionary Practices: Current Issues In Regulated And Deregulated Industries, 10/01/90

EXHIBIT B

Certified true copy of Exhibit B.

[signature], PARTNER, MORGAN LEWIS 9/22/03

CERTIFIED AT THE CANADIAN EMBASSY
FOR LEGALIZATION OF THE FOREGOING
SIGNATURE OF: STEPHEN PAUL MAHINKA
CERTIFIE A L'AMBASSADE DU CANADA
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TITLE 16 -- COMMERCIAL PRACTICES
CHAPTER I -- FEDERAL TRADE COMMISSION
SUBCHAPTER B -- GUIDES AND TRADE PRACTICE RULES
PART 233 -- GUIDES AGAINST DECEPTIVE PRICING

16 CFR 233.1

§ 233.1 Former price comparisons.

(a) One of the most commonly used forms of bargain advertising is to offer a reduction from the advertiser's own former price for an article. If the former price is the actual, bona fide price at which the article was offered to the public on a regular basis for a reasonably substantial period of time. It provides a legitimate basis for the advertising of a price comparison. Where the former price is genuine, the bargain being advertised is a true one. If, on the other hand, the former price being advertised is not bona fide but fictitious--for example, where an artificial, inflated price was established for the purpose of enabling the subsequent offer of a large reduction--the "bargain" being advertised is a false one; the purchaser is not receiving the unusual value he expects. In such a case, the "reduced" price is, in reality, probably just the seller's regular price.

(b) A former price is not necessarily fictitious merely because no sales at the advertised price were made. The advertiser should be especially careful, however, in such a case, that the price is one at which the product was openly and actively offered for sale, for a reasonably substantial period of time, in the recent, regular course of his business, honestly and in good faith--and, of course, not for the purpose of establishing a fictitious higher price on which a deceptive comparison might be based. And the advertiser should scrupulously avoid any implication that a former price is a selling, not an asking price (for example, by use of such language as, "Formerly sold at $-----"), unless substantial sales at that price were actually made.

(c) The following is an example of a price comparison based on a fictitious former price. John Doe is a retailer of Brand X fountain pens, which cost him $5 each. His usual markup is 50 percent over cost; that is, his regular retail price is $7.50. In order subsequently to offer an unusual "bargain", Doe begins offering Brand X at $10 per pen. He realizes that he will be able to sell no, or very few, pens at this inflated price. But he doesn't care, for he maintains that price for only a few days. Then he "cuts" the price to its usual level--$7.50--and advertises: "Terrific Bargain: X Pens, Were $10, Now Only $7.50!" This is obviously a false claim. The advertised "bargain" is not genuine.

(d) Other illustrations of fictitious price comparisons could be given. An advertiser might use a price at which he never offered the article at all; he might feature a price which was not used in the regular course of business, or which was not used in the recent past but at some remote period in the past, without making disclosure of that fact; he might use a price that was not openly offered to the public, or that was not maintained for a reasonable length of time, but was immediately reduced.

(e) If the former price is set forth in the advertisement, whether accompanied or not by descriptive terminology such as "Regularly," "Usually," "Formerly," etc., the advertiser should make certain that the former price is not a fictitious one. If the former price, or the amount or percentage of reduction, is not stated in the advertisement, as when the ad merely states, "Sale," the advertiser must take care that the amount of reduction is not so insignificant as to be meaningless. It should be sufficiently large that the consumer, if he knew what it was, would believe that a genuine bargain or saving was being offered. An advertiser who claims that an item has been "Reduced to $9.99," when the former price was $10, is misleading the consumer, who will understand the claim to mean that a much greater, and not merely nominal, reduction was being offered. [Guide I]

HISTORY:
32 FR 15534, Nov. 8, 1967.

AUTHORITY:
Secs. 5, 6, 38 Stat. 719, as amended, 721; *15 U.S.C. 45*, 46.

625 words

TITLE 16 -- COMMERCIAL PRACTICES
CHAPTER I -- FEDERAL TRADE COMMISSION
SUBCHAPTER B -- GUIDES AND TRADE PRACTICE RULES
PART 233 -- GUIDES AGAINST DECEPTIVE PRICING

16 CFR 233.2

§ 233.2 Retail price comparisons; comparable value comparisons.

(a) Another commonly used form of bargain advertising is to offer goods at prices lower than those being charged by others for the same merchandise in the advertiser's trade area (the area in which he does business). This may be done either on a temporary or a permanent basis, but in either case the advertised higher price must be based upon fact, and not be fictitious or misleading. Whenever an advertiser represents that he is selling below the prices being charged in his area for a particular article, he should be reasonably certain that the higher price he advertises does not appreciably exceed the price at which substantial sales of the particle are being made in the area--that is, a sufficient number of sales so that a consumer would consider a reduction from the price to represent a genuine bargain or saving. Expressed another way, if a number of the principal retail outlets in the area are regularly selling Brand X fountain pens at $10, it is not dishonest for retailer Doe to advertise: "Brand X Pens, Price Elsewhere $10, Our Price $7.50".

(b) The following example, however, illustrates a misleading use of this advertising technique. Retailer Doe advertises Brand X pens as having a "Retail Value $15.00, My Price $7.50," when the fact is that only a few small suburban outlets in the area charge $15. All of the larger outlets located in and around the main shopping areas charge $7.50, or slightly more or less. The advertisement here would be deceptive, since the price charged by the small suburban outlets would have no real significance to Doe's customers, to whom the advertisement of "Retail Value $15.00" would suggest a prevailing, and not merely an isolated and unrepresentative, price in the area in which they shop.

(c) A closely related form of bargain advertising is to offer a reduction from the prices being charged either by the advertiser or by others in the advertiser's trade area for other merchandise of like grade and quality--in other words, comparable or competing merchandise--to that being advertised. Such advertising can serve a useful and legitimate purpose when it is made clear to the consumer that a comparison is being made with other merchandise and the other merchandise is, in fact, of essentially similar quality and obtainable in the area. The advertiser should, however, be reasonably certain, just as in the case of comparisons involving the same merchandise, that the price advertised as being the price of comparable merchandise does not exceed the price at which such merchandise is being offered by representative retail outlets in the area. For example, retailer Doe advertises Brand X pen as having "Comparable Value $15.00". Unless a reasonable number of the principal outlets in the area are offering Brand Y, an essentially similar pen, for that price, this advertisement would be deceptive. [Guide II]

HISTORY:
32 FR 15534, Nov. 8, 1967.

AUTHORITY:
Secs. 5, 6, 38 Stat. 719, as amended, 721; *15 U.S.C. 45*, 46.

484 words

TITLE 16 -- COMMERCIAL PRACTICES
CHAPTER I -- FEDERAL TRADE COMMISSION
SUBCHAPTER B -- GUIDES AND TRADE PRACTICE RULES
PART 233 -- GUIDES AGAINST DECEPTIVE PRICING

16 CFR 233.3

§ 233.3 Advertising retail prices which have been established or suggested by manufacturers (or other nonretail distributors).

(a) Many members of the purchasing public believe that a manufacturer's list price, or suggested retail price, is the price at which an article is generally sold. Therefore, if a reduction from this price is advertised, many people will believe that they are being offered a genuine bargain. To the extent that list or suggested retail prices do not in fact correspond to prices at which a substantial number of sales of the article in question are made, the advertisement of a reduction may mislead the consumer.

(b) There are many methods by which manufacturers' suggested retail or list prices are advertised: Large scale (often nationwide) mass-media advertising by the manufacturer himself; preticketing by the manufacturer; direct mail advertising; distribution of promotional material or price lists designed for display to the public. The mechanics used are not of the essence. This part is concerned with any means employed for placing such prices before the consuming public.

(c) There would be little problem of deception in this area if all products were invariably sold at the retail price set by the manufacturer. However, the widespread failure to observe manufacturers' suggested or list prices, and the advent of retail discounting on a wide scale, have seriously undermined the dependability of list prices as indicators of the exact prices at which articles are in fact generally sold at retail. Changing competitive conditions have created a more acute problem of deception than may have existed previously. Today, only in the rare case are all sales of an article at the manufacturer's suggested retail or list price.

(d) But this does not mean that all list prices are fictitious and all offers of reductions from list, therefore, deceptive. Typically, a list price is a price at which articles are sold, if not everywhere, then at least in the principal retail outlets which do not conduct their business on a discount basis. It will not be deemed fictitious if it is the price at which substantial (that is, not isolated or insignificant) sales are made in the advertiser's trade area (the area in which he does business). Conversely, if the list price is significantly in excess of the highest price at which substantial sales in the trade area are made, there is a clear and serious danger of the consumer being misled by an advertised reduction from this price.

(e) This general principle applies whether the advertiser is a national or regional manufacturer (or other non-retail distributor), a mail-order or catalog distributor who deals directly with the consuming public, or a local retailer. But certain differences in the responsibility of these various types of businessmen should be noted. A retailer competing in a local area has at least a general knowledge of the prices being charged in his area. Therefore, before advertising a manufacturer's list price as a basis for comparison with his own lower price, the retailer should ascertain whether the list price is in fact the price regularly charged by principal outlets in his area.

(f) In other words, a retailer who advertises a manufacturer's or distributor's suggested retail price should be careful to avoid creating a false impression that he is offering a reduction from the price at which the product is generally sold in his trade area. If a number of the principal retail outlets in the area are regularly engaged in making sales at the manufacturer's suggested price, that price may be used in advertising by one who is selling at a lower price. If, however,

the list price is being followed only by, for example, small suburban stores, house-to-house canvassers, and credit houses, accounting for only an insubstantial volume of sales in the area, advertising of the list price would be deceptive.

(g) On the other hand, a manufacturer or other distributor who does business on a large regional or national scale cannot be required to police or investigate in detail the prevailing prices of his articles throughout so large a trade area. If he advertises or disseminates a list or preticketed price in good faith (i.e., as an honest estimate of the actual retail price) which does not appreciably exceed the highest price at which substantial sales are made in his trade area, he will not be chargeable with having engaged in a deceptive practice. Consider the following example:

(h) Manufacturer Roe, who makes Brand X pens and sells them throughout the United States, advertises his pen in a national magazine as having a "Suggested Retail Price $10," a price determined on the basis of a market survey. In a substantial number of representative communities, the principal retail outlets are selling the product at this price in the regular course of business and in substantial volume. Roe would not be considered to have advertised a fictitious "suggested retail price." If retailer Doe does business in one of these communities, he would not be guilty of a deceptive practice by advertising, "Brand X Pens, Manufacturer's Suggested Retail Price, $10, Our Price, $7.50."

(i) It bears repeating that the manufacturer, distributor or retailer must in every case act honestly and in good faith in advertising a list price, and not with the intention of establishing a basis, or creating an instrumentality, for a deceptive comparison in any local or other trade area. For instance, a manufacturer may not affix price tickets containing inflated prices as an accommodation to particular retailers who intend to use such prices as the basis for advertising fictitious price reductions. [Guide III]

HISTORY:
32 FR 15534, Nov. 8, 1967.

AUTHORITY:
Secs. 5, 6, 38 Stat. 719, as amended, 721; *15 U.S.C. 45,* 46.

940 words

TITLE 16 -- COMMERCIAL PRACTICES
CHAPTER I -- FEDERAL TRADE COMMISSION
SUBCHAPTER B -- GUIDES AND TRADE PRACTICE RULES
PART 233 -- GUIDES AGAINST DECEPTIVE PRICING

16 CFR 233.4

§ 233.4 Bargain offers based upon the purchase of other merchandise.

(a) Frequently, advertisers choose to offer bargains in the form of additional merchandise to be given a customer on the condition that he purchase a particular article at the price usually offered by the advertiser. The forms which such offers may take are numerous and varied, yet all have essentially the same purpose and effect. Representative of the language frequently employed in such offers are "Free," "Buy One--Get One Free," "2-For-1 Sale," "Half Price Sale," "1[cent sign] Sale," "50% Off," etc. Literally, of course, the seller is not offering anything "free" (i.e., an unconditional gift), or 1/2 free, or for only 1[cent sign], when he makes such an offer, since the purchaser is required to purchase an article in order to receive the "free" or "1[cent sign]" item. It is important, therefore, that where such a form of offer is used, care be taken not to mislead the consumer.

(b) Where the seller, in making such an offer, increases his regular price of the article required to be bought, or decreases the quantity and quality of that article, or otherwise attaches strings (other than the basic condition that the article be purchased in order for the purchaser to be entitled to the "free" or "1[cent sign]" additional merchandise) to the offer, the consumer may be deceived.

(c) Accordingly, whenever a "free," "2-for-1," "half price sale," "1[cent sign] sale," "50% off" or similar type of offer is made, all the terms and conditions of the offer should be made clear at the outset. [Guide IV]

HISTORY:
32 FR 15534, Nov. 8, 1967.

AUTHORITY:
Secs. 5, 6, 38 Stat. 719, as amended, 721; *15 U.S.C. 45,* 46.

257 words

TITLE 16 -- COMMERCIAL PRACTICES
CHAPTER I -- FEDERAL TRADE COMMISSION
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PART 233 -- GUIDES AGAINST DECEPTIVE PRICING

16 CFR 233.5

§ 233.5 Miscellaneous price comparisons.

The practices covered in the provisions set forth above represent the most frequently employed forms of bargain advertising. However, there are many variations which appear from time to time and which are, in the main, controlled by the same general principles. For example, retailers should not advertise a retail price as a "wholesale" price. They should not represent that they are selling at "factory" prices when they are not selling at the prices paid by those purchasing directly from the manufacturer. They should not offer seconds or imperfect or irregular merchandise at a reduced price without disclosing that the higher comparative price refers to the price of the merchandise if perfect. They should not offer an advance sale under circumstances where they do not in good faith expect to increase the price at a later date, or make a "limited" offer which, in fact, is not limited. In all of these situations, as well as in others too numerous to mention, advertisers should make certain that the bargain offer is genuine and truthful. Doing so will serve their own interest as well as that of the public. [Guide V]

HISTORY:
32 FR 15534, Nov. 8, 1967.

AUTHORITY:
Secs. 5, 6, 38 Stat. 719, as amended, 721; *15 U.S.C. 45,* 46.

190 words

Sec. 45. - Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1)

Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2)

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 et seq.), except as provided in section 406(b) of said Act (7 U.S.C. 227(b)), from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3)

This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless -

(A)

such methods of competition have a direct, substantial, and reasonably foreseeable effect -

(I)

Search this title:

Search Title 15

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on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(II)

on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B)

such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(II), this subsection shall apply to such conduct only for injury to export business in the United States.

(b) Proceeding by Commission; modifying and setting aside orders

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice.

Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that

(1)

the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and

(2)

in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph [1] (2) not later than 120 days after the date of the filing of such request.

(c) Review of order; rehearing

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person,

partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgement to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of title 28.

(d) Jurisdiction of court

Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

(e) Exemption from liability

No order of the Commission or judgement of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

(f) Service of complaints, orders and other processes; return

Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either

(a)

by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or

(b)

by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or

(c)

by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

(g) Finality of order

An order of the Commission to cease and desist shall become final -

(1)

Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b).

(2)

Except as to any order provision subject to paragraph (4), upon the sixtieth day after such order is served, if a petition for review has been duly filed; except that any such order may be stayed, in whole or in part and subject to such conditions as may be appropriate, by -

(A)

the Commission;

(B)

an appropriate court of appeals of the United States, if

(i)

a petition for review of such order is pending in such court, and

(ii)

an application for such a stay was previously submitted to the Commission and the Commission, within the 30-day period beginning on the date the application was received by the Commission, either denied the application or did not grant or deny the application; or

(C)

the Supreme Court, if an applicable petition for certiorari is pending.

(3)

For purposes of subsection (m)(1)(B) of this section and of section 57b(a)(2) of this title, if a petition for review of the order of the Commission has been filed -

(A)

upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B)

upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C)

upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(4)

In the case of an order provision requiring a person, partnership, or corporation to divest itself of stock, other share capital, or assets, if a petition for review of such order of the Commission has been filed -

(A)

upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B)

upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C)

upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(h) Modification or setting aside of order by Supreme Court

If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(i) Modification or setting aside of order by Court of Appeals

If the order of the Commission is modified or set aside by the court of appeals, and if

(1)

the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or

(2)

the petition for certiorari has been denied, or

(3)

the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(j) Rehearing upon order or remand

If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if

(1)

the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or

(2)

the petition for certiorari has been denied, or

(3)

the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

(k) "Mandate" defined

As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

(l) Penalty for violation of order; injunctions and other appropriate equitable relief

Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in a case of a

violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

(m) Civil actions for recovery of penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices; jurisdiction; maximum amount of penalties; continuing violations; de novo determinations; compromise or settlement procedure

(1)

(A)

The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this chapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1) of this section) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(B)

If the Commission determines in a proceeding under subsection (b) of this section that any act or practice is unfair or deceptive, and issues a final cease and desist order, other than a consent order, with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice -

(1)

after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2)

with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(C)

In the case of a violation through continuing failure to comply with a rule or with subsection (a)(1) of this section, each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2)

If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo. Upon request of any party to such an action against such defendant, the court shall also review the determination of law made by the Commission in the proceeding under subsection (b) of this section that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of subsection (a) of this section.

(3)

The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by a public statement of its reasons and is approved by the court.

(n) Standard of proof; public policy consideration

The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such

public policy considerations may not serve as a primary basis for such determination

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[1] So in original. Probably should be "clause".

Prev | Next

EXHIBIT C

Certified true copy of Exhibit C.

[signature], PARTNER, MORGAN LEWIS 9/22/03

CERTIFIED AT THE CANADIAN EMBASSY
FOR LEGALIZATION OF THE FOREGOING
SIGNATURE OF: STEPHEN PAUL MAHINKA
CERTIFIE A L'AMBASSADE DU CANADA
AUX FINS DE LEGALISER LA SIGNATURE
CI-DESSUS DE:

[signature]
Hélène Boudreau
Consular Program Officer
Agent Consulaire
Canadian Embassy/Ambassade du Canada
Washington, D.C.

Consular Section Consulaire
Canadian Embassy
Ambassade du Canada

ALASKA ADMINISTRATIVE CODE

*** THIS SECTION IS CURRENT THROUGH JUNE 5, 2003 ***

TITLE 1. GENERAL PROVISIONS
CHAPTER 5. ALASKA REGULATIONS

1 Alaska Admin. Code **05.020** (2003)

1 AAC **05.020.** Citation

The Alaska Administrative Code may be cited "AAC" preceded by the number of the title and followed by the number of the chapter and section. Example: This title may be cited "1 AAC"; this chapter may be cited "1 AAC 05"; this section may be cited "1 AAC **05.020.**"

AUTHORITY: AS 44.62.130

SOURCE: Eff. 1/29/73, Register 45

EXHIBIT D

Certified true copy of Exhibit D.

[signature], PARTNER, MORGAN LEWIS 9/22/03

:TIFIED AT THE CANADIAN EMBASSY
: LEGALIZATION OF THE FOREGOING
NATURE OF: STEPHEN PAUL MAHINKA
:TIFIE A L'AMBASSADE DU CANADA
(FINS DE LEGALISER LA SIGNATURE
ISSUS DE:

[signature]

[redacted]
ular Program Officer
Agent Consulaire
adian Embassy/Ambassade du Canada
hington, D.C.

Consular Section Consulaire
Canadian Embassy
Ambassade du Canada
501 Pennsylvania Avenue, N.W.
Washington, D.C. 20001

* THIS SECTION IS CURRENT THROUGH THE 2003 SUPPLEMENT (2001-2002 SESSION) *
INCLUDING ALL URGENCY LEGISLATION THROUGH 2003 REG. SESS. CH. 243, 8/29/03
1ST EXTRA SESS. CH. 13X, 8/2/03 AND 2ND EXTRA SESS. CH. 1XX, 2/20/03

BUSINESS & PROFESSIONS CODE
DIVISION 7. General Business Regulations
PART 3. Representations to the Public
CHAPTER 1. Advertising
ARTICLE 1. False Advertising in General

Cal Bus & Prof Code § **17501** (2003)

§ **17501.** Value determinations; Former price advertisements

For the purpose of this article the worth or value of any thing advertised is the prevailing market price, wholesale if the offer is at wholesale, retail if the offer is at retail, at the time of publication of such advertisement in the locality wherein the advertisement is published.

No price shall be advertised as a former price of any advertised thing, unless the alleged former price was the prevailing market price as above defined within three months next immediately preceding the publication of the advertisement or unless the date when the alleged former price did prevail is clearly, exactly and conspicuously stated in the advertisement.

HISTORY:
Added Stats 1941 ch 63 § 1.

NOTES:
HISTORICAL DERIVATION:
Former Pen C § 654a, as added Stats 1905 ch 254 § 1, amended Stats 1915 ch 634 § 1, Stats 1933 ch 952 § 1.

CROSS REFERENCES:
Inapplicability of this section to publisher acting in good faith: *B & P C § 17502.*

COLLATERAL REFERENCES:
Witkin & Epstein, Criminal Law (2d ed) § 750.
Cal Jur 3d (Rev) Consumer and Borrower Protection Laws § 71.

ATTORNEY GENERAL'S OPINIONS:
"Prevailing market price" defined; absence of authority to determine "prevailing market price" ab initio. *30 Ops. Cal. Atty. Gen. 127.*

ANNOTATIONS:

Validity and construction of statute or ordinance requiring or prohibiting publication of price of commodity or services. *89 ALR2d 901.*

NOTES OF DECISIONS

1. First Amendment Rights

1. First Amendment Rights

A preliminary injunction against defendants engaged in the mail order business of selling, in California, certificates purportedly entitling the buyers to a gambling vacation in a neighboring state (restraining specified promotional materials, business activities, and acceptance of money received as a result thereof) was supported by substantial evidence, and did not violate defendants' First Amendment rights, where it was shown that such materials and activities included: misleading buyers into believing that they would receive a gift by hiding the requirement of a purchase condition (*Bus. & Prof. Code, § 17537*) in an inadequate disclaimer and that the offer was limited in terms of participants and duration; an exaggeration not only of the value of the benefits, in violation of *Bus. & Prof. Code, § 17501* , but also of the quality of the accommodations; late delivery of the certificates or of alternative offers, in violation of *Bus. & Prof. Code, § 17538*; and subsequently imposed limitations on the benefits received. *People v Columbia Research Corp. (1977, 1st Dist) 71 Cal App 3d 607, 139 Cal Rptr 517.*

EXHIBIT E

Certified copy of Exhibit E.

[signature], PARTNER, MORGAN LEWIS 9/22/03

ERTIFIED AT THE CANADIAN EMBASSY
3R LEGALIZATION OF THE FOREGOING
GNATURE OF: STEPHEN PAUL MAHINKA
ERTIFIE A L'AMBASSADE DU CANADA
JX FINS DE LEGALISER LA SIGNATURE
:DESSUS DE:

[signature]

Hélène Boudreau
nsular Program Officer
Agent Consulaire
nadian Embassy/Ambassade du Canada
ashington, D.C.
Consular Section Consulaire
Canadian Embassy
Ambassade du Canada
501 Pennsylvania Avenue. N W

COLORADO REVISED STATUTES

*** THIS SECTION IS CURRENT THROUGH THE 2002 SUPPLEMENT (2002 SESSIONS) ***

TITLE 6. CONSUMER AND COMMERCIAL AFFAIRS
FAIR TRADE AND RESTRAINT OF TRADE
ARTICLE 1. COLORADO CONSUMER PROTECTION ACT
PART 1. CONSUMER PROTECTION - GENERAL

=1; GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

C.R.S. **6-1-105** (2002)

STATUS: CONSULT SLIP LAWS CITED BELOW FOR RECENT CHANGES TO THIS DOCUMENT
<=2> LEXSEE 2003 Colo. SB 182 -- See section 3.

6-1-105. Deceptive trade practices

(1) A person engages in a deceptive trade practice when, in the course of such person's business, vocation, or occupation, such person:

(a) Knowingly passes off goods, services, or property as those of another;

(b) Knowingly makes a false representation as to the source, sponsorship, approval, or certification of goods, services, or property;

(c) Knowingly makes a false representation as to affiliation, connection, or association with or certification by another;

(d) Uses deceptive representations or designations of geographic origin in connection with goods or services;

(e) Knowingly makes a false representation as to the characteristics, ingredients, uses, benefits, alterations, or quantities of goods, food, services, or property or a false representation as to the sponsorship, approval, status, affiliation, or connection of a person therewith;

(f) Represents that goods are original or new if he knows or should know that they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;

(g) Represents that goods, food, services, or property are of a particular standard, quality, or grade, or that goods are of a particular style or model, if he knows or should know that they are of another;

(h) Disparages the goods, services, property, or business of another by false or misleading representation of fact;

(i) Advertises goods, services, or property with intent not to sell them as advertised;

(j) Advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(k) Advertises under the guise of obtaining sales personnel when in fact the purpose is to first sell a product or service to the sales personnel applicant;

(l) Makes false or misleading statements of fact concerning the price of goods, services, or property or the reasons for, existence of, or amounts of price reductions;

(m) Fails to deliver to the customer at the time of an installment sale of goods or services a written order, contract, or receipt setting forth the name and address of the seller, the name and address of the organization which he represents, and all of the terms and conditions of the sale, including a description of the goods or services, stated in readable, clear, and unambiguous language;

(n) Employs "bait and switch" advertising, which is advertising accompanied by an effort to sell goods, services, or property other than those advertised or on terms other than those advertised and which is also accompanied by one or more of the following practices:

(I) Refusal to show the goods or property advertised or to offer the services advertised;

(II) Disparagement in any respect of the advertised goods, property, or services or the terms of sale;

(III) Requiring tie-in sales or other undisclosed conditions to be met prior to selling the advertised goods, property, or services;

(IV) Refusal to take orders for the goods, property, or services advertised for delivery within a reasonable time;

(V) Showing or demonstrating defective goods, property, or services which are unusable or impractical for the purposes set forth in the advertisement;

(VI) Accepting a deposit for the goods, property, or services and subsequently switching the purchase order to higher-priced goods, property, or services; or

(VII) Failure to make deliveries of the goods, property, or services within a reasonable time or to make a refund therefor;

(o) Knowingly fails to identify flood-damaged or water-damaged goods as to such damages;

(p) Solicits door-to-door as a seller, unless the seller, within thirty seconds after beginning the conversation, identifies himself or herself, whom he or she represents, and the purpose of the call;

(p.3) to (p.7) Repealed.

(q) Contrives, prepares, sets up, operates, publicizes by means of advertisements, or promotes any pyramid promotional scheme;

(r) Advertises or otherwise represents that goods or services are guaranteed without clearly and conspicuously disclosing the nature and extent of the guarantee, any material conditions or limitations in the guarantee which are imposed by the guarantor, the manner in which the guarantor will perform, and the identity of such guarantor. Any representation that goods or services are "guaranteed for life" or have a "lifetime guarantee" shall contain, in addition to the other requirements of this paragraph (r), a conspicuous disclosure of the meaning of "life" or "lifetime" as used in such representation (whether that of the purchaser, the goods or services, or otherwise). Guarantees shall not be used which under normal conditions could not be practically fulfilled or which are for such a period of time or are otherwise of such a nature as to have the capacity and tendency of misleading purchasers or prospective purchasers into believing that the goods or services so guaranteed have a greater degree of serviceability, durability, or performance capability in actual use than is true in fact. The provisions of this paragraph (r) apply not only to guarantees but also to warranties, to disclaimer of warranties, to purported guarantees and warranties, and to any promise or representation in the nature of a guarantee or warranty; however, such provisions do not apply to any reference to a guarantee in a slogan or advertisement so long as there is no guarantee or warranty of specific merchandise or other property.

(s) and (t) Repealed.

(u) Fails to disclose material information concerning goods, services, or property which information was known at the time of an advertisement or sale if such failure to disclose such information was intended to induce the consumer to enter into a transaction;

(v) Disburses funds in connection with a real estate transaction in violation of section 38-35-125 (2), C.R.S.;

(w) Repealed.

(x) Violates the provisions of sections 6-1-203 to 6-1-205 or of part 7 of this article;

(y) Fails, in connection with any solicitation, oral or written, to clearly and prominently disclose immediately adjacent to or after the description of any item or prize to be received by any person the actual retail value of each item or prize to be awarded. For the purposes of this paragraph (y), the actual retail value is the price at which substantial sales of the item were made in the person's trade area or in the trade area in which the item or prize is to be received within the last ninety days or, if no substantial sales were made, the actual cost of the item or prize to the person on whose behalf any contest or promotion is conducted; except that, whenever the actual cost of the item to the provider is less than fifteen dollars per item, a disclosure that "actual cost to the provider is less than fifteen dollars" may be made in lieu of disclosure of actual cost. The provisions of this paragraph (y) shall not apply to a promotion which is soliciting the sale of a newspaper, magazine, or periodical of general circulation, or to a promotion soliciting the sale of books, records, audio tapes, compact discs, or videos when the promoter allows the purchaser to review the merchandise without obligation for at least seven days and provides a full refund within thirty days after the receipt of the returned merchandise or when a membership club operation is in conformity with rules and regulations of the federal trade commission contained in 16 C.F.R. 425.

(z) Refuses or fails to obtain all governmental licenses or permits required to perform the services or to sell the goods, food, services, or property as agreed to or contracted for with a consumer;

(aa) Fails, in connection with the issuing, making, providing, selling, or offering to sell of a motor vehicle service contract, to comply with the provisions of article 11 of title 42, C.R.S.;

(bb) Repealed.

(cc) Engages in any commercial telephone solicitation which constitutes an unlawful telemarketing practice as defined in section 6-1-304;

(dd) Repealed.

(ee) Intentionally violates any provision of article 10 of title 5, C.R.S.;

(ee.5) to (ff) Repealed.

(gg) Fails to disclose or misrepresents to another person, a secured creditor, or an assignee by whom such person is retained to repossess personal property whether such person is bonded in accordance with section 4-9-629, C.R.S., or fails to file such bond with the attorney general;

(hh) Violates any provision of article 16 of this title;

(ii) Repealed.

(jj) Represents to any person that such person has won or is eligible to win any award, prize, or thing of value as the result of a contest, promotion, sweepstakes, or drawing, or that such person will receive or is eligible to receive free goods, services, or property, unless, at the time of the representation, the person has the present ability to supply such award, prize, or thing of value;

(kk) Violates any provision of article 6 of this title;

(ll) Knowingly makes a false representation as to the results of a radon test or the need for radon mitigation;

(mm) Violates section 35-27-113 (3) (e), (3) (f), or (3) (i), C.R.S.;

(nn) Repealed.

(oo) Fails to comply with the provisions of section 35-80-108 (1) (a), (1) (b), or (2) (f), C.R.S.;

(pp) Violates article 9 of title 42, C.R.S.;

(qq) Repealed.

(rr) Violates the provisions of part 8 of this article;

(ss) Violates part 31 of article 32 of title 24,C.R.S.;

(tt) Violates any provision of part 9 of this article;

(uu) Violates section 38-40-105, C.R.S.

(2) Evidence that a person has engaged in a deceptive trade practice shall be prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition.

(3) The deceptive trade practices listed in this section are in addition to and do not limit the types of unfair trade practices actionable at common law or under other statutes of this state.

HISTORY: Source: L. 69: p. 372, § 2.C.R.S. 1963: § 55-5-2.L. 71: p. 580, § 1.L. 73: p. 619, § 2.L. 75: (1)(r) added, p. 259, § 1, effective July 1.L. 84: (1)(e) and (1)(g) amended and (1)(s) added, pp. 289, 290, § § 2, 2, effective July 1.L. 85: (1)(t) added, p. 307, § 2, effective June 1.L. 87: (1)(a), (1)(b), (1)(e), (1)(g) to (1)(i) and (1)(l) amended and (1)(s)(V) and (1)(u) added, p. 357, § § 3, 4, effective July 1.L. 88: (1)(n) amended and (1)(v) and (1)(w) added, pp. 341, 1260, § § 2, 2, effective July 1.L. 89: (1)(s)(V) repealed and (1)(y), (1)(z), and (1)(aa) added, pp. 360, 357, § § 4, 1, effective July 7; (1)(x) added, p. 363, § 2, effective January 1, 1990.L. 90: (1)(ee) added, p. 378, § 2, effective April 20; (1)(t)(VI) amended and (1)(bb) to (1)(dd) added, p. 380, § 2, effective July 1.L. 91: (1)(t)(VI) amended and (1)(t)(VII) added, p. 329, § 1, effective May 16; (1)(dd)(I) amended and (1)(dd)(I.5) added, p. 331, § 1, effective June 8.L. 92: IP(1) amended and (1)(ff) added, p. 1835, § 2, effective April 29; IP(1) amended and (1)(gg) added, p. 247, § 2, effective June 1.L. 93: (1)(t)(VI) and (1)(y) amended and (1)(hh) to (1)(ll) added, p. 1571, § 1, effective July 1; (1)(cc) amended, p. 943, § 2, and (1)(mm) added, p. 1022, § 3, effective July 1.L. 94: (1)(nn) added, p. 759, § 1, effective April 20; (1)(ee.5) added, p. 94, § 1, and (1)(oo) added, p. 1311, § 10, effective July 1; (1)(aa) and (1)(ii) amended, p. 2544, § 14, effective January 1, 1995.L. 96: (1)(p) amended and (1)(p.3) and (1)(ee.7) added, pp. 787, 1787, § § 1, 1, effective July 1.L. 97: (1)(pp) added, p. 865, § 13, effective May 21; (1)(p.5) and (1)(p.7) added, p. 500, § 1, effective July 1; (1)(ee.8) added, p. 406, § 1, July 1.L. 98: (1)(qq) added, p. 746, § 2, effective August 5.L. 99: (1)(p.3), (1)(p.5), (1)(p.7), (1)(s), (1)(t), (1)(w), (1)(bb), (1)(dd), (1)(ee.5), (1)(ee.7), (1)(ee.8), (1)(ff), (1)(ii), and (1)(qq) repealed and (1)(x) amended, pp. 655, 652, § § 14, 3, effective May 18; (1)(qq) amended, p. 897, § 2, effective October 1.L. 2000: (1)(rr) added, p. 867, § 2, effective August 2; (1)(nn)(II) added by revision, p. 3, § 6; (1)(ss) added, p. 1162, § 3, effective July 1, 2001.L. 2001: (1)(gg) amended, p. 1445, § 37, effective July 1; (1)(tt) added, p. 1461, § 2, effective August 8.L. 2002: (1)(uu) added, p. 1602, § 3, effective June 7.

Editor's note: (1) Subsection (1)(dd)(I)(F) provided for the repeal of subsection (1)(dd)(I)(F), effective July 1, 1994. (See L.91, p. 331.) (2) Subsections (1)(p.3), (1)(p.5), (1)(p.7), (1)(s), (1)(t), (1)(w), (1)(bb), (1)(dd), (1)(ee.5), (1)(ee.7), (1)(ee.8), (1)(ff), (1)(ii), and (1)(qq) were repealed and relocated in 1999 to part 7 of this article.

(3) Subsection (1)(qq) as amended by House Bill 99-1270 will be renumbered as and harmonized with section 6-1-709 as relocated from section **6-1-105** in Senate Bill 99-143.

(4) Subsection (1)(nn)(II) provided for the repeal of subsection (1)(nn), effective July 1, 2001. (See L. 2000, p. 3.)

Am. Jur.2d. See 37 Am. Jur.2d, Fraud and Deceit, § § 56, 59, 150, 167, 234; 74 Am. Jur.2d, Trademarks and Tradenames, § § 84, 85, 87.

C.J.S. See 87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § § 124-130, 134-136, 348-352.

Law reviews. For article discussing remedies available in deceptive trade practices involving the misappropriation and use of a trade secret, see *48 U. Colo. L. Rev. 189 (1977).* For article, "Franchise Regulation", see 15 Colo. Law. 395 (1986). For article, "Commercial Law", which discusses recent Tenth Circuit decisions dealing with questions of commercial law, see *63 Den. U.L. Rev. 225 (1986).* For article, "Legal Aspects of Health and Fitness Clubs: A Healthy and Dangerous Industry", see 15 Colo. Law. 1787 (1986). For article, "Representing the Franchisee", see 18 Colo. Law. 2105 (1989). For article, "Default Judgments Against Consumers: Has the System Failed?", see *67 Den. U. L. Rev. 357 (1990).*

The list of deceptive trade practices in this section is not exhaustive and, because deceptive or unfair practices in the business of insurance could clearly injure the public, they are within the purview of the *Colorado Consumer Protection Act. Showpiece Homes Corp. v. Assurance Co. of America, 38 P.3d 47 (Colo. 2001).*

"Person", as used in this section, includes business corporations. *Heller v. Lexton-Ancira Real Estate Fund, 809 P.2d 1016 (Colo. App. 1990).*

"Passing off", as used in this section, is sufficiently plain in its meaning and does not require a special jury instruction. *Heller v. Lexton-Ancira Real Estate Fund, 809 P.2d 1016 (Colo. App. 1990).*

Because a distributorship is a franchise over which a dealer exercises a right of possession, use, and enjoyment, a distributorship is "property" as referenced in this section. Accordingly, a false representation of territorial exclusivity to dealers constituted a deceptive trade practice. *Rocky Mountain Rhino Lining, Inc. v. Rhino Linings USA, Inc., 37 P.3d 458 (Colo. App. 2001).*

False representation as to the use or benefits of services, such as recommending an automotive fuel injector flush as a routine preventive maintenance service, violates this section. *Jones v. Stevinson's Golden Ford, 36 P.3d 129 (Colo. App. 2001).*

Where a business first advertises a product at a very attractive price in order to invite inquiry, then disparages or "knocks" the product when members of the public make inquiry, and finally offers another item for sale which is more expensive than the first but which seems like a "bargain" in comparison to the disparaged product that was originally advertised, such practice constitutes deceptive use of advertising as a lure to sell other nonadvertised products or services which is exactly the kind of trade practice which the Colorado consumer protection act prohibits. *People ex rel. Dunbar v. Gym of America, Inc., 177 Colo. 97, 493 P.2d 660 (1972).*

Such "bait and switch" advertising and selling techniques have long been recognized in the legal literature and have long been subject to equitable sanctions. *People ex rel. Dunbar v. Gym of America, Inc., 177 Colo. 97, 493 P.2d 660 (1972).*

Likewise, the concept of a "tie-in sale" is not new to the law, as its practice has long been prohibited by the anti-trust laws. *People ex rel. Dunbar v. Gym of America, Inc., 177 Colo. 97, 493 P.2d 660 (1972).*

The fact that a "tie-in sale", like "disparagement", and "bait and switch" tactics is not a new or unfamiliar term to most business enterprises leads to the conclusion that its use in the Colorado consumer protection act does establish a standard against which one's business and trade activities can be tested, with a definite background of experience and precedent to illuminate the meaning of the words employed in the statute. *People ex rel. Dunbar v. Gym of America, Inc., 177 Colo. 97, 493 P.2d 660 (1972).*

Advertisement or sale of real property covered. The general assembly has included sales and advertisements respecting real property in its broad but undefined use of the term "services" in subsections (1)(e), (g), (i), and (l), which makes false or misleading statements in the advertisement or sale of real property subject to the provisions of the *Consumer Protection Act. People ex rel. MacFarlane v. Alpert Corp., 660 P.2d 1295 (Colo. App. 1982).*

The sale of insurance can be classified as a sale of goods, services, or property and is thus subject to the provisions of the Colorado Consumer Protection Act. *Showpiece Homes Corp. v. Assurance Co. of America, 38 P.3d 47 (Colo. 2001).*

Colorado Consumer Protection Act is applicable to an insurer's post-sale unfair or bad faith conduct. *Showpiece Homes Corp. v. Assurance Co. of America, 38 P.3d 47 (Colo. 2001).*

Setting the price of an item so high that the market analysis shows that very few items will be sold at that price, offering the item for sale at that price for a very short period of time, and showing the price as reduced and the item discounted in comparative price advertisements is a deceptive and misleading practice pursuant to the *Colorado Consumer Protection Act. State ex rel. Woodard v. May Dept. Stores Co., 849 P.2d 802 (Colo. App. 1992).*

Rescission and refunds under subsection (1)(t)(I) and (IV) were not available where buyer had previously cancelled contract, since at that point there was no contract to rescind and, after two years' use of club's facilities and services by buyer, parties could not be restored to their precontract status. *Robinson v. Lynmar Racquet Club, Inc., 851 P.2d 274 (Colo. App. 1993).*

Right of action based on failure to give notice of right to rescind under subsection (1)(t)(II) did not accrue until buyer learned of right to rescind by other means. Therefore, applicable limitation period did not begin to run and action was not time-barred. *Robinson v. Lynmar Racquet Club, Inc., 851 P.2d 274 (Colo. App. 1993).*

This article is inapplicable to excavating contracts. *Herman v. Steamboat Springs Super 8 Motel, Inc., 634 P.2d 1005 (Colo. App. 1981).*

Article inapplicable where the lease of a computer system was nothing, other than a commercial transaction or that the alleged fraudulent misrepresentations had no effect on consumers generally. *U.S. Welding, Inc. v. Burroughs Corp., 615 F. Supp. 554 (D. Colo. 1985).*

Subsection (1)(z) does not provide notice of any requirement to obtain a license to sell collision damage waivers. Notice is only given that it is a violation of the act to fail to obtain "all governmental licenses or permits required". Consequently, because no statute or appellate decision has defined "insurance" to include collision damage waivers, and the Colorado supreme court has declared that the issue of whether a collision damage waiver is insurance has not been resolved, the trial court correctly held that plaintiff could not recover on his claim that defendants violated the licensing requirement. *Mangone v. U-Haul Int'l, Inc., 7 P.3d 189 (Colo. App. 1999).*

Although plaintiff cannot recover damages under his subsection (1)(z) claim, the trial court erred in excluding that portion of the purchase price relating to collision damage waivers from plaintiff's non-insurance claims pursuant to subsections (1)(e) and (1)(u). *Mangone v. U-Haul Int'l, Inc., 7 P.3d 189 (Colo. App. 1999).*

Allegation of claim under this section need not be specifically pleaded. *Heller v. Lexton-Ancira Real Estate Fund, 809 P.2d 1016 (Colo. App. 1990).*

Certificate of review required by § 13-20-602 is not a prerequisite to a lawsuit against licensed real estate brokers based on paragraphs (1)(e) and (1)(g) of this section where plaintiffs who had purchased a home alleged that licensed real estate brokers failed to disclose hidden damage to the home's foundation walls of which they had actual knowledge. Expert testimony would not be necessary to prove plaintiffs' claims of actual knowledge of the damage. However, plaintiffs' claim that brokers should have known about damage required a certificate of review and was properly dismissed because expert testimony would be necessary to establish the proper standard of care. *Baumgarten v. Coppage, 15 P.3d 304 (Colo. App. 2000).*

Subsection (3) does not allow recovery on two separate theories based on the same facts. *Lexton-Ancira Real Estate Fund v. Heller, 826 P.2d 819 (Colo. 1992).*

Trial court did not err in refusing to direct a verdict for defendants where evidence revealed that, by representing to their customers that an easement existed across plaintiffs' property, defendants caused damage to the road and caused two prospective pasture leases to be lost, and where it was undisputed that the actions and representations of defendants

caused fences to be torn down, locks to be cut, and gates to be left open. *Walter v. Hall, 940 P.2d 991 (Colo. App. 1996),* aff'd, *969 P.2d 224 (Colo. 1998).*

Applied in *American Television Communications Corp. v. Manning, 651 P.2d 440 (Colo. App. 1982).*

EXHIBIT F

Certified true copy of Exhibit F.

[signature], PARTNER, MORGAN LEWIS 9/22/07

TIFIED AT THE CANADIAN EMBASSY
! LEGALIZATION OF THE FOREGOING
NATURE OF: STEPHEN PAUL MAHINKA
TIFIE A L'AMBASSADE DU CANADA
(FINS DE LEGALISER LA SIGNATURE
IESSUS DE:

[signature]
Fatima Bouchard
ular Program Officer
Agent Consulaire
adian Embassy/Ambassade du Canada
shington, D.C.
Consular Section Consulaire
Canadian Embassy
Ambassade du Canada
501 Pennsylvania Avenue, N W
Washington D.C. 20001

State of Colorado, ex rel. Duane **Woodard**, Attorney Generalof the State of Colorado, Plaintiff-Appellant, v. **May Department** StoresCompany, a New York corporation, d/b/a May D&F, Defendant-Appellee.
No. 90CA1795

COURT OF APPEALS OF COLORADO, DIVISION FOUR

849 P.2d 802; 1992 Colo. App. LEXIS 254; 16 BTR 1041

June 18, 1992, Decided

SUBSEQUENT HISTORY: Opinion Modified, and as Modified Rehearing Denied October 15, 1992. Certiorari Granted April 12, 1993 (92SC749). Released for Publication April 22, 1993.

PRIOR HISTORY: [**1] Appeal from the District Court of the City and County of Denver. Honorable Larry J. Naves, Judge. No. 89CV09274

DISPOSITION: JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff state sought review of a decision by the District Court of the City and County of Denver (Colorado), which entered an injunction and civil penalty award against defendant advertiser in an action brought under the Colorado Consumer Protection Act.

OVERVIEW: The state filed an action against an advertiser for price comparison violation under the Colorado Consumer Protection Act (CCPA). The state challenged the injunctive relief and civil penalties imposed by the trial court. The state contended that the injunction erroneously permitted the advertiser to continue employing fictitious reference pricing so long as it disclosed its method of determining its various prices. The advertiser argued that the disclosure requirements adequately protected consumers. The court reversed the injunctive order because it did not require the disclosure statement to be sufficiently prominent and understandable to the public. The court found that in addition to requiring a properly drafted disclaimer, the trial court should have also enjoined the underlying fraudulent practices. The court remanded the award as to the monetary judgment because it was unclear how the trial court interpreted the civil penalty section of the CCPA. The court concluded that Colo. Rev. Stat. § 6-1-112(1) required a civil penalty for each consumer affected by the misleading advertisement or broadcast, as well as for each transaction involved.

OUTCOME: The court reversed and remanded the trial court's injunctive order prohibiting the advertiser from using a reference price in advertising. The court remanded the monetary judgment against the advertiser to the trial court for findings and determination on damages.

CORE TERMS: advertising, civil penalty, misleading, comparative, injunction, customer, advertisement, pricing, disclaimer, consumer, guideline, newspaper, deceptive, fraudulent, mattress, buyer, merchandise, disclosure, mitigating, fictitious, selling, exempt, markup, understandable, prominent, disclose, injunctive order, six-month, displayed, media

LexisNexis (TM) HEADNOTES - Core Concepts:

Antitrust & Trade Law: Consumer Protection: False Advertising
Civil Procedure: Injunctions
[HN1] The granting or denial of an injunction, as well as its terms, lies within the sound discretion of the trial court and will be reversed only if there is an abuse of that discretion. While a trial court has broad discretion to fashion the appropriate injunctive relief, if there have been numerous, long-range, and repeated violations of law, the court has a duty to ensure that the injunctive decree will effectively redress the proven violations and prevent further ones. Injunctions and disclosure statements are accepted vehicles to prevent deceptive advertising. But, an injunction should be adequate to prevent the continuation of the retailer's violation of the law. Furthermore, when disclosure statements are ordered by the courts, their language should be prominent, clear, and understandable.

Antitrust & Trade Law: Consumer Protection: False Advertising
[HN2] Comparative price advertising, if honestly done, is not misleading, and thus, it does not necessarily violate the Colorado Consumer Protection Act.

Antitrust & Trade Law: Consumer Protection: False Advertising
[HN3] In order to avoid violating the Colorado Consumer Protection Act, the advertiser must set the initial (promotional markup price) reference price as a bona fide price at which it intends to sell a significant number of products. It cannot be set so high that it is a fictitious price which results in deceptive or misleading advertisements.

Antitrust & Trade Law: State Trade Regulation
[HN4] See Colo. Rev. Stat. § 6-1-112(1).

Antitrust & Trade Law: Consumer Protection: False Advertising
Antitrust & Trade Law: State Trade Regulation
[HN5] The Colorado Consumer Protection Act does not require that an actual injury or loss to a customer occur before a civil penalty may be awarded. A civil penalty under Colo. Rev. Stat. § 6-1-112 is not the same as an award of damages to an injured party in a tortious fraud lawsuit in which the injured party may recover only damages actually incurred. Instead, the civil penalty award goes to the state's general fund, and thus, its purpose is not to make an injured party whole, but rather it is solely intended to punish the wrongdoer for its illegal acts.

Governments: Legislation: Interpretation
[HN6] A statute should be construed as a whole so as to give consistent, harmonious, and sensible effect to all its parts. The particular wording of a statute is presumed to have a purpose and, therefore, not to be repetitious of other wording in the statute.

Antitrust & Trade Law: Consumer Protection: False Advertising
Antitrust & Trade Law: State Trade Regulation
[HN7] A transaction under the Colorado Consumer Protection Act consists of one ad in one media outlet per day.

Antitrust & Trade Law: Consumer Protection: False Advertising
[HN8] The trial court should apply the following concepts in determining the amount of a civil penalty award: (a) the good or bad faith of the defendant; (b) the injury to the public; (c) the defendant's ability to pay; and (d) the desire to eliminate the benefits derived by violations of the Colorado Consumer Protection Act.

Antitrust & Trade Law: Consumer Protection: False Advertising
Antitrust & Trade Law: State Trade Regulation
[HN9] Colo. Rev. Stat. § 6-1-106(1)(a) states that the Colorado Consumer Protection Act does not apply to a party if its conduct complies with the orders or rules or a statute administered by a federal, state, or local government agency.

COUNSEL:
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Williams, Youle & Koenigs, P.C., Robert E. Youle, Karen DuWaldt, Denver Colorado; Ronald J. Dolan, Stephen J. Horace, St. Louis, Missouri, for Defendant-Appellee

Collier, Shannon & Scott, William C. Macleod, Washington, DC, Amicus Curiae for Defendant-Appellee

Graft, Thomson, and Toedte, P.C., Alexander L. Thomson, Englewood, Colorado, Amicus Curiae for Defendant-Appellee

JUDGES: Opinion by JUDGE DUBOFSKY, Criswell and Marquez, JJ., concur

OPINIONBY: DUBOFSKY

OPINION: [*804] Plaintiff, the State of Colorado, appeals the injunctive and monetary judgment entered by the trial court in an action brought under the Colorado Consumer Protection Act (CCPA) against defendant, May D&F. We reverse the trial court's injunctive order and remand with directions to enter a new injunction consistent with the views expressed in this opinion. As to the [**2]monetary judgment, we also remand for further findings and determination.

In June 1989, the State sued May D&F alleging that May D&F's price comparison advertising violated the CCPA. The State complained that the advertising approach taken by May D&F violated *§ 6-1-105(1)(l), C.R.S.* (1991 Cum. Supp.) (making false statements concerning the price of [*805] goods); *§ 6-1-105(1)(i), C.R.S.* (1991 Cum. Supp.) (advertising goods with the intent not to sell them as advertised); and *§ 6-1-105(1)(u), C.R.S.* (1991 Cum. Supp.) (failing to disclose material information concerning the goods).

The matter was set for trial, and at that trial, evidence was presented showing that, between June 1986 and August 1989, May D&F set retail prices for its goods in the Home Store in the following manner (the 1986 policy). The prices in the Home Store, that part of May D&F which sold housewares, cookware, mattresses, linens, textiles, electronics, and small appliances, were

set by its buyers who, when they ordered the merchandise, established two prospective prices.

The first price was called the initial markup (IMU) price. The buyer determined the IMU by using a formula that considered the cost of goods to [**3]May D&F and the cost of doing business and May D&F's profit goals. The IMU was the approximate price at which May D&F would sell its goods a majority of the time and a price which also would provide a reasonable profit.

When the buyers set the IMU price, they also set a promotional markup (PMU) price. The PMU price is substantially higher than the IMU price. The PMU price became May D&F's original or reference price to be used in its comparative price advertising. The buyers did not set the "PMU" or original price at a level at which "substantial sales" of the merchandise were expected.

The 1986 policy required the merchandise in the Home Store to be offered at the PMU price for at least 10 days at the beginning of each six-month selling period. After the 10 days, the sales price was reduced significantly (first reduction). The first reduction price usually approximated the IMU price. After the first reduction, customers were informed through in-store displays and newspaper and other media advertisements that the IMU was a substantially reduced price from the "original price."

During each six-month selling period, after the short term sales were completed, the price[**4] would return to the IMU price, but not to the PMU price. Thus, during the six-month selling period, merchandise in the Home Store was usually offered at a variety of new prices and advertising usually indicated that they represented substantial discounts from the PMU. After each six-month period ended, May D&F would reestablish the "original price" of the merchandise by again offering it at the initial PMU price for 10 days.

Evidence at trial demonstrated numerous examples of how the PMU and IMU pricing method worked. For example, there was trial testimony that a mattress cost May D&F $190. The buyer set the IMU price at $360 at which price May D&F's profit goal would have been substantially achieved. The buyer also set the PMU price for the mattress at $700. The mattress was listed for sale for 10 days at the $700 PMU price. After the 10-day PMU period elapsed, however, the price of the mattress was reduced to the IMU price, and through advertising, the public was informed that this was a substantial price reduction.

By characterizing the mattress as being on sale for a dramatically reduced price, May D&F induced customers to purchase it in the belief they had received [**5]a substantial price reduction. Actually the $360 IMU price was merely competitive with the prices for the same mattress at other area stores.

May D&F's 1986 policy assumed that virtually none of its goods would sell at the PMU price, and that indeed was the case. The PMU price was, thus, a fictitious or false price set only to create the illusion to members of the consuming public that they could receive a dramatic bargain. This pricing scheme was used for many years by May D&F and resulted in the sale of millions of dollars worth of products.

In August 1989, after the State filed this action, May D&F modified its comparative price advertising practices (the 1989 policy). The 1989 policy differed from the 1986 policy in two significant ways. First, the [*806] initial PMU was reduced. Internally, this new reference price was called the regular price rather than the original price. Second, the PMU or original price under the 1989 policy was required to be in effect for at least 28 of the 90 days the item was offered for sale.

Because the reference price/PMU was in effect for almost one-third of the time that the merchandise was being sold, the evidence indicated that May D&F set[**6] that price at a lower markup so that there would be more sales during this initial period. This policy of requiring that the PMU be kept for 28 of the 90 days was based on the minimum offering period required by Connecticut and Wisconsin regulations addressing this problem.

After an eight-day bench trial in May 1990, the trial court found that May D&F's comparative advertising pricing policies violated the three above-referenced CCPA provisions. The trial court found that the May D&F buyers who set the PMU knew that the items would not sell at that inflated "original price." It also found that the advertised reduced bargain from the PMU to the sales price was a false claim. It concluded that the IMU price was the real "regular price" of the product, and the PMU price was not.

The trial court ordered May D&F to pay a civil penalty of $2,000 for each of the four customers who testified at trial and also to pay the State's attorney fees. It also enjoined May D&F's use of a PMU or reference price in advertising unless it was accompanied by disclosure of May D&F's methods of determining that inflated PMU price. On the basis that the injunctive relief and penalties imposed were [**7] inadequate, the State initiated this appeal.

I.

A.

Here, the trial court's injunction precluded May D&F from:

(1) using a promotional markup as a reference price unless it fully and completely discloses to consumers its method of determining the promotional markup;

(2) using reference price terms with meanings unique to May D&F unless it provides a glossary in its advertising which defines the reference term; and

(3) using a sale of limited duration to create a sense of urgency unless May D&F also discloses that the sale is only one of several such sales planned during the selling period.

The State argues that the provisions of this injunction are inadequate to assure protection for consumers. It argues that the injunction erroneously permits May D&F to continue employing fictitious reference pricing so long as it discloses its method of determining its various prices. The State contends that May D&F's manner of determining the reference price and its use in the comparative pricing scheme are inherently deceptive, and thus, its use of a fictitious reference price system should be unconditionally banned. It further maintains that the court's required disclosure statements [**8] are not adequate and that such disclosure statements cannot adequately eliminate the deceptive practice.

May D&F argues that the injunctive order of the trial court was within its discretion and that the disclosure requirements, coupled with the injunctive relief, adequately protect consumers so that they are no longer misled by the comparative price advertising. We agree with the State.

[HN1] The granting or denial of an injunction, as well as its terms, lies within the sound discretion of the trial court and will be reversed only if there is an abuse of that discretion. See *Colorado Springs Board of Realtors, Inc. v. State, 780 P.2d 494 (Colo. 1989); Litinsky v. Querard, 683 P.2d 816 (Colo. App. 1984).*

While a trial court has broad discretion to fashion the appropriate injunctive relief, if there have been numerous, long-range, and repeated violations of law, the court has a duty to ensure that the injunctive decree will effectively redress the proven violations and prevent further ones. See *United States v. E.I. Du Pont de Nemours & [*807] Co., 366 U.S. 316, 81 S.Ct. 1243, 6 L.Ed.2d 318 (1961).*

Injunctions[**9] and disclosure statements are accepted vehicles to prevent deceptive advertising. See *Encyclopaedia Britannica, Inc. v. F.T.C., 605 F.2d 964 (7th Cir. 1979),* cert. denied, *445 U.S. 934, 100 S.Ct. 1329, 63 L.Ed.2d 770 (1980); Grolier, Inc. v. F.T.C., 699 F.2d 983 (9th Cir. 1983),* cert. denied, *464 U.S. 891, 104 S.Ct. 235, 78 L.Ed.2d 227 (1983); In re Thompson Medical Co., 104 F.T.C. 648 (1984).*

But, an injunction should be adequate to prevent the continuation of the retailer's violation of the law. See *United States v. E.I. Du Pont de Nemours & Co., supra; Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960).* Furthermore, when disclosure statements are ordered by the courts, their language should be prominent, clear, and understandable. See *Encyclopaedia Britannica, Inc. v. F.T.C., supra.*

While the injunction order here states that both the 1986 and 1989 comparative pricing[**10] approaches of May D&F violate the CCPA, it does not prohibit May D&F from either using its 1986 or 1989 sales approach. The trial court's order implicitly states that, as long as May D&F discloses how it goes about setting its prices, it is no longer violating the CCPA. In our view, that is error.

While, in some circumstances, disclosure statements are sufficient to correct fraudulent and misleading practices, in others, they are not. See *F.T.C. v. Brown & Williamson Tobacco Corp., 778 F.2d 35 (D.C. Cir. 1985).* In many instances, a disclaimer cannot effectively eliminate advertising practices which are deceptive, fraudulent, and misleading. See *F.T.C. v. Brown & Williamson Tobacco Corp., supra.*

Thus, here, in addition to requiring, if needed, a properly drafted disclaimer, the trial court should have also enjoined the underlying fraudulent practices. See *Amrep v. F.T.C., 768 F.2d 1171 (10th Cir. 1985),* cert. denied, *475 U.S. 1034, 106 S.Ct. 1167, 89 L.Ed.2d 352 (1986); Thompson Medical Co. v. F.T.C., 791 F.2d 189 (D.C. Cir. 1986),* cert. [**11] denied, *479 U.S. 1086, 107 S.Ct. 1289, 94 L.Ed.2d 146 (1987); Encyclopaedia Britannica, Inc. v. F.T.C., supra.*

[HN2] Comparative price advertising, if honestly done, is not misleading, and thus, it does not necessarily violate the CCPA. Here, however, the trial court did not require May D&F to stop even the most egregious of its 1986 or 1989 practices. We therefore agree with the State that, in failing to enjoin these deceptive practices, the trial court erred.

[HN3] In order to avoid violating the CCPA, May D&F must set the initial (PMU) reference price as a bona

fide price at which it intends to sell a significant number of products. See *Spiegel, Inc. v. F.T.C., 411 F.2d 481 (7th Cir. 1969)*. It cannot be set so high that it is a fictitious price which results in deceptive or misleading advertisements.

We reject the trial court's view that its ordered disclaimer would prevent advertisements from being fraudulent and misleading, irrespective of the PMU price. A glossary explanation of how May D&F set its prices will not be adequate to remedy the effect on the customers of the other parts of the ad. [**12]See *F.T.C. v. Brown & Williamson Tobacco Corp., supra.*

We also agree with the State's implicit argument that a disclosure statement should be prominent, clear, and readily understandable to the public. It is apparent that the trial court did not impose this obligation on May D&F, and there is evidence that unless disclaimers are properly done, they will either be disregarded or will confuse rather than inform the public. See *F.T.C. v. Brown & Williamson Tobacco Corp., supra.*

Thus, the trial court erred in not requiring the disclosure statement to be sufficiently prominent and understandable to the public. It also erred in not requiring that May D&F demonstrate to it the adequacy of both the content and location of the disclaimer. See *Brennan v. Monson, 97 Colo. 448, 50 P.2d 534 (1935).*

[*808] B.

The State next argues that May D&F's use of the 28/90 day time period for keeping its goods at the PMU is inadequate and, thus, misleads the public when the term "sale" is later used. We disagree with this contention.

While there is evidence in the record which indicates that most customers believe that a discounted[**13] sales price means that the product has been offered at a regular or non-sales price for a majority of the time it has been displayed, the trial court acted within its discretion in implicitly approving certain aspects of the 28/90 day 1989 policy. In our view, however, the trial court erred in not making those aspects of the 28/90 day policy which it approved minimum requirements so long as May D&F continues its present comparative reference price advertising.

C.

The State next argues that the trial court's injunctive order was erroneous because it did not prohibit the sale of goods offered at the IMU price unless substantial quantities were first sold at the PMU price. We disagree that a particular product can only be advertised for sale at a discounted price after a substantial number have been sold at the PMU price. Because it does not allow for the good faith efforts of May D&F to set a bona fide PMU price, this approach is too restrictive.

Despite May D&F's good faith efforts to set a bona fide competitive price, we recognize that there are valid reasons why a product might not sell at the PMU price. We conclude, however, that it is essential for the trial court to monitor May D&F's pricing scheme for a reasonable period[**14] of time to ensure that it has acted in good faith in implementing the court's ordered aspects of the comparative pricing scheme. If this monitoring indicates that only a few products are sold at the PMU price, this might suggest that May D&F has not satisfactorily implemented the terms of the injunction and would require further action.

In summary, in regard to the court's injunctive order, we conclude:

(1) the disclaimer approach is inadequate to remedy the fraudulent advertising scheme;

(2) May D&F must be enjoined from using deceptive procedures, including fictitious PMU prices, in selling its products in the Home Store;

(3) at a minimum, those aspects of the 28/90 day PMU May D&F policy which the court approved must be a part of the court's order;

(4) disclaimers must be prominent and understandable to the public, and the court should review the disclaimers to ensure that these requirements are met;

(5) for a reasonable period of time, the trial court should require May D&F to file periodic reports demonstrating it is in compliance with the injunction; and

(6) those aspects of the trial court's order which are not affected by this order remain in place, i.e., disclaimer information pertaining to short term [**15]sales.

II.

The State next argues that the trial court erred in its award of civil penalties. Specifically, the State argues that the trial court erred by requiring, implicitly, proof of actual damages or harm to a particular customer as a predicate for awarding a civil penalty. May D&F argues, on the other hand, that the CCPA requires proof of an injury, loss, or damage to a particular party from the fraudulent or misleading advertisement before a penalty can be assessed. However, since it is unclear how the trial court interpreted the civil penalties section of the

CCPA, we remand to the trial court for further findings of fact and conclusions of law. See C.R.C.P. 52.

The trial court awarded civil penalties against May D&F of $8,000. The court awarded a $2,000 civil penalty for each of the four witnesses who testified that they were misled by May D&F's advertising. Two of the witnesses purchased items in apparent response to the advertisements. Because of the advertisements, the other [*809] two witnesses expended time, effort, and possibly money in pursuing products but ultimately decided not to buy them from May D&F. However, we cannot determine from the trial court's[**16] judgment whether it concluded that this was the sole basis upon which damages may be awarded or whether it concluded that the State's evidence was not sufficient to establish any other violation of the Act.

Since the question of what constitutes a violation of the CCPA that mandates imposition of a civil penalty will reoccur on remand, we address it now.

[HN4] *Section 6-1-112(1), C.R.S.* (1991 Cum. Supp.), states:

Any person who violates or causes another to violate any provision of this article shall forfeit and pay to the general fund of this state a civil penalty of not more than two thousand dollars for each such violation. For purposes of this subsection (1), a violation of any provision shall constitute a separate violation with respect to each consumer or transaction involved; except that the maximum civil penalty shall not exceed one hundred thousand dollars for any related series of violations. . . . (emphasis added)

In our view, [HN5] the CCPA does not require that an actual injury or loss to a customer occur before a civil penalty may be awarded. A civil penalty under § 6-1-112 is not the same as an award of damages to an injured party in a tortious fraud lawsuit[**17] in which the injured party may recover only damages actually incurred. *Zimmerman v. Loose, 162 Colo. 80, 425 P.2d 803 (1967).*

Instead, the civil penalty award goes to the State's general fund, and thus, its purpose is not to make an injured party whole, but rather it is solely intended to punish the wrongdoer for its illegal acts.

Given this purpose, the State argues that a violation of the CCPA occurred every time a newspaper which contained a misleading and fraudulent comparative pricing advertisement was printed and distributed. Thus, if, for example, on a given day 500,000 newspapers were circulated with a misleading comparative pricing advertisement, in the State's view, there would be 500,000 violations for which May D&F could be fined up to $2,000 per violation. These numbers would, of course, be multiplied by the number of days that the newspapers were printed and distributed. We reject this interpretation of the statute.

The first sentence in § 6-1-112(1) states that any person who violates any underlying provision of this article shall pay to the general fund a civil penalty for each violation. The next sentence in § 6-1-112(1) states[**18] that a violation of any provision constitutes a separate violation with respect to each customer or transaction involved. The issue then becomes how does the second sentence of § 6-1-112(1) impact the initial sentence of this statute.

[HN6] A statute should be construed as a whole so as to give consistent, harmonious, and sensible effect to all its parts. *Seibel v. Colorado Real Estate Commission, 34 Colo. App. 415, 530 P.2d 1290 (1974).* The particular wording of a statute is presumed to have a purpose and, therefore, not to be repetitious of other wording in the statute. *State v. Borquez, 751 P.2d 639 (Colo. 1988); People v. Bartsch, 37 Colo. App. 52, 543 P.2d 1273 (1975).* Applying these rules of construction, we conclude that the phrase "consumer or transaction involved," as used in § 6-1-112(1), refers to two different types of violation.

In our view, the term "each consumer . . . involved" means a person who has been exposed to May D&F's misleading information and then either purchases the item or undertakes other activities in response to the information. Hence, a person who receives a copy [**19] of a newspaper with a misleading ad, but who does not read or respond to the ad in any way, would not be a consumer who is involved within the meaning of § 6-1-112(1).

With reference to the term transaction, we note that Black's Law Dictionary 1341 (5th ed. 1979) states that to transact means:

to prosecute negotiations; to carry on business; to have dealings; to carry through; bring about; perform; to carry [*810] on or conduct; to pass back and forth as in negotiations or trade; to bring into actuality or existence.

Other courts, which have interpreted deceptive practice acts like the CCPA, have determined that there is a violation of the act for which a penalty may be assessed each time a deceptive ad or information is displayed or broadcast. See *People v. Superior Court, 96 Cal. App. 3d 181, 157 Cal. Rptr. 628 (Cal. Ct. App. 1979),* cert.

denied, *446 U.S. 935, 100 S.Ct. 2152, 64 L.Ed.2d 787 (1980); Commonwealth v. Tolleson, 14 Pa. Cmwlth. 140, 321 A.2d 701 (1974); State v. Ralph Williams N.W. Chrysler Plymouth, 87 Wash. 2d 298, 553 P.2d 423 (1976);* [**20]*State v. Menard, Inc., 121 Wis. 2d 199, 358 N.W.2d 813 (Wis. App. 1984).* These courts have determined that a penalty may be assessed for violating the act, irrespective of actual injury to a customer. See *People v. Superior Court, supra.*

Some courts have either found or acknowledged that there is a conceivable basis to find that each time a misleading deceptive ad is displayed or broadcast, a transaction is involved and a penalty is required. See *People v. Superior Court, supra; United States v. Reader's Digest Ass'n, Inc., 662 F.2d 955 (3rd Cir. 1981),* cert. denied, *455 U.S. 908, 102 S.Ct. 1253, 71 L.Ed.2d 446 (1982).* However, other courts, in interpreting their deceptive practice acts, have taken a more narrow view of what constitutes a separate violation and have held that there is only one violation for each day an advertisement by a particular media entity is used. *State v. Ralph Williams N.W. Chrysler Plymouth, supra; State v. Menard, Inc., supra;*[**21] Commonwealth of Pennsylvania v. Tolleson, supra.

Under the circumstances here, we adopt the more narrow concept, and we hold that [HN7] a transaction under the CCPA consists of one ad in one media outlet per day. In other words, if, on a given day, there are 500,000 newspapers with deceptive May D&F advertisements displayed in them, there would only be one violation on that day rather than 500,000. On the other hand, if the ad is run in two newspapers or in one newspaper and on one television station, two violations would occur.

Thus, we conclude that § 6-1-112(1) requires a civil penalty for each consumer affected by the misleading advertisement or broadcast, as well as for each transaction involved.

The State argues, inter alia, that it proved numerous transactions in regard to the regular use of media as well as establishing more than 16,000 transactional sales to customers. If the trial court did not initially evaluate the State claims in terms of the above-stated standards, it must do so on remand.

If, on remand, the court determines that there were numerous additional violations, it need not, of course, impose a maximum award of $2,000 for each violation. Furthermore, [**22] if the trial court determines that it did not apply correct legal standards in assessing the evidence presented by the State and decides to make an additional civil penalty award, [HN8] it should apply the following concepts in determining the amount of that award:

(a) the good or bad faith of the defendant;

(b) the injury to the public;

(c) the defendant's ability to pay; and

(d) the desire to eliminate the benefits derived by violations of the CCPA.

See *United States v. Papercraft Corp., 540 F.2d 131 (3rd Cir. 1976); Commonwealth v. Fall River Motor Sales, Inc., 409 Mass. 302, 565 N.E.2d 1205 (1991).*

III.

[HN9] *Section 6-1-106(1) (a), C.R.S.*, states that the CCPA does not apply to a party if its conduct complies with the orders or rules or a statute administered by a federal, state, or local government agency. The trial court determined that a Federal Trade Commission guideline addressing proper comparative pricing was an order or part of a statute administered by a federal agency. It further found, however, that May D&F was not in conformity with the order or statute and that, therefore, it was not exempt from the CCPA.

The[**23] State argues that the trial court erred in determining that the guideline was part of an order or statute within the meaning [*811] of § 6-1-106(1) (a). May D&F argues that the F.T.C. guideline is a part of the Federal Trade Commission's enabling and governing statutes, but argues that, since the trial court found it was not in compliance with this statute, the issue is irrelevant and moot. Furthermore, on appeal, May D&F has not argued that it is exempt from the CCPA.

We agree with May D&F that, since its conduct was not in compliance with the applicable F.T.C. guidelines, it is not exempt from the CCPA and the trial court's ruling concerning the F.T.C. guideline as being an order or part of a statute is irrelevant and moot. See *Coon v. Berger, 41 Colo. App. 358, 588 P.2d 386 (1978),* aff'd, *199 Colo. 133, 606 P.2d 68 (1980).* We therefore do not decide whether May D&F would be exempt from the CCPA if it had complied with the guidelines.

IV.

The State finally argues that the trial court erred in considering as mitigating factors May D&F's adoption of its 1989 policy, its Satisfaction Guaranteed policy which offered a full[**24] refund to dissatisfied customers, and its hiring of a Consumer Affairs Director. We agree with

the State that insofar as May D&F's 1989 policy is illegal, it is not a mitigating factor, but we agree with May D&F that the other matters are mitigating factors.

While the trial court considered the 1989 policy an improvement on the 1986 policy, it still found it illegal in certain aspects. Insofar as the 1989 policy is illegal, the illegal aspects are not proper items to be considered in mitigation.

We agree, however, with the trial court that the Satisfaction Guaranteed policy, which provides a refund to a dissatisfied customer for any reason, and the hiring of the Consumer Affairs Director to monitor compliance with May D&F's advertising standards are matters within its discretion and could properly be considered as mitigating factors in assessing damages. See *Industrial Commission v. Ewing, 160 Colo. 503, 418 P.2d 296 (1966); Comfort Homes, Inc. v. Peterson, 37 Colo. App. 516, 549 P.2d 1087 (1976).*

The other arguments of the State are without merit.

In summary:

(1) the trial court's injunction is reversed, and the cause is remanded for it to enter a new injunction consistent with[**25] this opinion;

(2) the civil penalty determination is remanded for further consideration in light of the views expressed herein;

(3) because the trial court properly considered the F.T.C. guidelines irrelevant to its decision in this case, we do not decide whether, if May D&F had conformed to the guidelines, it would be exempt from the CCPA;

(4) the illegal aspects of the 1989 policy of May D&F are not mitigating factors. However, its refund policy and appointment of a Consumer Affairs Director are legitimate mitigating factors.

JUDGE CRISWELL and JUDGE MARQUEZ concur.

EXHIBIT G

Certified true copy of Exhibit G.

[signature], PARTNER, MORGAN LEWIS 9/22/07

ITIFIED AT THE CANADIAN EMBASSY
R LEGALIZATION OF THE FOREGOING
NATURE OF: STEPHEN PAUL MAHINKA
TIFIE A L'AMBASSADE DU CANADA
K FINS DE LÉGALISER LA SIGNATURE
ESSUS DE:

[signature]
[illegible] Boudreau
ular Program Officer
Agent Consulaire
adian Embassy/Ambassade du Canada
shington, D.C.

Consular Section Consulaire
Canadian Embassy
Ambassade du Canada
501 Pennsylvania Avenue, N.W.
Washington, D.C. 20001

REGULATIONS OF CONNECTICUT STATE AGENCIES

* THIS DOCUMENT IS CURRENT THROUGH THE 8/26/03 ISSUE OF THE CONN. LAW JOURNAL *

TITLE 42 SALES AND COLLECTIONS
DEPARTMENT OF CONSUMER PROTECTION
COMPARISON PRICE ADVERTISING

Regs., Conn. State Agencies § **42-110b-12a** (2003)

Sec. **42-110b-12a.** Price comparison advertisements

(a) It shall be an unfair or deceptive act or practice for a seller to make any price comparison based upon a price at which consumer property or services were sold by the seller unless:

(1) the price is a price at which such property or services were actually sold by the seller in the last ninety days immediately preceding the date on which the price comparison is stated in the advertisement; or

(2) the price is a price at which such property or services were actually sold by the seller during any other period, and the advertisement discloses with the price comparison the date, time or seasonal period when such sales were made.

(b) It shall be an unfair or deceptive act or practice for a seller to make any price comparison based upon a price at which the seller has offered for sale but has not sold consumer property or services unless:

(1) the price is a price at which such property or services were actually offered for sale by the seller for at least four weeks during the last ninety days immediately preceding the date on which the price comparison is stated in the advertisement; or

(2) the price is a price at which such property or services were actually offered for sale by the seller for at least four weeks during any other ninety day period, and the advertisement clearly discloses the date, time, or seasonal period of such offer.

(c) It shall be an unfair or deceptive act or practice for a seller to make any price comparison in which the seller represents that it is conducting a "sale" unless:

(1) the termination date of the "sale" is clearly set forth in the advertisement; and

(2) the day after the "sale" ends, the consumer property or services reverts in price to the price charged by the seller for said item before the "sale" began or to a price which is higher than the "sale" price, except for "clearance," "closeout" or "permanent markdown" sales where the item will be reduced in price until it is removed from the seller's inventory.

(d) It shall be an unfair or deceptive act or practice for a seller to make any price comparison referencing a higher price at which consumer property or services will be offered or sold in the future unless:

(1) the advertisement clearly discloses that the price comparison is based upon a future price increase;

(2) the effective date of the future higher price, if more than ninety days after the price comparison is first stated in an advertisement, is clearly disclosed in the advertisement; and

(3) the future higher price increase takes effect on the date disclosed in the advertisement or, if not disclosed in the advertisement, within ninety days after the price comparison is stated in the advertisement, except where compliance becomes impossible because of circumstances beyond the seller's control.

(e) It shall be an unfair or deceptive act or practice for a seller to make any price comparison based upon advertised savings of a particular percentage or a range of percentages (e.g. "save 30%" or "20% to 60% off") unless:

(1) the minimum percent reduction is clearly stated in the advertisement in a manner as conspicuously as the maximum percentage reduction, when applicable;

(2) the basis for the advertised percent reduction is clearly and conspicuously disclosed in the advertisement (e.g. "20 [percent] off our regular price"); and

(3) the number of items available at the maximum savings comprise at least 10% of all the items in the offering.

(f) It shall be an unfair or deceptive act or practice for a seller to use the terms "wholesale prices," "factory outlet," "at cost," and other similar terms in a price comparison, unless the stated savings can be substantiated and the terms meet the following requirements:

(1) the terms "factory to you," "direct from maker," "factory outlet" and words of similar meaning shall not be used unless all advertised merchandise is actually manufactured by the advertiser or in factories, owned or controlled by the advertiser;

(2) the terms "wholesale," "wholesale outlet," "distributor" and words of similar meaning shall not be used unless the advertiser actually owns and operates or directly and absolutely controls a wholesale or distribution facility which sells the majority of its products to retailers or other wholesalers for resale, rather than to the ultimate consumer for use; and

(3) the terms "wholesale price," "at cost" and the like shall not be used unless they are the current prices which retailers usually and customarily pay when they buy such merchandise for resale.

(g) It shall be an unfair or deceptive act or practice for a seller, using the term "original" or "originally" in a price comparison, to fail to disclose that intermediate markdowns have been taken, if such is the case. A seller may use the term "original" or "originally" when offering a reduction from an original price that was the price at which such consumer property or services was actually offered for sale in the recent, regular course of business. If the comparative price, identified as "original" or "originally," is not also the last previous selling price, that fact shall be disclosed, by stating the last previous selling price, (e.g., "originally $599.95, formerly $499.95, now $399.95,") or indicating "intermediate markdowns taken."

(h) It shall be an unfair or deceptive act or practice for a seller to advertise consumer property or services for sale under special circumstances using terms such as "closeout," "clearance sale," "must be sacrificed" or similar terms unless the advertised item is permanently reduced in price in order to remove it from the seller's inventory.

Effective February 26, 1986

EXHIBIT H

Certified true copy of Exhibit H.

[redacted], PARTNER, MORGAN LEWIS 9/22/03

CERTIFIED AT THE CANADIAN EMBASSY
FOR LEGALIZATION OF THE FOREGOING
SIGNATURE OF: STEPHEN PAUL MAHINKA
CERTIFIE A L'AMBASSADE DU CANADA
AUX FINS DE LEGALISER LA SIGNATURE
CI-DESSUS DE:

Hélène Bouchard
Senior Program Officer
Agent Consulaire
Canadian Embassy/Ambassade du Canada
Washington, D.C.

Consular Section Consulaire
Canadian Embassy
Ambassade du Canada
501 Pennsylvania Avenue N.W.
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*** THIS DOCUMENT IS CURRENT THROUGH THE 2002 LEGISLATIVE SESSION ***
*** ANNOTATIONS CURRENT THROUGH AUGUST 1, 2003 ***

TITLE 33. REGULATION OF TRADE, COMMERCE, INVESTMENTS, AND SOLICITATIONS
CHAPTER 501. CONSUMER PROTECTION
PART II. **DECEPTIVE AND UNFAIR TRADE PRACTICES**

Fla. Stat. § 501.204 (2002)

§ 501.204. Unlawful acts and practices

(1) Unfair methods of competition, unconscionable acts or practices, and **unfair or deceptive** acts or **practices** in the conduct of any **trade** or commerce are hereby declared unlawful.

(2) It is the intent of the Legislature that, in construing subsection (1), due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act, *15 U.S.C. s. 45*(a)(1) as of July 1, 2001.

HISTORY: s. 1, ch. 73-124; s. 1, ch. 83-117; s. 4, ch. 85-63; s. 2, ch. 90-190; s. 3, ch. 93-38; s. 2, ch. 2001-39; s. 23, ch. 2001-214.

LexisNexis (TM) Notes:

CASE NOTES
Administrative Law: Agency Rulemaking
Antitrust & Trade Law: Consumer Protection
Antitrust & Trade Law: Consumer Protection: Deceptive Acts & Practices
Antitrust & Trade Law: Federal Trade Commission Act
Antitrust & Trade Law: Price Fixing & Restraints of Trade
Antitrust & Trade Law: State Trade Regulation
Antitrust & Trade Law: Trade Practices & Unfair Competition
Contracts Law: Contract Conditions & Provisions: Arbitration Clauses
Governments: Legislation: Interpretation
Governments: State & Territorial Governments: Gaming & Lotteries
Torts: Business & Employment Torts: Deceit & Fraud
Torts: Business & Employment Torts: Unfair Business Practices

Administrative Law: Agency Rulemaking

1. Dismissal of a complaint, which alleged that a moving company violated *Fla. Stat. ch. 501.204* by providing "low ball" estimates over the phone and tacking on extra charges when payments became due, should not have been based on the fact that there was no administrative rule or regulation specifying that such conduct was prohibited, because *Fla. Stat. ch. 501.205* did not require that an act had to violate a specific rule or regulation in order to constitute an unfair or deceptive practice. *Department of Legal Affairs v. Father & Son Moving & Storage, 643 So. 2d 22, 1994 Fla. App. LEXIS 9035, 19 Fla. L. Weekly D 1878, 19 Fla. L. Weekly D 1879 (Fla. Dist. Ct. App. 4th Dist. 1994),* review denied, *651 So. 2d 1193 (Fla. 1995).*

Antitrust & Trade Law: Consumer Protection

2. A client's allegations concerning unfair and deceptive acts committed by an attorney in the process of providing legal services states a claim under the broadprovisions of the Florida **Deceptive and Unfair Trade Practices** Act, *Fla. Stat. ch. 501.204. Kelly v. Nelson, 2002 U.S. Dist. LEXIS 6430, 15 Fla. L. Weekly Fed. D 247 (M.D. Fla. Mar. 20 2002).*

3. Relations between a commercial landlord and tenant were subject to the unfair competition provisions of *Fla. Stat. ch. 501.204(1)*; however, the landlords' failure to maintain the premises and alleged inducements to procure the lease contract were not the sort of "methods" and "practices" proscribed by the rule. *Beacon Prop. Mgmt., Inc. v. Pnr, Inc., 785 So. 2d 564, 2001 Fla. App. LEXIS 4339, 26 Fla. L. Weekly D 915 (Fla. Dist. Ct. App. 4th Dist. 2001).*

Antitrust & Trade Law: Consumer Protection: Deceptive Acts & Practices

4. Car buyers stated a claim under the Florida **Deceptive and Unfair Trade Practices** Act, specifically *Fla. Stat. ch. 501.204(1),* against a car dealer that refused to return the buyers' trade-in vehicle after a failed transaction, where the buyers alleged that the dealer induced them to sign the buyers order by representing to the buyers that they were not entering into a contract, and then claiming that by signing the buyers order, the buyers had given the dealer permission to immediately dispose of the buyers' trade-in vehicle; the buyers also alleged that the car dealer never once offered to compensate the buyers for the disposal of their trade-in vehicle. *Samuels v. King Motor Co., 782 So. 2d 489, 2001 Fla. App. LEXIS 4036, 26 Fla. L. Weekly D 849 (Fla. Dist. Ct. App. 4th Dist. 2001).*

5. A foreign corporation violated the Florida **Deceptive and Unfair Trade Practices** Act, *Fla. Stat. ch. 501.204,* by deliberately conspiring to fix the wholesale price of its thermal fax paper throughout the *United States. Execu-Tech Bus. Sys. v. New Oji Paper Co., 752 So. 2d 582, 2000 Fla. LEXIS 65, 25 Fla. L. Weekly S 40, 2000-1 Trade Cas. (CCH) P72771 (Fla. 2000),* cert. denied, *531 U.S. 818, 121 S. Ct. 58, 148 L. Ed. 2d 25 (2000).*

6. Trial court's award of damages to plaintiff, consisting of two loan payments made to the lending institution prior to plaintiff's cessation of payments on the car he purchased from defendant and money for the resale value of the purchased car and a trade-in car less the amount of plaintiff's loan payoffs, in plaintiff's action under the Florida **Deceptive and Unfair Trade Practices** Act, *Fla. Stat. ch. 501.204,* did not constitute actual damages under the Act and were therefore reversed. *Fort Lauderdale Lincoln Mercury v. Corgnati, 715 So. 2d 311, 1998 Fla. App. LEXIS 9085, 23 Fla. L. Weekly D 1706 (Fla. Dist. Ct. App. 4th Dist. 1998).*

7. Trial court properly entered summary judgment against the corporation on the issue of liability because the conflicts in the evidence were minimal, and did not undermine the trial court's conclusion that the corporation misrepresented the nature of the non-filing fee, and in so doing, committed an **unfair and deceptive trade practice** as a matter of law, *Fla. Stat. ch. 501.204. W.S. Badcock Corp. v. Myers, 696 So. 2d 776, 1996 Fla. App. LEXIS 13590, 22 Fla. L. Weekly D 34 (Fla. Dist. Ct. App. 1st Dist. 1996),* review denied, *698 So. 2d 840 (Fla. 1997).*

8. Trial court erroneously directed a verdict in favor of defendant in plaintiff's claim under the Florida **Deceptive and Unfair Trade Practices** Act, specifically *Fla. Stat. ch. 501.204,* where plaintiff showed that defendant charged plaintiff more than the sticker price of the car, allowed plaintiff less than the blue book value of the trade in, and made false

representations to plaintiff. *Suris v. Gilmore Liquidating, 651 So. 2d 1282, 1995 Fla. App. LEXIS 2592, 20 Fla. L. Weekly D 657 (Fla. Dist. Ct. App. 3d Dist. 1995).*

9. Dismissal of a complaint, which alleged that a moving company violated *Fla. Stat. ch. 501.204* by providing "low ball" estimates over the phone and tacking on extra charges when payments became due, should not have been based on the fact that there was no administrative rule or regulation specifying that such conduct was prohibited, because *Fla. Stat. ch. 501.205* did not require that an act had to violate a specific rule or regulation in order to constitute an unfair or deceptive practice. *Department of Legal Affairs v. Father & Son Moving & Storage, 643 So. 2d 22, 1994 Fla. App. LEXIS 9035, 19 Fla. L. Weekly D 1878, 19 Fla. L. Weekly D 1879 (Fla. Dist. Ct. App. 4th Dist. 1994),* review denied, *651 So. 2d 1193 (Fla. 1995).*

Antitrust & Trade Law: Federal Trade Commission Act

10. A foreign corporation violated the Florida **Deceptive and Unfair Trade Practices** Act, *Fla. Stat. ch. 501.204*, by deliberately conspiring to fix the wholesale price of its thermal fax paper throughout the *United States. Execu-Tech Bus. Sys. v. New Oji Paper Co., 752 So. 2d 582, 2000 Fla. LEXIS 65, 25 Fla. L. Weekly S 40, 2000-1 Trade Cas. (CCH) P72771 (Fla. 2000),* cert. denied, *531 U.S. 818, 121 S. Ct. 58, 148 L. Ed. 2d 25 (2000).*

Antitrust & Trade Law: Price Fixing & Restraints of Trade

11. Plaintiff, an indirect purchaser had standing to sue manufacturers for price fixing under the Florida **Deceptive and Unfair Trade Practices** Act, (Florida DTPA), *Fla. Stat. ch. 501.201* et seq., where, pursuant to *Fla. Stat. ch. 501.204(2),* consumers and indirect purchasers were permitted to bring suit for price fixing, conduct that violated federal antitrust laws; federal antitrust laws did not preempt the *Florida DTPA. Mack v. Bristol-Myers Squibb Co., 673 So. 2d 100, 1996 Fla. App. LEXIS 4598, 21 Fla. L. Weekly D 1110, 1996-1 Trade Cas. (CCH) P71401 (Fla. Dist. Ct. App. 1st Dist. 1996),* review dismissed, *689 So. 2d 1068 (Fla. 1997).*

Antitrust & Trade Law: State Trade Regulation

12. *Fla. Stat. ch. 501.205* of the Florida **Deceptive and Unfair Trade Practices** Act, *Fla. Stat. ch. 501.201* et seq., does not constitute an unlawful designation of legislative authority to the executive branch of government in violation of Fla. Const. art. III, § 1 because adequate standards have been announced in *Fla. Stat. ch. 501.204*, which require the enforcing and rulemaking authority to comply with *15 U.S.C.S. § 45*(a)(1) of the Federal Trade Commission Act, to guide the administrative agency in the exercise of the delegated powers consistent with constitutional dictates. *Department of Legal Affairs v. Rogers, 329 So. 2d 257, 1976 Fla. LEXIS 4286 (Fla. 1976).*

Antitrust & Trade Law: Trade Practices & Unfair Competition

13. Manufacturer had and was engaged in the business involved, that is, the manufacture, sale and distribution of the artificial sweetener product; the injury alleged, therefore, could not be characterized as arising out of a consumer transaction, and the manufacturer lacked standing to pursue its claim under the *Florida **Deceptive and Unfair Trade Practices** Act. Monsanto Co. v. Campuzano, 206 F. Supp. 2d 1252, 2002 U.S. Dist. LEXIS 16341 (S.D. Fla. 2002).*

Contracts Law: Contract Conditions & Provisions: Arbitration Clauses

14. Purchasers' claims against a car dealer for negligent misrepresentation, fraud, recission, breach of express and implied warranties, violation of the Magnuson-Moss Act, *15 U.S.C.S. § 2301,* and violation of the Florida **Deceptive and Unfair Trade Practices** Act, *Fla. Stat. ch. 501.204* were subject to arbitration where the purchase agreement contained a clause requiring arbitration of disputes employed the phrase "any controversy or claim arising out of or relating to" the contract; the purchasers did not specifically attack the arbitration clause. *Stacy David, Inc. v. Consuegra, 2003 Fla. App. LEXIS 7158* (May 16, 2003).

Governments: Legislation: Interpretation

15. Although *Fla. Stat. ch. 501.204(1)* refers to "acts" when discussing the deceptive practices and acts which are addressed by the Florida **Deceptive and Unfair Trade Practices** Act (FDUTPA), *Fla. Stat. ch. 501.201-.213*, FDUTPA is applicable in instances involving a single party or under a single transaction or contract pursuant to the clear and unambiguous language of the statute, the intent of the Legislature in enacting the statute, and the statutory construction principles of *Fla. Stat. ch. 1.01(1). Pnr, Inc. v. Beacon Prop. Mgmt., Inc., 2003 Fla. LEXIS 380, 28 Fla. L. Weekly S 229 (Fla. Mar. 13 2003).*

16. Pursuant to the Florida **Deceptive and Unfair Trade Practices** Act, *Fla. Stat. ch. 501.204(2)*, the Florida courts must give due consideration and great weight to Federal Trade Commission and federal court interpretations of the *Federal Trade Commission Act. Davis v. Powertel, Inc., 776 So. 2d 971, 2000 Fla. App. LEXIS 16959, 26 Fla. L. Weekly D 146 (Fla. Dist. Ct. App. 1st Dist. 2000).*

Governments: State & Territorial Governments: Gaming & Lotteries

17. Application of *Fla. Stat. ch. 849.09(1)* and *Fla. Stat. ch. 501.204(1)* to advertisement and promotion of the sale of foreign states' and foreign nations' lottery tickets, was held not to violate the federal Constitution's commerce clause. *Department of Legal Affairs v. Winshare Club of Canada, 530 So. 2d 348, 1988 Fla. App. LEXIS 3075, 13 Fla. L. Weekly 1731 (Fla. Dist. Ct. App. 5th Dist. 1988).*

Torts: Business & Employment Torts: Deceit & Fraud

18. Cruise passenger's Florida **Deceptive and Unfair Trade Practices** Act (FDUTPA) claim alleged fraud where the passenger claimed that the cruise that was promised was not received; hence, the FDUTPA claim should have been plead with particularity, and as plead, was insufficient. *Stires v. Carnival Corp., 2002 U.S. Dist. LEXIS 25456 (M.D. Fla. Nov. 7 2002).*

19. Pursuant to the Florida **Deceptive and Unfair Trade Practices** Act, *Fla. Stat. ch. 501.204(2)* the Florida courts must give due consideration and great weight to Federal Trade Commission and federal court interpretations of the *Federal Trade Commission Act. Davis v. Powertel, Inc., 776 So. 2d 971, 2000 Fla. App. LEXIS 16959, 26 Fla. L. Weekly D 146 (Fla. Dist. Ct. App. 1st Dist. 2000).*

Torts: Business & Employment Torts: Unfair Business Practices

20. Prospective home buyer stated a cause of action against a real estate developer under the Florida **Deceptive and Unfair Trade Practices** Act, *Fla. Stat. ch. 501.201* et seq., because the reservation form the developer used unequivocally represented that the prospective home buyer would be given the opportunity to purchase a particular lot or unit at a firm price, and was therefore likely to mislead. *Fendrich v. Rbf, L.L.C., 2003 Fla. App. LEXIS 3728, 28 Fla. L. Weekly D 758 (Fla. Dist. Ct. App. 4th Dist. Mar. 19 2003).*

21. Single instance of doing something did not make it a method or a practice; Florida **Deceptive and Unfair Trade Practices** Act required more than an isolated act of misconduct. *Keech v. Yousef, 815 So. 2d 718, 2002 Fla. App. LEXIS 5450, 27 Fla. L. Weekly D 967 (Fla. Dist. Ct. App. 5th Dist. 2002).*

TREATISES AND ANALYTICAL MATERIALS

1. *3-65 Florida Forms of Jury Instruction § 65.80*, Florida Forms of Jury Instruction, Division III TORT ACTIONS, § 65.80 Cause of Action, Copyright 2002, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

2. *4-52 Florida Real Estate Transactions § 52.11*, Florida Real Estate Transactions, Part VII LANDLORD AND TENANT, § 52.11 Tenant's Injunctive or Declaratory Action Against **Unfair Trade Practices** by Retaliating Landlord, Copyright 2002, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

3. *Florida Residential Landlord Tenant Manual § 12.02*, FLORIDA RESIDENTIAL LANDLORD TENANT MANUAL, VOLUME 2, § 12.02. Unconscionable Rental Agreements; Obligations of Good Faith, Copyright § 2001 LEXIS Law Publishing, a Division of Reed Elsevier, Inc.

4. *1-26 Florida Torts § 26.23*, Florida Torts, DIVISION II ACTIONS BASED ON INTENTIONAL CONDUCT, § 26.23 Anti-Fraud Statutes, Copyright 2002, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

5. *71 Fla. Bar J. 81*, COLUMN: BUSINESS LAW: FORMULA FOR SUCCESS: STANDING OF INDIRECT PURCHASERS UNDER THE FLORIDA **DECEPTIVE AND UNFAIR TRADE PRACTICES** ACT, by William J. Blechman and Scott E. Perwin, March, 1997, Copyright (c) 1997 by the Florida Bar, The Florida Bar Journal

6. *70 Fla. Bar J. 46*, FEATURE: AUTO LEASING: LET THE DEALER DISCLOSE, by Robert J. Buchner and Sara J. Sanders, November, 1996, Copyright (c) 1996 by the Florida Bar, The Florida Bar Journal

7. *71 Fla. Bar J. 49*, COLUMN: CONSUMER PROTECTION LAW: PHYSICIAN DECEPTIVE AND UNFAIR BUSINESS PRACTICES, by Michael Flynn, July/August, 1997, Copyright (c) 1997 by the Florida Bar, The Florida Bar Journal

FLORIDA ADMINISTRATIVE CODE ANNOTATED

*** THIS DOCUMENT REFLECTS CHANGES RECEIVED THROUGH JULY 31, 2003 ***

DEPARTMENT OF LEGAL AFFAIRS
CHAPTER 2-2 REPEAL OF RULES REGARDING UNFAIR AND DECEPTIVE TRADE PRACTICES

2-2.001, F.A.C.

2-2.001 Repeal of Rules Regarding Unfair and Deceptive Trade Practices.

It is neither possible nor necessary to codify every conceivable deceptive and unfair trade practice prohibited by Part II, Chapter 501, Florida Statutes. (See *Department of Legal Affairs v. Father & Son Moving & Storage, 643 So.2d 22 (Fla. 4th DCA 1994)).* The repeal by the Department of Legal Affairs of the following rule chapters shall not modify or restrict the application of Part II, Chapter 501, Florida Statutes, to deceptive and unfair trade practices: Title 2, Chapters 2-7, 2-9, 2-10, 2-11, 2-12, 2-13, 2-14, 2-15, 2-16, 2-17, 2-18, 2-19, 2-20, 2-22, and 2-28, F.A.C.
AUTHORITY: Specific Authority 501.205 FS.
Law Implemented 501.204 FS.

HISTORY
New 6-19-96, Amended 10-29-97.

EXHIBIT I

Certified true copy of Exhibit I.

[signature], PARTNER, MORGAN LEWIS 9/22/03

ERTIFIED AT THE CANADIAN EMBASSY
OR LEGALIZATION OF THE FOREGOING
IGNATURE OF: STEPHEN PAUL MAHINKA
ERTIFIE A L'AMBASSADE DU CANADA
UX FINS DE LEGALISER LA SIGNATURE
IDESSUS DE:

[signature]
Hélène Bouchard
uular Program Officer
Agent Consulaire
nadian Embassy/Ambassade du Canada
ashington, D.C.

Consular Section Consulaire
Canadian Embassy
Ambassade du Canada
501 Pennsylvania Avenue, N.W.
Washington, D.C. 20001

OFFICIAL CODE OF GEORGIA ANNOTATED

*** CURRENT THRU THE 2003 REGULAR SESSION OF THE GENERAL ASSEMBLY ***

TITLE 10. COMMERCE AND TRADE
CHAPTER 1. SELLING AND OTHER TRADE PRACTICES
ARTICLE 15. DECEPTIVE OR UNFAIR PRACTICES
PART 2. FAIR BUSINESS PRACTICES ACT

=1; GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

O.C.G.A. § **10-1-393** (2002)

§ 10-1-393. Unfair or deceptive practices in consumer transactions unlawful; examples

(a) Unfair or deceptive acts or practices in the conduct of consumer transactions and consumer acts or practices in trade or commerce are declared unlawful.

(b) By way of illustration only and without limiting the scope of subsection (a) of this Code section, the following practices are declared unlawful:

(1) Passing off goods or services as those of another;

(2) Causing actual confusion or actual misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(3) Causing actual confusion or actual misunderstanding as to affiliation, connection, or association with or certification by another;

(4)(A) Using deceptive representations or designations of geographic origin in connection with goods or services. Without limiting the generality of the foregoing, it is specifically declared to be unlawful:

(i) For any nonlocal business to publish in any local telephone classified advertising directory any advertisement containing a local telephone number for the business unless the advertisement clearly states the nonlocal location of the business; or

(ii) For any nonlocal business to cause to be listed in any nonclassified advertising local telephone directory a local telephone number for the business if calls to the number are routinely forwarded or otherwise transferred to the nonlocal business location that is outside the calling area covered by such local telephone directory and the listing fails to state clearly the principal place of business of the nonlocal business.

(B) For purposes of this paragraph, the term:

(i) "Local" or "local area" refers to the area in which any particular telephone directory is distributed free of charge to some or all telephone service subscribers.

(ii) "Local telephone classified advertising directory" refers to any telephone classified advertising directory which is distributed free of charge to some or all telephone subscribers in any area of the state and includes such directories distributed by telephone service companies as well as such directories distributed by other parties.

(iii) "Local telephone number" refers to any telephone number which is not clearly identifiable as a long-distance telephone number and which has a three-number prefix typically used by the local telephone service company for telephones physically located within the local area.

(iv) "Nonclassified advertising local telephone directory" refers to any telephone directory which is distributed free of charge to some or all telephone subscribers in any area of the state and which does not contain classified advertising and includes such directories distributed by telephone service companies as well as such directories distributed by other parties.

(v) "Nonlocal business" refers to any business which does not have within the local area a physical place of business providing the goods or services which are the subject of the advertisement or listing in question;

(5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have;

(6) Representing that goods are original or new if they are deteriorated, reconditioned, reclaimed, used, or secondhand;

(7) Representing that goods or services are of a particular standard, quality, or grade or that goods are of a particular style or model, if they are of another;

(8) Disparaging goods, services, or business of another by false or misleading representation;

(9) Advertising goods or services with intent not to sell them as advertised;

(10) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(11) Making false or misleading statements concerning the reasons for, existence of, or amounts of price reductions;

(12) Failing to comply with the provisions of Code Section 10-1-393.2 concerning health spas;

(13) Failure to comply with the following provisions concerning career consulting firms:

(A) A written contract shall be employed which shall constitute the entire agreement between the parties, a fully completed copy of which shall be furnished to the consumer at the time of its execution which shows the date of the transaction and the name and address of the career consulting firm;

(B) The contract or an attachment thereto shall contain a statement in boldface type which complies substantially with the following:

"The provisions of this agreement have been fully explained to me and I understand that the services to be provided under this agreement by the seller do not include actual job placement."

The statement shall be signed by both the consumer and the authorized representative of the seller;

(C) Any advertising offering the services of a career consulting firm shall contain a statement which contains the following language: "A career consulting firm does not guarantee actual job placement as one of its services.";

(14) Failure of a hospital or long-term care facility to deliver to an inpatient who has been discharged or to his or her legal representative, not later than six business days after the date of such discharge, an itemized statement of all charges for which the patient or third-party payor is being billed;

(15) Any violation of *49 U.S.C. Sections 32702* through 32704 and any violation of regulations prescribed under *49 U.S.C. Section 32705*. Notwithstanding anything in this part to the contrary, all such actions in violation of such federal statutes or regulations shall be consumer transactions and consumer acts or practices in trade or commerce;

(16) Failure to comply with the following provisions concerning promotions:

(A) For purposes of this paragraph, the term:

(i) "Conspicuously," when referring to type size, means either a larger or bolder type than the adjacent and surrounding material.

(ii) "In conjunction with and in immediate proximity to," when referring to a listing of verifiable retail value and odds for each prize, means that such value and odds must be adjacent to that particular prize with no other printed or pictorial matter between the value and odds and that listed prize.

(iii) "Notice" means a communication of the disclosures required by this paragraph to be given to a consumer that has been selected, or has purportedly been selected, to participate in a promotion. If the original notice is in writing, it shall include all of the disclosures required by this paragraph. If the original notice is oral, it shall include all of the disclosures required by this paragraph and shall be followed by a written notice to the consumer of the same disclosures. In all cases, written notice shall be received by the consumer before any agreement or other arrangement is entered into which obligates the consumer in any manner.

(iv) "Participant" means a person who is offered an opportunity to participate in a promotion.

(v) "Promoter" means the person conducting the promotion.

(vi) "Sponsor" means the person on whose behalf the promotion is conducted in order to promote or advertise the goods, services, or property of that person.

(vii) "Verifiable retail value," when referring to a prize, means:

(I) The price at which the promoter or sponsor can substantiate that a substantial number of those prizes have been sold at retail by someone other than the promoter or sponsor; or

(II) In the event that substantiation as described in subdivision (I) of this division is not readily available to the promoter or sponsor, no more than three times the amount which the promoter or sponsor has actually paid for the prize.

(A.1) Persons who are offered an opportunity to participate in a promotion must be given a notice as required by this paragraph. The written notice must be given to the participant either prior to the person's traveling to the place of business or, if no travel by the participant is necessary, prior to any seminar, sales presentation, or other presentation, by whatever name denominated. Written notices may be delivered by hand, by mail, by newspaper, or by periodical. Any offer to participate made through any other medium must be preceded by or followed by the required notice at the required time. It is the intent of this paragraph that full, clear, and meaningful disclosure shall be made to the participant in a manner such that the participant can fully study and understand the disclosure prior to deciding whether to travel to the place of participation or whether to allow a presentation to be made in the participant's home; and that this paragraph be liberally construed to effect this purpose. The notice requirements of this paragraph shall be applicable to any promotion offer made by any person in the State of Georgia or any promotion offer made to any person in the State of Georgia;

(B) The promotion must be an advertising and promotional undertaking, in good faith, solely for the purpose of advertising the goods, services, or property, real or personal, of the sponsor. The notice shall contain the name and address of the promoter and of the sponsor, as applicable. The promoter and the sponsor may be held liable for any failure to comply with the provisions of this paragraph;

(C) A promotion shall be a violation of this paragraph if a person is required to pay any money including, but not limited to, payments for service fees, mailing fees, or handling fees payable to the sponsor or seller or furnish any consideration for the prize, other than the consideration of traveling to the place of business or to the presentation or of allowing the presentation to be made in the participant's home, in order to receive any prize; provided, however, that the

payment of any deposit made in connection with an activity described in subparagraph (B) of paragraph (22) of this subsection shall not constitute a requirement to pay any money under this subparagraph;

(D) Each notice must state the verifiable retail value of each prize which the participant has a chance of receiving. Each notice must state the odds of the participant's receiving each prize if there is an element of chance involved. The odds must be clearly identified as "odds." Odds must be stated as the total number of that particular prize which will be given and of the total number of notices. The total number of notices shall include all notices in which that prize may be given, regardless of whether it includes notices for other sponsors. If the odds of winning a particular prize would not be accurately stated on the basis of the number of notices, then the odds may be stated in another manner, but must be clearly stated in a manner which will not deceive or mislead the participant regarding the participant's chance of receiving the prize. The verifiable retail value and odds for each prize must be stated in conjunction and in immediate proximity with each listing of the prize in each place where it appears on the written notice and must be listed in the same size type and same boldness as the prize. Odds and verifiable retail values may not be listed in any manner which requires the participant to refer from one place in the written notice to another place in the written notice to determine the odds and verifiable retail value of the particular prize. Verifiable retail values shall be stated in Arabic numerals;

(E) Upon arriving at the place of business or upon allowing the sponsor to enter the participant's home, the participant must be immediately informed which, if any, prize the participant will receive prior to any seminar, sales presentation, or other presentation; and the prize, or any voucher, certificate, or other evidence of obligation in lieu of the prize, must be given to the participant at the time the participant is so informed;

(F) No participant shall be required or invited to view, hear, or attend any sales presentation, by whatever name denominated, unless such requirement or invitation has been conspicuously disclosed to the participant in the written notice in at least ten-point boldface type;

(G) Except in relation to an activity described in subparagraph (B) of paragraph (22) of this subsection, in no event shall any prize be offered or given which will require the participant to purchase additional goods or services, including shipping fees, handling fees, or any other charge by whatever name denominated, from any person in order to make the prize conform to what it reasonably appears to be in the mailing or delivery, unless such requirement and the additional cost to the participant is clearly disclosed in each place where the prize is listed in the written notice using a statement in the same size type and boldness as the prize listed;

(H) Any limitation on eligibility of participants must be clearly disclosed in the notice;

(I) Substitutes of prizes shall not be made. In the event the represented prize is unavailable, the participant shall be presented with a certificate which the sponsor shall honor within 30 days by shipping the prize, as represented in the notice, to the participant at no cost to the participant. In the event a certificate cannot be honored within 30 days, the sponsor shall mail to the participant a valid check or money order for the verifiable retail value which was represented in the notice;

(J) In the event the participant is presented with a voucher, certificate, or other evidence of obligation as the participant's prize, or in lieu of the participant's prize, it shall be the responsibility of the sponsor to honor the voucher, certificate, or other evidence of obligation, as represented in the notice, if the person who is named as being responsible for honoring the voucher, certificate, or other evidence of obligation fails to honor it as represented in the notice;

(K) The geographic area covered by the notice must be clearly stated. If any of the prizes may be awarded to persons outside of the listed geographical area or to participants in promotions for other sponsors, these facts must be clearly stated, with a corresponding explanation that every prize may not be given away by that particular sponsor. If prizes will not be awarded or given if the winning ticket, token, number, lot, or other device used to determine winners in that particular promotion is not presented to the promoter or sponsor, this fact must be clearly disclosed;

(L) Upon request of the administrator, the sponsor or promoter must within ten days furnish to the administrator the names, addresses, and telephone numbers of persons who have received any prize;

(M) A list of all winning tickets, tokens, numbers, lots, or other devices used to determine winners in promotions involving an element of chance must be prominently posted at the place of business or distributed to all participants if

the seminar, sales presentation, or other presentation is made at a place other than the place of business. A copy of such list shall be furnished to each participant who so requests;

(N) Any promotion involving an element of chance which does not conform with the provisions of this paragraph shall be considered an unlawful lottery as defined in Code Section 16-12-20. The administrator may seek and shall receive the assistance of the prosecuting attorneys of this state in the commencement and prosecution of persons who promote and sponsor promotions which constitute an unlawful lottery;

(O) Any person who participates in a promotion and does not receive an item which conforms with what that person, exercising ordinary diligence, reasonably believed that person should have received based upon the representations made to that person may bring the private action provided for in Code Section 10-1-399 and, if that person prevails, shall be awarded, in addition to any other recovery provided under this part, a sum which will allow that person to purchase an item at retail which reasonably conforms to the prize which that person, exercising ordinary diligence, reasonably believed that person would receive; and

(P) In addition to any other remedy provided under this part, where a contract is entered into while participating in a promotion which does not conform with this paragraph, the contract shall be voidable by the participant for ten business days following the date of the participant's receipt of the prize. In order to void the contract, the participant must notify the sponsor in writing within ten business days following the participant's receipt of the prize;

(17) Failure to furnish to the buyer of any campground membership or marine membership at the time of purchase a notice to the buyer allowing the buyer seven days to cancel the purchase. The notice shall be on a separate sheet of paper with no other written or pictorial material, in at least ten-point boldface type, double spaced, and shall read as follows:

"Notice to the Buyer

Please read this form completely and carefully. It contains valuable cancellation rights.

The buyer or buyers may cancel this transaction at any time prior to 5:00 P.M. of the seventh day following receipt of this notice.

This cancellation right cannot be waived in any manner by the buyer or buyers.

Any money paid by the buyer or buyers must be returned by the seller within 30 days of cancellation.

To cancel, sign this form, and mail by certified mail or statutory overnight delivery, return receipt requested, by 5:00 P.M. of the seventh day following the transaction. Be sure to keep a photocopy of the signed form and your post office receipt.

Seller's Name

Address to which cancellation is to be mailed

I (we) hereby cancel this transaction.

Buyer's Signature

Buyer's Signature

Date

Printed Name(s) of Buyer(s)

Street Address

City, State, ZIP Code"

(18) Failure of the seller of a campground membership or marine membership to fill in the seller's name and the address to which cancellation notices should be mailed on the form specified in paragraph (17) of this subsection;

(19) Failure of the seller of a campground membership or marine membership to cancel according to the terms specified in the form described in paragraph (17) of this subsection;

(20)(A) Representing that moneys provided to or on behalf of a debtor, as defined in Code Section 44-14-162.1 in connection with property used as a dwelling place by said debtor, are a loan if in fact they are used to purchase said property and any such misrepresentation upon which is based the execution of a quitclaim deed or warranty deed by that debtor shall authorize that debtor to bring an action to reform such deed into a deed to secure debt in addition to any other right such debtor may have to cancel the deed pursuant to Code Section 23-2-2, 23-2-60, or any other applicable provision of law.

(B) Advertising to assist debtors whose loan for property the debtors use as a dwelling place is in default with intent not to assist them as advertised or making false or misleading representations to such a debtor about assisting the debtor in connection with said property.

(C) Failing to comply with the following provisions in connection with the purchase of property used as a dwelling place by a debtor whose loan for said property is in default and who remains in possession of this property after said purchase:

(i) A written contract shall be employed by the buyer which shall summarize and incorporate the entire agreement between the parties, a fully completed copy of which shall be furnished to the debtor at the time of its execution. Said contract shall show the date of the transaction and the name and address of the parties; shall state, in plain and bold language, that the subject transaction is a sale; and shall indicate the amount of cash proceeds and the amount of any other financial benefits that the debtor will receive;

(ii) This contract shall contain a statement in boldface type which complies substantially with the following:

"The provisions of this agreement have been fully explained to me. I understand that under this agreement I am selling my house to the other undersigned party."

This statement shall be signed by the debtor and the buyer;

(iii) If a lease or rental agreement is executed in connection with said sale, it shall set forth the amount of monthly rent and shall state, in plain and bold language, that the debtor may be evicted for failure to pay said rent. Should an option to purchase be included in this lease, it shall state, in plain and bold language, the conditions that must be fulfilled in order to exercise it; and

(iv) The buyer shall furnish to the seller at the time of closing a notice to the seller allowing the seller ten days to cancel the purchase. This right to cancel shall not limit or otherwise affect the seller's right to cancel pursuant to Code Section 23-2-2, 23-2-60, or any other applicable provision of law. The notice shall serve as the cover sheet to the closing documents. It shall be on a separate sheet of paper with no other written or pictorial material, in at least ten-point boldface type, double spaced, and shall read as follows:

"Notice to the Seller

Please read this form completely and carefully. It contains valuable cancellation rights.

The seller or sellers may cancel this transaction at any time prior to 5:00 P.M. of the tenth day following receipt of this notice.

This cancellation right cannot be waived in any manner by the seller or sellers.

Any money paid to the seller or sellers must be returned by the seller within 30 days of cancellation.

To cancel, sign this form, and return it to the buyer by 5:00 P.M. of the tenth day following the transaction. It is best to mail it by certified mail or statutory overnight delivery, return receipt requested, and to keep a photocopy of the signed form and your post office receipt.

Buyer's Name

Address to which cancellation

is to be returned

I (we) hereby cancel this transaction.

Seller's Signature

Seller's Signature

Date

Printed Name(s) of Seller(s)

Street Address

City, State, ZIP Code"

(D) The provisions of subparagraph (C) of this paragraph shall only apply where all three of the following conditions are present:

(i) A loan on the property used as a dwelling place is in default;

(ii) The debtor transfers the title to the property by quitclaim deed, limited warranty deed, or general warranty deed; and

(iii) The debtor remains in possession of the property under a lease or as a tenant at will;

(21) Advertising a telephone number the prefix of which is 976 and which when called automatically imposes a per-call charge or cost to the consumer, other than a regular charge imposed for long-distance telephone service, unless the advertisement contains the name, address, and telephone number of the person responsible for the advertisement and unless the person's telephone number and the per-call charge is printed in type of the same size as that of the number being advertised;

(22) Representing, in connection with a vacation, holiday, or an item described by terms of similar meaning, or implying that:

(A) A person is a winner, has been selected or approved, or is in any other manner involved in a select or special group for receipt of an opportunity or prize, or that a person is entering a contest, sweepstakes, drawing, or other competitive enterprise from which a winner or select group will receive an opportunity or prize, when in fact the

enterprise is designed to make contact with prospective customers, or in which all or a substantial number of those entering such competitive enterprise receive the same prize or opportunity; or

(B) In connection with the types of representations referred to in subparagraph (A) of this paragraph, representing that a vacation, holiday, or an item described by other terms of similar meaning, is being offered, given, awarded, or otherwise distributed unless:

(i) The item represented includes all transportation, meals, and lodging;

(ii) The representation specifically describes any transportation, meals, or lodging which is not included; or

(iii) The representation discloses that a deposit is required to secure a reservation, if that is the case.

The provisions of this paragraph shall not apply where the party making the representations is in compliance with paragraph (16) of this subsection;

(23) Except in relation to an activity which is in compliance with paragraph (16) or (22) of this subsection, stating, in writing or by telephone, that a person has won, is the winner of, or will win or receive anything of value, unless the person will receive the prize without obligation;

(24)(A) Conducting a going-out-of-business sale for more than 90 days.

(B) After the 90 day time limit in subparagraph (A) of this paragraph has expired, continuing to do business in any manner contrary to any representations which were made regarding the nature of the going-out-of-business sale.

(C) The prohibitions of this paragraph shall not extend to any of the following:

(i) Sales for the estate of a decedent by the personal representative or the personal representative's agent, according to law or by the provisions of the will;

(ii) Sales of property conveyed by security deed, deed of trust, mortgage, or judgment or ordered to be sold according to the deed, mortgage, judgment, or order;

(iii) Sales of all agricultural produce and livestock arising from the labor of the seller or other labor under the seller's control on or belonging to the seller's real or personal estate and not purchased or sold for speculation;

(iv) All sales under legal process;

(v) Sales by a pawnbroker or loan company which is selling or offering for sale unredeemed pledges of chattels as provided by law; or

(vi) Sales of automobiles by an auctioneer licensed under the laws of the State of Georgia;

(25) The issuance of a check or draft by a lender in connection with a real estate transaction in violation of Code Section 44-14-13;

(26) With respect to any individual or facility providing personal care services:

(A) Any person or entity not duly licensed or registered as a personal care home formally or informally offering, advertising to, or soliciting the public for residents or referrals;

(B) Any personal care home, as defined in subsection (a) of Code Section 31-7-12, offering, advertising, or soliciting the public to provide services:

(i) Which are outside the scope of personal care services; and

(ii) For which it has not been specifically authorized.

Nothing in this subparagraph prohibits advertising by a personal care home for services authorized by the Department of Human Resources under a waiver or variance pursuant to subsection (b) of Code Section 31-2-4;

(C) For purposes of this paragraph, "personal care" means protective care and watchful oversight of a resident who needs a watchful environment but who does not have an illness, injury, or disability which requires chronic or convalescent care including medical and nursing services.

The provisions of this paragraph shall be enforced following consultation with the Department of Human Resources which shall retain primary responsibility for issues relating to licensure of any individual or facility providing personal care services;

(27) Mailing any notice, notification, or similar statement to any consumer regarding winning or receiving any prize in a promotion, and the envelope or other enclosure for the notice fails to conspicuously identify on its face that the contents of the envelope or other enclosure is a commercial solicitation and, if there is an element of chance in winning a prize, the odds of winning as "odds";

(28) Any violation of the rules and regulations promulgated by the Department of Human Resources pursuant to subsection (e) of Code Section 40-5-83 which relates to the consumer transactions and business practices of DUI Alcohol or Drug Use Risk Reduction Programs, except that the Department of Human Resources shall retain primary jurisdiction over such complaints;

(29) With respect to any consumer reporting agency:

(A) Any person who knowingly and willfully obtains information relative to a consumer from a consumer reporting agency under false pretenses shall be guilty of a misdemeanor;

(B) Any officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to a person not authorized to receive that information shall be guilty of a misdemeanor; and

(C) Each consumer reporting agency which compiles and maintains files on consumers on a nation-wide basis shall furnish to any consumer who has provided appropriate verification of his or her identity two complete consumer reports per calendar year, upon request and without charge;

(30) With respect to any individual or facility providing home health services:

(A) For any person or entity not duly licensed by the Department of Human Resources as a home health agency to regularly hold itself out as a home health agency; or

(B) For any person or entity not duly licensed by the Department of Human Resources as a home health agency to utilize the words "home health" or "home health services" in any manner including but not limited to advertisements, brochures, or letters. Unless otherwise prohibited by law, nothing in this subparagraph shall be construed to prohibit persons or entities from using the words "home health" or "home health services" in conjunction with the words "equipment," "durable medical equipment," "pharmacy," "pharmaceutical services," "prescription medications," "infusion therapy," or "supplies" in any manner including but not limited to advertisements, brochures, or letters. An unlicensed person or entity may advertise under the category "home health services" in any advertising publication which divides its advertisements into categories, provided that:

(i) The advertisement is not placed in the category with the intent to mislead or deceive;

(ii) The use of the advertisement in the category is not part of an unfair or deceptive practice; and

(iii) The advertisement is not otherwise unfair, deceptive, or misleading.

For purposes of this paragraph, the term "home health agency" shall have the same definition as contained in Code Section 31-7-150, as now or hereafter amended. The provisions of this paragraph shall be enforced by the administrator

in consultation with the Department of Human Resources; provided, however, that the administrator shall not have any responsibility for matters or functions related to the licensure of home health agencies;

(30.1) Failing to comply with the following provisions in connection with a contract for health care services between a physician and an insurer which offers a health benefit plan under which such physician provides health care services to enrollees:

(A) As used in this paragraph, the term:

(i) "Enrollee" means an individual who has elected to contract for or participate in a health benefit plan for that individual or for that individual and that individual's eligible dependents and includes that enrollee's eligible dependents.

(ii) "Health benefit plan" means any hospital or medical insurance policy or certificate, health care plan contract or certificate, qualified higher deductible health plan, health maintenance organization subscriber contract, any health benefit plan established pursuant to Article 1 of Chapter 18 of Title 45, or any managed care plan.

(iii) "Insurer" means a corporation or other entity which is licensed or otherwise authorized to offer a health benefit plan in this state.

(iv) "Patient" means a person who seeks or receives health care services under a health benefit plan.

(v) "Physician" means a person licensed to practice medicine under Article 2 of Chapter 34 of Title 43.

(B) Every contract between a physician and an insurer which offers a health benefit plan under which that physician provides health care services shall be in writing and shall state the obligations of the parties with respect to charges and fees for services covered under that plan when provided by that physician to enrollees under that plan. Neither the insurer which provides that plan nor the enrollee under that plan shall be liable for any amount which exceeds the obligations so established for such covered services.

(C) Neither the physician nor a representative thereof shall intentionally collect or attempt to collect from an enrollee any obligations with respect to charges and fees for which the enrollee is not liable and neither such physician nor a representative thereof may maintain any action at law against such enrollee to collect any such obligations.

(D) The provisions of this paragraph shall not apply to the amount of any deductible or copayment which is not covered by the health benefit plan.

(E) This paragraph shall apply to only such health benefit plan contracts issued, delivered, issued for delivery, or renewed in this state on or after July 2, 2001.

(31) With respect to telemarketing sales:

(A) For any seller or telemarketer to use any part of an electronic record to attempt to induce payment or attempt collection of any payment that the seller or telemarketer claims is due and owing to it pursuant to a telephone conversation or series of telephone conversations with a residential subscriber. Nothing in this paragraph shall be construed to:

(i) Prohibit the seller or telemarketer from introducing, as evidence in any court proceeding to attempt collection of any payment that the seller or telemarketer claims is due and owing to it pursuant to a telephone conversation or series of telephone conversations with a residential subscriber, an electronic record of the entirety of such telephone conversation or series of telephone conversations; or

(ii) Expand the permissible use of an electronic record made pursuant to 16 C.F.R. Part 310.3(a)(3), the Federal Telemarketing Sales Rule.

(B) For purposes of this paragraph, the term:

(i) "Covered communication" means any unsolicited telephone call or telephone call arising from an unsolicited telephone call.

(ii) "Electronic record" means any recording by electronic device of, in part or in its entirety, a telephone conversation or series of telephone conversations with a residential subscriber that is initiated by a seller or telemarketer in order to induce the purchase of goods, services, or property. This term shall include, without limitation, any subsequent telephone conversations in which the seller or telemarketer attempts to verify any alleged agreement in a previous conversation or previous conversations.

(iii) "Residential subscriber" means any person who has subscribed to residential phone service from a local exchange company or the other persons living or residing with such person.

(iv) "Seller or telemarketer" means any person or entity making a covered communication to a residential subscriber for the purpose of inducing the purchase of goods, services, or property by such subscriber. This term shall include, without limitation, any agent of the seller or telemarketer, whether for purposes of conducting calls to induce the purchase, for purposes of verifying any calls to induce the purchase, or for purposes of attempting to collect on any payment under the purchase; or

(32) Selling, marketing, promoting, advertising, providing, or distributing any card or other purchasing mechanism or device that is not insurance or evidence of insurance coverage and that purports to offer or provide discounts or access to discounts on purchases of health care goods or services from providers of the same or making any representation or statement that purports to offer or provide discounts or access to discounts on purchases of health care goods or services from providers of the same, when:

(A) Such card or other purchasing mechanism or device does not contain a notice expressly and prominently providing in boldface type that such discounts are not insurance; or

(B) Such discounts or access to such discounts are not specifically authorized under a separate contract with a provider of health care goods or services to which such discounts are purported to be applicable.

(c) A seller may not by contract, agreement, or otherwise limit the operation of this part notwithstanding any other provision of law.

(d) Notwithstanding any other provision of the law to the contrary, the names, addresses, telephone numbers, social security numbers, or any other information which could reasonably serve to identify any person making a complaint about unfair or deceptive acts or practices shall be confidential. However, the complaining party may consent to public release of his or her identity by giving such consent expressly, affirmatively, and directly to the administrator or administrator's employees. Nothing contained in this subsection shall be construed to prevent the subject of the complaint, or any other person to whom disclosure to the complainant's identity may aid in resolution of the complaint, from being informed of the identity of the complainant, to prohibit any valid discovery under the relevant discovery rules, or to prohibit the lawful subpoena of such information.

HISTORY: Ga. L. 1975, p. 376, § 3; Ga. L. 1978, p. 2001, § 2; Ga. L. 1982, p. 3, § 10; Ga. L. 1982, p. 1689, §§ 2, 4; Ga. L. 1983, p. 1298, § 1; Ga. L. 1984, p. 22, § 10; Ga. L. 1984, p. 463, § 1; Ga. L. 1985, p. 149, § 10; Ga. L. 1985, p. 938, § 2; Ga. L. 1985, p. 1183, § 1; Ga. L. 1986, p. 405,
§ 2; Ga. L. 1986, p. 1313, § 2; Ga. L. 1987, p. 794, § 2; Ga. L. 1987, p. 1386, § 2; Ga. L. 1988, p. 13, § 10; Ga. L. 1988, p. 399, §§ 1-3; Ga. L. 1988, p. 983, § 1; Ga. L. 1988, p. 1657, § 1; Ga. L. 1989, p. 14, § 10; Ga. L. 1989, p. 560, § 3; Ga. L. 1989, p. 1606, §
1; Ga. L. 1990, p. 1653, § 2; Ga. L. 1991, p. 94, § 10; Ga. L. 1992, p. 1129, § 1; Ga. L. 1992, p. 2139, § 1; Ga. L. 1993, p. 91, § 10; Ga. L. 1993, p. 1076, §§ 1, 2; Ga. L. 1993, p. 1676, § 1; Ga. L. 1995, p. 729, § 1; Ga. L. 1996, p. 1030, § 1; Ga. L. 1997, p. 143, § 10; Ga. L. 1997, p. 1507,
§ 1; Ga. L. 1998, p. 643, § 1; Ga. L. 2000, p. 557, § 1; Ga. L. 2000, p. 1181, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2001, p. 4, § 10; Ga. L. 2001, p. 1170, § 2.

NOTES: THE 1998 AMENDMENT, effective July 1, 1998, and applicable to acts and offenses committed on or after July 1, 1998, rewrote paragraph (4) of subsection (b).

THE 2000 AMENDMENTS. --The first 2000 amendment, effective July 1, 2000, in subsection (b), deleted "or" at the end of paragraph (30), substituted "; or" for the period at the end of paragraph (31), and added paragraph (32). The second 2000 amendment, effective July 1, 2000, inserted "including, but not limited to, payments for service fees, mailing fees, or handling fees payable to the sponsor or seller" in subparagraph (b)(16)(C). The third 2000 amendment, effective July 1, 2000, and applicable with respect to notices delivered on or after July 1, 2000, in subsection (b), substituted "certified mail or statutory overnight delivery" for "certified mail" in the fifth undesignated paragraph in the form in paragraph (17); in division (b)(20)(C)(iv), substituted "certified mail or statutory overnight delivery" for "certified mail" in the fifth undesignated paragraph in the form.

THE 2001 AMENDMENTS. --The first 2001 amendment, effective February 12, 2001, part of an Act to revise, modernize, and correct the Code, substituted "subparagraph" for "subparagaraph" in subparagraph (b)(16)(G). The second 2001 amendment, effective July 1, 2001, added paragraph (b)(30.1).

CROSS REFERENCES. --Criminal penalties for unauthorized reproduction and sale of recorded materials, § 16-8-60. Criminal penalty for deceptive business practices, § 16-9-50. Fraud generally, § 23-2-50, et seq. Misbranding of food generally, § 26-2-28. Labeling of meat, §§ 26-2-107, 26-2-111, 26-2-112. Misbranding of drugs, § 26-3-8. Misbranding and false advertisement of cosmetics, § 26-3-12, et seq. Time-share program sales, deceptive practices, § 44-3-185, et seq.

CODE COMMISSION NOTES. --Owing to the duplication in paragraph designations, paragraphs (16), (17), and (18) added to subsection (b) by Ga. L. 1986, p. 405, § 2, were redesignated paragraphs (17), (18), and (19), respectively, in 1986, pursuant to Code Section 28-9-5. In accordance with this revision, in subsection (b), punctuation was revised, "or" was deleted at the end of paragraph (15), and the references in paragraphs (18) and (19) were adjusted accordingly.

Three 1988 Acts amended this Code section, two of which added a paragraph (21) to subsection (b). Pursuant to Code Section 28-9-5, in 1988, the paragraph enacted by Ga. L. 1988, p. 399 has retained the (b)(21) designation but paragraph (21) enacted by Ga. L. 1988, p. 1657 and paragraph (22) also enacted by Ga. L. 1988, p. 1657 have been redesignated as paragraphs (22) and (23) of subsection (b), respectively.

Pursuant to Code Section 28-9-5, in 1988, semi-colons were substituted for periods at the end of paragraphs (20) and (21) of subsection (b).

Pursuant to Code Section 28-9-5, in 1989, "spas;" was substituted for "spas." in paragraph (12) of subsection (b) and "going-out-of-business" was substituted for "going out of business" in subparagraphs (b)(24)(A) and (b)(24)(B).

Pursuant to Code Section 28-9-5, in 1993, in subsection (b), a semicolon was substituted for the period at the end of paragraph (25), a semicolon was substituted for a period at the end of paragraph (26), the word "or" was stricken at the end of paragraph (27), "; or" was substituted for a period at the end of paragraph (28), and paragraph (27) as added by Ga. L. 1993, p. 1676, § 1, was redesignated as paragraph (29).

EDITOR'S NOTES. --Ga. L. 1985, p. 938 contained a § 2 which amended this Code section and a second § 2, not codified by the General Assembly, which contained a standard repeal provision.

Ga. L. 1989, p. 14, § 10 which amended paragraph (12) of subsection (b) was superseded by Ga. L. 1989, p. 1606, § 1.

Ga. L. 1990, p. 1653, § 3, not codified by the General Assembly, provides that the Act shall not be construed to repeal or modify any provisions of law relative to the utterance or delivery of a worthless check and the provisions of the Act shall be cumulative of such other provisions.

Ga. L. 2001, p. 1170, § 1, not codified by the General Assembly, provides: "The General Assembly finds that managed health care has benefited consumers by negotiating contracts with physicians which prohibit such physicians from billing consumers for fees above and beyond the amount paid by the managed care plan. In order to ensure that the consumers of this state continue to receive such benefits, it is imperative that physicians adhere to their contractual obligations to charge only those fees contractually agreed to and not attempt to pass additional or hidden costs along to consumers. The purpose of Section 2 of this Act is to ensure that consumers are not charged fees above and beyond those already contracted for between their physician and their health benefit plans."

LAW REVIEWS. --For article commenting on the 1997 amendment of this section, see 14 Georgia St. U. L. Rev. 29 (1997). For review of 1998 legislation relating to commerce and trade, see *15 Ga. St. U. L. Rev. 9 (1998).*

For note on 1989 amendment to this Code section, see *6 Ga. St. U.L. Rev. 150 (1989).* For note on 1992 amendment of this Code section, see *9 Ga. St. U.L. Rev. 265 (1992).* For note on the 2001 amendment to O.C.G.A. § **10-1-393,** see *18 Ga. St. U. L. Rev. 241 (2001).*

For comment, "The Georgia Fair Business Practices Act: Business As Usual," see *9 Ga. St. U.L. Rev. 453 (1993).*

JUDICIAL DECISIONS

ANALYSIS
General Consideration
Automobiles
Real Property
Trademarks, Names

GENERAL CONSIDERATION

PURPOSE. --Objective of part is elimination of deceptive acts and practices in "consumer marketplace". For there to be a "consumer marketplace," the underlying transaction must involve a businessman as well as a consumer. *Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910 (1980).*

TEST AS TO WHETHER ACTIVITIES COVERED. --In analyzing whether defendant's allegedly wrongful activities are in violation of this part to protect the public or an "isolated" incident not covered under this part, two factors are determinative: (a) medium through which act or practice is introduced into stream of commerce; and (b) market on which act or practice is reasonably intended to impact. *Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910 (1980).*

TRANSACTION MUST BE PART OF ONGOING, PUBLIC BUSINESS. --This section requires that alleged wrongful act in "consumer transaction" occur in context of ongoing business in which defendant holds himself out to the public. *Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910 (1980).*

NO IMPACT ON GENERAL CONSUMING PUBLIC AND BEYOND REACH OF FBPA. --Although the department store deviated from its credit fraud policy by not promptly investigating plaintiff's claim after plaintiff sent the information requesting the store to correct plaintiff's account, there was no evidence of other instances in which the store failed to follow its policy, and any deviation this time was viewed as a isolated event that had no impact on the general consuming public and is therefore beyond the reach of the *Fair Business Practices Act. Davis v. Rich's Dep't Stores, Inc., 248 Ga. App. 116, 545 S.E.2d 661 (2001).*

ACTIVITY MUST BE IN CONTEXT OF CONSUMER MARKETPLACE. --To be subject to direct suit under this part, an alleged offender must perform some volitional act to avail himself of the channels of consumer commerce and the allegedly offensive activity must take place within the context of the consumer marketplace. *State ex rel. Ryles v. Meredith Chevrolet, Inc., 145 Ga. App. 8, 244 S.E.2d 15,* aff'd sub nom. *State v. Meredith Chevrolet, Inc., 242 Ga. 294, 249 S.E.2d 87 (1978); Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910 (1980).*

Any act or practice which is outside the context of the public consumer marketplace, no matter how unfair or deceptive, is not directly regulated by this part. *O'Brien v. Union Oil Co., 699 F. Supp. 1562 (N.D. Ga. 1988).*

Where a bank's commercial checking accounts were not offered to consumers, its practices concerning those accounts were outside the consumer market place and the Fair Business Practices Act did not apply to an action against the bank based on misrepresentation of the "standard, quality, or grade" of its services. *Eason Publications, Inc. v. Nationsbank, 217 Ga. App. 726, 458 S.E.2d 899 (1995).*

Claim against a private school after a student was dismissed from the school due to misbehavior was properly denied since the school's alleged acts and conduct did not arise in the context of the consumer marketplace. *Pryor v. CCEC, Inc., 257 Ga. App. 450, 571 S.E.2d 454 (2002).*

NONCONSUMERS DO NOT HAVE A CAUSE OF ACTION under the Fair Business Practices Act when they allege an injury due to a competitor's misrepresentations to the general public. *Friedlander v. PDK Labs, Inc., 266 Ga. 180, 465 S.E.2d 670 (1996).*

ACTION UNDER § 40-1-5. --The court properly granted the plaintiff's motion for partial summary judgment on plaintiff's Fair Business Practices Act (FBPA) claim because the undisputed facts established a violation of § 40-1-5, and thus a per se violation of the *FBPA. Neal Pope, Inc. v. Garlington, 245 Ga. App. 49, 537 S.E.2d 179 (2000).*

PRIVATE TRANSACTIONS NOT COVERED. --Even though a single instance of an unfair or deceptive act can be a sufficient basis for a claim under the Fair Business Practices Act, the act does not apply to suits based upon deceptive practices which occur in transactions that are essentially private. *Borden v. Pope Jeep-Eagle, Inc., 200 Ga. App. 176, 407 S.E.2d 128 (1991).*

The trial court properly concluded that the defendants were entitled to summary judgment on the plaintiff's claim for a violation of the Georgia Fair Business Practices Act where the sale of the farm to the plaintiffs, and any representations preceding it, involved a private transaction which would not affect the consuming public generally. *Condon v. Kunse, 208 Ga. App. 856, 432 S.E.2d 266 (1993).*

The fraudulent failure to furnish an ample supply of yarn was a matter strictly between private business parties, who are nonconsumers, and therefore does not give rise to the application of the *Fair Business Practices Act. Benchmark Carpet Mills, Inc. v. Fiber Indus., Inc., 168 Ga. App. 932, 311 S.E.2d 216 (1983); Medley v. Boomershine Pontiac-GMC Truck, Inc., 214 Ga. App. 795, 449 S.E.2d 128 (1994).*

CONTRACT PROVISION THAT IT IS "ABSOLUTELY NONCANCELLABLE". --Where contract on its face fails to state clearly "the cancellation and refund policies of seller" and states that it "is absolutely noncancellable," it is violative of this part in attempting to limit operation of the statute. *Little v. Paco Collection Servs., Inc., 156 Ga. App. 175, 274 S.E.2d 147 (1980).*

FAILURE OF CONSUMER TO EXERCISE REQUISITE DILIGENCE. --There was no violation of subsection (c) in precluding the introduction of testimony as to an alleged oral misrepresentation because the proffered evidence was inadmissible to vary the terms of the written contract, where the nonviability of purchaser's claim was not the result of defendant's contractual limitation of the applicability of this part but was the result of purchaser's own failure to exercise the requisite diligence to read the contract that he signed. *Heidt v. Potamkin Chrysler-Plymouth, Inc., 181 Ga. App. 903, 354 S.E.2d 440 (1987).*

PHYSICIAN'S STATEMENTS ABOUT NURSE-MIDWIFE. --Physician's allegedly disparaging statements about a nurse-midwife, which were made during a conversation between the two at a hospital nurses' station, took place outside the context of consumer commerce and therefore did not fall within the regulatory authority of the *Fair Business Practices Act. Sweeney v. Athens Regional Medical Ctr., 709 F. Supp. 1563 (M.D. Ga. 1989).*

DAMAGES. --Fair Business Practices Act authorized punitive damages in addition to mandating treble damages for intentional violations. *Conseco Fin. Servicing Corp. v. Hill, 252 Ga. App. 655, 556 S.E.2d 24 (2001).*

CITED in *Lancaster v. Eberhardt, 141 Ga. App. 534, 233 S.E.2d 880 (1977); Attaway v. Tom's Auto Sales, Inc., 144 Ga. App. 813, 242 S.E.2d 740 (1978); Atlanta Auto Auction v. Ryles, 148 Ga. App. 20, 251 S.E.2d 28 (1978); Standish v. Hub Motor Co., 149 Ga. App. 365, 254 S.E.2d 416 (1979); Greenbriar Dodge, Inc. v. May, 155 Ga. App. 892, 273 S.E.2d 186 (1980); Plaza Pontiac, Inc. v. Shaw, 158 Ga. App. 799, 282 S.E.2d 383 (1981); Taylor v. Bear Stearns & Co., 572 F. Supp. 667 (N.D. Ga. 1983); Stafford v. Fitness for Life, 171 Ga. App. 422, 319 S.E.2d 891 (1984); Paces Ferry Dodge, Inc. v. Thomas, 174 Ga. App. 642, 331 S.E.2d 4 (1985); Atlanta Gas Light Co. v. Semaphore Adv., Inc., 747 F. Supp. 715 (S.D. Ga. 1990).*

AUTOMOBILES

SALE BETWEEN TWO NON-BUSINESSMEN. --Sale of motor vehicle in the course of private negotiations between two individual parties, neither of whom was a businessman, did not constitute a transaction "in the conduct of any trade or commerce." *Reilly v. Mosley, 165 Ga. App. 479, 301 S.E.2d 649 (1983).*

TRANSACTION BETWEEN AUTO DEALER AND FINANCE COMPANY. --Where a dealer paid a discount to a finance company to take the assignment of an auto buyer's retail installment sales contract, the transaction was essentially private and outside the protection of the *Fair Business Practices Act. Chancellor v. Gateway Lincoln-Mercury, Inc., 233 Ga. App. 38, 502 S.E.2d 799 (1998).*

SELLER'S CLAIMS AS TO CONDITION OF CAR. --Trial court properly granted summary judgment as to a car buyer's claims based on the Fair Business Practices Act, where the seller's claims as to the condition of the car, which were relied on by the buyer to support his claim of fraud, were mere sales puffing. *Hill v. Jay Pontiac, Inc., 191 Ga. App. 258, 381 S.E.2d 417 (1989).*

Misrepresentation by car dealer's salesperson that used vehicle was a demonstrator was within the scope of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. *Catrett v. Landmark Dodge, Inc., 253 Ga. App. 639, 560 S.E.2d 101 (2002).*

PRE-SALE NOTICE TO SELLER OF DEFECTS IN HIS TITLE TO MERCHANDISE. --It would constitute an unfair business practice if, before merchandise is sold in the consumer marketplace, a seller is placed on reasonable notice that his claim of title to the merchandise could be legally defective and thereafter in blatant disregard of the rights of innocent purchasers fails to take reasonable measures to ascertain the true state of facts concerning title before consummating the sale. *Regency Nissan, Inc. v. Taylor, 194 Ga. App. 645, 391 S.E.2d 467 (1990).*

SELLER'S KNOWLEDGE OF DISCREPANCY IN VEHICLE IDENTIFICATION NUMBER. --It was not error, in an action alleging violation of the Fair Business Practices Act, to refuse to grant summary judgment in favor of the defendant automobile seller, where the truck sold to the plaintiff buyer was confiscated as a stolen vehicle, and the evidence was that the seller's agent was timely notified of a model number discrepancy on the vehicle identification number plate. *Regency Nissan, Inc. v. Taylor, 194 Ga. App. 645, 391 S.E.2d 467 (1990).*

FAILURE OF MANUFACTURER TO NOTICE DEFECTIVE DOOR and its refusal to give the buyers, upon their refusal to allow the manufacturer to attempt to repair the vehicle, a new car, are not by themselves an unfair or deceptive practice affecting the consuming public. *DeLoach v. General Motors, 187 Ga. App. 159, 369 S.E.2d 484 (1988).*

LEASE OF "USED DEMO" AUTOMOBILE. --Automobile leased by plaintiffs from defendant dealer as a "used demo" was a "new" car, not a "used" car, and the fact that the car was previously titled to the dealer's son-in-law did not create an issue of fraud in violation of the *Fair Business Practices Act. Toirkens v. Willett Toyota, Inc., 192 Ga. App. 109, 384 S.E.2d 218 (1989).*

ADVERTISEMENT OFFERING OPTION BETWEEN LEASE AND FINANCED SALE. --Automobile dealer's advertisement offering either an annual finance rate of 7.7 percent or a 48-month lease was not misleading or deceptive, where, although the customer may have misunderstood the distinction between the various offers made in the advertisement, he admitted he understood the difference between a financed sale and a lease. *Blum v. GMAC, 185 Ga. App. 714, 365 S.E.2d 474 (1988).*

NEGLIGENT REPAIR OF INDIVIDUAL VEHICLE. --Part does not apply to negligent repair of individual vehicle when the damaged vehicle's owner brings it to a body shop and enters into a repair agreement and the body shop represents only that it has been repaired when it has not. *Burdakin v. Hub Motor Co., 183 Ga. App. 90, 357 S.E.2d 839,* cert. denied, *183 Ga. App. 905, 357 S.E.2d 839 (1987).*

REAL PROPERTY

MISREPRESENTATION BY HOMEOWNER SELLING OWN HOUSE is not likely recurring "consumer" threat and, therefore, has no potential "impact" on general consuming public. *Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910 (1980).*

Any misrepresentation made by seller in context of selling his own home is not made "in the conduct of any trade or business" but rather in course or private negotiations between two individual parties who have countervailing rights and liabilities established under common-law principles of contract, tort, and property law. *Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910 (1980).*

MISREPRESENTATION BY REAL ESTATE BROKER. --Fair Business Practices Act incorporates the "reliance" element of the common law tort of misrepresentation into the causation element of an FBPA claim; thus, a claim by purchasers against a real estate broker and sales associates for a violation of FBPA was barred for failure to show reasonable or justifiable reliance on the broker's representations. *Allen v. Remax N. Atlanta, Inc., 213 Ga. App. 644, 445 S.E.2d 774 (1994).*

SINGLE MISREPRESENTATION BY BUSINESS IN ISOLATED SALE. --Single oral misrepresentation made by real estate business in context of isolated nondevelopmental sale of real property relating to unique facts concerning that property appears to be an essentially "private" controversy with no impact whatsoever on consumer marketplace. *Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910 (1980).*

MISREPRESENTATION MADE TO PUBLIC OR IN CONNECTION WITH LARGER DEVELOPMENT. --It is arguable that in order to trigger applicability of this part, misrepresentation concerning a single parcel of real property must be made either in context of public medium addressed to general public or, if not made "public," be made in context of overall development of larger tract of which individual parcel is part. *Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910 (1980).*

LANDLORD'S FAILURE TO REPAIR FUSE BOX. --Evidence that a landlord failed to repair a fuse box which malfunctioned in his tenant's trailer did not establish a prima facie cause of action under the *Fair Business Practices Act. Simpson v. Yonts, 197 Ga. App. 311, 398 S.E.2d 407 (1990).*

TRADEMARKS, NAMES

USE OF EXISTING TRADEMARK. --Corporate poultry producer and marketer, by adopting and using the trademark GOLDEN MEDALLION on its frozen poultry products, infringed poultry cooperative's existing MEDALLION trademark and engaged in unfair competition and deceptive trade practices. *Gold Kist, Inc. v. ConAgra, Inc., 708 F. Supp. 1291 (N.D. Ga. 1989).*

USE OF BALLOONS, COSTUMES, AND NAMES OF COMIC BOOK CHARACTERS by singing telegram company created confusion. *DC Comics Inc. v. Unlimited Monkey Bus., Inc., 598 F. Supp. 110 (N.D. Ga. 1984).*

OPINIONS OF THE ATTORNEY GENERAL

FINGERPRINTING OF OFFENDERS. --A violation of paragraph (b) (29) is an offense for which those charged with a violation are to be fingerprinted. 1996 Op. Att'y Gen. No. 96-17.

RESEARCH REFERENCES

AM. JUR. 2D. --54A Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, §§ 1168, 1169, 1178, 1182, et seq., 1190, et seq., 1216.

C.J.S. --87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, §§ 238, 239, 244.

ALR. --Right to protection against simulation of physical appearance or arrangement of place of business, or vehicle, *17 ALR 784; 28 ALR 114.*

Application of principles of unfair competition to artistic or literary property, *19 ALR 949.*

Protection of business or trading corporation against use of same or similar name by another corporation, *66 ALR 948; 72 ALR3d 8.*

Right of manufacturer to question reasonableness of regulation by individual or private corporation which excludes use of manufacturer's products, *81 ALR 1422.*

Protection of business or trading corporation against use of same or similar name by another corporation, *115 ALR 1241.*

Unfair competition in use of geographical trade name by persons carrying on business elsewhere, *174 ALR 496.*

Right, in absence of self-imposed restraint, to use one's own name for business purposes to detriment of another using the same or a similar name, *44 ALR2d 1156; 72 ALR3d 8.*

Construction and effect of state statute forbidding unfair trade practice or competition by discriminatory allowance of rebates, commissions, discounts, or the like, *54 ALR2d 1187.*

Criminal responsibility for fraud or false pretenses in connection with home repairs or installations, *99 ALR2d 925.*

Commercial competitor's truthful denomination of his goods as copies of designs of another, using designer's name, as trademark infringement, unfair competition, or the like, *1 ALR3d 760.*

Unfair competition by direct reproduction of literary, artistic, or musical property, *40 ALR3d 566.*

Validity, construction, and effect of state legislation regulating or controlling "bait-and-switch" or "disparagement" advertising or sales practices, *50 ALR3d 1008.*

Right of state, public official, or governmental entity to seek, or power of court to allow, restitution of fruits of consumer fraud, without specific statutory authorization, *55 ALR3d 198.*

Use of "family name" by corporation as unfair competition, *72 ALR3d 8.*

Trade dress simulation of cosmetic products as unfair competition, *86 ALR3d 505.*

Unfair competition by imitation in sign or design of business place, *86 ALR3d 884.*

Validity, construction, and application of state statute forbidding unfair trade practice or competition by discriminatory allowance of rebates, commissions, discounts, or the like, *41 ALR4th 675.*

Private contests and lotteries: entrants' rights and remedies, *64 ALR4th 1021.*

USER NOTE: For more generally applicable notes, see notes under the first section of this subpart, part, article, chapter or title.

RULES AND REGULATIONS OF THE STATE OF GEORGIA

*** THIS DOCUMENT IS CURRENT THROUGH THE 04/30/03 CUMULATIVE SUPPLEMENT ***

TITLE 122: OFFICE OF CONSUMER AFFAIRS
CHAPTER 122-1 ADMINISTRATION

Ga. Comp. R. & Regs. r. **122-1-.04** (2003)

122-1-.04 Unlawful Acts and Practices.

(1) In addition to the authority granted in Ga. L. 1975, Sec. 3(a), it shall be unlawful to:

(a) Pass off goods or services as those of another;

(b) Cause actual confusion or actual misunderstanding as to source, sponsorship, approval, or certification of goods or services;

(c) Cause actual confusion or actual misunderstanding as to affiliation, connection, or association with, or certification by, another;

(d) Use deceptive representations or designations of geographic origin in connection with goods or services;

(e) Represent that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have, or that a person has sponsorship, approval, status, affiliation, or connection that he does not have;

(f) Represent that goods are original or new if they are deteriorated, reconditioned, reclaimed, used, or second-hand;

(g) Represent that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(h) Disparage goods, services or business of another by false or misleading representation;

(i) Advertise goods or services with intent not to sell them as advertised;

(j) Advertise goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(k) Make false or misleading statements concerning the reasons for, existence of, or amounts of price reductions.

(2) A seller may not contract, agreement or otherwise limit the operation of Ga. L. 1975, Sec. 3, notwithstanding and other provision of law.

AUTHORITY: Ga. L. 1975, pp. 376, 378, 379.

ADMINISTRATIVE HISTORY: Original Rule was filed on August 19, 1977; effective September 8, 1977.

EXHIBIT J

Certified true copy of Exhibit J.

, PARTNER, MORGAN LEWIS 9/22/03

CERTIFIED AT THE CANADIAN EMBASSY
FOR LEGALIZATION OF THE FOREGOING
SIGNATURE OF: STEPHEN PAUL MAHINKA
CERTIFIÉ À L'AMBASSADE DU CANADA
AUX FINS DE LÉGALISER LA SIGNATURE
CI-DESSUS DE:

Hélène Bouchard
Consular Program Officer
Agent Consulaire
Canadian Embassy/Ambassade du Canada
Washington, D.C.

Consular Section Consulaire
Canadian Embassy
Ambassade du Canada
501 Pennsylvania Avenue, N.W.
Washington, D.C. 20001

IDAHO ADMINISTRATIVE CODE

*** THIS DOCUMENT IS CURRENT THROUGH JULY 1, 2002 ***

IDAPA 04: OFFICE OF THE ATTORNEY GENERAL
TITLE 02
CHAPTER 01: IDAHO RULES OF CONSUMER PROTECTION,

OFFICE OF THE ATTORNEY GENERAL
SUBCHAPTER F: DECEPTIVE, COMPARATIVE, REFERENCE, AND WHOLESALE PRICING

(RULES 60 -- 69)

IDAPA **04.02.01.062** (2002)

062. COMPARISONS OF SELLER'S PRESENT PRICES TO SELLER'S FORMER PRICES (Rule 62).

It is an unfair and deceptive act or practice for a seller to: Effective Date: (1-21-92)

01. Fictitious Prices. Offer goods or services by representations comparing present prices to former prices of the seller, if the seller establishes a fictitious or inflated former price for a short period of time and for the purpose of subsequently offering a reduction. For example, a seller usually sells a certain pen for a regular price of seven dollars and fifty cents ($7.50), but he raises the price of the pen to an inflated price of ten dollars ($10) for a short period of time. He then "cuts" the price to its usual level of seven dollars and fifty cents ($7.50), and advertises: "Terrific Bargain: Were $10.00, Now Only $7.50"; or Effective Date: (1-1-79)

02. Bona Fide Regular Price. Offer goods or services by representations comparing present prices to former prices of the seller, if the former price was merely an asking price and was not the bona fide, regular price at which such goods or services were openly, actively, and actually offered for sale or sold. Effective Date: (7-1-93)

IDAHO ADMINISTRATIVE CODE

*** THIS DOCUMENT IS CURRENT THROUGH JULY 1, 2002 ***

IDAPA 04: OFFICE OF THE ATTORNEY GENERAL
TITLE 02
CHAPTER 01: IDAHO RULES OF CONSUMER PROTECTION,

OFFICE OF THE ATTORNEY GENERAL
SUBCHAPTER F: DECEPTIVE, COMPARATIVE, REFERENCE, AND WHOLESALE PRICING

(RULES 60 -- 69)

IDAPA 04.02.01.061 (2002)

061. COMPARATIVE PRICING -- GENERAL RULE (Rule 61).

It is an unfair and deceptive act or practice for a seller to represent by any means which has the capacity, tendency, or effect of deceiving or misleading a consumer acting reasonably under the circumstances as to the value of the past, present, common, or usual price of goods or services, or as to any reduction in the price of goods or services, or any savings relating to the cost or price of the goods or services. Effective Date: (1-21-92)

01. Savings Or Value Claims. Savings or value claims utilized in connection with terms such as "originally," "formerly," "regularly," "usually," "list price," "compare at," or other like terms, expressions or representations must be based on facts provable by the seller: Effective Date: (1-1-79)

a. By the seller's own records; or Effective Date: (1-21-92)

b. By reasonably substantial competitive sales in the trade area where such claims or representations are made, under circumstances and conditions represented or implied by the claims or representations. Effective Date: (1-21-92)

02. Comparison Claims. The use of such terms as "reduced," "sale," "special price," "originally," "formerly," "slashed," etc. shall be deemed to be comparisons between the seller's present prices and his bona fide, regular prices. Terms such as "list price," "compare at," "comparable value," "suggested price," etc. shall be deemed to be comparisons between the seller's present prices and the prevailing competitors' prices. Terms such as "discount," "usually," "regularly," etc. which have a vague meaning shall be presumed to be a comparison between the seller's present prices and his bona fide, regular prices, unless the seller states otherwise in his advertising or sales promotion. Effective Date: (1-21-92)

EXHIBIT K

Certified true copy of Exhibit K.

[signature], partner, Morgan Lewis 9/22/03

CERTIFIED AT THE CANADIAN EMBASSY
FOR LEGALIZATION OF THE FOREGOING
SIGNATURE OF: STEPHEN PAUL MAHINKA
CERTIFIÉ À L'AMBASSADE DU CANADA
AUX FINS DE LÉGALISER LA SIGNATURE
CI-DESSUS DE:

[signature]
Consular Program Officer
Agent Consulaire
Canadian Embassy/Ambassade du Canada
Washington, D.C.

Consular Section Consulaire
Canadian Embassy
Ambassade du Canada
501 Pennsylvania Avenue, N.W.
Washington, D.C. 20001

*** THIS SECTION IS CURRENT THROUGH PUBLIC ACT 93-224 ***
*** JUNE 11, 2003 ANNOTATION SERVICE ***

CHAPTER 815. BUSINESS TRANSACTIONS
DECEPTIVE PRACTICES
UNIFORM DECEPTIVE TRADE PRACTICES ACT

815 ILCS 510/2 (2003)

[Prior to 1/1/93 cited as: Ill. Rev. Stat., Ch. 121 1/2, para. 312]

§ 815 ILCS 510/2. Deceptive trade practices

Sec. 2. Deceptive trade practices. (a) A person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, the person:

(1) passes off goods or services as those of another;

(2) causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(3) causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with or certification by another;

(4) uses deceptive representations or designations of geographic origin in connection with goods or services;

(5) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have;

(6) represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;

(7) represents that goods or services are of a particular standard, quality, or grade or that goods are a particular style or model, if they are of another;

(8) disparages the goods, services, or business of another by false or misleading representation of fact;

(9) advertises goods or services with intent not to sell them as advertised;

(10) advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(11) makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;

(12) engages in any other conduct which similarly creates a likelihood of confusion or misunderstanding.

(b) In order to prevail in an action under this Act, a plaintiff need not prove competition between the parties or actual confusion or misunderstanding.

(c) This Section does not affect unfair trade practices otherwise actionable at common law or under other statutes of this State.

HISTORY:
Source: P.A. 79-1365; 92-16, § 105.

NOTES:
NOTE.
This section was Ill.Rev.Stat., Ch. 121 1/2, para. 312.
Section 996 of P.A. 92-16 contains a "no acceleration or delay" provision, and Section 997 contains a "no revival or extension" provision.

EFFECT OF AMENDMENTS.
The 2001 amendment by P.A. 92-16, effective June 28, 2001, inserted the section heading; and made gender-neutralizing and stylistic changes.

CASE NOTES

ANALYSIS

Constitutionality

--First Amendment

In General

Applicability

--In General

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--Course of Business

--Damages

--Insurance

--Mortgage Company Loan Applications

--Not Shown

--Other Conduct

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--Limitation Period

--Representation

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--Stated

--Upheld

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Commercial Disparagement

--Actionability

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--In General

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--Not Warranted

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--Corporations

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--Advertising Misrepresentations

--Not Warranted

Trade Disparagement

--Elements of Claim

--Not Shown

Unfair Competition

--In General

--Logos

--Not Applicable

Violation

--Not Shown

--Shown

CONSTITUTIONALITY

--FIRST AMENDMENT

Defendant fundraisers were entitled to dismissal of an action alleging that they violated this section by failing to affirmatively volunteer their fee arrangement with donors to a charity for which they raised money, since such a requirement would have violated the defendants' First Amendment rights of the defendants. *People ex rel. Ryan v. Telemarketing Assocs., 313 Ill. App. 3d 559, 246 Ill. Dec. 314, 729 N.E.2d 965, 2000 Ill. App. LEXIS 391* (1 Dist. 2000).

Because it was only the false and misleading statements of defendant's manual of vehicle pricing information which were prohibited by this Act and the Consumer Fraud and Deceptive Business Practices Act (*815 ILCS 505/1* et seq.), there was no First Amendment impediment to those prohibitions. *People ex rel. Hartigan v. MacClean Hunter Publishing Corp., 119 Ill. App. 3d 1049, 75 Ill. Dec. 486, 457 N.E.2d 480* (1 Dist. 1983).

IN GENERAL

Activity covered by *815 ILCS 510/2*, such as business activities that create confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services, does not necessarily constitute fraud that would implicate Rule 9(b), *Fed. R. Civ. P. Publ'ns Int'l, LTD. v. Leapfrog Enters., F. Supp. 2d , 2002 U.S. Dist. LEXIS 20738* (N.D. Ill. Oct. 23, 2002).

Any conduct in a business which creates a likelihood of consumer confusion or misunderstanding is potentially actionable under this section. *Unique Coupons, Inc. v. Northfield Corp., F. Supp. 2d , 2000 U.S. Dist. LEXIS 6767* (N.D. Ill. May 11, 2000).

This Act effectively delineates two prohibited forms of action; the first is "passing off" the goods or services of another and the second is causing a likelihood of confusion by some pattern of designation or representation in conjunction with goods or services. *Zeller v. LaHood, 627 F. Supp. 55 (C.D. Ill. 1985).*

The Consumer Fraud and Deceptive Business Practices Act (*815 ILCS 505/1* et seq.), incorporates into its enumerated unlawful practices those described in this section. *American Buyers Club v. Honecker, 46 Ill. App. 3d 252, 5 Ill. Dec. 666, 361 N.E.2d 1370* (5 Dist. 1977).

APPLICABILITY

--IN GENERAL

This Act does not provide a cause of action for damages, but it does permit private suits for injunctive relief and has generally been held to apply to situations where one competitor is harmed or may be harmed by the unfair trade practices of another. *Greenberg v. United Airlines, 206 Ill. App. 3d 40, 150 Ill. Dec. 904, 563 N.E.2d 1031* (1 Dist. 1990), cert. denied, *137 Ill. 2d 664, 156 Ill. Dec. 561, 571 N.E.2d 148 (1991).*

--COMPETITION

Plaintiffs and defendants need not be engaged in competition in order for an action to be sustained under this Act. *Crinkley v. Dow Jones & Co., 67 Ill. App. 3d 869, 24 Ill. Dec. 573, 385 N.E.2d 714* (1 Dist. 1978).

--COURSE OF BUSINESS

This section does not apply to a dispute where there was no purposeful misrepresentation; the alleged violation must be done by someone in the course of his business, vocation or occupation. *Bentley v. Slavik, 663 F. Supp. 736 (S.D. Ill. 1987).*

--DAMAGES

Consumers are not allowed to recover money damages under this Act. *Greisz v. Household Bank (Ill.), 8 F. Supp. 2d 1031 (N.D. Ill. 1998),* aff'd, *176 F.3d 1012 (7th Cir. 1999).*

--INSURANCE

It is doubtful that this section is applicable to the purchase of insurance per se. *Advance Labor Serv., Inc. v. Hartford Accident & Indem. Co., 353 F. Supp. 666 (N.D. Ill. 1973).*

--MORTGAGE COMPANY LOAN APPLICATIONS

This Act was applicable to the alleged misrepresentations made by mortgage company dealing with the time in which loan applications could be closed. *People ex rel. Hartigan v. Commonwealth Mtg. Corp. of Am., 732 F. Supp. 885 (N.D. Ill. 1990).*

--NOT SHOWN

Even if a system of marketing flashlight bulbs were the sole creation of plaintiff's ingenuity and labor, it would not be susceptible to protection under unfair competition laws. *Duo-Tint Bulb & Battery Co. v. Moline Supply Co., 46 Ill. App. 3d 145, 4 Ill. Dec. 685, 360 N.E.2d 798* (3 Dist. 1977).

--OTHER CONDUCT

Where retailers were acting in compliance with the rules of a state agency when they reimbursed themselves for liability imposed by the municipal retailers' occupation tax, subsection (12) of this section was not applied and they were not performing a deceptive trade practice. *Johnson v. Marshall Field & Co., 8 Ill. App. 3d 937, 291 N.E.2d 310* (1 Dist. 1972), aff'd, *57 Ill. 2d 272, 312 N.E.2d 271 (1974).*

APPLICATION AND CONSTRUCTION

--LIMITATION PERIOD

The three-year limitation period under *815 ILCS 505/10a(e)* applies as well to claims under this Act. *Elrad v. United Life & Accident Ins. Co., 624 F. Supp. 742 (N.D. Ill. 1985).*

--REPRESENTATION

Implicit (if not explicit) within the twelve enumerated subsections of this section is that for a violation to occur, the defendant must make some form of a representation (or do something) to the public (or a potential buyer) regarding a good or service. *Lynch Ford, Inc. v. Ford Motor Co., 957 F. Supp. 142 (N.D. Ill. 1997).*

ATTORNEY FEES

--NOT STATED

Where plaintiffs' complaint alleged only the language of the statute itself, but did not allege how or why a likelihood of confusion in an airline frequent flyer program would occur in the future, dismissal for failure to state a cause of action was proper. *Greenberg v. United Airlines, 206 Ill. App. 3d 40, 150 Ill. Dec. 904, 563 N.E.2d 1031* (1 Dist. 1990), cert. denied, *137 Ill. 2d 664, 156 Ill. Dec. 561, 571 N.E.2d 148 (1991).*

As plaintiff's cause was not sustainable as a class action and there was not a sufficient showing of course of business or trade to state a claim under this Act, the trial court properly dismissed the claim. *Blake v. State Farm Mut. Auto. Ins. Co., 168 Ill. App. 3d 918, 119 Ill. Dec. 617, 523 N.E.2d 85* (1 Dist. 1988).

Plaintiff's decision not to continue under a disputed name did not negate the effect of defendant's consent; accordingly, defendant's consent to plaintiff's exclusive use of the name precluded defendant from alleging that this use constituted unfair competition and a deceptive trade practice. *Saltzberg v. Fishman, 123 Ill. App. 3d 447, 78 Ill. Dec. 782, 462 N.E.2d 901* (1 Dist. 1984).

Where plaintiffs' complaint was deficient in that it failed to show that defendants disparaged the quality of plaintiffs' services, plaintiffs failed to state a claim for relief under this Act. *American Pet Motels, Inc. v. Chicago Veterinary Medical Ass'n, 106 Ill. App. 3d 626, 62 Ill. Dec. 325, 435 N.E.2d 1297* (1 Dist. 1982).

Plaintiff's action for service mark infringement and unfair competition seeking to enjoin the defendants from use of the title "Your Dollars" for a series of consumer information radio programs was denied, where the plaintiff's radio program was merely descriptive of the content and subject matter of the radio programs and printed materials, the theme of which was advising consumers how to obtain greater value for their financial expenditures, and where the plaintiff had failed to establish that the phrase had acquired any secondary meaning linking the product to its source.
Eirinberg v. CBS Inc., 521 F. Supp. 450 (N.D. Ill. 1981).

A mere possibility that some confusion may arise from a misleading caption under a photo in a trade journal was too nebulous a basis for a cause of action, without any claim or evidence of uniqueness or secondary meaning resulting from the design of the plaintiff's product. *Custom Bus. Sys. v. Boise Cascade Corp., 68 Ill. App. 3d 50, 24 Ill. Dec. 801, 385 N.E.2d 942* (2 Dist. 1979).

Allegedly offending newspaper article did not disparage the quality of plaintiff's services as an executive, but appeared to have imputed want of integrity to plaintiff in his business, which is actionable under a defamation theory rather than commercial disparagement; thus defendant failed to state a cause of action. *Crinkley v. Dow Jones & Co., 67 Ill. App. 3d 869, 24 Ill. Dec. 573, 385 N.E.2d 714* (1 Dist. 1978).

Evidence was sufficient to show that defendants did not wrongfully appropriate the construction details of plaintiffs' battery display container. *Filter Dynamics Int'l, Inc. v. Astron Battery, Inc., 19 Ill. App. 3d 299, 311 N.E.2d 386* (2 Dist. 1974).

--STATED

Allegations that defendants falsely characterized their manual of vehicle pricing information as complete, current, impartial, accurate, dependable and average values, and their alleged failure to inform subscribers that their price quotes were unofficial and subjective estimates of value, were sufficient to state a cause of action under this subsection. *People ex rel. Hartigan v. MacClean Hunter Publishing Corp., 119 Ill. App. 3d 1049, 75 Ill. Dec. 486, 457 N.E.2d 480* (1 Dist. 1983).

Plaintiff's complaint adequately stated a cause of action under the clear and concise language of the Illinois statutes and when amplified by the incorporated interpretations of the Federal Trade Commission as required by *815 ILCS 505/2*, and the federal courts, there was no doubt that plaintiff's complaint was legally sufficient. *Williams v. Bruno Appliance & Furn. Mart, Inc., 62 Ill. App. 3d 219, 19 Ill. Dec. 537, 379 N.E.2d 52* (1 Dist. 1978).

--UPHELD

Award of attorney fees to a corporation whose president breached his fiduciary duty to the corporation by cooperation with formation of a rival company which copied original company's label was proper. *Unichem Corp. v. Gurtler, 148 Ill. App. 3d 284, 101 Ill. Dec. 400, 498 N.E.2d 724* (1 Dist. 1986).

BAIT AND SWITCH

Subsections (9) and (12) of this section address "bait and switch" practices where a seller seeks to attract customers through advertising at low prices products which he does not intend to sell in more than nominal amounts, and when prospective buyers respond, sale of the "bait" is discouraged through various artifices. *Disc Jockey Referral Network, Ltd. v. Ameritech Publishing, 230 Ill. App. 3d 908, 172 Ill. Dec. 725, 596 N.E.2d 4* (1 Dist.), cert. denied, *146 Ill. 2d 625, 176 Ill. Dec. 796, 602 N.E.2d 450 (1992).*

CAUSE OF ACTION

--NOT STATED

In an action arising from a letter written by the defendant to the Republican National Committee pertaining to its hiring of the plaintiff marketing company, which was owned by a known Democrat, to perform file list development services, the plaintiff failed to state a claim upon which relief could be granted as the comments made by the defendant did not indicate that the file list development services provided by the plaintiff were substandard, negligent, or harmful and, instead, the statements suggested only that the plaintiff was in a position to disseminate the Republican National Committee's voter information to unauthorized third parties. *Donnelley Mktg., Inc. v. Sullivan, F. Supp. 2d , 2002 U.S. Dist. LEXIS 3320* (N.D. Ill. Feb. 27, 2002).

Plaintiff failed to state a claim under this section where it alleged that the defendant's representatives made statements to its customers about the plaintiff's products that were not true, but failed to allege that the defendant knew the statements were untrue or intended to misrepresent anything to anyone. *Berthold Types Ltd. v. Adobe Sys., 101 F. Supp. 2d 697, 2000 U.S. Dist. LEXIS 8335 (N.D. Ill. 2000).*

Defendant's counterclaim about plaintiff's production and sale of catalytic converter shells to defendant's competitors was not sufficient because there were no allegations that the shells contained any kind of distinctive mark identifying them as defendant's product. *Combined Metals of Chicago Ltd. Partnership v. Airtek, Inc., 985 F. Supp. 827 (N.D. Ill. 1997).*

Plaintiff did not state a cause of action for violation of the Illinois Deceptive Trace Practices Act; merely registering a domain name similar to another name does not create a likelihood of confusion nor amount to deception. *Juno Online Servs., v. Juno Lighting, Inc., 979 F. Supp. 684 (N.D. Ill. 1997).*

Complaint which alleged that defendant held out that auto dealers were independent dealerships when they were really owned and operated by defendant did not allege any representation by defendant concerning an identifiable good or service and therefore did not violate the Act. *Lynch Ford, Inc. v. Ford Motor Co., 957 F. Supp. 142 (N.D. Ill. 1997).*

Complaint that merely asserted that defendants misrepresented to plaintiff that if it developed chemicals that met their specifications, then they would purchase these products from the plaintiff, was insufficient to state a claim under the Act. *Industrial Specialty Chems., Inc. v. Cummins Engine Co., 902 F. Supp. 805 (N.D. Ill. 1995).*

The allegations presented were simply insufficient to support a common-law fraud claim or a cause of action for a violation of the Consumer Fraud and Deceptive Business Practices Act (*815 ILCS 505/2*) and subsection (12), where the complaint alleged that plaintiffs were duped into mortgage agreement by an advertisement stating that company would not charge points and missing from the complaint were factual allegations that the company requested the loan referred to in the advertisement or that their contract was actually negotiated to contain the advertisement's terms. *Talbert v. Home Sav. Bank of Am., 265 Ill. App. 3d 376, 202 Ill. Dec. 708, 638 N.E.2d 354* (1 Dist. 1994), appeal denied, *159 Ill. 2d 581, 207 Ill. Dec. 524, 647 N.E.2d 1017 (1995).*

COMMERCIAL DISPARAGEMENT

The Illinois Consumer Fraud and Deceptive Business Practices Act (*815 ILCS 505/1* et seq.) and this Act provide a remedy for disparagement of a product, but that is different from the disparagement of the producer, i.e., from defamation. *Brown & Williamson Tobacco Corp. v. Jacobson, 713 F.2d 262 (7th Cir. 1983).*

Defamation and commercial disparagement are separate and distinct torts: a defamation action lies when the integrity or credit of a business has been impugned, but if the quality of the goods or services are demeaned, then an action for commercial disparagement may be proper. *Crinkley v. Dow Jones & Co., 67 Ill. App. 3d 869, 24 Ill. Dec. 573, 385 N.E.2d 714* (1 Dist. 1978).

--ACTIONABILITY

Counter-claimants in a trade dress infringement suit regarding air conditioners were not entitled to a preliminary injunction as to their deceptive practices claim, because the statements in the manufacturer's e-mail and press release were unrelated to the quality of the counter-claimants' products. *Fedders Corp. v. Elite Classics, F. Supp. 2d , 2003 U.S. Dist. LEXIS 7570* (S.D. Ill. May 1, 2003).

Words which criticize the quality of one's goods or services will give rise to a cause of action for disparagement, just as words which reflect upon one's integrity in his business or profession may serve as grounds for a defamation action; a statement may also simultaneously attack both quality and integrity, in which case both causes of action may lie. *Crinkley v. Dow Jones & Co., 67 Ill. App. 3d 869, 24 Ill. Dec. 573, 385 N.E.2d 714* (1 Dist. 1978).

--COMMON LAW TORT

The common law tort of commercial disparagement exists in Illinois, notwithstanding this Act. *Richard Wolf Medical Instruments Corp. v. Dory, 723 F. Supp. 37 (N.D. Ill. 1989).*

--PROHIBITED

This section substantially embodies the common law tort of commercial disparagement, which has consistently been applied to statements which disparage the quality of one's goods or services. *Crinkley v. Dow Jones & Co., 67 Ill. App. 3d 869, 24 Ill. Dec. 573, 385 N.E.2d 714* (1 Dist. 1978).

CONCEALMENT

--TEST

A concealment must be shown to have been done with the intent to deceive under circumstances creating an opportunity and duty to speak, but mere passive concealment of pertinent facts during a business transaction does not necessarily constitute a fraud. *Stefani v. Baird & Warner, Inc., 157 Ill. App. 3d 167, 109 Ill. Dec. 444, 510 N.E.2d 65* (1 Dist. 1987).

CONSUMER ACTIONS

--IN GENERAL

In order to maintain a consumer action under the Deceptive Trade Practices Act, the consumer must allege facts which would indicate that he is likely to be damaged in the future. *Popp v. Cash Station, Inc., 244 Ill. App. 3d 87, 184 Ill. Dec. 558, 613 N.E.2d 1150* (1 Dist. 1992).

Although this Act was intended to protect business people, a consumer action is permissible if the consumer can allege facts which would indicate he is likely to be damaged in the future. *Greenberg v. United Airlines, 206 Ill. App. 3d 40, 150 Ill. Dec. 904, 563 N.E.2d 1031* (1 Dist. 1990), cert. denied, *137 Ill. 2d 664, 156 Ill. Dec. 561, 571 N.E.2d 148 (1991).*

By virtue of the Consumer Fraud and Deceptive Business Practices Act's (*815 ILCS 505/1* et seq.) incorporation of this Act, the legislature gave to consumers a vehicle by which they could recover money damages for violations of this Act. *Duncavage v. Allen, 147 Ill. App. 3d 88, 100 Ill. Dec. 455, 497 N.E.2d 433* (1 Dist. 1986), appeal denied, *106 Ill. Dec. 46, 505 N.E.2d 352 (Ill. 1987).*

Although this Act was intended to protect businessmen and provide them with a remedy for unethical competitive conduct, its provisions have also been found applicable to cases where a consumer brings suit; however, the problem inherent in consumer actions is the inability to allege facts which would indicate that plaintiff is likely to be damaged, since ordinarily, the harm has already occurred. *Hayna v. Arby's, Inc., 99 Ill. App. 3d 700, 55 Ill. Dec. 1, 425 N.E.2d 1174* (1 Dist. 1981).

DAMAGES

--IRREPARABLE HARM

If plaintiffs could be compensated with a cash recovery, their harm was not irreparable. *Greenberg v. United Airlines, 206 Ill. App. 3d 40, 150 Ill. Dec. 904, 563 N.E.2d 1031* (1 Dist. 1990), cert. denied, *137 Ill. 2d 664, 156 Ill. Dec. 561, 571 N.E.2d 148 (1991).*

--NOT AVAILABLE

Allegations that insurers made misrepresentations and omissions regarding the value of underinsured motorist coverage and that such violated this Act did not support an action for damages. *Glazewski v. Coronet Ins. Co., 108 Ill. 2d 243, 91 Ill. Dec. 628, 483 N.E.2d 1263 (1985).*

Regardless of whether a misrepresentation as to the length of time property had been listed for sale might have given rise to a ground for rescission of a contract for sale or a sale, such a misrepresentation could not give rise to a claim for money damages. *Beard v. Gress, 90 Ill. App. 3d 622, 46 Ill. Dec. 8, 413 N.E.2d 448* (4 Dist. 1980).

DECEPTIVE PRACTICES

--ADVERTISING

Federal district court found that a Delaware corporation violated § 43(a) of the Lanham Act, *15 U.S.C.S. § 1125*(a), § 2 of the Illinois Consumer Fraud and Deceptive Business Practices Act, *815 ILCS 505/2*, § 2 of the Illinois Uniform Deceptive Trade Practices Act, *815 ILCS 510/2*, and the common law by depicting and describing facial masks manufactured by an Illinois corporation in its advertising and shipping masks made of a different material to fill customers' orders. *Allergy Asthma Tech., Ltd. v. I Can Breathe, Inc., 195 F. Supp. 2d 1059, 2002 U.S. Dist. LEXIS 6307 (N.D. Ill. 2002).*

In a case against a used car dealership to recover the difference between the price paid and a lower advertised sale price, where the defendant's sales manager testified that the car prices were listed on the cars themselves, but the plaintiff stated that no price was listed on the car he purchased, and that when he asked the salesman the price of the car, the salesman, after first stating that he did not know the price, quoted a price that was higher than the advertised price, even though the price was negotiable and the defendant ought to have informed the plaintiff of the advertised sale price, since the advertisement was placed to draw in customers, the defendant's failure to disclose the advertised sale price constituted deceptive conduct under this Act. *Affrunti v. Village Ford Sales, Inc., 232 Ill. App. 3d 704, 174 Ill. Dec. 30, 597 N.E.2d 1242* (3 Dist. 1992).

--BENEFITS

Representations and statements that a product or service has benefits that it does not have are actionable under this Act and additionally a failure to inform has been held also to be actionable under the Act. *Glazewski v. Allstate Ins. Co., 126 Ill. App. 3d 401, 81 Ill. Dec. 349, 466 N.E.2d 1151* (1 Dist. 1984), rev'd on other grounds, *108 Ill. 2d 243, 91 Ill. Dec. 628, 483 N.E.2d 1263 (1985).*

--CERTIFICATION MARKS

Defendant's misuse of plaintiff's safety certification documents constituted a deceptive trade practice in violation of this section. *Underwriters Lab., Inc. v. Innovative Indus. of Tampa, Inc., F. Supp. 2d , 2000 U.S. Dist. LEXIS 6766* (N.D. Ill. May 15, 2000).

--CONSTRUED

A person commits a deceptive practice when he engages in any conduct which similarly creates a likelihood of confusion or of misunderstanding. *Stefani v. Baird & Warner, Inc., 157 Ill. App. 3d 167, 109 Ill. Dec. 444, 510 N.E.2d 65* (1 Dist. 1987).

--COPYING

Ex-employee of flashlight bulb distributor could not copy plaintiff's bulb dispenser box, but was entitled to copy the bulb information chart and reorder card as long as they sufficiently identified the source of the chart or card to a customer by providing proper labeling on the item. *Duo-Tint Bulb & Battery Co. v. Moline Supply Co., 46 Ill. App. 3d 145, 4 Ill. Dec. 685, 360 N.E.2d 798* (3 Dist. 1977).

--FUNCTIONALITY

Functional features for purposes of rule that imitation of packaging can be actionable if the imitated parts are functionable, include those which contribute to efficiency or economy in manufacture and handling through the marketing process, and those which contribute to the product's (or container's) utility, durability or effectiveness or to the ease with which it serves its function or is handled by users. *Filter Dynamics Int'l, Inc. v. Astron Battery, Inc., 19 Ill. App. 3d 299, 311 N.E.2d 386* (2 Dist. 1974).

--INSIGNIFICANT FEATURES

Copying features of plaintiffs' packaging which are not primary determinants of consumer source association of the product cannot presumptively establish either likelihood of confusion or secondary meaning. *Filter Dynamics Int'l, Inc. v. Astron Battery, Inc., 19 Ill. App. 3d 299, 311 N.E.2d 386* (2 Dist. 1974).

--PROOF OF COPYING AND VISUAL SIMILARITY

Proof of copying, together with visual comparisons showing similarity in use and appearance between defendant's and plaintiff's products, was sufficient to establish that the trade dress employed by the defendants was likely to deceive the public and cause public confusion as to source. *Clairol, Inc. v. Andrea Dumon, Inc., 14 Ill. App. 3d 641, 303 N.E.2d 177* (1 Dist. 1973).

--UNAUTHORIZED PRACTICE OF LAW

The plaintiff was not entitled to summary judgment in an action alleging that the defendant franchise consultant engaged in the unauthorized practice of law and thereby obtained an unfair advantage over competitors, notwithstanding that the defendant drafted franchise agreements, offering circulars and registration certificates, where the defendant insisted that clients' independent counsel were responsible for any legal work product, all of the defendant's clients were represented by counsel, and the precise division of responsibilities between the defendant and independent counsel was unclear and very much in dispute. *Francorp, Inc. v. Siebert, 211 F. Supp. 2d 1051, 2002 U.S. Dist. LEXIS 5232 (N.D. Ill. 2002).*

The unauthorized practice of law can be a deceptive trade practice. *Francorp, Inc. v. Siebert, 211 F. Supp. 2d 1051, 2002 U.S. Dist. LEXIS 5232 (N.D. Ill. 2002).*

DEFAMATION

--DISTINGUISHED

Defamation protects interests of personality; commercial disparagement protects property interests. *Allcare, Inc. v. Bork, 176 Ill. App. 3d 993, 126 Ill. Dec. 406, 531 N.E.2d 1033* (1 Dist. 1988), appeal denied, *126 Ill. 2d 557, 133 Ill. Dec. 666, 541 N.E.2d 1104 (1989).*

FEDERAL LAW

--COMPARISON

This Act does indeed focus on deception, as its title implies, where the federal Copyright Act *(17 U.S.C. § 300* et seq.) does not specifically mention deception or a synonym, but this distinction does not alter the equivalence of the protections of the two statutes. *Balsamo/Ison Group, Inc. v. Bradley Place Ltd. Partnership, 950 F. Supp. 896 (C.D. Ill. 1997).*

--FEDERAL STANDARDS

Where a plaintiff's complaint was devoid of allegations concerning noncompliance with the federal standards including specific statements regarding the variance between the claimed weight and the actual weight as computed under the federal regulations, plaintiff's complaint was dismissed without prejudice with leave given to amend such complaint within 30 days. *Mario's Butcher Shop & Food Ctr., Inc. v. Armour & Co., 574 F. Supp. 653 (N.D. Ill. 1983).*

--PREEMPTION

An action for the violation of this Act arising from the defendants' alleged use of photographs taken by the plaintiffs without the plaintiffs' permission was preempted pursuant to *17 U.S.C. § 301*(a) since the works at issue were fixed in a tangible form (photographs), they fell within the subject matter of copyright, and the rights asserted were equivalent to those specified in *17 U.S.C. § 106*, namely the exclusive right to reproduce, distribute, and display the photographs. *Natkin v. Winfrey, 111 F. Supp. 2d 1003, 2000 U.S. Dist. LEXIS 11463 (N.D. Ill. 2000).*

A claim of reverse passing off based on the defendants' alleged release of a song without crediting the plaintiff, who asserted that the song was based on his previously-released and copyrighted song of the same name, was preempted by the federal copyright act. *Lacour v. Time Warner, Inc., F. Supp. 2d , 2000 U.S. Dist. LEXIS 7286* (N.D. Ill. May 22, 2000).

Claims based on this Act, the common law of unfair competition, and the Consumer Fraud and Deceptive Business Practices Act (*815 ILCS 505/1* et seq.) were dismissed because of the failure of claims based on the same legal inquiry brought under the Lanham Act *(15 U.S.C. § 1125* (a)). *MJ & Partners Restaurant Ltd. Partnership v. Zadikoff, 10 F. Supp. 2d 922 (N.D. Ill. 1998).*

Allegation that defendants deceptively caused confusion as to the source and authorship of the plaintiffs' architectural and technical drawings was in essence equivalent to a claim of copyright infringement and was therefore preempted by the federal Copyright Act *(7 U.S.C. § 300* et seq.). *Balsamo/Ison Group, Inc. v. Bradley Place Ltd. Partnership, 950 F. Supp. 896 (C.D. Ill. 1997).*

Because plaintiff did not have a protectible trade name under the Lanham Act *(15 U.S.C. § 1125),* the plaintiff could not prevail on its claims under this Act or The Consumer Fraud and Deceptive Business Practices Act (*815 ILCS 505/1* et seq.); claims for unfair competition and deceptive business practices brought under Illinois statutes are to be resolved according to the principles set forth under the *Lanham Act. Spex, Inc. v. Joy of Spex, Inc., 847 F. Supp. 567 (N.D. Ill. 1994).*

In general, actions against a long distance telephone service company alleging violation of this Act and the Consumer Fraud and Deceptive Business Practices Act (*815 ILCS 505/1* et seq.) are preempted by the Federal Communications Act of 1934 *(47 U.S.C. § 151* et seq.); but where plaintiff's state law claims did not seek to regulate the manner in which

defendant provided communications service to the public, but sought to regulate defendant's advertising practices in the solicitation of customers and ask that damages be awarded for past abuses, the claims were not preempted by federal law. *Kellerman v. MCI Telecommunications Corp., 134 Ill. App. 3d 71, 89 Ill. Dec. 51, 479 N.E.2d 1057* (1 Dist. 1985), aff'd, *112 Ill. 2d 428, 98 Ill. Dec. 24, 493 N.E.2d 1045*, cert. denied, *479 U.S. 949, 107 S. Ct. 434, 93 L. Ed. 2d 384 (1986).*

The preemption doctrine would not be applied in a situation where the alleged infringing activity was not within the scope of the federal law; since the copyright laws did not protect a licensing program instituted by a copyright owner, defendants' preemption argument was inappropriate. *F.E.L. Publications, Ltd. v. National Conference of Catholic Bishops, 466 F. Supp. 1034 (N.D. Ill. 1978).*

FUNCTIONALITY

--IN GENERAL

The doctrine of functionality applies equally to the package as to its contents. *Duo-Tint Bulb & Battery Co. v. Moline Supply Co., 46 Ill. App. 3d 145, 4 Ill. Dec. 685, 360 N.E.2d 798* (3 Dist. 1977).

The doctrine of functionality is designed in part to mesh state unfair competition law with federal patent law; if any portion of goods or their packages are functional, then, in determining whether protection should be extended, the functional features are properly judged only by federal patent law standards, such as novelty and non-obviousness, and not by a state's law of unfair competition, but, where a feature, or more aptly design, is a mere arbitrary embellishment, imitation may be forbidden where the requisite showing of secondary meaning is made. *Duo-Tint Bulb & Battery Co. v. Moline Supply Co., 46 Ill. App. 3d 145, 4 Ill. Dec. 685, 360 N.E.2d 798* (3 Dist. 1977).

INJUNCTION

--IN GENERAL

A trial court can grant injunctive relief if there is a threat that the harm is likely to occur in the future. *Greenberg v. United Airlines, 206 Ill. App. 3d 40, 150 Ill. Dec. 904, 563 N.E.2d 1031* (1 Dist. 1990), cert. denied, *137 Ill. 2d 664, 156 Ill. Dec. 561, 571 N.E.2d 148 (1991).*

--BURDEN

Plaintiff seeking a preliminary injunction had the burden of establishing a likelihood of success on the merits and a need to preserve the status quo -- the last actual peaceable, uncontested status which preceded the controversy -- in order to prevent irreparable injury for which there was no adequate remedy at law. *Associates for Oral Surgery, Ltd. v. Associates for Oral & Maxillofacial Surgery, Ltd., 39 Ill. App. 3d 73, 350 N.E.2d 109* (1 Dist. 1976).

--COMPLAINT

To state a cause of action for injunctive relief, a plaintiff must minimally allege that he is likely to be damaged by another's deceptive trade practice. *Greenberg v. United Airlines, 206 Ill. App. 3d 40, 150 Ill. Dec. 904, 563 N.E.2d 1031* (1 Dist. 1990), cert. denied, *137 Ill. 2d 664, 156 Ill. Dec. 561, 571 N.E.2d 148 (1991).*

--DENIED

The plaintiff was not entitled to injunctive relief under this Act where she could not show any likelihood of future harm resulting from the defendant's conduct. *Greisz v. Household Bank (Ill.), 8 F. Supp. 2d 1031 (N.D. Ill. 1998)*, aff'd, *176 F.3d 1012 (7th Cir. 1999).*

Injunctive relief was unnecessary where defendant had already published an acknowledgment of its error in mislabeling a caption to a photograph in a trade journal identifying plaintiff's product as its own and had expressed regret for it, the nature of the publication in which the article appeared -- a trade journal issued only quarterly -- did not suggest a commercial motive or even a deliberate act and from the nature of the incident there was no reason to suppose

that there was a threat of future misrepresentation which should be enjoined. *Custom Bus. Sys. v. Boise Cascade Corp., 68 Ill. App. 3d 50, 24 Ill. Dec. 801, 385 N.E.2d 942* (2 Dist. 1979).

While plaintiff may be entitled to protection of its name if a secondary meaning is established, no evidence was presented at a hearing on a motion for a preliminary injunction to support that theory, and absent such evidence, it was not probable or likely plaintiff would succeed on the merits of the case; therefore, the trial court did not abuse its discretion in denying plaintiff's request for a preliminary injunction. *Associates for Oral Surgery, Ltd. v. Associates for Oral & Maxillofacial Surgery, Ltd., 39 Ill. App. 3d 73, 350 N.E.2d 109* (1 Dist. 1976).

--IMPROPER

The issuance of an injunction enjoining defendant from selling, distributing, or promoting electric breast pumps and accessories was an abuse of the trial court's discretion, where the defendant's actions were insufficient to satisfy the unfair trade standards under this Act since plaintiffs failed to prove defendant's representations misled or confused anyone and the injunction was too broad to insure reasonable protection to plaintiff. *Egnell, Inc. v. Weniger, 94 Ill. App. 3d 325, 49 Ill. Dec. 895, 418 N.E.2d 915* (1 Dist. 1981).

--NECESSITY

The trial court may not grant injunctive relief under the Uniform Deceptive Trade Practices Act (*815 ILCS 505/1* et seq.) in the absence of a demonstrated need for such a measure. *American Pet Motels, Inc. v. Chicago Veterinary Medical Ass'n, 106 Ill. App. 3d 626, 62 Ill. Dec. 325, 435 N.E.2d 1297* (1 Dist. 1982).

--PROPER

Injunctive relief was clearly appropriate against chemical company who copied rival's label for the single and obvious purpose of creating confusion among those customers who regularly purchased goods from original company. *Unichem Corp. v. Gurtler, 148 Ill. App. 3d 284, 101 Ill. Dec. 400, 498 N.E.2d 724* (1 Dist. 1986).

INTERPRETATION

--CODIFICATION OF COMMON LAW

Subsection (8) of this section substantially codifies the common law tort of commercial disparagement, i.e., disparagement of the quality of one's goods or services. *Allcare, Inc. v. Bork, 176 Ill. App. 3d 993, 126 Ill. Dec. 406, 531 N.E.2d 1033* (1 Dist. 1988), appeal denied, *126 Ill. 2d 557, 133 Ill. Dec. 666, 541 N.E.2d 1104 (1989).*

This Act merely codifies Illinois common law. *National Football League Properties, Inc. v. Consumer Enter., Inc., 26 Ill. App. 3d 814, 327 N.E.2d 242* (1 Dist. 1975).

JURISDICTION

In action alleging violations of federal patent and trademark statutes, the Illinois Uniform Deceptive Trade Practices Act, *815 ILCS 510/1* et seq., the Illinois Consumer Fraud and Deceptive Business Practices Act, *815 ILCS 505/1* et seq., and the common law, federal district court sitting in Illinois held that it had personal jurisdiction over corporations that allegedly sold the plaintiffs' product to Illinois residents over the Internet or at stores located in Illinois, but not over an out-of-state corporation that exercised control over an Internet site that provided links to the offending websites but did not offer the plaintiffs' product for sale. *Aero Prods. Int'l, Inc. v. Intex Corp., F. Supp. 2d , 2002 U.S. Dist. LEXIS 17948* (N.D. Ill. Sept. 19, 2002).

Claims by utilities' customers that delayed payment charges in their rate schedules were charges in excess of the maximum permitted under law were, in reality, claims that customers were overcharged; the Commerce Commission had exclusive jurisdiction over such issues and thus administrative remedies had to be exhausted. *Klopp v. Commonwealth Edison Co., 54 Ill. App. 3d 671, 12 Ill. Dec. 911, 370 N.E.2d 822* (1 Dist. 1977).

JURY TRIAL

Trial court did not err in determining that plaintiff was not entitled to a jury trial on a count alleging violations of the Consumer Fraud and Deceptive Business Practices Act (*815 ILCS 505/1* et seq.) and this Act. *Wheeler v. Sunbelt Tool Co., 181 Ill. App. 3d 1088, 130 Ill. Dec. 863, 537 N.E.2d 1332* (4 Dist. 1989).

LEGISLATIVE INTENT

This Act was enacted to prohibit unfair competition and was not intended to be a consumer protection statute. *Chabraja v. Avis Rent A Car Sys., 192 Ill. App. 3d 1074, 140 Ill. Dec. 221, 549 N.E.2d 872* (1 Dist. 1989), appeal denied, *131 Ill. 2d 558, 142 Ill. Dec. 880, 553 N.E.2d 394 (1990).*

The intent of the legislature with regard to the relationship between the consumer protection statutes and other statutes which provide for or regulate specific kinds of activities is to affirm the integrity of the specific statutes while ensuring that the consumer is not bereft of the considerable protections afforded by the consumer legislation. *Aurora Firefighter's Credit Union v. Harvey, 163 Ill. App. 3d 915, 114 Ill. Dec. 873, 516 N.E.2d 1028* (2 Dist. 1987), appeal denied, *119 Ill. 2d 553, 119 Ill. Dec. 381, 522 N.E.2d 1240 (1988).*

LIABILITY

--IN GENERAL

Under this Act a defendant is liable only if the plaintiff can establish a likelihood of confusion between the parties' products. *McGraw-Edison Co. v. Walt Disney Prods., 787 F.2d 1163 (7th Cir. 1986).*

--ILLUSTRATIVE CASE

Where three major items of furniture were pictured in an advertisement with a price listed directly beneath, and language that the seller asserted was intended as clarification of the picture appeared to its right and in significantly smaller print, a trier of fact could reasonably have found that the format of the advertisement created a likelihood of confusion or misunderstanding. *Williams v. Bruno Appliance & Furn. Mart, Inc., 62 Ill. App. 3d 219, 19 Ill. Dec. 537, 379 N.E.2d 52* (1 Dist. 1978).

LIKELIHOOD OF CONFUSION

--ACTIONABLE STATEMENTS

Any conduct in a business which creates a likelihood of consumer confusion or misunderstanding is potentially actionable under this section, and the statements made need not actually have been false, but only misleading. *Unique Concepts, Inc. v. Manuel, 669 F. Supp. 185 (N.D. Ill. 1987).*

--ACTUAL PURCHASING CONDITIONS

To determine whether there is unfair competition, a side-by-side comparison is not necessarily controlling to determine likelihood of confusion; rather, the actual purchasing conditions and their effect upon the prospective customer must be considered. *Filter Dynamics Int'l, Inc. v. Astron Battery, Inc., 19 Ill. App. 3d 299, 311 N.E.2d 386* (2 Dist. 1974).

--CONSTRUED

"Likelihood of confusion" has the same meaning in unfair competition cases under this Act as it has in traditional infringement cases. *McGraw-Edison Co. v. Walt Disney Prods., 787 F.2d 1163 (7th Cir. 1986).*

"Likelihood of confusion" has the same meaning under this Act as it has in trademark infringment cases. *M-F-G Corp. v. EMRA Corp., 626 F. Supp. 699 (N.D. Ill. 1985),* aff'd, *817 F.2d 410 (7th Cir. 1987).*

"Likelihood of confusion" has the same meaning in unfair competition cases under this Act as it has in trademark infringement cases; it exists when the defendant's use of a deceptive trade name, trademark, or other distinctive symbol

is likely to confuse or mislead consumers as to the source or origin of the product or service. *Hooker v. Columbia Pictures Indus., Inc., 551 F. Supp. 1060 (N.D. Ill. 1982).*

The legislature intended, by the use of its phrase "likelihood of confusion or misunderstanding," to codify Illinois' common law tradition. *Clairol, Inc. v. Andrea Dumon, Inc., 14 Ill. App. 3d 641, 303 N.E.2d 177* (1 Dist. 1973).

--DUTY TO AVOID

Even absent any fraudulent intent, under Illinois law a latecomer to the market has a duty to take affirmative precautions sufficient to make confusion in the use of similar service marks improbable; the fact that defendants had no knowledge of plaintiff's existence until after it had begun operations or had no intention of harming plaintiff was not controlling. *Pride Communications Ltd. Partnership v. WCKG, Inc., 851 F. Supp. 895 (N.D. Ill. 1994).*

--NEARBY BUSINESS

Plaintiff alleged facts sufficient to state a cause of action where defendant located his sign-making business next door to the plaintiffs' business, both parties engaged in the same type of business, and most importantly, defendant operated his business under a name that was very similar to the name used by the plaintiffs, even though there was no allegation of breach of contract, plaintiff did not have the exclusive right to the defendant's name and there was no covenant not to compete. *Phillips v. Cox, 261 Ill. App. 3d 78, 198 Ill. Dec. 338, 632 N.E.2d 668* (5 Dist. 1994).

--NOT SHOWN

Phone book ads placed by defendant franchisees before the termination of franchise by franchisor could be an infringement, and thus, while the advertisement containing the telephone number and trademarks was arguably beyond the franchisees' control, except for disconnecting the telephone number, a likelihood of confusion could not be determined under *815 ILCS 510/2* (1999). *Jake Flowers, Inc. v. Kaiser, F. Supp. 2d , 2002 U.S. Dist. LEXIS 24929* (N.D. Ill. Dec. 30, 2002).

Where plaintiff's identity as martial artist had no celebrity status or public recognition, it lacked commercial value, prior to his modeling for arcade games manufactured by defendant, and consumer confusion was highly unlikely. *Pesina v. Midway Mfg. Co., 948 F. Supp. 40 (N.D. Ill. 1996).*

Summary judgment was proper on plaintiff's claim under this Act, where the evidence was sufficient for a reasonable fact finder to infer that defendant passed itself off as affiliated with plaintiff; the argument that plaintiff's distinctive logo was confused with defendant's plain, unadorned, non-stylized lettering of the generic term was unsupported by evidence as confusion appeared to result from both parties' use of the generic term "door systems", not from the alleged similarity of logos. *Door Sys. v. Overhead Door Sys., 905 F. Supp. 492 (N.D. Ill. 1995),* aff'd sub nom. *Door Sys. v. Pro-line Door Sys., 83 F.3d 169 (7th Cir. 1996).*

Likelihood of confusion has the same meaning in the Illinois Deceptive Trade Practices Act as it does in trademark infringement cases. *Rock-A-Bye Baby, Inc. v. Dex Prods., Inc., 867 F. Supp. 703 (N.D. Ill. 1994).*

--PLEADINGS

Essential to the maintenance of an action under this section are well-pleaded allegations indicating the existence of a "likelihood of confusion." *Hooker v. Columbia Pictures Indus., Inc., 551 F. Supp. 1060 (N.D. Ill. 1982).*

--PRESUMPTION OF INJURY

In trademark infringement cases, the court may presume that irreparable injury will result where there is a likelihood of proving consumer confusion. *Pride Communications Ltd. Partnership v. WCKG, Inc., 851 F. Supp. 895 (N.D. Ill. 1994).*

--RADIO STATIONS

The test of trademark infringement under the Lanham Act *(15 U.S.C. § 1125),* and under Illinois law is likelihood of confusion; likelihood of confusion was shown where the allegedly infringing mark -- "Star 107.9" -- was similar in form, spelling, and sound to plaintiff's "Star 105.5," and defendants' station was very close to plaintiff's on the radio dial and witness testified credibly that the average listener was not likely to maintain a precise recollection of call letters or

frequencies and under these circumstances, an ordinary consumer or listener was likely to be confused by defendants' use of "Star 107.9." *Pride Communications Ltd. Partnership v. WCKG, Inc., 851 F. Supp. 895 (N.D. Ill. 1994).*

--SHOWN

The plaintiff software company was entitled to summary judgment on its claim that the defendants violated the statute since the plaintiff had registered the relevant marks, offered unrebutted evidence that the defendants used and/or distributed a counterfeit mark, and demonstrated that the defendants obtained this counterfeit software without the plaintiff's consent from non-authorized distributors, and there was no dispute concerning the defendants' use and/or distribution of the counterfeit software in commerce. *Microsoft Corp. v. Logical Choice Computers, Inc., F. Supp. 2d , 2001 U.S. Dist. LEXIS 479* (N.D. Ill. Jan. 19, 2001).

The following acts by defendant constituted conduct which created a likelihood of confusion or of misunderstanding on plaintiff's part regarding property's development potential and value: 1) failure to provide written notice he was acting on his own behalf; 2) failure to list property for sale as he agreed to; 3) failure to use his best efforts to procure the best and highest selling price for the property on the plaintiff's behalf; and 4) placing his own interests ahead of plaintiffs' interests by proceeding to subdivide the land and sell the parcels. *Kirkruff v. Wisegarver, 297 Ill. App. 3d 826, 231 Ill. Dec. 852, 697 N.E.2d 406* (4 Dist. 1998).

With respect to likelihood of confusion in a trade dress simulation case, defendants' argument that plaintiff would not be damaged because of a lack of likelihood of confusion was wholly unsupported. *Clairol, Inc. v. Andrea Dumon, Inc., 14 Ill. App. 3d 641, 303 N.E.2d 177* (1 Dist. 1973).

Where a legend clearly implied that a service charge would be imposed on all past due amounts but this was not an accurate description of the collection practices, it created the "likelihood of confusion or of misunderstanding" proscribed by this section. *Garland v. Mobil Oil Corp., 340 F. Supp. 1095 (N.D. Ill. 1972).*

--TRADEMARK

Automobile manufacturer was entitled to preliminary injunction directing an automobile repair shop to stop using a certain name under the Illinois Deceptive Trade Practices Act (*815 ILCS 510/1* et seq.); defendant's name was likely to cause customer confusion, deception, or mistake. *Porsche Cars N. Am., Inc. v. Manny's Porshop, Inc., 972 F. Supp. 1128 (N.D. Ill. 1997).*

The evidence was held sufficient to find that the defendant's use of a trademark was likely to cause a misunderstanding or confuse the public as to the source or sponsorship, affiliation or association of defendant with plaintiff within the meaning of this Act. *St. Charles Mfg. Co. v. St. Charles Furn. Corp., 482 F. Supp. 397 (N.D. Ill. 1979).*

MOTION TO DISMISS

Complaint was sufficient to withstand a motion to dismiss where the plaintiff alleged that the defendant represented to the plaintiff's customers that a product manufactured by the plaintiff was subject to prior injunction since such statement, if proven, would be deemed a false statement designed to mislead the customers into believing that purchasing such product would expose them to infringement liability. *Unique Coupons, Inc. v. Northfield Corp., F. Supp. 2d , 2000 U.S. Dist. LEXIS 6767* (N.D. Ill. May 11, 2000).

PACKAGING

--ACQUISITION OF SECONDARY MEANING

Any secondary meaning that plaintiffs seek to establish for their battery package was largely destroyed by allowing private labels to be substituted on the battery itself in place of plaintiffs' proprietary brand name. *Filter Dynamics Int'l, Inc. v. Astron Battery, Inc., 19 Ill. App. 3d 299, 311 N.E.2d 386* (2 Dist. 1974).

Acquisition of a secondary meaning for purposes of a trade dress simulation case means no more than an association in the public mind between the trade dress of a product and the source of that product thus marketed. *Clairol, Inc. v. Andrea Dumon, Inc., 14 Ill. App. 3d 641, 303 N.E.2d 177* (1 Dist. 1973).

--BURDEN OF PROOF

Although the plaintiffs have the burden of proving that the public distinguished the source of their batteries by the packaging or trade dress features which they claim have been imitated, they need not show that their specific identity as manufacturer of batteries displayed in battery containers is known or recognized. *Filter Dynamics Int'l, Inc. v. Astron Battery, Inc., 19 Ill. App. 3d 299, 311 N.E.2d 386* (2 Dist. 1974).

--PARTICULAR IDENTIFICATION REQUIRED

Because the packaging of a product is not likely to cause confusion over the source or origin of the product unless the package has acquired a secondary meaning, plaintiffs were required to establish that the shape or form of their battery container achieved identification in the minds of the consuming public with a particular person or producer. *Filter Dynamics Int'l, Inc. v. Astron Battery, Inc., 19 Ill. App. 3d 299, 311 N.E.2d 386* (2 Dist. 1974).

--SECONDARY MEANING

Allegations in the limited liability company's complaint that the "Meridian" product line of levels and level-transits had acquired secondary meaning, that in the minds of the public, the primary significance of the trade dress was to identify the source of the product rather than the product itself and, thus, was protectable, set out sufficient factual matter to outline the elements of a trade dress infringement claim; therefore, because the LLC could prove some set of facts to support the allegations in its trade dress infringement claim under the Illinois Uniform Deceptive Trade Practices Act, *815 ILCS 510/1* et seq, dismissal under Fed. R. Civ. P. 12(b)(6) was improper. *David White Instruments, LLC. v. TLZ, Inc., F. Supp. 2d , 2003 U.S. Dist. LEXIS 8375* (N.D. Ill. May 14, 2003).

--SIMILARILY SHAPED PRODUCTS

The likelihood of confusion and dilution from similarly shaped products can be remedied by requiring that packaging and labelling fairly warn purchasers of the true source of the product. *Laura Secord Candy Shops Ltd. v. Barton's Candy Corp., 368 F. Supp. 851 (N.D. Ill. 1973).*

PASSING OFF GOODS AND SERVICES

--CONSTRUED

The plaintiff organization's allegations that the defendant's representation of its products as authentic Indian-made products when they were not and that the plaintiff competed with the defendant as a seller of authentic Indian products, were sufficient to state claims under this Act and the Consumer Fraud and Deceptive Business Practices Act (*815 ILCS 505/1* et seq.). *Native Am. Arts, Inc. v. Chico Arts, Inc., 8 F. Supp. 2d 1066 (N.D. Ill. 1998).*

PASSING OFF GOODS AND SERVICES

--CONSTRUED

There is no passing off where a seller ensures that buyers are not under the impression that his goods are the products of his competitor. *American Wheel & Eng'g Co. v. Dana Molded Prods., Inc., 132 Ill. App. 3d 205, 87 Ill. Dec. 299, 476 N.E.2d 1291* (1 Dist. 1985).

--INTENT

On the issue of "passing off goods and services of another," intent to deceive is not a necessary element. *Zeller v. LaHood, 627 F. Supp. 55 (C.D. Ill. 1985).*

--NOT SHOWN

Defendant's representation that its wheels were made from the same material as those of plaintiff's was not passing off, where the record showed that both sets of wheels were made from the same formula and possessed the same

specifications. *American Wheel & Eng'g Co. v. Dana Molded Prods., Inc., 132 Ill. App. 3d 205, 87 Ill. Dec. 299, 476 N.E.2d 1291* (1 Dist. 1985).

--PURPOSE

This Act is designed to protect consumers from having goods of one manufacturer being palmed off as goods made by another manufacturer. *McDonald's Corp. v. Gunvill, 441 F. Supp. 71 (N.D. Ill. 1977),* aff'd, *622 F.2d 592 (7th Cir. 1980).*

PROTECTED WORDS

--IN GENERAL

Where a word is not a coined or invented word, but one firmly established in the English vocabulary -- an already diluted name -- that term is not entitled to the same protection as that afforded to a strongly coined name such as "Kodak" or "Polaroid." *Associates for Oral Surgery, Ltd. v. Associates for Oral & Maxillofacial Surgery, Ltd., 39 Ill. App. 3d 73, 350 N.E.2d 109* (1 Dist. 1976).

PURPOSE

The purpose of this Act is to stem unfair competition; the deceptive trade practices singled out can be classed roughly into either misleading trade identification or false and deceptive advertising. *Barliant v. Follett Corp., 138 Ill. App. 3d 756, 91 Ill. Dec. 677, 483 N.E.2d 1312* (1 Dist. 1985).

This Act was designed to prevent the palming off of one's goods as another's and the resultant consumer confusion, and not to prevent similarity of products. *Egnell, Inc. v. Weniger, 94 Ill. App. 3d 325, 49 Ill. Dec. 895, 418 N.E.2d 915* (1 Dist. 1981).

This Act was designed to provide a remedy to be utilized where a likelihood of confusion or misunderstanding exists or may exist in the public's mind as to goods or services. *Bonner v. Westbound Records, Inc., 49 Ill. App. 3d 543, 7 Ill. Dec. 409, 364 N.E.2d 570* (1 Dist. 1977).

QUESTIONS OF FACT

The question of whether defendant's failure to disclose its dual representation resulted in confusion or misunderstanding or was done intentionally to conceal a material fact upon which plaintiffs relied, was a question of fact to be determined by the trier of fact. *Stefani v. Baird & Warner, Inc., 157 Ill. App. 3d 167, 109 Ill. Dec. 444, 510 N.E.2d 65* (1 Dist. 1987).

SANCTIONS

--NOT WARRANTED

Trial court did not err by not imposing sanctions against plaintiffs where plaintiffs brought suit under the Illinois Consumer Fraud and Deception Act (*815 ILCS 505/1* et seq.) and under this Act, and plaintiffs' complaint was a good faith argument for the extension, modification, or reversal of existing law. *Chabraja v. Avis Rent A Car Sys., 192 Ill. App. 3d 1074, 140 Ill. Dec. 221, 549 N.E.2d 872* (1 Dist. 1989), appeal denied, *131 Ill. 2d 558, 142 Ill. Dec. 880, 553 N.E.2d 394 (1990).*

STANDING

--CORPORATIONS

Standing under this Act is not restricted to consumers, as the statute states that "a person likely to be damaged by a deceptive trade practice of another may be granted an injunction," and the definition of "person" includes a corporation,

under subsection (5) of this section. *McDonald's Corp. v. Gunvill, 441 F. Supp. 71 (N.D. Ill. 1977),* aff'd, *622 F.2d 592 (7th Cir. 1980).*

SUMMARY JUDGMENT

--ADVERTISING MISREPRESENTATIONS

If defendant was responsible for listing in buying guide that included a misrepresentation that defendant was the source of goods when it was not, or an exclusive distributor, it would be responsible for violations of this Act and the Consumer Fraud and Deceptive Business Practices Act, *815 ILCS 505/2,* and plaintiff's claim under these sections would withstand summary judgment. *Keller Medical Specialties Prods. v. Armstrong Medical Indus., Inc., 842 F. Supp. 1086 (N.D. Ill. 1994).*

--NOT WARRANTED

Where there was no evidence that mortgage guaranty insurer made any representation, true or otherwise, to plaintiff regarding mortgage guaranty insurance, insurance premiums, or refunds of unearned insurance premiums and, in fact, it was the lender, not defendant, that discussed the subject of mortgage guaranty insurance with plaintiff and made representations to plaintiff regarding her obligation to pay for the insurance as a condition of obtaining a mortgage and her entitlement to later refunds, summary judgment in plaintiff's favor on those counts alleging fraud, negligent misrepresentation, and statutory violations was error. *Peleschak v. Verex Assurance, Inc., 272 Ill. App. 3d 1077, 209 Ill. Dec. 384, 651 N.E.2d 562* (1 Dist. 1995).

Where a court found that a genuine issue of material fact existed regarding the likelihood of confusion between defendants' and plaintiff's products bearing a designated trademark, the granting of summary judgment was unwarranted and improper on plaintiff's claim under this Act, and where the existence of these factual issues precluded the court from finding that plaintiff's trademark was not distinctive as a matter of law, it was error for the district court to grant summary judgment on a claim brought under the Anti-Dilution Act (*765 ILCS 1035/15*). *McGraw-Edison Co. v. Walt Disney Prods., 787 F.2d 1163 (7th Cir. 1986).*

TRADE DISPARAGEMENT

--ELEMENTS OF CLAIM

The focus of this section is the goods, services, or business itself; an attack upon one's business rival, no matter how malicious, which does not touch upon the rival's goods, services, or his business does not state a claim under this portion of the Act. *Richard Wolf Medical Instruments Corp. v. Dory, 723 F. Supp. 37 (N.D. Ill. 1989).*

--NOT SHOWN

Statements contained in defendant's letters impugned plaintiff's business integrity, but not its products, and therefore did not support a claim under the *Illinois Uniform Deceptive Trade Practices Act. Republic Tobacco, L.P. v. N. Atl. Trading Co., 254 F. Supp. 2d 985, 2002 U.S. Dist. LEXIS 6150 (N.D. Ill. 2002).*

Where none of the false statements contained in a letter which a plaintiff sent to the defendant's customers touched upon the quality of the defendant's products, the letter did not state that the defendant's devices did not operate properly, or that they were harmful, but rather the letter accused plaintiff of being a vexatious litigant and a patent infringer, there was no trade disparagement. *Richard Wolf Medical Instruments Corp. v. Dory, 723 F. Supp. 37 (N.D. Ill. 1989).*

UNFAIR COMPETITION

--IN GENERAL

Under the law of unfair competition, an individual has a protectable interest only in the nonfunctional aspects of his goods; once goods have been placed in the public domain, the functional attributes of the goods are free to be copied by

all. *Duo-Tint Bulb & Battery Co. v. Moline Supply Co., 46 Ill. App. 3d 145, 4 Ill. Dec. 685, 360 N.E.2d 798* (3 Dist. 1977).

Under this Act, plaintiff may be granted relief under a theory of unfair competition even thought its products are not in direct competition with defendant's, and even though plaintiff does not show palming off by defendant. *National Football League Properties, Inc. v. Consumer Enter., Inc., 26 Ill. App. 3d 814, 327 N.E.2d 242* (1 Dist. 1975).

Unfair competition is a broader concept than trademark infringement, and depends upon likelihood of confusion as to the source of plaintiff's and defendant's goods when the whole appearance of the product is considered. *National Football League Properties, Inc. v. Consumer Enter., Inc., 26 Ill. App. 3d 814, 327 N.E.2d 242* (1 Dist. 1975).

--LOGOS

Professional football team patches were entitled to protection because the trademarks of the teams copied by defendant indicated sponsorship or origin in addition to their ornamental value. *National Football League Properties, Inc. v. Consumer Enter., Inc., 26 Ill. App. 3d 814, 327 N.E.2d 242* (1 Dist. 1975).

--NOT APPLICABLE

Where many of plaintiff's customers became defendant's customers because of familiarity with and confidence in the salesmen who were servicing their stores, once these salesmen became affiliated with the new organization offering a similar product, merchants quite understandably preferred to deal with a salesman whom they knew and trusted; however, the law of unfair competition does not afford relief for the misfortune and loss of business caused by such a preference. *Duo-Tint Bulb & Battery Co. v. Moline Supply Co., 46 Ill. App. 3d 145, 4 Ill. Dec. 685, 360 N.E.2d 798* (3 Dist. 1977).

VIOLATION

--NOT SHOWN

State Supreme Court affirmed judgment dismissing state attorney general's action which claimed that fund raisers committed common law fraud, breached their fiduciary duty, and violated 225 ILSC 460/15(b)(5), *815 ILCS 505/1* et seq., and *815 ILCS 510/2* (1996) by soliciting funds without telling donors that **85** percent of donations to charity would be paid to fund raisers. *People ex rel. Ryan v. Telemarketing Assocs., 198 Ill. 2d 345, 261 Ill. Dec. 319, 763 N.E.2d 289, 2001 Ill. LEXIS 1439 (2001).*

Where no allegations of bait and switch practices were set forth in plaintiff's complaint, but plaintiff contended that defendants were obligated to distribute only combined white and yellow page directories as regional directories, and no set of facts was alleged in the complaint to support this purported obligation, there was no violation of this section. *Disc Jockey Referral Network, Ltd. v. Ameritech Publishing, 230 Ill. App. 3d 908, 172 Ill. Dec. 725, 596 N.E.2d 4* (1 Dist.), cert. denied, *146 Ill. 2d 625, 176 Ill. Dec. 796, 602 N.E.2d 450 (1992).*

A collision damage waiver in a car rental agreement did not violate this Act. *Chabraja v. Avis Rent A Car Sys., 192 Ill. App. 3d 1074, 140 Ill. Dec. 221, 549 N.E.2d 872* (1 Dist. 1989), appeal denied, *131 Ill. 2d 558, 142 Ill. Dec. 880, 553 N.E.2d 394 (1990).*

Bank's omission of information from brochure disclosing terms of common carrier insurance accompanying credit card useage, including identity of the insurer and method of making claims, did not constitute a deceptive trade practice, as the terms of the policy were within conventional expectations, they did not conflict with the description given in the brochure of the available coverage, and plaintiffs could have called a toll free number for additional information. *Fineman v. Citicorp, 137 Ill. App. 3d 1035, 92 Ill. Dec. 780, 485 N.E.2d 591* (1 Dist. 1985).

Trial court did not err in granting summary judgment in favor of defendant where defendant's failure to disclose that the lending institution to be used by plaintiff charged a nominal mortgage insurance premium did not constitute conduct creating a likelihood of confusion or misunderstanding. *Kellerman v. Mar-Rue Realty & Bldrs., Inc., 132 Ill. App. 3d 300, 87 Ill. Dec. 267, 476 N.E.2d 1259* (1 Dist. 1985).

--SHOWN

Corporation violated this Act where it used labels which had acquired a secondary meaning in the mind of the public where such labels were the same as its rival in the size, color, layout, print, and contents. *Unichem Corp. v. Gurtler, 148 Ill. App. 3d 284, 101 Ill. Dec. 400, 498 N.E.2d 724* (1 Dist. 1986).

Evidence sufficiently established a likelihood of confusion of chemical company's label with that of new rival where 80% of new company's customers were former customers of the other company and the clear similarity between the labels used by the two companies in itself suggested that customer confusion was inevitable. *Unichem Corp. v. Gurtler, 148 Ill. App. 3d 284, 101 Ill. Dec. 400, 498 N.E.2d 724* (1 Dist. 1986).

Misstatement whereby purchasers of realty were misled into believing that they did not need to concern themselves with the conditions of the premises while they were purchasing the same, since any substantial material defects would be required to be repaired or replaced by the seller and where they were in fact material defects which were not repaired or replaced, could be considered to be conduct which created a likelihood of misunderstanding and therefore a deceptive trade practice as defined in this section. *Buzzard v. Bolger, 117 Ill. App. 3d 887, 73 Ill. Dec. 140, 453 N.E.2d 1129* (2 Dist. 1983).

Where the wording of an agreement created a likelihood of confusion or misunderstanding, there was a clear violation of this section, permitting the awarding of damages. *American Buyers Club v. Hayes, 46 Ill. App. 3d 270, 5 Ill. Dec. 679, 361 N.E.2d 1383* (5 Dist. 1977).

LEGAL PERIODICALS

For article, "Business Standing Under the Illinois Consumer Fraud Act: An Attempt to Resolve the Confusion," see *17 N. Ill. U.L. Rev. 71 (1996).*

For article, "Commercial Law: 1985-86 Illinois Law Survey," see *18 Loy. U. Chi. L.J. 357* (1986-87).

For article, "Trademark Protection of Container and Package Configurations -- A Primer," see *59 Chi.-Kent L. Rev. 779 (1983).*

For article, "Consumer Service Transactions, Implied Warranty and a Mandate for Realistic Reform," see *11 Loy. U. Chi. L.J. 405* (1979-80).

RESEARCH REFERENCES

World wide web domain as violating state trademark protection statute or state unfair trade practices act. *96 ALR5th 1.*

ILLINOIS ADMINISTRATIVE CODE

*** THIS DOCUMENT IS CURRENT THROUGH JULY 25, 2003 ***

TITLE 14. COMMERCE
SUBTITLE B. CONSUMER PROTECTION
CHAPTER II. ATTORNEY GENERAL
PART 470. RETAIL ADVERTISING
SUBPART B. RETAIL PRICE COMPARISONS AND SAVINGS CLAIMS

14 Ill. Adm. Code **470.220** (2003)

§ **470.220** Comparison to Seller's Own Former (Regular) Prices.

It is an unfair or deceptive act for a seller to compare current price with its former (regular) price for any product or service, (for example: "$99, Now $69--Save $30"; "Regularly $99, Now $69"; "Originally $99, Now $69"; "Save $30, Now $69") unless one of the following criteria are met:

a) the former (regular) price is equal to or below the price(s) at which the seller made a substantial number of sales of such products in the recent regular course of its business; or

b) the former (regular) price is equal to or below the price(s) at which the seller offered the product for a reasonably substantial period of time in the recent regular course of its business, openly and actively and in good faith, with an intent to sell the product at that price(s).

<=1> Authority & General Source

ILLINOIS ADMINISTRATIVE CODE

*** THIS DOCUMENT IS CURRENT THROUGH JULY 25, 2003 ***

TITLE 14. COMMERCE
SUBTITLE B. CONSUMER PROTECTION
CHAPTER II. ATTORNEY GENERAL
PART 470. RETAIL ADVERTISING
SUBPART B. RETAIL PRICE COMPARISONS AND SAVINGS CLAIMS

14 Ill. Adm. Code 470.240 (2003)

§ 470.240 Range of Savings or Price Comparison Claims.

It is an unfair or deceptive act to state or imply that any products are being offered for sale at a range of prices or at a range of percentage or fractional discounts (for example: "Save from 10% to 50% Off") unless the highest price or lowest discount in the range is clearly and conspicuously disclosed in the advertisement and a reasonable number of these items in the advertisement are offered with at least the largest advertised discount. If at least 5% of the items in the advertisement are offered with at least the largest advertised discount it shall create a rebuttable presumption that a reasonable number were offered with at least the largest advertised discount.

<=1> Authority & General Source

EXHIBIT L

Certified true copy of Exhibit L.

[signature], PARTNER, MORGAN LEWIS 9/22/03

CERTIFIED AT THE CANADIAN EMBASSY
FOR LEGALIZATION OF THE FOREGOING
SIGNATURE OF: STEPHEN PAUL MAHINKA
CERTIFIÉ À L'AMBASSADE DU CANADA
AUX FINS DE LÉGALISER LA SIGNATURE
CI-DESSUS DE:

[signature]
Hélène Bouchard
Consular Program Officer
Agent Consulaire
Canadian Embassy/Ambassade du Canada
Washington, D.C.

Consular Section Consulaire
Canadian Embassy
Ambassade du Canada
501 Pennsylvania Avenue, N.W.
Washington, D.C. 20001

CODE OF MASSACHUSETTS REGULATIONS

*** THIS DOCUMENT REFLECTS ALL REGULATIONS IN EFFECT AS OF AUGUST 29, 2003 ***

TITLE 940: OFFICE OF THE ATTORNEY GENERAL
CHAPTER 6.00: RETAIL ADVERTISING

940 CMR 6.05 (2003)

6.05: Price Comparison and Savings Claims

(1) Declaration of Policy. Price comparison advertising is a form of advertising used in the sale of products whereby current prices are compared with the seller's former or future prices, the prices of other sellers, or other stated values to demonstrate price reductions or cost savings. While price comparisons which accurately reflect market values in the trade area provide consumers with useful information in making buying decisions, price comparisons based on false, arbitrary or inflated prices or values deceive or mislead the public. Abuse also occurs when sellers fail to disclose material information which is important to enable consumers to understand the price comparison.

It is the intent of these regulations to ensure that the comparative price used in any price comparison advertisement provides accurate information and meaningful guidance to the consumer, and to this end 940 CMR 6.05 (1) through (17) are to be liberally construed.

(2) Unidentified Price Comparisons.

(a) It is an unfair or deceptive act for a seller to state or imply that it is offering any savings as to any product by making a direct or indirect price comparison, unless the seller clearly and conspicuously describes the basis for the price comparison. Notwithstanding the foregoing, a seller may claim a savings or compare a higher and a lower price without disclosing the basis for the comparison if the seller is comparing to its own former price. In such a case, the provisions of 940 CMR 6.05 (3) will be applied solely for the purpose of determining the seller's former price.

(b) Terms such as "formerly", "regularly", "originally", or terms of similar meaning shall mean the seller's own former price, as determined in accordance with 940 CMR 6.05 (3). Advertisements containing such language shall be construed under such 940 CMR 6.05 (3).

(3) Comparison to Seller's Own Former Prices.

(a) Except in a catalog as defined in 940 CMR 6.01, it is an unfair or deceptive act for a seller to compare its current price with its former price for any product, unless such former price meets one of the following conditions:

1. The former price is equal to or below the price(s) at which the seller made at least 30% of its sales of such products in Massachusetts in the 12 month period immediately preceding the Measurement Date of the advertisement; or

2. The comparison is made during a 180-day period immediately following the establishment of the former price, and the product is not offered for sale at a lower price for more than 45% of that 180-day period. For purposes of this provision a former price is established by offering the product for sale at such price or a higher price openly and in good faith on each business day of a period of at least 14 consecutive calendar days immediately preceding the initial advertisement of the price comparison.

A seller offers a product openly and in good faith when the seller's former price does not exceed the seller's usual and customary retail mark-up for similar merchandise, i.e., the former price is not an inflated or exaggerated price. The burden shall be on the seller to show that its former price is not an inflated or exaggerated price. The following factors may be considered in determining whether the seller has met such burden:

a. whether the seller compares its current price to its former price when the seller knows at the time it sets the former price that no sales, or very few sales, will be made at such former price; or

b. whether the former price substantially exceeds the price at which a reasonable number of non-discount sellers sell the product in the seller's trade area; or

c. where a "manufacturer's suggested retail price" or a "list price" exists for the product, whether the former price exceeds such price and by what amount; or

d. whether the product was openly and actively offered in the recent, regular course of business, such as by devoting reasonable display space to the product during the period(s) in which it was at the former price, maintaining reasonable inventory during former price periods, advertising the product at the former price; or

3. The former price is equal to or below the price(s) at which the seller has offered the product for sale in Massachusetts for less than 14 days, and the seller clearly and conspicuously discloses in all advertisements for the product the specific period during which the seller offered the product at the former price.

(b) Notwithstanding **940** CMR **6.05** (3)(a), it shall not be an unfair or deceptive act for a seller to advertise a sale with a duration of four days or less that involves a substantial portion of the products in a store or department, even if the sale covers some products with respect to which a general price comparison made in the advertisement fails to meet the requirements of **940** CMR **6.05** (3)(a), provided that such products do not constitute a substantial portion of all products involved in the sale.

(c) Notwithstanding **940** CMR **6.05** (3)(a), it shall not be an unfair or deceptive act for a seller to offer a product in accordance with an advertised price policy whereby prices are reduced by a set amount or percentage on a pre-set schedule.

(4) Introductory Offers and Future Price Comparisons.

(a) Except for a catalog as defined in **940** CMR 6.01 or a health club as defined in M.G.L. c. 93, § 78, it is an unfair or deceptive act for a seller to make an introductory offer or to compare its current price for a product with the price at which the product will be offered in the future, unless:

1. the future price takes effect immediately after the sale is over but not later than 60 calendar days after the dissemination date of the introductory offer or price comparison; and

2. following the date the future price takes effect the product is offered openly and in good faith in Massachusetts at the future price for a period of time that is at least equal to the period of time that it was offered at the introductory price, but not less than 21 days, except where compliance becomes impossible because of unforeseeable circumstances beyond the seller's control which the seller is able to document.

(b) It is an unfair or deceptive act for a health club as defined in M.G.L. c. 93, § 78, to make an introductory offer or to compare its current price for a service with the price at which the service will be offered in the future unless:

1. the seller clearly and conspicuously discloses the type(s) of membership(s) or contract(s) to which the introductory offer or price comparison applies, if the introductory offer or price comparison does not apply to each type of membership or contract sold by the seller;

2. the future price takes effect immediately after the introductory offer or sale is over but not later than 150 calendar days after the dissemination date of the introductory offer or price comparison;

3. the future price is maintained for at least 90 days immediately after the introductory offer or sale is over, and, in the case of pre-opening sales, the future or a higher price is maintained continuously for at least 90 days following the opening of the facility;

4. the seller complies with all of the disclosure requirements of M.G.L. c. 93, § 84; and

5. in the case of pre-opening introductory offers or sales, the seller provides each purchaser with a written pre-opening price protection guarantee which states that:

a. the price for which the contract for health club services is being offered or sold is the lowest price currently available for that type of membership or contract at that facility;

b. the future price will take effect on or before a date certain specified in the contract regardless of whether the facility opens for business on that date;

c. the price may or may not go up significantly between the date the consumer signs the contract and the date the future price takes effect; and

d. if, on the date the future price is to take effect or at any time within 90 days thereafter, or in the case of pre-opening sales, within 90 days following the opening of the facility, the actual selling price is less than the advertised future price, the seller will refund in cash, or, if the purchaser has not paid for his or her membership in full, will credit to the purchaser's account, the difference between the lowest actual selling price and the advertised future price.

(c) **940** CMR 6.00 does not apply to introductory offers which are limited to first-time purchasers of a service, if:

1. the introductory price represents at least a 10% savings from the price at which the seller is currently offering the service to non-first-time purchasers;

2. the seller has made at least 30% of its sales to non-first-time purchasers at the higher price;

3. the number of sales made to first-time purchasers of the service at the reduced price does not exceed the number of sales made to non-first-time purchasers of the service at the higher price during any one month period that the offer is available to first-time purchasers; and

4. in the case of a seller with multiple locations in Massachusetts or in any adjacent state, the higher price must be the price at which non-first-time buyers are purchasing the service at the location making the offer, not at another location in the trade area.

For purposes of **940** CMR **6.05** (4)(c), a first-time purchaser is any person who responds to an advertisement offering,

a. a reduction in the regular price being paid or the future price to be paid by other users of the service, if such person purchases the service for the first time, or

b. a promotion or price reduction to any person who purchases the service when they first visit the location offering the promotion or price reduction.

(5) Use of "Sale" Terminology.

(a) It is an unfair or deceptive act for a seller to use the words "priced for sale", "on sale", "sale", "selling out", "clearance", "reduced", "liquidation", "must sell", "must be sacrificed", "now only $X", or other words which state or imply a price savings unless:

1. The actual former price, or the actual reduction stated as a fraction or percentage of the former price, is clearly and conspicuously disclosed; or

2. The product offered for sale is being offered at a price at least 10% below the former price of the same product if the former price was $200 or less, or 5% below the former price if the former price was more than $200.

(b) For purposes of this section a seller's "former price" shall be determined in accordance with **940** CMR **6.05** (3).

(c) If a seller states a particular purpose or reason for a sale (for example, "clearance", "liquidation", "must be sacrificed"), then the seller must be able to substantiate that purpose or reason.

(6) Use of "List Price" or Similar Comparisons.

(a) Seller's responsibility. It is an unfair or deceptive act for a seller to compare its current price for a product with a "list price," "manufacturer's suggested retail price" or term of similar meaning, unless the list or manufacturer's suggested retail price is the price charged for the advertised product by a reasonable number of sellers in the seller's trade area as of the Measurement Date. However, a seller may offer pre-ticketed merchandise containing comparisons to a "list price" or a "manufacturer's retail price" as long as such comparisons comply with the provisions of **940** CMR **6.05** (9)(b)2.

(b) Manufacturer's or franchisor's responsibility. It is an unfair or deceptive act for any manufacturer, franchisor or distributor to compare in an advertisement the current price of any seller(s) with a list price or suggested retail price or term of similar meaning, unless such comparisons complies with the provisions of **940** CMR **6.05** (9)(c).

(7) Comparison to Other Seller's Price for Identical Product. It is an unfair or deceptive act for a seller to compare the seller's price with a price being offered by any other seller for an identical product, except in representations subject to the requirements of **940** CMR **6.05** (10), unless the stated higher comparative price is at or below the price at which the identical product is being offered in the seller's trade area as of the Measurement Date, or has been offered during another period which is specifically identified, by either:

(a) a reasonable number of other sellers; or

(b) other seller(s), the identity of which is documented in the seller's records.

(8) Comparison to Seller's Own or Other Seller's Price for Comparable Product. It is an unfair or deceptive act for a seller to compare the seller's price with the price at which it or any other seller is offering a comparable product unless:

(a) The comparable product is being offered for sale as of the Measurement Date, or has previously been offered for sale during another period which is specifically identified, at the stated higher comparative price by:

1. the seller;

2. a reasonable number of other sellers in the seller's trade area; or

3. other seller(s) who are specifically identified in the advertisement; and

(b) There are no substantial differences in quality, grade, materials, or craftsmanship between the comparable product and the product being offered for sale; and

(c) If the comparison is made to a comparable product sold by the seller, the comparative price is determined in the same manner as a former price in accordance with **940** CMR **6.05** (3).

(9) Price Comparisons on Price Tickets or Labels.

(a) General. It is an unfair or deceptive act for a manufacturer to imprint or attach to a product any ticket or label (pre-ticket) containing a fictitious or inflated price which is capable of being used by sellers as a basis for offering fictitious price reductions. It is also an unfair or deceptive act for a seller to order or request such a ticket or label.

(b) Seller's Practices.

1. The regulations governing price comparisons and savings claims apply to a seller's use of price comparisons on price tickets or labels.

2. A seller may offer a product for sale which has been pre-ticketed with a price by either a manufacturer who uses a list price or suggested retail price or another seller who refers to its own former price, when the seller does not know and

could not reasonably determine whether such price comparisons are in compliance with **940** CMR **6.05** (6), (7), or (8), provided that:

a. The seller has not requested, ordered or in any way induced the manufacturer or other seller to pre-ticket the product; and

b. The seller does not advertise such price comparisons outside the store unless it can substantiate that the price comparisons comply with **940** CMR **6.05** (6), (7), or (8), as applicable.

(c) Manufacturer's Practices. It is an unfair or deceptive practice for a manufacturer, franchisor or distributor to pre-ticket a product with a list price or suggested retail price or term of similar meaning unless the manufacturer or non-retail distributor independently sets such price and the list price or suggested retail price is the price at which the product has been sold in the recent, regular course of business or, if not previously offered, can reasonably be anticipated to be sold in substantial volume in the recent, regular course of business in the principal retail outlets in at least 50% of the states in which such product is or will be sold.

(10) Regional and National Sellers' Use of Composite Price Comparisons in Catalogs. (Effective 9/1/90)

(a) It is an unfair or deceptive act for a regional or national seller to use any composite price comparison, as defined in **940** CMR 6.01, in a catalog unless:

1. The seller clearly and conspicuously discloses in the catalog

a. the locations in which the seller does business, and

b. that the comparative prices used in a composite price comparison may not have been actual selling prices for the advertised products in Massachusetts in the following or substantially similar language:

"We show you the comparative price next to our everyday low price. The comparative price is your guide to an item's usual selling price at non-discount department stores and similar retailers. It is not our present or former selling price. Specifically, any comparative price identified in this catalog is either:

1. the suggested retail price recommended by the manufacturer in this catalog's distribution area;

2. our own determination of full retail price, based on prices at which the same or similar merchandise is offered by principal retailers -- department stores, specialty shops, and other non-discount sellers; or

3. our own determination of full retail price based on customary retailer markups for similar merchandise. We believe that our comparative prices do not appreciably exceed the highest retail prices at which sales are made in this catalog's distribution area. We cannot assure you, however, that our comparative prices represent prevailing prices in every community. Between the time we print our catalog and the time you are in the market for a specific item, the comparative price may fluctuate somewhat. Our comparative prices are determined at the time of printing and are not typically adjusted until the items carrying those prices appear in a later catalog. The comparative price is your approximate guide to what you would pay elsewhere. You will want to make an exact comparison for yourself when you buy, especially for a major purchase. And we encourage you to do so. It's in your best interest --and ours--to compare our prices with the prices you would pay elsewhere."

(11) Range of Savings or Price Reduction Claims.

(a) It is an unfair or deceptive act to state or imply that any products are being offered for sale at a range of prices or at a range of percentage or fractional discounts unless:

1. The highest price or lowest discount in the range is clearly and conspicuously disclosed and, if in print, the type is at least the same size as the type size of the lowest price or highest discount in the range;

2. The number of items available at the lowest price or highest discount comprises a significant number of the items in the offering at the Measurement Date, which shall not be less than 10% of the items in the offering in the case of a sale that is not a department-wide or store-wide sale;

3. The seller clearly and conspicuously discloses in the advertisement any material facts about the lowest priced or highest discounted products offered, the omission of which would have the tendency or capacity to mislead or deceive reasonable buyers or reasonable prospective buyers with respect to the description, size, grade or quality of such products;

4. If a range of discounts or price reductions is stated, the seller discloses the basis for the price comparison in accordance with **940** CMR **6.05** (2); and

5. If the price of a product is being compared to a range of prices for an identical or comparable product in accordance with **940** CMR **6.05** (7) or (8), the lowest price in the range of prices of the identical or comparable product is clearly and conspicuously disclosed and, if in print, the type is at least the same size as the highest price in the range.

(12) Use of Terms "Wholesale" or "At Cost."

(a) It is an unfair or deceptive act for a seller to state or imply that any product is being offered at or near the seller's "wholesale" price or "at cost" or to use a term of similar meaning unless the price is, in fact, either at or below the price paid by the seller at wholesale, or, in the case of a service, the seller's cost for the service excluding overhead and profit.

(b) The following constitute violations of **940** CMR **6.05** (12)(a):

1. A seller advertising a retail price as a wholesale price; or

2. A seller advertising a price as a factory or wholesale price where the price is not the price paid by a seller purchasing directly from the manufacturer.

(13) Use of Terms "Two for the Price of One", "Buy One--Get One Free". It is an unfair or deceptive act for a seller to state or imply that products are being offered at the usual price of a smaller number of the same or a different product (for example, "Four gallons of paint for the price of three" or "Buy two pairs of shoes and pay only the price for the higher priced pair") unless:

(a) The seller clearly and conspicuously discloses all material conditions which are imposed on the sale; and

(b) The price advertised as the usual price for the smaller number of products is the seller's own former price as determined by **940** CMR **6.05** (3); and

(c) The products are of substantially the same quality, grade, material and craftsmanship as the seller offered prior to the advertisement.

(14) Use of Term "If Purchased Separately".

(a) It is an unfair or deceptive act for a seller to make any price comparison based on the difference between the price of a system, set or group of products and the price of the products "if purchased separately" (or words of similar meaning) unless:

1. A reasonable number of sellers in the seller's trade area are currently offering the products as separate items at or above the stated separate purchase price as of the Measurement Date; or

2. The seller has actually sold or offered the products for sale as separate items at the stated separate purchase price in accordance with **940** CMR **6.05** (3).

(15) Prices for Parts or Units of Sets or Systems. It is an unfair or deceptive act for a seller to advertise a price for any product which normally sells as part of a pair, system, or set without clearly and conspicuously disclosing that the price stated is the price per item or unit only, and not the price for the pair, system or set.

(16) Gifts. It is an unfair or deceptive act for a seller to state or imply that any product is being offered for free or at a reduced price (a "gift") in conjunction with the purchase of another product ("primary product"), unless:

(a) The seller clearly and conspicuously identifies the gift in the advertisement;

(b) The stated price of the primary product does not exceed the seller's former price, as defined in **940** CMR **6.05** (3);

(c) The seller clearly and conspicuously discloses in the advertisement the value of the gift, with such value being determined according to:

1. **940** CMR **6.05** (3) if the gift has been sold or offered for sale by the seller; or

2. **940** CMR **6.05** (7) or (8) in all other instances, unless the gift is not commercially available;

(d) The seller clearly and conspicuously discloses in the advertisement all material conditions or limitations imposed by the seller as a prerequisite to receipt of or on the use of the gift; and

(e) The gift is provided to the buyer at the time the conditions are met, unless:

1. The advertisement clearly and conspicuously discloses a specific later delivery date (for example, 20 days after the consumer satisfies the advertised conditions); or

2. The consumer agrees in writing to a specific later delivery date.

(17) Use of Disclaimers. The use in an advertisement of a price comparison prohibited by these regulations is an unfair or deceptive act even if the advertisement also contains disclaimers or explanatory language.

REGULATORY AUTHORITY

940 CMR 6.00: M.G.L. c. 93A, § 2(c).

EXHIBIT M

Certified true copy of Exhibit M.

[signature], PARTNER, MORGAN LEWIS 9/22/03

RTIFIED AT THE CANADIAN EMBASSY
R LEGALIZATION OF THE FOREGOING
GNATURE OF: STEPHEN PAUL MAHINKA
RTIFIE A L'AMBASSADE DU CANADA
IX FINS DE LEGALISER LA SIGNATURE
DESSUS DE:

[signature]

[illegible] Bouchard
nsular Program Officer
Agent Consulaire
nadian Embassy/Ambassade du Canada
shington, D.C.

Consular Section Consulaire
Canadian Embassy
Ambassade du Canada
501 Pennsylvania Avenue, N.W.
Washington, D.C. 20001

MISSOURI CODE OF STATE REGULATIONS

* THIS DOCUMENT REFLECTS ALL REGULATIONS IN EFFECT AS OF JULY 31, 2003 *

TITLE 15 - ELECTED OFFICIALS
DIVISION 60 - ATTORNEY GENERAL
CHAPTER 7 - RULES FOR ADVERTISING

15 CSR **60-7.060** (2003)

60-7.060 Price Comparisons and Savings Claims

(1) Price Comparison in General.

(A) Examples: $29.99--Save $10; 20% off all men's shirts.

(B) A seller shall not make any price comparison in which the product being advertised materially differs in composition, grade or quality, style or design, model, name or brand, kind or variety, or service and performance characteristics from the comparative product, unless the seller clearly discloses the material difference in the advertisement with the price comparison.

(2) Price Comparison to Seller's Former Prices.

(A) Examples: Regularly $99, Now $69; $99, Now $69--Save $30; Originally $99, Now $69; Last Year's Price $99, Now $69.

(B) A seller shall not make a price comparison to a former price, unless the comparative price is actual, bona fide and not illusory or fictitious, and is--

1. A price at which reasonably substantial sales of the product were made to the public by the seller in the regular course of the seller's business, and on a regular basis during a reasonably substantial period of time in the immediate, recent period preceding the advertisement. There shall be a rebuttable presumption that the seller has not complied with the terms set forth in paragraph (2)(B)1. unless the seller can show that the percentage of unit sales of the product at the comparative price, or at prices higher than the comparative price, is ten percent (10%) or more of the total unit sales of the product during a period of time, not less than thirty (30) days nor more than twelve (12) months, which includes the advertisement;

2. A price at which the product was openly and actively offered for sale to the public by the seller in the regular course of the seller's business, and on a regular basis during a reasonably substantial period of the time in the immediate, recent period preceding the advertisement. There shall be a rebuttable presumption that the seller has not complied with the terms set forth in paragraph (2)(B)2. unless the seller can show that the product was offered for sale at the comparative price, or at prices higher than the comparative price, forty percent (40%) or more of the time during a period of time, not less than thirty (30) days nor more than twelve (12) months, which includes the advertisement;

3. A price at which reasonably substantial sales of the product were made to the public by the seller in the regular course of the seller's business, and on a regular basis during a reasonably substantial period of time in any period preceding the advertisement, and the advertisement clearly discloses, with the price comparison, the date, time or seasonal period of that offer. There shall be a rebuttable presumption that the seller has not complied with the terms set forth in paragraph (2)(B)3. unless the seller can show that the percentage of unit sales of the product at the comparative price, or at prices higher than the comparative price, is ten percent (10%) or more of the total unit sales of the product during the disclosed date, time or seasonal period; or

4. A price at which the product was openly and actively offered for sale to the public by the seller in the regular course of the seller's business, and on a regular basis during a reasonably substantial period of time in any period preceding the advertisement, and the advertisement clearly discloses with the price comparison, the date, time or seasonal period of

that offer. There shall be a rebuttable presumption that the seller has not complied with the terms set forth in paragraph (2)(B)4. unless the seller can show that the product was offered for sale at the comparative price, or at prices higher than the comparative price, forty percent (40%) or more of the time during a period of time, not less than thirty (30) days nor more than twelve (12) months, which includes or is included within the disclosed date, time or seasonal period.

(C) A seller shall not make any price comparison to a former price that is not based on the price in effect immediately preceding the reduction unless the seller clearly discloses that intermediate price reductions have been made.

(3) Price Comparison to Seller's Future Prices.

(A) Examples: After Sale $99, Now $69; Save $30, Now $69, Will be $99.

(B) A seller shall not make any price comparison referencing a higher price at which any product will be offered or sold in the future unless--

1. The advertisement clearly discloses that the price comparison is based upon a future price increase;

2. The effective date of the future higher price, if more than ninety (90) days after the price comparison is first stated in an advertisement, is clearly disclosed in the advertisement; and

3. The future higher price increase takes effect on the date disclosed in the advertisement or, if not disclosed in the advertisement, within ninety (90) days after the price comparison is stated in the advertisement and the price increase remains in effect for at least fifteen (15) days, except where compliance becomes impossible because of circumstances beyond the seller's control.

(4) Price Comparison to a Competitor's Prices.

(A) Examples: Compare at $99, Now $69; Comparable value $99, Our price $69.

(B) A seller shall not make any price comparison based on a competitor's price unless--

1. The competitor's price is either a price at which the competitor sold or offered products for sale at any time within the ninety (90)-day period immediately preceding the date on which the price comparison is stated in the advertisement;

2. The competitor's price is a price that is representative of prices at which the products are sold or offered for sale in the trade area in which the price comparison is made and is not an isolated price; and

3. Disclosure is made with the price comparison that the price used as a basis for the comparison was not the seller's own price.

(C) Notwithstanding paragraph (4)(B)2., a seller may reference a competitor's price outside the trade area in which the price comparison is made, provided the seller clearly discloses that the prices are offered by competitors in other geographic areas, clearly discloses the other geographic area in which the price comparison is made, and clearly discloses that prices may vary in the trade area in which the price comparison is made.

(5) Range of Savings or Price Comparison Claims.

(A) Examples: Save from 10% to 50% off.

(B) A seller shall not state or imply that any products are being offered at a range of reduced prices or at a range of percentage or fractional discounts, unless--

1. The highest price or lowest discount is clearly and conspicuously disclosed in the advertisement and, if the lowest price or highest of the range of discounts is disclosed;

2. An appreciable number of items are offered at the lowest price or highest savings or discount advertised; and

3. The type size of the lowest price or highest of the range of discounts is not so exaggerated as to obscure the fact that there is a range of savings.

(6) Price Comparison to List Price or Similar Comparisons.

(A) A seller shall not make any price comparison to a manufacturer's list price, a manufacturer's suggested retail price or other similar comparisons unless--

1. The list price or suggested retail price is the price at which the product is offered by a substantial number of sellers in the seller's trade area;

2. The list price or suggested retail price is a seller's bona fide former price and in compliance with the provisions of 15 CSR **60-7.060**(2); or

3. The seller uses its best efforts and is unable to ascertain that the list price or suggested retail price is the price at which the product is offered by a substantial number of sellers in the seller's trade area. In this circumstance, a seller may reference a list price or suggested retail price in relation to its current price as long as no savings are claimed and the seller clearly discloses that the list price or suggested retail price may not necessarily be the price at which the product is sold in the trade area.

(B) A list or suggested retail price permanently imprinted on or affixed to a product or its container by the manufacturer, and not under the control of or instigated by the seller, need not be covered or obliterated when the seller's current offering price is attached to, printed on or placed on a label, tag or sign accompanying the product, providing that no sale is claimed and no other price comparison is made from it.

(7) Use of Terms--Free, Two for Price of One, Buy One, Get One Free.

(A) A seller shall not state or imply that products are being offered for free or words of similar import (Buy one pair of shoes, second pair free) unless--

1. The seller clearly and conspicuously discloses all material conditions which are imposed on the sale; and

2. The price indicated by the seller as its price for the products that must be purchased as a condition to receiving the free or bonus item is the seller's own former or future price for those products as determined in accordance with 15 CSR **60-7.060**(2) or (3).

(8) Savings Claims Without Disclosing the Basis of the Comparative Price.

(A) Examples: 20% off; Clearance $59, Save $30.

(B) A seller shall not advertise a product as reduced in price without specifically disclosing the basis of the comparison unless the price comparison is a comparison to a seller's former price in compliance with 15 CSR **60-7.060**(2).

Auth: sections 407.020 and 407.145, RSMo (1986).

Original rule filed June 25, 1990, effective Nov. 30, 1990.

NOTES: PURPOSE: The attorney general administers and enforces the provisions of the Merchandising Practices Act, Chapter 407, RSMo (1986). This rule specifies acts and practices that are deemed to be violative of section 407.020, RSMo (1986).

EXHIBIT N

Certified true copy of Exhibit N.

[signature], PARTNER, MORGAN LEWIS 9/22/07

CERTIFIED AT THE CANADIAN EMBASSY
FOR LEGALIZATION OF THE FOREGOING
SIGNATURE OF: STEPHEN PAUL MAHINKA
CERTIFIÉ À L'AMBASSADE DU CANADA
AUX FINS DE LÉGALISER LA SIGNATURE
CI-DESSUS DE:

[signature]
[illegible]
Consular Program Officer
Agent Consulaire
Canadian Embassy/Ambassade du Canada
Washington, D.C.

Consular Section Consulaire
Canadian Embassy
Ambassade du Canada
501 Pennsylvania Avenue, N.W.
Washington, D.C. 20001

NEW JERSEY ADMINISTRATIVE CODE

*** THIS FILE INCLUDES ALL REGULATIONS PUBLISHED THROUGH THE ***

*** NEW JERSEY REGISTER, VOL. 35, NO. 16, AUGUST 18, 2003 ***

TITLE 13. LAW AND PUBLIC SAFETY
CHAPTER 45A. ADMINISTRATIVE RULES OF THE DIVISION OF CONSUMER AFFAIRS
SUBCHAPTER 9. GENERAL ADVERTISING

N.J.A.C. § **13:45A-9.4**

§ 13:45A-9.4 Price reduction advertisements; items of merchandise specifically advertised at a price of more than $100.00

(a) An advertiser offering an item of merchandise specifically advertised for sale at a price of $100.00 or more shall, in addition to complying with the provisions of N.J.A.C. 13:45A-9.2:

1. State the selling price or price range;

2. State the former price or price range or the amount of the reduction in dollars;

3. State with specificity in any price reduction advertisement the period of time during which the price reduction shall be applicable, unless the merchandise is advertised in the manner set forth in N.J.A.C. 13:45A-9.2(a) 1i through iii;

4. Set forth the former price or price range or the amount of reduction in dollars in close proximity to the selling price or price range and the advertised item;

5. Set forth the basis upon which the former price or price range or the amount of reduction in dollars was established in close proximity to the former price or price range of the advertised item. In this regard, terms such as "comparable value," "competitor's price," "our regular price," or words of similar import shall be used to designate the basis for the former price; and

6. Set forth with specificity when in the remote past a former price of an item of merchandise was effective if it was not actively or openly offered for sale within the advertiser's trade area in the regular course of business during at least 28 of the 90 days before the effective date of the advertisement. In this regard, when advertising a seasonal sale, such as Christmas dishes, pool supplies, outdoor furniture, etc., actual dates, specific holidays or terms such as "last season," may be used to describe when the former price was used in the remote past.

(b) A former price or a selling price may be stated in terms of a price range when, and only when:

1. An advertiser operates more than one retail outlet at which advertised merchandise has been or will be available for purchase at different prices in the ordinary course of business. In such case, the price range shall be based upon the sales or offers of sale at the advertiser's retail outlets; or

2. An advertiser advertises two or more items of comparable merchandise as available at reduced prices, in which case the price range shall be based upon former or usual selling prices of the advertised products.

i. The following examples would comply with this paragraph: "Regular price $110 to $125--On sale for $100"; "Brand X 19" color TV--Regularly $250 to $300. Now $150 to $200."

NOTES:
HISTORY:

New Rule, R.1996 d.309, effective July 1, 1996 (operative August 15, 1996).

See: 28 New Jersey Register 1186(a), 28 New Jersey Register 3304(a).

<=1> Chapter Note

EXHIBIT O

Certified true copy of Exhibit O.

, PARTNER, MORGAN LEWIS 9/22/03

ERTIFIED AT THE CANADIAN EMBASSY
OR LEGALIZATION OF THE FOREGOING
IGNATURE OF: STEPHEN PAUL MAHINKA
ERTIFIE A L'AMBASSADE DU CANADA
IN FINS DE LEGALISER LA SIGNATURE
-DESSUS DE:

Hélène Bouchard
onsular Program Officer
Agent Consulaire
anadian Embassy/Ambassade du Canada
ashington, D.C.

Consular Section Consulaire
Canadian Embassy
Ambassade du Canada
501 Pennsylvania Avenue, N.W.
Washington, D.C. 20001

GENERAL BUSINESS LAW
ARTICLE 22-A. CONSUMER PROTECTION FROM DECEPTIVE ACTS AND PRACTICES

NY CLS Gen Bus § **350** (2003)

§ **350.** False advertising unlawful

False advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful.

HISTORY: Add, L 1963, ch 813, eff Sept 1, 1963.
Former § **350**, add, L 1909, ch 25, repealed, L 1957, ch 894, § 1, eff Apr 24, 1957.

NOTES:

CROSS REFERENCES:
This section referred to in §§ 220-j, **350**-d, 863; CLS *Art & Cult Affrs §§ 15.17, 15.19*

FEDERAL ASPECTS:
False advertisement defined, *15 USCS § 55*
Fair packaging and labeling generally, *15 USCS §§ 1451* et seq

RESEARCH REFERENCES AND PRACTICE AIDS:
2A NY Jur 2d, Advertising §§ 11, 14
2 NY Jur, Advertising and Advertisements § 2
21 NY Jur 2d, Consumer and Borrower Protection §§ 9, 176
21 NY Jur 2d, Consumer and Borrower Protection § 14
24 NY Jur 2d, Costs in Civil Actions § 212
67A NY Jur 2d, Injunctions § 19
1 Am Jur Pl and Pr Forms (Rev ed), Advertising, Forms 31, 32

MATHEW BENDER'S NEW YORK PRACTICE GUIDES:
1 New York Practice Guide: Business and Commercial § 8.01

ANNOTATIONS:
Validity, construction, and effect of state legislation regulating or controlling "bait-and-switch" or "disparagement" advertising or sales practices. *50 ALR3d 1008*
Advertising agency as subject to FTC order under *15 USCS § 45* for false or deceptive representations in its advertisements for client's product. *47 ALR Fed 393*

What constitutes "false advertising" of food products or cosmetics within §§ 5 and 12 of the Federal Trade Commission Act *(15 USCS §§ 45, 52). 50 ALR Fed 16*

LAW REVIEWS:

Consumer protection in New York. *32 Albany L Rev 522*

Hill, Damages for innocent misrepresentation. *73 Columbia L Rev 679*

Commercial speech and the first amendment: an emerging doctrine. *5 Hofstra L Rev 655*

Developments in the regulation of supermarket advertising practices: an empirical analysis. *48 NY U L Rev 395*

TEXTS:

Bjorklund, Fishman & Kurtz, New York Nonprofit Law and Practice with Tax Analysis § 6-6(b)

New York Intellectual Property Handbook (1999 ed, Matthew Bender)

CASE NOTES

Plaintiffs who failed to conceive child after participating in defendants' in vitro fertilization program could maintain action for deceptive practices and false advertising under consumer protection statutes (CLS *Gen Bus §§ 349* and *350*) although defendants' alleged misrepresentations related to provision of medical services.*Karlin v IVF Am., Inc. (1999) 93 NY2d 282, 690 NYS2d 495, 712 NE2d 662.*

In action by plaintiffs who failed to conceive child after participating in defendants' in vitro fertilization program, claims for deceptive practices and false advertising under consumer protection statutes (CLS *Gen Bus §§ 349* and *350*) were not governed exclusively by informed consent statute (CLS *Pub Health § 2805-d*) where complaint alleged that defendants' "promotional materials, advertisements, slide presentations and so-called educational seminars" contained misrepresentations that had effect of "deceiving and misleading members of the public."*Karlin v IVF Am., Inc. (1999) 93 NY2d 282, 690 NYS2d 495, 712 NE2d 662.*

Consumer protection claims arising from defendants' operation of in vitro fertilization program did not foreclose additional claims under informed consent statute (CLS *Pub Health § 2805-d*) because interests at stake in action under **General Business Law** are distinctly different from interests involved in suit for professional malpractice.*Karlin v IVF Am., Inc. (1999) 93 NY2d 282, 690 NYS2d 495, 712 NE2d 662.*

Plaintiff, public interest and consumer advocacy organization, and three individual plaintiffs, who are alleged to be plaintiffs in personal injury actions, brought action against defendant, mouthpiece for insurance industry, and its president, predicated upon paid advertisements in magazines and on television in which defendant expressed its views concerning supposedly dire social and financial costs attendant upon explosion of civil lawsuits and escalating jury awards; plaintiffs allege that defendant's editorial campaign was false, misleading and deceptive and, therefore, in violation of ***General Business Law §*** *349 (a)* and § **350**; section 349 (a) prohibits deceptive acts or practices in conduct of any business, trade or commerce or in furnishing of any service and section **350** proscribes false advertising in conduct of any business, trade or commerce or in furnishing of any service- ***General Business Law §§ 349*** and ***350*** are consumer protection statutes never intended to encompass type of editorial comment at issue herein and, indeed, could not constitutionally do so; to construe sections 349 and **350** otherwise would be to render them contrary to First Amendment-defendant's advertisements were not commercial speech and were, accordingly, due full protection of First Amendment; subject advertisements do not propose commercial transaction since they are not specifically directed at potential purchasers of advertiser's product; to extent that defendant's purpose was to influence public officials, voters and citizens in general in order to increase sympathy for concerns of insurance industry, defendant was engaged in precisely sort of free debate which First Amendment was intended to safeguard; consequently, defendant's motion to dismiss complaint against it was properly granted. *New York Pub. Interest Research Group v Insurance Information Inst., 161 AD2d 204.*

In view of the immediate correction of the offending advertisement and the passage of almost three years without repetition of the offense, it would be inappropriate to grant injunctive relief against defendant for violation of unlawful advertising statute and the People should be relegated solely to recovery of civil penalty. *People by Lefkowitz v Volkswagen of America, Inc. (1975, 1st Dept) 47 AD2d 868, 366 NYS2d 157.*

Under statute relating to unlawful advertising the test is not whether the average man would be deceived since statutes are enacted to safeguard the vast multitude which includes the ignorant, the unthinking and the credulous. *People by Lefkowitz v Volkswagen of America, Inc. (1975, 1st Dept) 47 AD2d 868, 366 NYS2d 157.*

Deceptive and misleading advertising has a tendency to deceive or mislead the purchasing public and is therefore per se a violation of the unlawful advertising statute as well as public policy of *New York. People by Lefkowitz v Volkswagen of America, Inc. (1975, 1st Dept) 47 AD2d 868, 366 NYS2d 157.*

In action brought by Attorney General under statute making it offense to indulge in deceptive business conduct, question of grant of permanent injunction would be decided after trial, where public was adequately protected by temporary injunction in effect and where grant of partial summary judgment for permanent injunction would not spare time or effort of either court or litigants. *People v Record Club of America, Inc. (1976, 1st Dept) 51 AD2d 709, 380 NYS2d 26.*

Mail-order seller of photographic equipment was entitled to hearing in proceeding in which Attorney General sought permanent injunction to prevent seller from engaging in fraudulent conduct (failure to ship and to issue refunds), and in false and deceptive advertising, where proof of such conduct consisted only of unsworn complaint letters and affirmation of attorney who lacked knowledge of facts; prior to hearing, relief granted should be limited to preliminary injunction. *People by Abrams v D.B.M. International Photo Corp. (1987, 1st Dept) 135 App Div 2d 353, 521 NYS2d 246.*

Depositor's allegations that bank imposed $3 quarterly charge on accounts with balance below $250, without notice or proper authorization, stated cause of action for deceptive business practices under CLS *Gen Bus §§ 349* and ***350***; further, depositor's cause of action on behalf of class of similarly situated depositors stated claim on behalf of proposed class. *Littlefield v Goldome Bank (1988, 4th Dept) 142 App Div 2d 978, 530 NYS2d 400.*

Complaint did not present nonjusticiable political question by alleging that charitable organization had misrepresented in its literature that it allocated funds collected from contributors for charitable use throughout Israel, including areas acquired during Six-Day War, when in fact it had failed to distribute resources to areas acquired during that war, since court was not required to determine whether State of Israel encompassed territories acquired during war, but only whether charity was misrepresenting use to which funds obtained from contributors were being used. *Marcus v Jewish Nat. Fund, Inc. (1990, 1st Dept) 158 App Div 2d 101, 557 NYS2d 886.*

Advertisements, brochures, and other solicitations distributed by charitable organization were not exempt from compliance with strictures against false advertising and other deceptive practices as provided in CLS *Gen Bus §§ 349* and ***350***. *Marcus v Jewish Nat. Fund, Inc. (1990, 1st Dept) 158 App Div 2d 101, 557 NYS2d 886.*

Court properly enjoined charitable organization from distributing allegedly misleading advertisements for solicitations since (1) there would be significant risk that people would contribute money under mistaken impression concerning where their contributions would go if charity were allowed to persist in its deceptive practices, (2) plaintiffs merely wished to preserve status quo and not prevent charity from soliciting donations, and (3) there was strong likelihood that plaintiffs would ultimately prevail on merits. *Marcus v Jewish Nat. Fund, Inc. (1990, 1st Dept) 158 App Div 2d 101, 557 NYS2d 886.*

CLS *Gen Bus §§ 349* and ***350*** were inapplicable to series of pain advertisements in magazines and on television in which Insurance Information Institute expressed its views concerning supposedly dire social and financial costs attendant upon explosion of civil lawsuits and escalating jury awards; as consumer protection laws, §§ 349 and 350 prohibit, and have only been applied to, frauds or other deceptive practices arising from commercial transactions and not to general expressions of opinion about public matters. *New York Public Interest Research Group, Inc. v Insurance Information Inst. (1990, 1st Dept) 161 AD2d 204, 554 NYS2d 590, 17 Media L R 1974, 14 USPQ2d 2067.*

Complaint failed to state cause of action against merchant for false advertising and unfair and deceptive practice pursuant to CLS *Gen Bus §§ 349* and ***350*** where it alleged that plaintiff purchased bicycle at fictitious "sale" price, but defendant submitted sales slip receipts, advertisements and computer information, supported by affidavit of its sales manager, to show that "regular" and "sale" prices were bona fide prices.*Abramovitz v Paragon Sporting Goods Co. (1994, 1st Dept) 202 AD2d 206, 608 NYS2d 432.*

Securities transactions come within ambit of CLS *Gen Bus §§ 349* and ***350***. *Breakwaters Townhomes Ass'n v Breakwaters of Buffalo (1994, 4th Dept) 207 AD2d 963, 616 NYS2d 829.*

Court properly dismissed counterclaims purporting to allege violations of New York Consumer Protection Act based on theories of trademark infringement and unfair competition involving alleged use of confusing labels in manufacture of women's coats, which does not pose significant risk of harm to public health or interest.*DePinto v Ashley Scott, Inc. (1995, 1st Dept) 222 AD2d 288, 635 NYS2d 215.*

Sale of securities in cooperative corporation to residential shareholders is consumer-oriented transaction within meaning of CLS *Gen Bus §§ 349* and ***350***. *B.S.L. One Owners Corp. v Key Int'l Mfg. (1996, 2d Dept) 225 AD2d 643, 640 NYS2d 135.*

In proceeding under CLS *Exec § 63(12)* and CLS Gen Bus Art 22-A, court properly enjoined respondents from engaging in pool installation business despite contention that they supplied items sold in each instance and did not operate "phantom business," where they repeatedly advertised and offered contracts to consumers containing full-year

warranty on parts and labor and lifetime warranty on construction, and then failed to fulfill these warranties by refusing to correct defects and conditions covered thereunder, which constituted deceptive practice under CLS *Gen Bus § 349* and misleading advertising under CLS *Gen Bus § 350. People* by *Koppell v Empyre Inground Pools (1996, 3d Dept) 227 AD2d 731, 642 NYS2d 344.*

False advertising claim under CLS *Gen Bus § 350* should have been dismissed where there was no showing that any plaintiff relied upon or even knew about defendant's allegedly false advertisements when cars in question were purchased. *McGill v GMC (1996, 1st Dept) 231 AD2d 449, 647 NYS2d 209.*

Filed rate doctrine, coupled with related doctrine of "primary administrative jurisdiction," mandated dismissal with prejudice of all actions brought by plaintiff, telephone customer and ratepayer, alleging that defendants secretly and fraudulently followed policy of charging for phone calls in whole-minute increments only, since consumer's claim, however disguised, seeking relief for injury allegedly caused by payment of rate on file with regulatory commission, is attack on rate approved by regulatory commission.*Porr v NYNEX Corp. (1997, 2d Dept) 230 AD2d 564, 660 NYS2d 440,* motion den (NY App Div, 2d Dept) *1997 NY App Div LEXIS 11103* and app den *91 NY2d 807, 669 NYS2d 260, 692 NE2d 129.*

Injunctive relief was not warranted in action in which plaintiff, telephone customer and ratepayer, alleged that defendants secretly and fraudulently followed policy of charging for phone calls in whole-minute increments only since plaintiff did not show that he was in imminent danger of suffering irreparable harm for which legal remedies were inadequate if defendants did not
more conspicuously advertise their "rounding up" practice; moreover, courts are not equipped to dictate or police how such defendants advertise their charges, tasks which legislature has expressly assigned to *Public Service Commission.Porr v NYNEX Corp. (1997, 2d Dept) 230 AD2d 564, 660 NYS2d 440,* motion den (NY App Div, 2d Dept) *1997 NY App Div LEXIS 11103* and app den *91 NY2d 807, 669 NYS2d 260, 692 NE2d 129.*

Students stated no cause of action against self-improvement/lifestyle teacher for false advertising under CLS *Gen Bus § 350* where enrollment materials put in issue were clearly not advertisements.*Bader v Siegel (1997, 1st Dept) 238 AD2d 272, 657 NYS2d 28.*

Court should have dismissed plaintiffs' actions alleging violations of CLS *Gen Bus §§ 349* and *350*, which were premised on statements made to plaintiffs and other patients about course of treatment at defendants' infertility clinic and probable results of that treatment; statutes do not extend to providers of medical services.*Karlin v IVF Am. (1997, 2d Dept) 239 AD2d 560, 658 NYS2d 73,* app gr *92 NY2d 807, 678 NYS2d 593, 700 NE2d 1229*
and motion gr (NY) *1999 NY LEXIS 747* and mod in part and revd in part (NY) *1999 NY LEXIS 815.*

Court properly denied plaintiffs' motion for class certification in action brought under CLS *Gen Bus §§ 349* and *350*, alleging that defendants, operators of fertility clinic, misrepresented their success rates and concealed health risks of treatment, since individual issues existed as to what each patient was told about treatment, effect on each patient, and extent of damages.*Karlin v IVF Am. (1997, 2d Dept) 239 AD2d 562, 657 NYS2d 460,* dismd (2d Dept) *239 AD2d 560, 658 NYS2d 73,* app gr *92 NY2d 807, 678 NYS2d 593, 700 NE2d 1229* and motion gr (NY) *1999 NY LEXIS 747* and mod in part and revd in part (NY) *1999 NY LEXIS 815.*

Insured company was entitled to summary judgment declaring that its liability insurer was required to defend it in underlying action for disparagement of another company's products, despite policy exclusion of advertising injury "arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity," where (1) complaint in underlying action alleged not only fraudulent intent but also violations of CLS *Gen Bus §§ 349* and *350*, which do not require proof of intentional or even reckless conduct, (2) there was sworn testimony that offending letter was published without knowledge of its falsity, and (3) because insurer might be obligated to indemnify insured for at least some causes of action asserted in underlying action, it had to defend insured on all causes of action asserted therein.*Simply Lite Food Corp. v Aetna Cas. & Sur. Co. of Am. (1997, 2d Dept) 245 App Div 2d 500, 666 NYS2d 714.*

Insured was entitled to judgment declaring that insurer had duty to defend it in underlying federal action for false advertising and deceptive business practices where insured could be liable under Lanham Act and CLS *Gen Bus §§ 349* and *350*
without showing of intentional or knowing conduct on its part, such conduct being relevant on issue of damages only.*PG Ins. Co. v S.A. Day Mfg. Co. (1998, 4th Dept) 251 AD2d 1065, 674 NYS2d 199.*

Court erred in granting class certification in consumer fraud actions against cigarette manufacturers and various tobacco-related industries purportedly brought on behalf of cigarette consumers where proposed class actions would be unmanageable because individual factual issues of reliance, causation, and damages as to each of 5 million plaintiffs predominated over any common issues relating to defendants' alleged conspiracy to deceive public.*Small v Lorillard Tobacco Co. (1998, 1st Dept) 252 AD2d 1, 679 NYS2d 593,* app gr (App Div, 1st Dept) *681 NYS2d 748,* motion gr (NY) *1999 NY LEXIS 2884* and affd, ctfd ques ans *94 NY2d 43, 698 NYS2d 615, 720 NE2d 892.*

Plaintiffs' claims were preempted by Federal Cigarette Labeling and Advertising Act insofar as they alleged fraudulent concealment and failure to warn of dangers of nicotine against cigarette manufacturers and various tobacco-related entities; those claims that were not preempted insofar as they alleged affirmative misrepresentations on which plaintiffs relied to their detriment would also be dismissed since plaintiffs' allegations of misrepresentation did not furnish sufficient examples of misrepresentations on which they relied necessary to support prima facie case that defendants defrauded plaintiffs by means of affirmative misrepresentations about addictive properties of nicotine in their cigarettes.*Small v Lorillard Tobacco Co. (1998, 1st Dept) 252 AD2d 1, 679 NYS2d 593,* app gr (App Div, 1st Dept) *681 NYS2d 748,* motion gr (NY) *1999 NY LEXIS 2884* and affd, ctfd ques ans *94 NY2d 43, 698 NYS2d 615, 720 NE2d 892.*

In special proceeding under CLS *Exec § 63(12)* and CLS Gen Bus Art 22-A alleging that respondents engaged in fraudulent and deceptive scheme to induce authors to submit their manuscripts to respondents for editing by misleading them into believing that their work had been selected because it had commercial potential, court properly issued permanent injunction without conducting hearing, where respondents failed to raise any triable issues in response to Attorney General's prima facie case; however, it was abuse of discretion for court to order restitution in full amount of fees received by respondents without proof of percentage attributable to their deception.*People v Appel (1999, 4th Dept) 258 AD2d 957, 685 NYS2d 504,* reargument den (NY App Div, 4th Dept) *1999 NY App Div LEXIS 5151.*

Car manufacturer's failure to include Automatic Ride Control feature in car purchased by plaintiff was not deserving of sanction under CLS *Gen Bus §§ 349* and *350* where it had voluntarily disclosed that vehicles in question were not equipped with Automatic Ride Control, it refunded $650 purchase price of that feature, and relatively small number of customers other than plaintiff were affected.*Faden Bayes Corp. v Ford Motor Co. (1999, 1st Dept) 259 AD2d 352, 687 NYS2d 63.*

In action against defendant which supplied panels containing allegedly inferior product known as "Duripanel" for use in construction and installation of exterior walls of plaintiff's building, court should have dismissed CLS *Gen Bus § 350* cause of action for lack of proof of any deceptive act or practice in that (1) defendant's failure to disclose that product supplied to installer contained Duripanel with epoxy resin coating, while possibly less than candid, could not be found deceitful given its unrefuted assertion that it believed that epoxy resin coated Duripanel was suitable for exterior use, and (2) record established only 4 customer complaints, which did not in and of itself rise to fraudulent failure to disclose.*St. Patrick's Home for the Aged & Infirm v Laticrete Int'l (1999, 1st Dept) 264 AD2d 652, 696 NYS2d 117, 39 UCCRS2d 774,* later proceeding (1st Dept)
267 AD2d 166, 700 NYS2d 28.

In action for breach of contract and violation of CLS *Gen Bus §§ 349* and *350*, court properly granted motion for class certification where predominant focus of litigation was defendants' general practice of offering, in prominent print, ostensibly easily available credit insurance coverage, while, at same time, relegated to small, inconspicuous print precise terms of coverage being extended, and then rejecting insurance claims on ground that customer had not been paying for appropriate type of insurance; matter affected hundreds, if not thousands, of consumers who, responding to offers, enrolled for credit insurance defendant purported to offer.*Taylor v American Bankers Ins. Group (1999, 1st Dept) 267 AD2d 178, 700 NYS2d 458.*

Purchasers' false advertising claim, arising from defendant computer seller's alleged failure to deliver promised "round-the-clock" service, was within scope of arbitration clause contained in sales agreements delivered with computers; service contract did not apply to some separate product which could be retained while computer products were returned.*Brower v Gateway 2000 (1998, 1st Dept) 246 AD2d 246, 676 NYS2d 569, 37 UCCRS2d 54.*

In action against publishers of "Yellow Pages" telephone directories alleging, inter alia, untimely distribution of Yellow Pages in which plaintiffs had purchased advertisements for their small businesses, complaint failed to state cause of action for false advertising under CLS Gen Bus art 22-A as (1) advertisement space in Yellow Pages is, by definition, available to businesses only, and (2) plaintiffs did not show how complained-of conduct might directly or potentially affect consumers at large.*Cruz v NYNEX Info. Resources (2000, 1st Dept) 263 AD2d 285, 703 NYS2d 103.*

Action under CLS *Gen Bus §§ 349* and *350* for misrepresentation of nutritional contents of food product was not preempted by Federal Nutritional Labeling and Education Act (NLEA) where (1) CLS *Gen Bus § 349(d)* specifically excludes from its remedial ambit any act or practice subject to and in compliance with federal rules, regulations, or statutes, (2) defendants' alleged misconduct did not violate NLEA, (3) plaintiffs did not seek to impose liability for conduct sanctioned by NLEA, and (4) consistency of plaintiffs' remedial objectives with NLEA did not render their action one to enforce NLEA per se, because such enforcement action may be instituted only by United States or by states with federal permission.*Morelli v Weider Nutrition Group, Inc. (2000, 1st Dept) 275 AD2d 607, 712 NYS2d 551.*

Congress, in committing to United States power to enforce Federal Nutritional Labeling and Education Act, did not intend to limit state's otherwise undoubted power to afford consumers within its borders statutory remedy for injuries

caused by knowingly deceptive and misleading business practices where, as in present case, such remedy does not interfere with federal prerogative to promulgate and enforce uniform food labeling standards.*Morelli v Weider Nutrition Group, Inc. (2000, 1st Dept) 275 AD2d 607, 712 NYS2d 551.*

In class action on behalf of all subscribers to health care plans offered by insurer and related defendants, plaintiffs' causes of action for breach of contract, fraud, and violations of CLS *Gen Bus §§ 349(a)* and ***350*** were properly sustained over defendants' objection that, under CLS *Pub Health § 4406*
, responsibility for regulating contracts of health maintenance organizations lies with Commissioner of Department of Health where nothing in § 4406 or elsewhere in statutory scheme suggests clear legislative intent to preempt common-law or other rights and remedies.*Batas v Prudential Ins. Co. of Am. (2001, 1st Dept) 281 AD2d 260, 724 NYS2d 3,* motion gr (App Div, 1st Dept) *721 NYS2d 856.*

In class action on behalf of all subscribers to health care plans offered by insurer and related defendants, plaintiffs sufficiently stated cause of action for fraud where (1) claim that defendants misrepresented facts in materials used to induce potential subscribers to obtain defendants' health insurance policies was not duplicative of plaintiffs' breach of contract claim, which was based on defendants' alleged failure to conduct promised utilization review procedures, and (2) plaintiffs adequately pleaded reliance, it being unnecessary at pleading stage to set forth with particularity materials relied on.*Batas v Prudential Ins. Co. of Am. (2001, 1st Dept) 281 AD2d 260, 724 NYS2d 3,* motion gr (App Div, 1st Dept) *721 NYS2d 856.*

Claims by non-New York subscribers to defendants' Digital Subscriber Line (DSL) service, premised on defendants alleged misrepresentations in violation of CLS *Gen Bus §§ 349* and ***350***, should have been dismissed where non-New York residents did not allege that they received DSL services in New York state.*Scott v Bell Atl. Corp. (2001, 1st Dept) 282 AD2d 180, 726 NYS2d 60,* reargument den (NY App Div, 1st Dept) *2001 NY App Div LEXIS 9516* and app gr, in part *97 NY2d 698, 739 NYS2d 95, 765 NE2d 299.*

In action by present or former subscribers to defendants' Digital Subscriber Line (DSL) service, seeking to hold defendants liable for allegedly misrepresenting quality of their DSL service, plaintiffs' CLS *Gen Bus §§ 349* and ***350*** claims should have been dismissed for failure to allege requisite false or deceptive conduct since representations concerning maximum possible speed, dedicated connection, and quality of technical support staff had to be evaluated in light of 30-day trial period and right to cancel without obligation, provisions of Internet Access Service Agreement stating that service would be provided on "as is" or "as available" basis, and specific and general disclaimers of express and implied warranties.*Scott v Bell Atl. Corp. (2001, 1st Dept) 282 AD2d 180, 726 NYS2d 60,* reargument den (NY App Div, 1st Dept) *2001 NY App Div LEXIS 9516* and app gr, in part *97 NY2d 698, 739 NYS2d 95, 765 NE2d 299.*

In action on behalf of proposed class of subscribers to defendant's wireless communications plan, alleging that subscribers often experienced difficulties with service due to inadequacy of communications network in handling demand which contradicted defendant's advertising and marketing representations, claims for common-law fraud and violations of CLS *Gen Bus §§ 349,* ***350*** **and** ***350*** *-a,* for making false statements and concealing material information, were not preempted under Federal Communications Act, *47 USCS § 332*
(c)(3)(A).*Naevus Int'l, Inc. v AT&T Corp. (2001, 1st Dept) 283 AD2d 171, 724 NYS2d 721.*

In action by subscribers to AT&T corporation's "Digital One Rate" wireless communications plan, alleging that they often experienced difficulties with service due to inadequacy of communications network in handling demand, which contradicted AT&T's advertising and marketing representations, plaintiffs' claim that defendant retailer that enrolled subscribers in Digital One Rate plan had superior knowledge, and displayed AT&T's advertising and promotional literature which it knew to be false, yet failed to warn subscribers who relied on that literature, was sufficient to support causes of action under CLS *Gen Bus §§ 349,* ***350*** **and** ***350*** *-a.Naevus Int'l, Inc. v AT&T Corp. (2001, 1st Dept) 283 AD2d 171, 724 NYS2d 721.*

Court erred in concluding that company's acts did not affect consumers at large by offering 2-year, fixed-price contracts for delivery of home heating oil where company solicited contracts from public and, after entering into some 143 contracts, unilaterally changed their terms.*People v Wilco Energy Corp. (2001, 2d Dept) 284 AD2d 469, 728 NYS2d 471.*

Company's conduct constituted deceptive practice under CLS *Gen Bus §§ 349* and ***350*** by offering fixed-price contracts for delivery of home heating oil and then refusing to comply with agreed-upon price, notwithstanding that company reinstated fixed prices and credited its customers' accounts after complaints were made and investigation commenced; further, defense of commercial impracticability under CLS *UCC § 2-615* was not applicable.*People v Wilco Energy Corp. (2001, 2d Dept) 284 AD2d 469, 728 NYS2d 471.*

In action to compel sponsor of cooperative conversion to sell unsold shares of cooperative units it had held for more than 10 years, plaintiffs' CLS *Gen Bus §§ 349* and ***350*** fraud claims were dismissed for lack of standing, as Attorney General has exclusive jurisdiction to prosecute sponsors who violate disclosure requirements of

Martin Act.511 W. 232nd Owners Corp. v Jennifer Realty Co. (2001, 1st Dept) 285 AD2d 244, 729 NYS2d 34, reargument den, app gr (1st Dept) *287 AD2d 947, 735 NYS2d 746,* motion gr (NY) *2002 NY LEXIS 177* and motion gr (NY) *2002 NY LEXIS 166* and motions ruled upon (NY) *2002 NY LEXIS 485* and motions ruled upon (NY) *2002 NY LEXIS 524.*

It appeared the state legislature intended to adopt requirements identical to those established by the Federal Trade Commission and to apply them to intrastate transactions in New York. The defense that advertising is subject to and complies with rules and regulations of statutes administered by the Federal Trade Commission must be made available in any action to enforce provisions of local laws relating to advertising. *Metropolitan New York Retail Merchants Asso. v New York (1969) 60 Misc 2d 805, 303 NYS2d 612.*

Enforcement of the **General Business Law** is in the province of the Attorney General and individual plaintiffs are without standing to bring actions with respect to such laws. *Schutzman & Schutzman v News Syndicate Co. (1969) 60 Misc 2d 827, 304 NYS2d 167.*

Provisions of the Executive Law and the **General Business Law** authorizing the Attorney General to apply for an order enjoining allegedly fraudulent, illegal and deceptive practices and acts in the marketing and sale of certain products is not unconstitutional as being ambiguous, as failing to define proscribed conduct in language that is able to be understood, nor as amounting to an unauthorized delegation of legislative authority.
State by Lefkowitz v Fey (1976) 87 Misc 2d 987, 386 NYS2d 549.

No cause of action under *Gen Bus Law §§ 349* or ***350*** could be maintained by airline passengers who were bumped from reserved seats on an airline flight, where the airline fully complied with CAB regulations governing disclosures of its bumping policies. Further, the passengers could not maintain that a confirmed reservation was a warranty of boarding so as to sustain a cause of action for breach of warranty, where the tickets expressly stated that a confirmed reservation holder might be denied passage. *Mendelson v Trans World Airlines, Inc. (1983) 120 Misc 2d 423, 466 NYS2d 168.*

Persons in business of providing information on abandoned assets held by state comptroller who falsely claim in solicitations that consumer must know source of funds before funds can be claimed and that only persons in business can supply necessary information, who falsely and misleadingly claim that they have irrefutable proof that solicited consumer is entitled to money held by state, who mislead consumers into thinking that they are entitled to substantial amount of money and who create false impression that consumer must respond to solicitation at once in order to prevent state from keeping abandoned property permanently have violated CLS *Exec Law § 63* and CLS *Gen Bus Law § **350**. State v Abandoned Funds Information Center, Inc. (1985) 129 Misc 2d 614, 493 NYS2d 907.*

Criteria which private party must meet to obtain preliminary injunction for false advertising under CLS Gen Bus Art 22-A are those criteria traditionally required for such relief, since CLS *Gen Bus § **350**-d* states that Art 22-A "neither enlarges nor diminishes the rights of parties in private litigation except as provided in this section." *McDonald v North Shore Yacht Sales, Inc. (1987) 134 Misc 2d 910, 513 NYS2d 590.*

To establish private cause of action for false advertising pursuant to CLS *Gen Bus §§ **350** and **350**-a*, plaintiff is only required to demonstrate that advertisement was misleading in material respect and that he was injured; injured person is defined as one who was misled or deceived by such advertisement. *McDonald v North Shore Yacht Sales, Inc. (1987) 134 Misc 2d 910, 513 NYS2d 590.*

Retail car dealer violated state and federal truth in lending laws by displaying large signs in showroom windows stating "No Money Down" and "$99/Mo" when in fact customers could not buy cars on those terms; laws require full disclosure in plain language, dealer's advertising scheme was come-on designed to lure customers by half truths or falsity, and plaintiff was not required to show that advertising injured anyone, only that it had misleading effect. *State v Terry Buick, Inc. (1987) 137 Misc 2d 290, 520 NYS2d 497.*

Injunction against false and deceptive advertising was available remedy for established violation of federal and state truth in lending laws, without showing of irreparable damage, since traditional concepts of irreparable damage which apply to private parties do not govern public interest field. *State v Terry Buick, Inc. (1987) 137 Misc 2d 290, 520 NYS2d 497.*

Statutes prohibiting deceptive practices and false advertising in conduct of any business (CLS *Gen Bus §§ 349* and ***350***) were applicable to advertisements sponsored by non-profit insurance industry communications organization, which asserted that quality of every American's life was threatened by large awards handed down in personal injury actions, since § 349 applies to "deceptive acts or practices in the conduct of any business," and by its own definition, organization's business was to provide information about insurance business; moreover, there was no dispute that communications at issue constituted "advertising" under § **350.** *New York Public Interest Research Group, Inc. v Insurance Information Institute (1988) 140 Misc 2d 920, 531 NYS2d 1002,* affd (1st Dept) *161 App Div 2d 204, 554 NYS2d 590, 17 Media L R 1974, 14 USPQ2d 2067.*

New York Public Interest Research Group, which, inter alia, conducted research and made recommendations concerning insurance-related issues, stated cause of action for violation of CLS *Gen Bus §§ 349* and ***350***

, which prohibit deceptive practices and false advertising in conduct of any business, where it was alleged that defendant, non-profit insurance industry communications organization, was mouthpiece of insurance industry, was deliberately deceiving public, through its "Lawsuit Crisis" advertising campaign, about nature and cause of current "insurance crisis" (high cost and unavailability of liability insurance), and that purported "Lawsuit Crisis" was myth manufactured by insurance industry to prejudice juries and judges, subvert judicial system, and undermine right to jury trial. *New York Public Interest Research Group, Inc. v Insurance Information Institute (1988) 140 Misc 2d 920, 531 NYS2d 1002,* affd (1st Dept) *161 App Div 2d 204, 554 NYS2d 590, 17 Media L R 1974, 14 USPQ2d 2067.*

New York Public Interest Research Group (NYPIRG), and individuals who were plaintiffs in separate personal injury actions, had standing to bring action under CLS *Gen Bus §§ 349* and ***350*** for money damages and to restrain allegedly false advertising sponsored by insurance industry communications organization, whose advertisements asserted that quality of every American's life was threatened by large awards handed down in personal injury actions, since (1) NYPIRG qualified as bona fide organization dedicated to serving interests of general public welfare, (2) statutes were enacted to protect general public, and (3) individual plaintiffs fell within zone of interest to be protected, for if their allegations were deemed true, they would settle their cases for amounts less than their personal injury actions would otherwise be worth, or would receive reduced jury verdicts as result of effect of defendant's advertising on people who would comprise juries in civil actions. *New York Public Interest Research Group, Inc. v Insurance Information Institute (1988) 140 Misc 2d 920, 531 NYS2d 1002,* affd (1st Dept) *161 App Div 2d 204, 554 NYS2d 590, 17 Media L R 1974, 14 USPQ2d 2067.*

Advertisements sponsored by insurance industry communications organization (organization), asserting that quality of every American's life was threatened by large awards handed down in personal injury actions, were not primarily commercial speech, and thus were subject to full first amendment protection, since advertisements (1) were not directed to potential buyers of insurance products and, as such, did not propose commercial transaction, (2) sought to influence public, as potential voters, to encourage particular legislative action, and, as potential jurors, to award lower verdicts in personal injury cases, and (3) sought to improve image of insurance industry; thus, organization was entitled to dismissal of action for violation of CLS *Gen Bus*
§§ 349 and ***350***, which prohibit deceptive practices and false advertising in conduct of any business, since it would be constitutionally impermissible to regulate, on basis of its falsity, advertising whose primary purpose was to influence variety of public debates. *New York Public Interest Research Group, Inc. v Insurance Information Institute (1988) 140 Misc 2d 920, 531 NYS2d 1002,* affd (1st Dept) *161 App Div 2d 204, 554 NYS2d 590, 17 Media L R 1974, 14 USPQ2d 2067.*

Deceptive acts and practices and false advertising may be established by one's capacity to deceive or mislead. *Vallery v Bremuda Star Line, Inc. (1988) 141 Misc 2d 395, 532 NYS2d 965.*

Test as to whether representation is deceptive or misleading is measured not against standard of reasonable person but against public, including unwary and unthinking consumers who buy on impulse motivated by appearances and general impressions as affected by advertising and sales representations. *Vallery v Bremuda Star Line, Inc. (1988) 141 Misc 2d 395, 532 NYS2d 965.*

Plaintiffs established false advertising and deceptive business acts by cruise ship line where (1) plaintiffs booked cruise for themselves and their children on ship, based on advertising and representations by cruise ship line's agent which led plaintiffs to believe that they would be residing in luxury cabin and that children's playroom would be available for their young children, but (2) stateroom in which plaintiffs resided did not meet quality represented to them and there was no children's playroom available. *Vallery v Bremuda Star Line, Inc. (1988) 141 Misc 2d 395, 532 NYS2d 965.*

Representations by cruise ship line regarding stateroom did not constitute mere puffing since representations assigned qualities to stateroom which it did not possess. *Vallery v Bremuda Star Line, Inc. (1988) 141 Misc 2d 395, 532 NYS2d 965.*

Failure by employer-fee-paid employment agency to disclosure its identity in classified advertisements did not constitute false advertising "in the conduct of any business, trade or commerce or in the furnishing of any service" within meaning of CLS *Gen Bus § 350*; to hold otherwise would negate express legislative intent exempting such agencies from disclosure requirement. *Association of Personnel Consultants, Inc. v Green (1992, Sup) 153 Misc 2d 156, 580 NYS2d 635.*

Doctrine of primary jurisdiction and filed rate doctrine did not apply to action alleging that defendant telephone corporations engaged in deceptive and fraudulent conduct by concealing from public their policy of charging for telephone calls in whole-minute increments ("rounding up") as gravamen of claim sounded in fraudulent advertising, which does not implicate reasonableness of filed rate; thus, defendants' motion to dismiss causes of action under CLS *Gen Bus §§ 349* and ***350***
was denied.*Porr v NYNEX Corp. (1996, Sup) 170 Misc 2d 203, 650 NYS2d 509.*

Credit card holders were entitled to recover from issuing bank under CLS *Gen Bus § 350* where solicitation for credit insurance issued by bank was false and misleading, and reasonable consumers receiving solicitation as part of monthly billing statement would have believed that credit unemployment insurance had been made part of their coverage with no need for them to take further action; card members' claim for breach of contract and bank's counterclaims for amounts owing on cards amounted to setoff, so net recovery of each party was zero.*Kermit Card v Chase Manhattan Bank (USA) (1996, Civ Ct) 175 Misc 2d 389, 669 NYS2d 117.*

By falsely advertising attentive customer services and disseminating fictitious testimonials, respondent violated CLS *Gen Bus § 350. People* by *Vacco v Lipsitz (1997, Sup) 174 Misc 2d 571, 663 NYS2d 468.*

Claims under CLS *Gen Bus §*
§ 349 and *350*, based on allegedly deceptive acts and practices and false advertising by defendant tobacco companies and associations, were not preempted by Cigarette Labeling and Advertising Act, *15 USCS § 1354*(b), as such claims were based, not on duty to warn, but on duty not to deceive or make false statements.*Small v Lorillard Tobacco Co. (1997, Sup) 176 Misc 2d 413, 672 NYS2d 601,* revd, complaint dismd (App Div, 1st Dept) *677 NYS2d 515,* recalled, vacated, on reh (App Div, 1st Dept) *681 NYS2d 748* and substituted op (1st Dept) *252 AD2d 1, 679 NYS2d 593,* app gr (App Div, 1st Dept) *681 NYS2d 748.*

Plaintiffs sufficiently stated cause of action for false advertising against cigarette manufacturers, where amended complaints alleged several purportedly false advertisements on which some plaintiffs relied.*Small v Lorillard Tobacco Co. (1997, Sup) 176 Misc 2d 413, 672 NYS2d 601,* revd, complaint dismd (App Div, 1st Dept) *677 NYS2d 515,* recalled, vacated, on reh (App Div, 1st Dept) *681 NYS2d 748* and substituted op (1st Dept) *252 AD2d 1, 679 NYS2d 593,* app gr (App Div, 1st Dept) *681 NYS2d 748.*

In consumer class action on behalf of all persons who purchased book entitled "The Beardstown Ladies' Common-Sense Investment Guide," which was advertised, marketed and sold based on false assertion (repeated on book's cover) that club achieved annual rate of return in securities investments of 23.4 percent over 10-year period, claims under CLS *Gen Bus §§ 349* and *350* were dismissed because, under state constitution and cases interpreting federal constitution, challenged statements were not "core" commercial speech
and were entitled to full First Amendment protection.*Lacoff v Buena Vista Publ'g, Inc. (2000, Sup) 183 Misc 2d 600, 705 NYS2d 183, 28 Media L R 1307.*

Plaintiffs' claims of telecommunication companies' violation of CLS *Gen Bus §§ 349* and *350*, and common-law fraud, were not preempted by federal Communications Act of 1934 *(47 USCS § 332*(c)(3)) since they were not tantamount to regulation of companies' rates or entry into market.*Naevus Int'l, Inc. v AT&T Corp. (2000, Sup) 185 Misc 2d 655, 713 NYS2d 642,* affd in part and mod in part (App Div, 1st Dept) *724 NYS2d 721.*

Buyers of an improved waterfront property had no actionable claim against a realty company and its agent, pursuant to *N.Y. Gen. Bus. Law §§ 349* and **350,** for misrepresentations as to the lot size, which they indicated was about double the size that it actually was, because in order for the claims to avoid dismissal, the misrepresentation had to affect consumers or the public at large, which this did not; additionally, the court noted that there was no actual harm suffered, which was another necessary element to be pleaded and proved.*Canario v Gunn (2002, App Div, 2d Dept) 751 NYS2d 310.*

Seller did not engage in a deceptive act by representing that the ink cartridges were included with the purchase of each printer without disclosing that they were economy-size cartridges; thus, the causes of action for violations of *N.Y. Gen. Bus. Law § 350* was properly dismissed since the complaint failed to allege an act or practice that was misleading in a material respect.*Andre Strishak & Assocs., P.C. v Hewlett Packard Co. (2002, App Div, 2d Dept) 752 NYS2d 400.*

In action by plaintiff manufacturer of 2 products used to treat sun-damaged skin, seeking to enjoin defendant cosmetics manufacturer from advertising that its cosmetics had "anti-aging effect" or were otherwise effective at diminishing wrinkles and other signs of sun damage, court properly dismissed claims based on CLS *Gen Bus §§ 349* and *350*, which prohibit deceptive business acts or practices and false advertising, since plaintiff failed to submit any evidence indicating that consumers were misled by defendant's advertising; moreover, even if plaintiff proved that defendant's advertisements were false on their face, and even if showing of falsity was sufficient in lieu of showing that advertisements were materially misleading, plaintiff failed to prove that it was injured as result of defendant's advertisements.*Ortho Pharmaceutical Corp. v Cosprophar, Inc. (1994, CA2 NY) 32 F3d 690, 1994-2 CCH Trade Cases P 70683.*

To establish claim under CLS *Gen Bus § 350*, intention to deceive need not be shown; also, plaintiff need not prove actual damages but merely that advertisement is materially misleading; test is not what average consumer would think, but rather "vast multitude." *Mennen Co. v Gillette Co. (1983, SD NY) 565 F Supp 648, 220 USPQ 354.*

Manufacturer/supplier lacks standing to maintain action for "bait and switch" operation under CLS *Gen Bus L §§ 349* and ***350***. *H.L. Hayden Co. v Siemens Medical Systems, Inc. (1987, SD NY) 672 F Supp 724, 1988-1 CCH Trade Cases P 68104.*

Business competitor has standing to sue under CLS *Gen Bus L §§ 349*, ***350***; most appropriate limitations period for actions under §§ 349 and **350** is CLS *CPLR § 214*(4) for injury to property. *Construction Technology, Inc. v Lockformer Co. (1989, SD NY) 704 F Supp 1212, 10 USPQ2d 1401.*

Federal law did not preempt New York's enforcement of its deceptive advertising laws, where New York brought an action against airline alleging false advertising of fares relating to air travel, hotel accommodations, and car rentals under *Gen Bus Law § 350* but airline alleged that FAA regulations preempted state enforcement, because there is little connection between regulation of false advertising by New York and regulation of rates, routes, and service preempted by federal law. *People by Abrams v Trans World Airlines, Inc. (1989, SD NY) 728 F Supp 162, 1989-2 CCH Trade Cases P 68876* (disapproved by *Trans World Airlines, Inc. v Mattox (CA5 Tex) 897 F2d 773, 1990-1 CCH Trade Cases P 68983, 16 FR Serv 3d 122,* cert den (US) *112 L Ed 2d 261, 111 S Ct 307, 111 S Ct 308,* later proceeding (CA5 Tex) *924 F2d 1055,* reported in full (CA5 Tex) *949 F2d 141, 1991-2 CCH Trade Cases P 69667,* later proceeding (US) *115 L Ed 2d 969, 111 S Ct 2794, 111 S Ct 2795* and motion gr (US) *117 L Ed 2d 128, 112 S Ct 962* and affd in part and revd in part (US) *119 L Ed 2d 157, 112 S Ct 2031, 92 CDOS 4585, 92 Daily Journal DAR 7347, 1992-1 CCH Trade Cases P 69828,* on remand, remanded (CA5) *966 F2d 1512, 1992-2 CCH Trade Cases P 69912* and cert gr (US) *116 L Ed 2d 601, 112 S Ct 632* and motion den (US) *117 L Ed 2d 404, 112 S Ct 1155* and cert den (US) *119 L Ed 2d 578, 112 S Ct 2956)* and dismd (SD NY) *764 F Supp 864,* transf to (1st Dept) *171 App Div 2d 76, 575 NYS2d 1.*

Publisher of weekly newspaper concerning computers may not recover under *NY Gen Bus Law § 350* from computer retailer, where publisher seeks to prevent retailer from using logos incorporating similar name to that of newspaper in its retailing and advertising efforts, because publisher failed to prove any likelihood of confusion under Lanham Trade-Mark Act *(15 USCS §§ 1058* et seq.), it cannot demonstrate either that retailer's advertisements are misleading or that it has been injured. *International Data Group, Inc. v J & R Electronics, Inc. (1992, SD NY) 798 F Supp 135,* affd without op *International Data v J & R Electronics (1992, CA2) 1992 US App LEXIS 34979.*

Brewer is not entitled to preliminary injunction against competitor's advertising, where random consumer survey answers indicated that persons exposed to light beer commercials were only mildly deceived, if at all, by competitor's implications that its light beer was fresher, different, and not watered down due to its being produced entirely in one location, because brewer is not likely to succeed on merits of its claim that beer drinkers are being "railroaded" in violation of CLS *Gen Bus Law §§ 349* and ***350***. *Coors Brewing Co. v Anheuser-Busch Cos. (1992, SD NY) 802 F Supp 965.*

Drug manufacturer did not state claim for deceptive business practices against cosmetic manufacturer under NYCLS *Gen Bus Law §§ 349*, ***350***, where cosmetic company sold non-prescription, vitamin A-derived cosmetics designed to prevent aging of skin, drug company sold vitamin A-derived prescription medication for acne, which some physicians also prescribed to prevent aging of skin, and drug company failed to introduce evidence of what consumers thought about cosmetic company's products or advertising, because drug company failed to show that cosmetic company's advertising misled consumers. *Ortho Pharmaceutical Corp. v Cosprophar, Inc. (1993, SD NY) 828 F Supp 1114, 29 USPQ2d 1103,* costs/fees proceeding (SD NY) *1993 US Dist LEXIS 15193.*

Rental car company is not entitled to injunctive or other relief regarding competitor's false or misleading advertising of its "Return Valet" service under CLS *Gen Bus Law §§ 349* and ***350***, where company is neither consumer of competitor's service nor consumer protection agency, because statutes were enacted for purpose of protecting consumers.*Hertz Corp. v Avis, Inc. (1994, SD NY) 867 F Supp 208, 33 USPQ2d 1517, 1994-2 CCH Trade Cases P 70794.*

Car leasing company failed to state cause of action against competitor for deceptive trade practices and false advertising under CLS *Gen Bus § 349* and ***350***, since it was neither consumer of competitor's services nor consumer protection agency, and it failed to assert that it had relied on competitor's alleged representations.*Hertz Corp. v Avis, Inc. (1994, SD NY) 867 F Supp 208, 33 USPQ2d 1517, 1994-2 CCH Trade Cases P 70794.*

Provision of agency agreement, giving insurer absolute right to terminate agreement by giving 180 days notice, defeated claim by agents and agency that insurer's termination of agreement for unacceptable loss ratios was part of redlining scheme that violated CLS *Gen Bus §§ 349* and ***350***. *Keeney* v *Kemper Nat'l Ins. Cos. (1997, ED NY) 960 F Supp 617,* affd (CA2 NY) *1998 US App LEXIS 1226.*

Airline passenger's claims against airline's wholly-owned subsidiary, for false and deceptive advertising regarding arrival time of flight purchased as part of reduced-rate vacation package, were preempted by Airline Deregulation Act *(49 USCS § 41713*(b)(1)).*McLaughlin v TWA Getaway Vacations (1997, SD NY) 979 F Supp 174.*

Consumers failed to cite any specific advertisements or public statements that could have been considered deceptive with respect to their claim that the making and selling of the fast food chain's product was deceptive and injured the health of minors.*Pelman v McDonald's Corp. (2003, SD NY) 237 F Supp 2d 512.*

CLS *Exec L § 63(12)* authorizes action by Attorney General against publisher for his advertisement offering "world atlas for only $1," even though CLS *Gen Bus L § 350* provides for bringing of civil action in cases of alleged false advertising, since § **350** does not preclude Attorney General, in cases of persistent fraudulent misconduct rather than isolated instance of misleading advertising, from seeking relief under § 63(12). *New York v Ginzburg (1980, NY Sup) 5 Media L R 2469.*

*** THIS SECTION IS CURRENT THROUGH CH. 328, 08/05/2003 ***
*** WITH THE EXCEPTION OF CHS. 1-3, 282 and 283 ***

GENERAL BUSINESS LAW
ARTICLE 22-A. CONSUMER PROTECTION FROM DECEPTIVE ACTS AND PRACTICES

NY CLS Gen Bus § **350** -a (2003)

§ **350** -a. False advertising

1. The term "false advertising" means advertising, including labeling, [fig 1] of a commodity, or of the kind, character, terms or conditions of any employment opportunity if such advertising is misleading in a material respect [fig 2] . In determining whether any advertising is misleading, there shall be taken into account (among other things) not only representations made by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertising fails to reveal facts material in the light of such representations with respect to the commodity or employment to which the advertising relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. For purposes of this article, with respect to the advertising of an employment opportunity, it shall be deemed "misleading in a material respect" to either fail to reveal whether the employment available or being offered requires or is conditioned upon the purchasing or leasing of supplies, material, equipment or other property or whether such employment is on a commission rather than a fixed salary basis and, if so, whether the salaries advertised are only obtainable if sufficient commissions are earned.

2. (Added, L 1988) An employer shall not be liable under this section as a result of a failure to disclose all material facts relating to terms and conditions of employment if the aggrieved person has not suffered actual pecuniary damage as a result of the misleading advertising of an employment opportunity or if the employer has, prior to the aggrieved person suffering any pecuniary damage, disclosed in writing to that person a full and accurate description of the kind, character, terms and conditions of the employment opportunity.

3. (Added, L 1994) It shall constitute false advertising to display or announce, in print or broadcast advertising, the price of an item after deduction of a rebate unless the actual selling price is displayed or announced, and clear and conspicuous notice is given in the advertisement that a mail-in rebate is required to achieve the lower net price.

HISTORY: Add, L 1963, ch 813, eff Sept 1, 1963.
Amd, L 1988, ch 615, § 1, eff Sept 1, 1988.
Sub 1, formerly entire section, so designated and amd, L 1988, ch 615, § 1, eff Sept 1, 1988.
The 1988 act deleted at fig 1 "which" and at fig 2 "; and in"
Sub 2, add, L 1988, ch 615, § 1, eff Sept 1, 1988.
Sub 3, add, L 1994, ch 107, § 1, eff May 24, 1995.

NOTES:

CROSS REFERENCES:

This section referred to in § **350** -d

FEDERAL ASPECTS:

False advertisement defined, *15 USCS § 55*

RESEARCH REFERENCES AND PRACTICE AIDS:

2A NY Jur 2d, Advertising §§ 11, 13, 14
2 NY Jur, Advertising and Advertisements § 2
21 NY Jur 2d, Consumer and Borrower Protection §§ 9, 142
21 NY Jur 2d, Consumer and Borrower Protection § 14
24 NY Jur 2d, Costs in Civil Actions § 212
52 NY Jur 2d, Employment Relations § 51
67A NY Jur 2d, Injunctions § 19
32 Am Jur 2d, False Pretenses § 88
1B Am Jur Pl & Pr Forms (Rev ed), Advertising, Form 71.1

ANNOTATIONS:

Validity, construction, and effect of state legislation regulating or controlling "bait-and-switch" or "disparagement" advertising or sales practices. *50 ALR3d 1008*

Validity, construction, and application of state statutory provision prohibiting sales of commodities below cost-modern cases. *41 ALR4th 612*

LAW REVIEWS:

Law of comparative advertising: how much worse is "better" than "great.". *76 Columbia L Rev 80*

TEXTS:

New York Intellectual Property Handbook (1999 ed, Matthew Bender)

CASE NOTES

A cause of action for deceptive trade practices or false advertising need not show that customers are or were actually injured, and the capacity of a statement to deceive is not measured with reference to the average customer, but with reference to those the statutes were designed to protect, including the ignorant, the unthinking and the credulous. *Guggenheimer v Ginzburg (1977) 43 NY2d 268, 401 NYS2d 182, 372 NE2d 17.*

Mislabeling is "false advertising" within the meaning of the *Gen Bus Law § 350 -a. Galaxy Export, Inc. v Bedford Textile Products, Inc. (1981, 2d Dept) 84 App Div 2d 572, 443 NYS2d 439.*

Defendants committed a deceptive business practice where facts concerning the value of the products advertised were concealed, and where defendants' opposition papers in an action for deceptive business practices failed to establish a question of fact concerning the capacity of the advertisement to deceive the public at large. *State v Middletown Beef Co. (1981, 2d Dept) 84 App Div 2d 834,* 444 NSY2d 184.

In action for false advertising pursuant to CLS *Gen Bus § 350 -d* , plaintiff has burden of proving that advertisement was misleading in material respect and that he was injured. *De Santis v Sears, Roebuck & Co. (1989, 3d Dept) 148 App Div 2d 36, 543 NYS2d 228.*

Defendant store was not entitled to dismissal of action for false advertising pursuant to CLS *Gen Bus § 350 -d* where (1) store advertised that sabre saw was on sale until December 20 in advertisement that bore inducement to "wrap up a beautiful Christmas," and (2) when plaintiff arrived at store to purchase saw, he learned that store had none in stock and that store had sold out of saws prior to commencement of sale; total unavailability of saws rendered advertisement materially misleading pursuant to CLS *Gen Bus § 350 -a(1). De Santis v Sears, Roebuck & Co. (1989, 3d Dept) 148 App Div 2d 36, 543 NYS2d 228.*

In action against publishers of "Yellow Pages" telephone directories alleging, inter alia, untimely distribution of Yellow Pages in which plaintiffs had purchased advertisements for their small businesses, complaint failed to state cause of action for false advertising under CLS Gen Bus art 22-A as (1) advertisement space in Yellow Pages is, by definition, available to businesses only, and (2) plaintiffs did not show how complained-of conduct might directly or potentially affect consumers at large.*Cruz v NYNEX Info. Resources (2000, 1st Dept) 263 AD2d 285, 703 NYS2d 103.*

In action on behalf of proposed class of subscribers to defendant's wireless communications plan, alleging that subscribers often experienced difficulties with service due to inadequacy of communications network in handling demand which contradicted defendant's advertising and marketing representations, claims for common-law fraud and

violations of CLS *Gen Bus §§ 349, 350* **and** *350 -a*, for making false statements and concealing material information, were not preempted under Federal Communications Act, *47 USCS § 332*(c)(3)(A).*Naevus Int'l, Inc. v AT&T Corp. (2001, 1st Dept) 283 AD2d 171, 724 NYS2d 721.*

In action by subscribers to AT&T corporation's "Digital One Rate" wireless communications plan, alleging that they often experienced difficulties with service due to inadequacy of communications network in handling demand, which contradicted AT&T's advertising and marketing representations, plaintiffs' claim that defendant retailer that enrolled subscribers in Digital One Rate plan had superior knowledge, and displayed AT&T's advertising and promotional literature which it knew to be false, yet failed to warn subscribers who relied on that literature, was sufficient to support causes of action under CLS *Gen Bus*

§§ 349, 350 **and** *350 -a.Naevus Int'l, Inc. v AT&T Corp. (2001, 1st Dept) 283 AD2d 171, 724 NYS2d 721.*

In an action by a consumer seeking to recover the regular price of dishes that defendant refused to sell to her at a greatly reduced advertised price, the consumer was entitled under *Gen Bus Law § 350 -d* to recover minimum damages of $50 where, despite defendant's argument that the advertised price was so low that it could not have been taken for anything but an obvious mistake, the consumer established that defendant's advertisement was misleading in a material way and where, although the consumer failed to prove actual damages in that she did not go elsewhere to purchase the dishes after defendant's refusal to sell, the consumer would be considered "injured" in that she was misled or deceived by defendant's materially misleading advertisement. *Geismar v Abraham & Straus (1981) 109 Misc 2d 495, 439 NYS2d 1005.*

Respondents' newspaper advertisements and telephone solicitations which described goods and services contained in coupon booklet as "free" but which actually contained significant conditions, restrictions, and limitations, as well as substantial purchase price for booklet, are false and misleading under *GBL § 350 -a* such that deceptive practices and false advertising may be enjoined by *Attorney General. State v Stevens (1985) 130 Misc 2d 790, 497 NYS2d 812.*

To establish private cause of action for false advertising pursuant to CLS *Gen Bus §§ 350* **and** *350 -a*, plaintiff is only required to demonstrate that advertisement was misleading in material respect and that he was injured; injured person is defined as one who was misled or deceived by such advertisement. *McDonald v North Shore Yacht Sales, Inc. (1987) 134 Misc 2d 910, 513 NYS2d 590.*

Purchaser of yacht was likely to succeed on merits in his private action for false advertising, so as to support preliminary injunction against manufacturer that would enjoin it from advertising any of its products within state, where (1) average person would be unable to determine, from arrangement of advertising copy, that statement regarding specifications being subject to change without notice applied to equipment listed under "Cruise Pac" package, (2) facts that advertisement did not state price and that manufacturer's dealers were independent did not negate impression given by advertisement that product sold would be exactly as advertised, (3) purchaser's particular contract did not negate fact that advertisement appeared to be misleading, (4) manufacturer made "grave admission" that final prototype of yacht was not even completed at time advertisement was submitted to magazine, and (5) nowhere except in statement that specifications were subject to change without notice was consumer advised that advertisement dealt only with prototype which was yet to undergo major revision before sale. *McDonald v North Shore Yacht Sales, Inc. (1987) 134 Misc 2d 910, 513 NYS2d 590.*

It would be no defense in action for false advertising for yacht manufacturer to assert that advertisement at issue had to be submitted to magazine several months before final prototype of yacht had been completed, purportedly in order for advertisement to appear at same time yacht was ready for sale, where nowhere did advertisement indicate that yacht was anything less than fully developed product, and nowhere (except in statement that specifications were subject to change without notice) was consumer advised that advertisement dealt only with prototype which was yet to undergo major revision before sale to public; furthermore, fact that revisions were financially costly to manufacturer was not relevant to whether advertising was misleading. *McDonald v North Shore Yacht Sales, Inc. (1987) 134 Misc 2d 910, 513 NYS2d 590.*

Yacht manufacturer would have no defense in purchaser's private action for false advertising based on provision in sales contract between purchaser and dealer which stated dealer and manufacturer were purportedly not obligated to change particular unit purchased to comply with changes that manufacturer might make "at any time," especially where (1) all manufacturer's dealers were independent contractors, (2) manufacturer offered no evidence as to what each dealer's contract with customers provided, and (3) manner in which purchaser's particular contract was customized might have negated effect of provision. *McDonald v North Shore Yacht Sales, Inc. (1987) 134 Misc 2d 910, 513 NYS2d 590.*

Absence of stated price and fact that yacht manufacturer's dealers were independent were irrelevant in determining liability of manufacturer for falsity of its advertising where detailed listings of specifications and features gave impression that yacht was sold as completed item, without options or changes. *McDonald v North Shore Yacht Sales, Inc. (1987) 134 Misc 2d 910, 513 NYS2d 590.*

In private action against yacht manufacturer for false advertising, fact that advertisement stated that yacht's specifications might be subject to change without notice did not give even average person, "no less the ignorant, unthinking or credulous consumer," notice that items listed in certain "Cruise Pac" were also subject to change without notice where advertisement had 2 distinct sections separated by white space, one containing "Specifications" and other entitled "Cruise Pac." *McDonald v North Shore Yacht Sales, Inc. (1987) 134 Misc 2d 910, 513 NYS2d 590.*

Retail car dealer violated state and federal truth in lending laws by displaying large signs in showroom windows stating "No Money Down" and "$99/Mo"
when in fact customers could not buy cars on those terms; laws require full disclosure in plain language, dealer's advertising scheme was come-on designed to lure customers by half truths or falsity, and plaintiff was not required to show that advertising injured anyone, only that it had misleading effect. *State v Terry Buick, Inc. (1987) 137 Misc 2d 290, 520 NYS2d 497.*

Allegation that defendant telephone company used various forms of media to advertise its sale of long distance telephone services, which was falsely represented by defendant's failure to disclose that residential consumers were billed for calls per minute rounded up to next higher full minute, did not establish claim of false advertising under CLS *Gen Bus § 350 -a(1)* because defendant's tariff was matter of public record and was not concealed.*Marcus v AT&T Corp. (1998, CA2 NY) 138 F3d 46.*

Airline passenger's claims against airline's wholly-owned subsidiary, for false and deceptive advertising regarding arrival time of flight purchased as part of reduced-rate vacation package, were preempted by Airline Deregulation Act *(49 USCS § 41713*(b)(1)).*McLaughlin v TWA Getaway Vacations (1997, SD NY) 979 F Supp 174.*

*** THIS SECTION IS CURRENT THROUGH CH. 328, 08/05/2003 ***
*** WITH THE EXCEPTION OF CHS. 1-3, 282 and 283 ***

GENERAL BUSINESS LAW
ARTICLE 26. MISCELLANEOUS

NY CLS Gen Bus § 396 (2003)

§ **396.** Unlawful selling practices

1. No person, firm, partnership, association or corporation, or agent or employee thereof, shall, in any manner, or by any means of advertisement, or other means of communication, offer for sale any merchandise, commodity, or service, as part of a plan or scheme with the intent, design, or purpose not to sell the merchandise, commodity, or service so advertised at the price stated therein, or with the intent, design or purpose not to sell the merchandise, commodity, or service so advertised. Nothing in this section shall apply to any television or sound radio broadcasting station or to any publisher or printer of a newspaper, magazine, or other form of printed advertising, who broadcasts, publishes, or prints such advertisement.

2. a. No person, firm, partnership, association or corporation, or agent or employee thereof, shall, in any manner, or by any means, offer for sale goods, wares or merchandise, where the offer includes the voluntary and unsolicited sending of goods, wares or merchandise not actually ordered or requested by the recipient, either orally or in writing; any such goods, wares or merchandise so sent shall be prominently marked upon the container thereof in bold letters as follows: "THIS IS A GIFT. PAYMENT NOT REQUIRED FOR THIS ITEM". The receipt of any goods, wares or merchandise pursuant to an existing membership or club arrangement in which the recipient receives such goods, wares or merchandise at specified intervals or a plan where the recipient agrees to receive such goods, wares or merchandise without further obligation shall not be construed as the receipt of unsolicited goods, wares or merchandise for the purposes of this section. The receipt of any such unsolicited goods, wares or merchandise shall for all purposes be deemed an unconditional gift to the recipient who may use or dispose of the same in any manner he sees fit without any obligation on his part to the sender.

If after any such receipt deemed to be an unconditional gift under this paragraph a, the sender continues to send bill statements or requests for payment with respect thereto, an action may be brought by the recipient to enjoin such conduct, in which action there may also be awarded reasonable attorneys' fees and costs to the prevailing party.

b. If a person is a member of an organization which makes retail sales of any goods, wares, or merchandise to its members, and the person notifies the organization of his termination of membership by certified mail, return receipt requested, any unordered goods, wares, or merchandise which are sent to the person after thirty days following execution of the return receipt for the certified letter by the organization, shall for all purposes be deemed unconditional gifts to the person, who may use or dispose of the goods, wares, or merchandise in any manner he sees fit without any obligation on his part to the organization.

If the termination of a person's membership in such organization breaches any agreement with the organization, nothing in this subdivision shall relieve the person from liability for damages to which he might be otherwise subjected to pursuant to law.

The provisions of this paragraph shall not apply to a member of an organization the sole purpose of which is the sale of a specific type of goods, wares or merchandise to its members until the member has fulfilled his initial purchase obligation.

3. Whenever there shall be a violation of this section, an application may be made by the attorney general in the name of the people of the state of New York to a court or justice having jurisdiction to issue an injunction, and upon notice to the defendant of not less than five days, to enjoin and restrain the continuance of such violation; and if it shall appear to the satisfaction of the court or justice that the defendant is, in fact, violating this section, an injunction may be issued by such court or justice, enjoining and restraining such action or violation, without requiring proof that any person has, in fact, been misled or deceived or otherwise damaged thereby.

HISTORY: Add, L 1958, ch 849, § 1; amd, L 1966, ch 99, § 1, eff Sept 1, 1966.
Former § **396**, add, L 1909, ch 25; amd, L 1947, ch 655; repealed, L 1949, ch 96, § 1, eff March 7, 1949.
Sub 2, add, L 1966, ch 99, § 1; amd, L 1968, ch 428, § 1, eff Sept 1, 1968.
Former sub 2, renumbered sub 3, L 1966, ch 99, § 1, eff Sept 1, 1966.
Sub 2, par a, formerly entire sub 2, so designated and amd, L 1976, ch 658, § 1; amd, L 1988, ch 492, § 1, eff Sept 1, 1988.
Sub 2, par a, undesignated par, add, L 1976, ch 658, § 1, eff Sept 1, 1976.
Sub 2, par b, add, L 1976, ch 658, § 1, eff Sept 1, 1976.
Sub 3, formerly sub 2, so designated, L 1966, ch 99, § 1, eff Sept 1, 1966.

NOTES:

CROSS REFERENCES:
Untrue and misleading advertisements, CLS *Penal § 190.20*

FEDERAL ASPECTS:
Unfair or deceptive acts or practices in commerce, *15 USCS § 1456*

RESEARCH REFERENCES AND PRACTICE AIDS:
2A NY Jur 2d, Advertising § 10
21 NY Jur 2d, Consumer and Borrower Protection §§ 14, 15, 260, 285-287
93 NY Jur 2d, Sales and Exchanges of Personal Property § 51
104 NY Jur 2d, Trade Regulation § 366
1B Am Jur Pl & Pr Forms (Rev ed), Advertising, Forms 21 et seq

ANNOTATIONS:
Advertisement addressed to public relating to sale or purchase of goods at specified price as an offer the acceptance of which will consummate a contract. *43 ALR3d 1102*

CASE NOTES
The enactment of this section, which authorizes Attorney General to bring a civil action for an injunction against certain false advertising, did not prevent the prosecution of defendants for violating *§ 421 of the Penal Law. People v Glubo (1959) 5 NY2d 461, 186 NYS2d 26, 158 NE2d 699.*
A subpoena is not subject to quashal where it is issued by the Attorney General, under § 91 of the General Corporation Law, to ascertain whether the recipient has been violating this section so as to warrant filing of proceedings for annulment of charter. *Lawrence Aluminum Industries, Inc. v Lefkowitz (1960) 20 Misc 2d 739, 196 NYS2d 844.*
Conduct of a corporation in engaging in deceptive advertising, widely disseminated in the public press, and which induced a substantial number of people to come to its place of business on a promise of offering employment opportunities in floor waxing, then proceeding to sell them waxing machines, worth $102.90, on an installment sale basis for $936, which were inadequate for commercial purposes, was such that it could be found to fall within § 421 of the *Penal Law, § 396* of the *General Business Law, or art. 10 of the Retail Installment Sales Act. People v Abbott*

Maintenance Corp. (1960) 22 Misc 2d 1019, 200 NYS2d 210, mod (1960, 1st Dept) *11 App Div 2d 136, 201 NYS2d 895,* app den *(1960) 8 NY2d 710,* reported in full *(1960) 8 NY2d 1120, 209 NYS2d 800, 171 NE2d 883* and motion gr *(1961) 9 NY2d 687, 212 NYS2d 422, 173 NE2d 241* and affd *(1961) 9 NY2d 810, 215 NYS2d 761, 175 NE2d 341.*

Upon a showing that defendants advertised and offered for sale certain aluminum items without intent to sell such merchandise at the stated price, they were enjoined from so doing, the court stating that it was immaterial whether anyone had been misled, deceived, or otherwise damaged.
People by Lefkowitz v Levinson (1960) 23 Misc 2d 483, 199 NYS2d 625.

A business firm, which licensed others to use its good will and name, thereby making it possible for the licensee to conduct a fraudulent "bate and switch" advertising campaign breached its duty to prevent the misuse of its name for purposes of fraud and deceit and was responsible for the fraudulent business practices of the licensee by placing in its hands the means making possible the deception and fraud. Accordingly, the permanent injunction to restrain such deceptive advertising was issued. *People by Lefkowitz v Ludwig Baumann & Co. (1968) 56 Misc 2d 153, 288 NYS2d 404.*

Both the Executive Law and the **General Business Law** empower the Attorney General to apply for an injunction restraining the continuance of the proscribed business practices. *People by Lefkowitz v Ludwig Baumann & Co. (1968) 56 Misc 2d 153, 288 NYS2d 404.*

EXHIBIT P

Certified true copy of Exhibit P.

[signature], PARTNER, MORGAN LEWIS 9/22/03

CERTIFIED AT THE CANADIAN EMBASSY
FOR LEGALIZATION OF THE FOREGOING
SIGNATURE OF: STEPHEN PAUL MAHINKA
CERTIFIE A L'AMBASSADE DU CANADA
AUX FINS DE LEGALISER LA SIGNATURE
CI-DESSUS DE:

[signature]

Hélène Bouchard
Consular Program Officer
Agent Consulaire
Canadian Embassy/Ambassade du Canada
Washington, D.C.

Consular Section Consulaire
Canadian Embassy
Ambassade du Canada
501 Pennsylvania Avenue, N.W.
Washington, D.C. 20001

In the Matter of the People of the State of New York, by theAttorney-General, Louis J. Lefkowitz, Petitioners, v. Sanford Levinson et al.,Doing Business under the Name of American Aluminum, et al., Respondents
[NO NUMBER IN ORIGINAL]

Supreme Court of New York, Erie County

23 Misc. 2d 483; 199 N.Y.S.2d 625; 1960 N.Y. Misc. LEXIS3217

April 8, 1960

DISPOSITION: [***1]

Motion granted, without costs.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner Attorney General of the State of New York instituted a proceeding to enjoin respondent businessman from engaging in deceptive consumer sales practices proscribed by *N.Y. Gen. Bus. Law § 396*.

OVERVIEW: The Attorney General's verified petition was supported by affidavits of former employees and customers establishing that the businessman advertised items at very low prices; discouraged sales of the advertised items by disparaging them; and if the customer persevered in demanding the advertised item, there was a protracted delay in delivery to foster cancellation of orders. The court determined that there were so many instances of orders for the advertised items delayed and unfilled as to demonstrate an intention and practice not to sell the advertised item and not to sell at the advertised price. Noting that the proceeding was civil, not criminal, and that evidence could be found in affidavits sufficient by a fair preponderance of the believable facts, the court ruled that the businessman's methods were deceitful and violated the public policy described in *N.Y. Gen. Bus. Law § 396*. The court enjoined and restrained the businessman from engaging in "bait advertising" and in all other "bait and switch" practices in connection with sales of an advertised product.

OUTCOME: The court granted the Attorney General's request for an injunction.

CORE TERMS: advertised, merchandise, injunction, aluminum, advertising, salesmen, bait and switch, salesman, bait advertising, advertisement, customer, new machine, disparagement, commodity, enjoined, offering, rebuilt, damaged, selling, switch, civil action, protestation, proscribed, enjoining, speaking, enjoin, trier, Penal Law, unfair competition, purpose of selling

LexisNexis (TM) HEADNOTES - Core Concepts:

Antitrust & Trade Law: Consumer Protection: Deceptive Acts & Practices
[HN1] *N.Y. Gen. Bus. Law § 396* provides in part that 1. No person, firm, partnership, association, or corporation, or agent or employee thereof, shall, in any manner, or by any means of advertisement, or other means of communication, offer for sale any merchandise, commodity, or service, as part of a plan or scheme with the intent, design, or purpose not to sell the merchandise, commodity, or service so advertised at the price stated therein, or with the intent, design or purpose not to sell the merchandise, commodity, or service so advertised. 2. Whenever there shall be a violation of *N.Y. Gen. Bus. Law § 396*, an application may be made by the attorney general in the name of the people of the state of New York to a court or justice having jurisdiction to issue an injunction, and upon notice to the defendant of not less than five days, to enjoin and restrain the continuance of such violation; and if it shall appear to the satisfaction of the court or justice that the defendant is, in fact, violating this section, an injunction may be issued by such court or justice, enjoining and restraining such action or violation, without requiring proof that any person has, in fact, been misled or deceived or otherwise damaged thereby.

COUNSEL: Louis J. Lefkowitz, Attorney-General (Alfred B. Silverman of counsel), for petitioners.

John J. Naples for Alphonse Amigone, respondent.

Lorenzo & Lorenzo for Sanford Levinson, respondent.

JUDGES: Michael Catalano, J.

OPINIONBY: CATALANO

OPINION: [*483] [**626] The Attorney-General of the State of New York has brought this proceeding to enjoin respondent Levinson from certain practices proscribed by *section 396 of the General Business Law*. Respondent

Amigone has been dropped from the[***2] proceeding by order of this court, based upon the stipulation in open court by the attorneys for all the parties. The verified petition is buttressed by affidavits of four former employees of Levinson and of some dozen and a half customers of the Levinson enterprises. By these it has been shown that said respondent established and pursued a plan or scheme as follows:

1. Aluminum window assemblies, aluminum patio assemblies and aluminum and other residence sidings were periodically advertised at very low prices, and telephone inquiries were solicited.

2. Telephone inquiry brought one or more of respondent's salesmen to the residence of the prospect. Then there would follow a pattern of conduct discouraging the sale of the advertised article and resulting time after repeated time in the sale of a much more expensive article.

3. Such pattern consisted of disparagement of the advertised article by word and by sample. If the prospect persevered in demanding the advertised article, there was protracted delay in delivery, enough to discourage many of the customers and foster cancellation of orders.

[*484] There were so many instances of orders for the advertised article delayed[***3] and unfilled as to demonstrate an intention and practice not to sell the advertised article and not to sell at the advertised price. No commission was paid on the sale of the advertised article. Instructions to salesmen were to sign up an order for the advertised article and use such signed order as a lever for forcing a different sale. The forcing procedure included exhibiting a poor-appearing specimen of the advertised article, sometimes purposely damaged to make it look worse; telling the prospect that the advertised article was a much thinner metal; that it would pit and tarnish; that it was an overlapping window likely to leak; that the advertised patio would pit, darken, leak and pull away. The victimized prospect, usually committed in writing, and perhaps by a cash deposit, to what was made to appear a bad deal, was in such fashion softened for the coup de grace. The coup consisted of a switch to the purchase of a model costing several times as much as the one advertised.

[**627] This, then, was the plan or scheme which has been overwhelmingly demonstrated. Respondent's denials and protestations are voluminous, but they leave untouched the salient facts. Of what[***4] worth is a protestation that salesmen were not instructed to kill sales of the advertised articles when it remains undisputed that salesmen received no commissions on such sales? The salesman, whatever the instructions to him were, had to switch the sale or he went unpaid.

Section 396 of the General Business Law, entitled "Unlawful selling practices", provides, in part:

[HN1] "1. No person, firm, partnership, association, or corporation, or agent or employee thereof, shall, in any manner, or by any means of advertisement, or other means of communication, offer for sale any merchandise, commodity, or service, as part of a plan or scheme with the intent, design, or purpose not to sell the merchandise, commodity, or service so advertised at the price stated therein, or with the intent, design or purpose not to sell the merchandise, commodity, or service so advertised.

"2. Whenever there shall be a violation of this section, an application may be made by the attorney general in the name of the people of the state of New York to a court or justice having jurisdiction to issue an injunction, and upon notice to the defendant of not less than five days, to enjoin and restrain the continuance[***5] of such violation; and if it shall appear to the satisfaction of the court or justice that the defendant is, in fact, violating this section, an injunction may be issued by such court or justice, enjoining and restraining such action or violation, [*485] without requiring proof that any person has, in fact, been misled or deceived or otherwise damaged thereby." (L. 1958, ch. 849, eff. July 1, 1958.)

In 1958, the Governor's Message to the Legislature stated (N. Y. State Legis. Annual, 1958, p. 381): "As various district attorneys have indicated publicly, the present Penal Law does not give them adequate authority to prosecute those who cheat consumers by means of vicious sales promotional practices. One such practice is bait advertising, where products are advertised for sale at a price at which the seller has no intention of selling. Another problem is that of fictitious bargain claims. I recommend legislation to provide adequate protection to the consumer against those evils, both through changes in the Penal Law and by the provision of new civil remedies."

Chief Judge Conway, speaking for the majority of the Court of Appeals, in *People v. Glubo (5 N Y 2d 461)* said[***6] (p. 473): "new *section 396 of the General Business Law* (L. 1958, ch. 849) * * * authorizes the Attorney-General [**628]to bring a civil action for an injunction where it appears that a person advertises merchandise with the intent, design or purpose (a) not to sell the merchandise so advertised at the price stated in the advertisement or (b) not to sell the merchandise so advertised * * * By the enactment of *section 396 of the General Business Law*, the Legislature merely gave to

the Attorney-General the right to seek a civil injunction against certain acts which are criminal. This is not without precedent. The false advertising of securities comes within the ban of *section 421 of the Penal Law*. Nevertheless, the Attorney-General is authorized by the Martin Act (General Business Law, art. 23-A) to seek a civil injunction against untrue and misleading advertisements made with the intent to sell securities (*People v. Federated Radio Corp., 244 N. Y. 33).*"

In a civil action seeking injunction because of the "bait and switch" advertising tactics of the defendant, Chief Judge Conway, again speaking for the majority of the Court of Appeals, in *Electrolux Corp. v. Val-Worth[***7] (6 N Y 2d 556)* said (p. 566): "Most of the evidence on those issues was based on the testimony of (a) Adler, the investigator, (b) Forde, the salesman who testified for the plaintiff, and (c) of defendant Sacks. There was a sharp conflict of testimony, particularly between Forde and Sacks. That raised an issue of credibility which was primarily in the hands of the original trier of the facts * * * Thus, the facts disclose a sales promotion with the following steps:

[*486] "1. Advertising a 'rebuilt Electrolux' at a very attractive price in order to invite inquiry.

"2. Gaining admittance to people's homes under the guise of answering the inquiries, but really for the purpose of selling a much more expensive new machine in competition with Electrolux.

"3. 'Switching' the transaction by 'knocking' or disparaging the 'rebuilt Electrolux' and introducing the new machine." * * *

"But if defendants' methods are deceitful and run contrary to accepted business ethics, the public policy of the State is relevant, though perhaps not decisive, in evaluating a claim of unfair competition" (p. 568). "activities of the nature of 'bait and switch' advertising are deceptive and harmful to [***8]the public interest."

"Here, the customer, who is * * * trapped in his own home, is faced with a choice between the rebuilt machine as to which only he made inquiry and the new machine, with the salesman using all of his talents to effectuate the 'switch'" [**629] (p. 569).

Concluding, in part: "that the defendants be enjoined from offering any vacuum cleaner under the trade name Electrolux at an attractive price for the purpose of luring prospects with the object of diverting them from the advertised article by disparagement or other like conduct and for the purpose of inducing them to purchase a product or products not manufactured by the plaintiff" (p. 572).

Here, it is clear that defendant Levinson advertised and offered for sale certain aluminum merchandise as part of a scheme with intent not to sell such merchandise at the stated price, and with intent not to sell the same as advertised. The fact that any person has been misled or deceived or otherwise damaged thereby is immaterial. This is a vicious sales promotional practice known as "bait advertising", "bait and switch advertising" and "fictitious bargain claims."

This is a civil proceeding, not criminal. The evidence[***9] may be found in affidavits sufficient by a fair preponderance of the believable facts. Any issue on credibility is for this court as the original trier of the facts without a jury.

The respondent Levinson's methods are deceitful and violate accepted business ethics, thus the public policy of the State as described in *section 396 of the General Business Law*, is relevant and decisive. The Legislature may and should define the ethics of the market place so as to protect fully the trusting public too often exemplified by the lone housewife in the home wherein the cunning salesman has been permitted ingress not [*487] unlike the wolf in sheep's clothing. Analogy to time-honored fables describing the villain of the piece may often strike to the core of the truth more quickly than belabored logic. In a word, let the home be inviolate.

Therefore, let the respondent Levinson, his firm, his partnership, his association, his corporation, his agents and his employees be enjoined and restrained from in any manner offering merchandise for sale as a part of a scheme or plan, with the intent not to sell said merchandise or not to sell said merchandise at the advertised price; from using[***10] a sales plan or method of compensation which is designed to prevent or discourage salesmen from selling the advertised product, or which penalizes them when they do sell the advertised product; from encouraging advocating and countenancing the disparagement by acts or words, of the advertised product or of the guarantee, credit terms, availability of service for repairs or parts; from refusing to take orders for the advertised merchandise to be delivered within a period of reasonable time; from demonstrating or showing a product which is defective, unusable, or impractical for the purposes represented or implied in the said advertisement; from accepting a deposit for the advertised products, then switching to higher-priced products; from engaging in "bait advertising" [**630]and in all other "bait and switch" practices in connection with

sales of an advertised product which may be construed as "unselling" with the intent and purpose of selling other merchandise instead.

Motion granted, without costs.

EXHIBIT Q

Certified true copy of Exhibit Q.

[signature], PARTNER, MORGAN LEWIS 9/22/03

RTIFIED AT THE CANADIAN EMBASSY
R LEGALIZATION OF THE FOREGOING
GNATURE OF: STEPHEN PAUL MAHINKA
RTIFIE A L'AMBASSADE DU CANADA
X FINS DE LEGALISER LA SIGNATURE
DESSUS DE:

[signature]

[illegible] Bouchard
nsular Program Officer
Agent Consulaire
nadian Embassy/Ambassade du Canada
shington, D.C.

Consular Section Consulaire
Canadian Embassy
Ambassade du Canada
501 Pennsylvania Avenue, N.W.
Washington, D.C. 20001

NEVADA ADMINISTRATIVE CODE

*** THIS SECTION IS CURRENT THROUGH THE 2003-3 SUPPLEMENT ***

CHAPTER 598. MISCELLANEOUS TRADE REGULATIONS AND DECEPTIVE TRADE PRACTICES
COMPARATIVE PRICE ADVERTISING
Advertisement Containing Assertion of Price

NAC **598.270** (2003)

598.270 Basis for assertion.

A seller shall not make an assertion of price in an advertisement unless:

1. The comparison of prices is based on a reliable and trustworthy survey;

2. He can substantiate the price of the products in the marketplace at the time the comparison of products was made; and

3. Each product of the competitor being compared in the survey is the same or comparable in all material respects in grade, content, weight, quality, quantity and substance.

(Added to NAC by Dep't of Commerce, eff. 10-29-93)

NEVADA ADMINISTRATIVE CODE

*** THIS SECTION IS CURRENT THROUGH THE 2003-3 SUPPLEMENT ***

CHAPTER 598. MISCELLANEOUS TRADE REGULATIONS AND DECEPTIVE TRADE PRACTICES
COMPARATIVE PRICE ADVERTISING
Advertisement Containing Assertion of Price

NAC 598.260 (2003)

598.260 Required disclosure; basis for comparison; substantiation; temporary lowering of price to distort survey prohibited.

1. An advertisement containing an assertion of price must clearly and distinctly disclose the date on which the comparison of prices was made, the method used in comparing prices, and the name of the seller or other person representing the seller who performed the survey of prices and who will substantiate the assertion of price upon request pursuant to subsection 3.

2. An assertion of price in an advertisement must be based on a comparison of the shelf, sticker or tag price of the products being compared or other evidence that the price being compared was in existence on the date of the comparison.

3. Upon the timely request of the commissioner or any other person, including a competitor mentioned in the advertisement containing an assertion of price, information substantiating the assertion of price must be provided by the seller making the assertion or an independent representative of the seller who is qualified to conduct a comparison of prices based on a survey of the prices of products of the seller and prices of products of a competitor. A request is timely if made within the period prescribed for maintaining written documentation pursuant to subsection 4.

4. The information substantiating an assertion of price must include:

(a) The date that the comparison of prices was performed;

(b) The location of the stores of the seller and the competitor specified in the advertisement where the prices were compared;

(c) A list specifying the products and the prices of the products compared in the stores of the seller and the competitor; and

(d) Any additional information required by the commissioner.

The seller shall maintain for not less than 1 year after making an assertion of price, written documentation containing the information specified in paragraphs (a), (b) and (c).

5. A price of a product of the seller being used in a comparison of prices for the purpose of making an assertion of price in an advertisement must not be temporarily lowered for the purpose of distorting the results of the survey in a manner favorable to the seller. For the purposes of this subsection, a rebuttable presumption arises that a price of a product has been temporarily lowered for the purpose of distorting the results of the survey in a manner favorable to the seller if the product has been offered for sale for less than the 21 days immediately preceding the date of the comparison at a price equal to or less than the price stated in the survey. The commissioner may find that the presumption is rebutted if evidence is offered, which he deems sufficient and credible, that:

(a) The lower price stated in the survey is caused by conditions in the marketplace or by factors not within the control of the seller; or

(b) The price was lowered for some other purpose deemed reasonable by the commissioner.

(Added to NAC by Dep't of Commerce, eff. 10-29-93)

EXHIBIT R

Certified true copy of Exhibit R.

[signature], PARTNER, MORGAN LEWIS 9/22/03

CERTIFIED AT THE CANADIAN EMBASSY
FOR LEGALIZATION OF THE FOREGOING
SIGNATURE OF: STEPHEN PAUL MAHINKA
CERTIFIE A L'AMBASSADE DU CANADA
AUX FINS DE LEGALISER LA SIGNATURE
CI-DESSUS DE:

[signature]
Hélène Bouchard
Consular Program Officer
Agent Consulaire

Canadian Embassy/Ambassade du Canada
Washington, D.C.

Consular Section Consulaire
Canadian Embassy
Ambassade du Canada
501 Pennsylvania Avenue, N.W.
Washington, D.C. 20001

OHIO ADMINISTRATIVE CODE

*** THIS DOCUMENT IS CURRENT THROUGH MARCH 6, 2003 ***

109:4 CONSUMER PROTECTION
Chapter 109:4-3 Deceptive Acts or Trade Practices in Connection with Consumer Transactions

OAC Ann.**109:4-3-12** (Anderson 2003)

109:4-3-12 Price comparisons.

(A) Declaration of policy

This rule is designed to define with reasonable specificity certain circumstances in which a supplier's acts or practices in advertising price comparisons are deceptive and therefore illegal. For purposes of this rule, price comparisons involve a comparison of the present or future price of the subject of a consumer transaction to a reference price, usually as an incentive for consumers to purchase. This rule deals only with out-of-store advertisements as defined in section (B)(3), infra. The rule stems from the general principle, codified in section 1345.02(B) of the Revised Code, that it is deceptive for any claimed savings, discount, bargain, or sale not to be genuine, for the prices which are the basis of such comparisons not to be bona fide, genuine prices, and for out-of-store advertisements which indicate price comparisons to create false expectations in the minds of consumers.

(B) Definitions

(1) "Goods and services" means, for the purposes of this rule, all items which may be the subject of consumer transactions as defined in section 1345.01(A) of the Revised Code.

(2) "Meaningful reduction" means a reduction from a reference price, which reduction is reasonably significant when compared to the reference price as a percentage, or when otherwise compared when the reference price is greater than one hundred dollars.

(3) "Out-of-store advertising" means any advertisement, message, or representation made by a supplier outside of its interior premises. It includes but is not limited to communications made via newspapers, television, radio, printed brochures, leaflets, fliers, billboards or signs painted on or posted in windows.

(4) "Price comparison" or "comparison" means any representation, however expressed, that a savings, reduction or discount exists or will exist; provided, however, that language which does not reasonably imply a comparison to identifiable prices or items does not express a price comparison.

(5) "Reference price" means a higher price to which a supplier compares another, lower price for the purpose of indicating that a reduction in price exists or will exist.

(6) "Regular price" means the price at which a supplier has recently offered the subject of a consumer transaction for sale, in good faith in the regular course of his business. It is prima facie evidence that a price is not a regular price:

(a) If it was not offered as the selling price of the goods or services in question for a period of at least thirty-one days out of the sixty days immediately preceding an advertised price comparison; or

(b) If it was offered as the price of the goods or services in question for a period of less than thirty days preceding an advertised price comparison, and substantial sales of the goods or services were not made during such period.

(7) "Trading area" means the geographical area in which a supplier in the regular course of its business solicits substantial numbers of customers. A trading area can be local, regional, or national. In the case of a supplier which does business through branch outlets, any branch outlet or group of outlets may have a trading area distinct from that of the supplier as a whole or from other of the supplier's branch outlets. The geographical reach of the out-of-store advertising of a supplier or of any of its branches can serve as evidence of the extent of its trading area.

(C) Character of supplier

(1) It is deceptive for a supplier to use in its out-of-store advertising words which identify or characterize its business or a section or department thereof in terms such as "discount," "bargain," "outlet," "wholesale," "factory prices," or other terms which indicate that substantially all or most goods and services sold are available at a meaningful reduction in price unless the supplier's business or section or department thereof is, in fact, of such a character.

(2) Where an advertisement which characterizes a supplier's business or a section or department thereof in a manner mentioned in section (C)(1) of this rule does not indicate a particular number, amount, or percentage of goods or services available at a meaningful reduction, it is deceptive if less than a reasonably large and substantial number of all types, brands, and models of items offered for sale by the supplier are available at a meaningful reduction.

(3) Where an advertisement which characterizes a supplier's business or a section or department thereof in a manner mentioned in section (C)(1) of this rule does indicate a particular number, amount, or percentage of goods and services available at a meaningful reduction, it is deceptive if fewer than the advertised number, amount, or percentage of goods and services are in fact available at a meaningful reduction.

(D) Reduction for special circumstances

(1) It is deceptive for a supplier in its out-of-store advertising to indicate or to imply that a "sale," "bargain," or other offering of a reduction in price will terminate within a given or anticipated period of time unless it does in fact terminate within the period indicated or implied. But, if circumstances which in good faith were unforeseen at the time the reduction was advertised necessitate an extension of the time within which the reduction is to terminate, a supplier does not violate this rule if it:

(a) Extends the time of termination of the reduction; and

(b) Clearly and conspicuously discloses in its further advertising the fact of such an extension.

(2) It is deceptive for a supplier in its out-of-store advertising to indicate in any way that a reduction in price exists for reasons which are not true.

(E) Comparison with supplier's own price

(1) It is deceptive for a supplier in its out-of-store advertising to make any price comparison by the use of such terms as "regularly . . . . . ., now . . . . . ." ". . . . . per cent off," "reduced from . . . . . to . . . . . ," "save $. . . . . ," unless:

(a) The comparison is to the supplier's regular price; or

(b) If the reference price is the regular price of a previous season, the season and year are clearly and conspicuously disclosed; or

(c) There is language in the advertisement which clearly and conspicuously discloses that the comparison is to another price and which discloses the nature of the reference price.

(2) If a supplier, in its out-of-store advertising, uses language indicating a range of savings or reduction, it is deceptive if the goods and services offered at the savings do not contain a reasonable number of items priced at the maximum reduction or lower. Where the offering does not contain such reasonable number of items, a supplier does not violate this rule if it clearly and conspicuously discloses this fact in its out-of-store advertising.

(F) Comparison with prices which are not the supplier's own

(1) It is deceptive for a supplier in its out-of-store advertising to use as a reference price in making a price comparison any "list," "catalogue," "manufacturer's suggested," "competitor's," or any other price which is not its own unless:

(a) Such a reference price is genuine; and

(b) The advertisement clearly and conspicuously indicates that the reference price is not the supplier's own price.

(2) For a reference price which is not a supplier's own to be genuine, it must correspond to prices at which substantial offers for sales are made at retail outlets in the trading area in which the goods or services are offered at the reference price, and it must not be an isolated price.

(3) It is prima facie evidence of compliance with sections (F)(1) and (F)(2) of this rule if the supplier:

(a) Has no knowledge that the reference price is not genuine; and

(b) Has made reasonable, bona fide efforts to determine whether the reference price is genuine.

(G) Comparison with non-identical goods

It is deceptive for a supplier in its out-of-store advertising to make a comparison between the prices of similar, but non-identical goods or services unless:

(1) The non-identical goods or services are of essentially similar quality to the advertised goods or services or the dissimilar aspects are clearly and conspicuously disclosed in the advertisements; and

(2) The advertisement clearly and conspicuously discloses that non-identical goods or services are being compared; and

(3) Either:

(a) The price comparison is to the regular price of the reference goods or services; or

(b) The nature of the reference price is clearly and conspicuously disclosed; and

(4) Either:

(a) Reference goods or services are available in the supplier's trading area; or

(b) The fact that they are not available is clearly and conspicuously disclosed.

(H) Advance or introductory sales

(1) It is deceptive for a supplier in its out-of-store advertising to use terms such as "advance sale," "introductory offer," or other language which makes a comparison to a reference price which is a future price unless the reference price becomes the regular price within the period reasonably implied by the advertisement.

(2) A supplier will not be in violation of section (H)(1) of this rule if circumstances which in good faith were unforeseen at the time that the reference price was advertised as a future regular price necessitate the reference price not becoming or remaining the regular price.

(I) Significant reduction

It is deceptive for a supplier in its out-of-store advertising to use such terms as "sale," "discount," "bargain," or any other terms indicating a savings or reduction in prices unless:

(1) The savings or reduction is a meaningful reduction; or

(2) The actual amount or percentage of savings is clearly and conspicuously indicated in the advertisement.

(former COcp-3-01.12); Eff 8-1-75

Rule promulgated under: RC Chapter 119.

Rule authorized by: RC 1345.05

EXHIBIT S

Certified true copy of Exhibit S.

[signature], PARTNER, MORGAN LEWIS 9/22/03

CERTIFIED AT THE CANADIAN EMBASSY
FOR LEGALIZATION OF THE FOREGOING
SIGNATURE OF: STEPHEN PAUL MAHINKA
CERTIFIÉ À L'AMBASSADE DU CANADA
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CI-DESSUS DE:

[signature]
Stéphane Bourbeau
Consular Program Officer
Agent Consulaire
Canadian Embassy/Ambassade du Canada
Washington, D.C.

Consular Section Consulaire
Canadian Embassy
Ambassade du Canada
501 Pennsylvania Avenue, N.W.
Washington, D.C. 20001

OREGON REVISED STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH THE 2001 REGULAR SESSION OF THE 71ST LEGISLATIVE ASSEMBLY ***

*** ANNOTATIONS CURRENT THROUGH VOLUME 19 (2002 CUMULATIVE SUPPLEMENT) ***

TITLE 50. TRADE REGULATIONS AND PRACTICES
CHAPTER 646. TRADE PRACTICES AND ANTITRUST REGULATION
UNLAWFUL TRADE PRACTICES

=1; GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

ORS § **646.608** (2001)

STATUS: CONSULT SLIP LAWS CITED BELOW FOR RECENT CHANGES TO THIS DOCUMENT
<=2> LEXSEE 2003 Ore. SB 103 -- See sections 2 and 3.
<=3> LEXSEE 2003 Ore. HB 2429 -- See sections 1 and 2.

646.608. Unlawful business, trade practices; proof; Attorney General's rules.

(1) A person engages in an unlawful practice when in the course of the person's business, vocation or occupation the person does any of the following:

(a) Passes off real estate, goods or services as those of another.

(b) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of real estate, goods or services.

(c) Causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another.

(d) Uses deceptive representations or designations of geographic origin in connection with real estate, goods or services.

(e) Represents that real estate, goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, quantities or qualities that they do not have or that a person has a sponsorship, approval, status, qualification, affiliation, or connection that the person does not have.

(f) Represents that real estate or goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand.

(g) Represents that real estate, goods or services are of a particular standard, quality, or grade, or that real estate or goods are of a particular style or model, if they are of another.

(h) Disparages the real estate, goods, services, property or business of a customer or another by false or misleading representations of fact.

(i) Advertises real estate, goods or services with intent not to provide them as advertised, or with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity.

(j) Makes false or misleading representations of fact concerning the reasons for, existence of, or amounts of price reductions.

(k) Makes false or misleading representations concerning credit availability or the nature of the transaction or obligation incurred.

(L) Makes false or misleading representations relating to commissions or other compensation to be paid in exchange for permitting real estate, goods or services to be used for model or demonstration purposes or in exchange for submitting names of potential customers.

(m) Performs service on or dismantles any goods or real estate when not authorized by the owner or apparent owner thereof.

(n) Solicits potential customers by telephone or door to door as a seller unless the person provides the information required under ORS 646.611.

(o) In a sale, rental or other disposition of real estate, goods or services, gives or offers to give a rebate or discount or otherwise pays or offers to pay value to the customer in consideration of the customer giving to the person the names of prospective purchasers, lessees, or borrowers, or otherwise aiding the person in making a sale, lease, or loan to another person, if earning the rebate, discount or other value is contingent upon occurrence of an event subsequent to the time the customer enters into the transaction.

(p) Makes any false or misleading statement about a prize, contest or promotion used to publicize a product, business or service.

(q) Promises to deliver real estate, goods or services within a certain period of time with intent not to deliver them as promised.

(r) Organizes or induces or attempts to induce membership in a pyramid club.

(s) Makes false or misleading representations of fact concerning the offering price of, or the person's cost for real estate, goods or services.

(t) Concurrent with tender or delivery of any real estate, goods or services fails to disclose any known material defect or material nonconformity.

(u) Engages in any other unfair or deceptive conduct in trade or commerce.

(v) Violates any of the provisions relating to auction sales, auctioneers or auction marts under ORS 698.640, whether in a commercial or noncommercial situation.

(w) Manufactures mercury fever thermometers.

(x) Sells or supplies mercury fever thermometers unless the thermometer is required by federal law, or is:

(A) Prescribed by a person licensed under ORS chapter 677; and

(B) Supplied with instructions on the careful handling of the thermometer to avoid breakage and on the proper cleanup of mercury should breakage occur.

(y) Sells a thermostat that contains mercury unless the thermostat is labeled in a manner to inform the purchaser that mercury is present in the thermostat and that the thermostat may not be disposed of until the mercury is removed, reused, recycled or otherwise managed to ensure that the mercury does not become part of the solid waste stream or wastewater. For purposes of this paragraph, "thermostat" means a device commonly used to sense and, through electrical communication with heating, cooling or ventilation equipment, control room temperature.

(z) Violates the provisions of ORS 803.375, 803.385 or 815.410 to 815.430.

(aa) Violates ORS 646.850 (1).

(bb) Violates any requirement of ORS 646.661 to 646.686.

(cc) Violates the provisions of ORS 128.801 to 128.898.

(dd) Violates ORS 646.883 or 646.885.

(ee) Violates any provision of ORS 646.195.

(ff) Violates ORS 646.569.

(gg) Violates the provisions of ORS 646.859.

(hh) Violates ORS 759.290.

(ii) Violates ORS 646.872.

(jj) Violates ORS 646.553 or 646.557 or any rule adopted pursuant thereto.

(kk) Violates ORS 646.563.

(LL) Violates ORS 759.690 or any rule adopted pursuant thereto.

(mm) Violates the provisions of ORS 759.705, 759.710 and 759.720 or any rule adopted pursuant thereto.

(nn) Violates ORS 646.892 or 646.894.

(oo) Violates any provision of ORS 646.249 to 646.259.

(pp) Violates ORS 646.384.

(qq) Violates ORS 646.871.

(rr) Violates ORS 822.046.

(ss) Violates ORS 128.001.

(tt) Violates ORS 646.649 (2) to (4).

(uu) Violates ORS 646.877 (2) to (5).

(vv) Violates ORS 87.686.

(ww) Violates ORS 646.651.

(xx) Violates ORS 646.879.

(yy) Violates ORS 646.402 or any rule adopted under ORS 646.402 or 646.404.

(2) A representation under subsection (1) of this section or ORS 646.607 may be any manifestation of any assertion by words or conduct, including, but not limited to, a failure to disclose a fact.

(3) In order to prevail in an action or suit under ORS 646.605 to 646.652, a prosecuting attorney need not prove competition between the parties or actual confusion or misunderstanding.

(4) No action or suit shall be brought under subsection (1)(u) of this section unless the Attorney General has first established a rule in accordance with the provisions of ORS 183.310 to 183.550 declaring the conduct to be unfair or deceptive in trade or commerce.

HISTORY: 1971 c.744 § 7 (enacted in lieu of 646.615); 1973 c.235 § 2; 1973 c.513 § 1; 1975 c.437 § 1; 1977 c.195 § 2; 1979 c.503 § 4; 1983 c.404 § 5; 1985 c.251 § 10a; 1985 c.538 § 3; 1985 c.694 § 8; 1985 c.729 § 22; 1987 c.626 § 5; 1989 c.273 § 7; 1989 c.451 § 4; 1989 c.458 § 3; 1989 c.621 § 4; 1989 c.622 § 7; 1989 c.623 § 3; 1989 c.913 § 1; 1991 c.532 § 25; 1991 c.672 § 8; 1993 c.58 § 3; 1993 c.283 § 10; 1993 c.582 § 11; 1993 c.645 § 10; 1993 c.700 § 2; 1995 c.713 § 6; 1995 c.788 § 2; 1997 c.132 § 6; 1997 c.806 § 2; 1999 c.194 § 9; 1999 c.400 § 4; 1999 c.669 § 3; 1999 c.719 § 3; 1999 c.875 § 3; 2001 c.924 § 11; 2001 c.969 § 5

NOTES:

The amendments to **646.608** by section 11, chapter 924, Oregon Laws 2001, become operative July 1, 2002. See section 12, chapter 924, Oregon Laws 2001. The text that is operative until July 1, 2002, including amendments by section 5, chapter 969, Oregon Laws 2001, is set forth for the user's convenience.

646.608. (1) A person engages in an unlawful practice when in the course of the person's business, vocation or occupation the person does any of the following:

(a) Passes off real estate, goods or services as those of another.

(b) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of real estate, goods or services.

(c) Causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another.

(d) Uses deceptive representations or designations of geographic origin in connection with real estate, goods or services.

(e) Represents that real estate, goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, quantities or qualities that they do not have or that a person has a sponsorship, approval, status, qualification, affiliation, or connection that the person does not have.

(f) Represents that real estate or goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand.

(g) Represents that real estate, goods or services are of a particular standard, quality, or grade, or that real estate or goods are of a particular style or model, if they are of another.

(h) Disparages the real estate, goods, services, property or business of a customer or another by false or misleading representations of fact.

(i) Advertises real estate, goods or services with intent not to provide them as advertised, or with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity.

(j) Makes false or misleading representations of fact concerning the reasons for, existence of, or amounts of price reductions.

(k) Makes false or misleading representations concerning credit availability or the nature of the transaction or obligation incurred.

(L) Makes false or misleading representations relating to commissions or other compensation to be paid in exchange for permitting real estate, goods or services to be used for model or demonstration purposes or in exchange for submitting names of potential customers.

(m) Performs service on or dismantles any goods or real estate when not authorized by the owner or apparent owner thereof.

(n) Solicits potential customers by telephone or door to door as a seller unless the person provides the information required under ORS 646.611.

(o) In a sale, rental or other disposition of real estate, goods or services, gives or offers to give a rebate or discount or otherwise pays or offers to pay value to the customer in consideration of the customer giving to the person the names of prospective purchasers, lessees, or borrowers, or otherwise aiding the person in making a sale, lease, or loan to another person, if earning the rebate, discount or other value is contingent upon occurrence of an event subsequent to the time the customer enters into the transaction.

(p) Makes any false or misleading statement about a prize, contest or promotion used to publicize a product, business or service.

(q) Promises to deliver real estate, goods or services within a certain period of time with intent not to deliver them as promised.

(r) Organizes or induces or attempts to induce membership in a pyramid club.

(s) Makes false or misleading representations of fact concerning the offering price of, or the person's cost for real estate, goods or services.

(t) Concurrent with tender or delivery of any real estate, goods or services fails to disclose any known material defect or material nonconformity.

(u) Engages in any other unfair or deceptive conduct in trade or commerce.

(v) Violates any of the provisions relating to auction sales, auctioneers or auction marts under ORS 698.640, whether in a commercial or noncommercial situation.

(w) Violates the provisions of ORS 803.375, 803.385 or 815.410 to 815.430.

(x) Violates ORS 646.850 (1).

(y) Violates any requirement of ORS 646.661 to 646.686.

(z) Violates the provisions of ORS 128.801 to 128.898.

(aa) Violates ORS 646.883 or 646.885.

(bb) Violates any provision of ORS 646.195.

(cc) Violates ORS 646.569.

(dd) Violates the provisions of ORS 646.859.

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(vv) Violates ORS 646.402 or any rule adopted under ORS 646.402 or 646.404.

(2) A representation under subsection (1) of this section or ORS 646.607 may be any manifestation of any assertion by words or conduct, including, but not limited to, a failure to disclose a fact.

(3) In order to prevail in an action or suit under ORS 646.605 to 646.652, a prosecuting attorney need not prove competition between the parties or actual confusion or misunderstanding.

(4) No action or suit shall be brought under subsection (1)(u) of this section unless the Attorney General has first established a rule in accordance with the provisions of ORS 183.310 to 183.550 declaring the conduct to be unfair or deceptive in trade or commerce.

Note: The amendments to **646.608** by section 13, chapter 924, Oregon Laws 2001, become operative January 1, 2006. See section 14, chapter 924, Oregon Laws 2001. The text that is operative on and after January 1, 2006, is set forth for the user's convenience.

646.608. (1) A person engages in an unlawful practice when in the course of the person's business, vocation or occupation the person does any of the following:

(a) Passes off real estate, goods or services as those of another.

(b) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of real estate, goods or services.

(c) Causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another.

(d) Uses deceptive representations or designations of geographic origin in connection with real estate, goods or services.

(e) Represents that real estate, goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, quantities or qualities that they do not have or that a person has a sponsorship, approval, status, qualification, affiliation, or connection that the person does not have.

(f) Represents that real estate or goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand.

(g) Represents that real estate, goods or services are of a particular standard, quality, or grade, or that real estate or goods are of a particular style or model, if they are of another.

(h) Disparages the real estate, goods, services, property or business of a customer or another by false or misleading representations of fact.

(i) Advertises real estate, goods or services with intent not to provide them as advertised, or with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity.

(j) Makes false or misleading representations of fact concerning the reasons for, existence of, or amounts of price reductions.

(k) Makes false or misleading representations concerning credit availability or the nature of the transaction or obligation incurred.

(L) Makes false or misleading representations relating to commissions or other compensation to be paid in exchange for permitting real estate, goods or services to be used for model or demonstration purposes or in exchange for submitting names of potential customers.

(m) Performs service on or dismantles any goods or real estate when not authorized by the owner or apparent owner thereof.

(n) Solicits potential customers by telephone or door to door as a seller unless the person provides the information required under ORS 646.611.

(o) In a sale, rental or other disposition of real estate, goods or services, gives or offers to give a rebate or discount or otherwise pays or offers to pay value to the customer in consideration of the customer giving to the person the names of prospective purchasers, lessees, or borrowers, or otherwise aiding the person in making a sale, lease, or loan to another person, if earning the rebate, discount or other value is contingent upon occurrence of an event subsequent to the time the customer enters into the transaction.

(p) Makes any false or misleading statement about a prize, contest or promotion used to publicize a product, business or service.

(q) Promises to deliver real estate, goods or services within a certain period of time with intent not to deliver them as promised.

(r) Organizes or induces or attempts to induce membership in a pyramid club.

(s) Makes false or misleading representations of fact concerning the offering price of, or the person's cost for real estate, goods or services.

(t) Concurrent with tender or delivery of any real estate, goods or services fails to disclose any known material defect or material nonconformity.

(u) Engages in any other unfair or deceptive conduct in trade or commerce.

(v) Violates any of the provisions relating to auction sales, auctioneers or auction marts under ORS 698.640, whether in a commercial or noncommercial situation.

(w) Manufactures mercury fever thermometers.

(x) Sells or supplies mercury fever thermometers unless the thermometer is required by federal law, or is:

(A) Prescribed by a person licensed under ORS chapter 677; and

(B) Supplied with instructions on the careful handling of the thermometer to avoid breakage and on the proper cleanup of mercury should breakage occur.

(y) Sells a thermostat that contains mercury unless the thermostat is labeled in a manner to inform the purchaser that mercury is present in the thermostat and that the thermostat may not be disposed of until the mercury is removed, reused, recycled or otherwise managed to ensure that the mercury does not become part of the solid waste stream or wastewater. For purposes of this paragraph, "thermostat" means a device commonly used to sense and, through electrical communication with heating, cooling or ventilation equipment, control room temperature.

(z) Sells or offers for sale a motor vehicle manufactured after January 1, 2006, that contains mercury light switches.

(aa) Violates the provisions of ORS 803.375, 803.385 or 815.410 to 815.430.

(bb) Violates ORS 646.850 (1).

(cc) Violates any requirement of ORS 646.661 to 646.686.

(dd) Violates the provisions of ORS 128.801 to 128.898.

(ee) Violates ORS 646.883 or 646.885.

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(zz) Violates ORS 646.402 or any rule adopted under ORS 646.402 or 646.404.

(2) A representation under subsection (1) of this section or ORS 646.607 may be any manifestation of any assertion by words or conduct, including, but not limited to, a failure to disclose a fact.

(3) In order to prevail in an action or suit under ORS 646.605 to 646.652, a prosecuting attorney need not prove competition between the parties or actual confusion or misunderstanding.

(4) No action or suit shall be brought under subsection (1)(u) of this section unless the Attorney General has first established a rule in accordance with the provisions of ORS 183.310 to 183.550 declaring the conduct to be unfair or deceptive in trade or commerce.

PERMANENT EDITION ANNOTATIONS:

CASENOTES:

Under former similar statute instruction was properly refused where figures complained of as constituting misbranding were not placed for advertising as the term was used in the statute, or in such a manner as to attract attention or to mislead anyone. *Laubhein v. Holsman, (1924) 111 Or 78, 225 P 190.*

Under former similar statute, whether article was misbranded was a question for determination of jury. Id.

ATTY-GEN-OPIN:

Prosecuting a publishing company, not acting in good faith in holding out to the public that one is licensed to practice professional engineering when he is not so licensed, for false advertising, 1944-46, p 24; misleading advertisement of drugs, 1962-64, p 448; legality of offering a car with erroneous mileage on odometer, (1969) Vol 34, p 811.

LAWREV-CITATIONS:

48 OLR 157, 159; 49 OLR 426.

CURRENT ANNOTATIONS

NOTES OF DECISIONS

Ascertainable loss is necessary under this section to bring individual action to recover damages. *Scott v. Western Int. Sales, Inc., 267 Or 512, 517 P2d 661 (1973)*

The making of loans is not "sale or offering for sale" of goods or service or "the conduct of any trade or commerce" under the *Unlawful Trade Practices Act. Haeger v. Johnson, 25 Or App 131, 548 P2d 532 (1976)*

This section should apply only to those unlawful practices which arise out of transactions which are at least indirectly connected with ordinary and usual course of the defendant's business, vocation or occupation. *Wolverton v. Stanwood, 278 Or 341, 563 P2d 1203 (1977)*

Action could not lie where no assertion was made that particular repair services performed on automobile were performed according to any particular standard of quality. *Denson v. Ron Tonkin Gran Turismo, Inc., 279 Or 85, 566 P2d 1177 (1977)*

Misrepresentations of offering prices are not explicitly prohibited by this section. *Denson v. Ron Tonkin Gran Turismo, Inc., 279 Or 85, 566 P2d 1177 (1977)*

Seller's misrepresentation as to title or ownership of automobile was not misrepresentation of "characteristics . . . or qualities" of goods within meaning of this section. *Chamberlain v. Jim Fisher Motors, Inc., 282 Or 229, 578 P2d 1225 (1978)*

In action for personal injuries sustained in automobile accident in which plaintiff alleged dealer violated this section in representing that car had good brakes, contention of dealer that "private remedy" conferred on consumers by Uniform Trade Practices Act was not intended to create new cause of action for personal injury was correct. *Gross-Haentjens v. Tharp, 38 Or App 313, 589 P2d 1209 (1979)*

When federal and state law required contractor to inform homeowner of right to rescind contract, representation by contractor that homeowner had no right to rescind was unlawful practice under this section and no proof of justifiable reliance was required. *Tri-West Const. v. Hernandez, 43 Or App 961, 607 P2d 1375 (1979)*, Sup Ct review denied

Furnishing contract for sale of automobile to buyer which indicated that vehicle was new rather than a demonstrator was sufficient representation that vehicle was new under this section even though buyer saw automobile's odometer reading. *Searcy v. Bend Garage Co., 286 Or 11, 592 P2d 558 (1979)*

Under former version of this section representation need not be of material nature. *Searcy v. Bend Garage Co., 286 Or 11, 592 P2d 558 (1979)*

Demurrer to complaint alleging "false or misleading representations" by defendant regarding discount fee in transaction involving government insured loan to purchaser of plaintiffs' house was properly sustained, because Unfair Trade Practices Act does not apply to loans or extensions of credit. *Lamm v. Amfac Mortgage Corp., 44 Or App 203, 605 P2d 730 (1980)*

Where defendant, a denturist, advertised his services without any indication that he was not a dentist or acting under dentist's supervision, advertisement constituted unlawful trade practice under this section since at time of advertisement only dentist or denturist under direction of dentist could offer denture services. *Terry v. Holden-Dhein Enterprises, Ltd., 48 Or App 763, 618 P2d 7 (1980)*, Sup Ct review denied

Misrepresentations as to age and amount of use made during sale of hay baler were not covered by this section. *Miller v. Hubbard-Wray Co., 52 Or App 897, 630 P2d 880 (1981)*, Sup Ct review denied, as modified by *53 Or App 531, 633 P2d 1 (1981)*

Mere fact that State Board closely supervises profession of dentistry does not lead to conclusion that consumers who are measurably damaged by dentist's actions are prohibited from suing under *Trade Practices Act. Investigators, Inc. v. Harvey, 53 Or App 586, 633 P2d 6 (1981)*

Where testimony established that value of mobile home plaintiff purchased from defendant would be substantially decreased if it had to be moved, permanency of location was both a "characteristic" and a "quality" under this section and failure to communicate fact that mobile home park where mobile home was located was likely to be sold constituted false representation of characteristic or quality. *Caldwell v. Pop's Homes, Inc., 54 Or App 104, 634 P2d 471 (1981)*

There is no requirement that representations constituting willful violation of Act be made to injured customer. *Raudebaugh v. Action Pest Control, 59 Or App 166, 650 P2d 1006 (1982)*

Facts that car sold as new had not been previously titled, licensed or registered and that plaintiff received new car rebate and warranty are factors for trier of fact to consider but are not in themselves determinative of question whether car that had been previously subject to conditional sale and delivery was "new" under *Unlawful Trade Practices Act.*

Weigel v. Ron Tonkin Chevrolet, 66 Or App 232, 673 P2d 574 (1983), aff'd as modified *298 Or 127, 690 P2d 488 (1984)*

"Likelihood of confusion" exists when consumers are likely to assume that product or service is associated with source other than actual source because of similarities between two sources' marks or marketing techniques. *Shakey's Inc. v. Covalt, 704 F2d 426 (1983)*

Where ordinary purchaser was not likely to confuse antifreeze of plaintiff and defendants, all of same yellow color and packaged in F-style jug, there was no likelihood of injury to plaintiff's business reputation and no ground for injunctive relief. *Union Carbide Corp. v. Fred Meyer, Inc., 619 F Supp 1028 (1985)*

Where plaintiff used car buyer brought action for car seller's violation of this section, plaintiff did not waive his claim for misrepresentation by reason of entry into new agreement with knowledge of fraud when he signed final sales contract because signing of contract was culmination of deceptive transaction and not separate agreement. *Teague Motor Company v. Rowton, 84 Or App 72, 733 P2d 93 (1987)*

Federal Trade Commission statutes and regulations regarding used motor vehicles do not preempt this section. *Hinds v. Paul's Auto Werkstatt, Inc., 107 Or App 63, 810 P2d 874 (1991),* Sup Ct review denied

Where borrowers retain professional services of nonlender to obtain nonbusiness loan, misrepresentation of character, quality or cost of services provided by nonlender is actionable under act. *Cullen v. Investment Strategies, Inc., 139 Or App 119, 911 P2d 936 (1996),* Sup Ct review denied

Nonlender misrepresentation of loan terms is not actionable under act. *Cullen v. Investment Strategies, Inc., 139 Or App 119, 911 P2d 936 (1996),* Sup Ct review denied

Failure of merchant to disclose known material defect or nonconformity may be "concurrent with tender or delivery" although occurring at other than precise moment of delivery. *Parrott v. Carr Chevrolet, Inc., 156 Or App 257, 965 P2d 440 (1998),* aff'd *331 Or 537, 17 P3d 473 (2001)*

Where known supply of goods is limited, exclusivity is "characteristic" of goods. *Feitler v. The Animation Celection, Inc., 170 Or App 702, 13 P3d 1044 (2000)*

LAW REVIEW CITATIONS: *73 OLR 639 (1994)*

OREGON ADMINISTRATIVE RULES

*** THIS DOCUMENT REFLECTS CHANGES FILED AS OF AUGUST 15, 2003 ***

CHAPTER 137 DEPARTMENT OF JUSTICE
DIVISION 20 MISLEADING PRICE REPRESENTATIONS

Or. Admin. R. **137-020-0010** (2003)

137-020-0010 Trade Practices Act

(1) Purpose: It is the purpose of this rule to declare as an unlawful trade practice certain representations relating to price reductions.

(2) Scope: At present, it is unlawful under ORS 646.608(1)(j) to make "false or misleading representations of fact concerning the reasons for, existence of, or amounts of price reductions." This rule is intended to define types of price comparisons which are in violation of that section, by establishing permissible types of reference price advertising. The rule does not address mis-representations regarding the "reasons for" price reductions. The Examples provided in this rule are for illustrative purposes only.

(3) Authority: This rule is adopted pursuant to ORS Chapter 183 on authority granted to the Attorney General by ORS 646.608(1)(s) and (4).

(4) Effective Date: This rule applies to all advertisements (other than catalogues) printed, distributed, or broadcast, or offers for sale made, after September 1, 1976. Subsection (6)(e) of this rule applies to all catalogues distributed in Oregon after January 1, 1977.

(5) Definitions: As used in this rule:

(a) The definitions of terms set forth in ORS 646.605(1975) are applicable;

(b) "Catalogue" means a multi-page solicitation in which a person offers more than one specific type of goods for sale from which a consumer can order goods directly without going to the seller's place of business, and which is distributed to consumers by means other than by inclusion in a newspaper;

(c) "Competitor" means a retail outlet in the person's geographic market area with whom the person in fact competes for sales;

(d) "Offering Price" means the price at which a person represents that goods will be sold or leased, whether stated as a definite sum of money or as a determinate reduction from a reference price;

(e) "Reference Price" means any price, whether stated in dollars, in terms of a percentage or faction, or by any other method, to which a person compares the currently represented offering price of its own goods. Examples of "reference prices" include manufacturer's suggested list or suggested retail prices; a competitor's offering price for the same or similar goods; a price at which the person formerly offered for sale or sold the same or similar goods; and an unspecified price at which the person formerly offered for sale or sold the same or similar goods suggested by the use of terms such as "on sale," "reduced to," ".....% off," or the like;

(f) "Readily Ascertainable Reference Price" means a reference price which is capable of being determined, from a stated offering price, by means of a simple arithmetic computation;

(g) "Similar Goods" mean goods associated with a reference price which are similar in each significant aspect, including size, grade, quality, quantity, ingredients, utility and operating characteristics, to the offered goods.

(6) Unfair or Deceptive Use of Reference Prices: A person engages in conduct which unfair or deceptive in trade or commerce when it represents that goods are available for sale or lease by it at an offering price less than a reference price unless such reference price comes within any one of the following exceptions:

(a) The reference price is stated or readily ascertainable, and is a price at which the person, in the regular course of its business, made good faith sales of the same or similar goods or, if no sales were made, offered in good faith to make sales of the same or similar goods, either:

(A) Within the preceding 30 days; or

(B) At any other time in the past which is identified.

EXAMPLE: This exception is intended to identify the most common price comparison -- to a former price charged by the seller himself. The former price must be one which was used in good faith to make or offer to make sales. Good faith is absent if the person raises his price for the purpose of subsequently claiming reductions. Comparisons to "a" legitimate former price are allowed. Thus, if a chain store reduces its price in one or two outlets to meet localized competition, its price throughout the rest of the chain can be used as a reference price. Seasonal comparisons from year-to-year are also permitted.

(b) The reference price is the price at which the person will offer the same or similar goods for sale in the future, provided that:

(A) The reference price is stated or readily ascertainable; and

(B) If the reference price will not be put into effect for more than 90 days after the representation, the effective date of the reference price is stated; and

(C) Such reference price is actually put into effect for the purpose of offering in good faith to make sales.

EXAMPLE : This exception permits introductory offering prices and the like.

(c) The reference price is stated or readily ascertainable, and is a price at which an identified or identifiable competitor is or has in the recent regular course of its business offered to make good faith sales of the same or similar goods.

EXAMPLE : A person may rely upon the recent advertised price of a competitor for the same or similar goods, if he reasonably believes the competitor was attempting to make sales at that price. Alternatively, a person can "shop" his competitor to determine the latter's recent offering price.

(d) The reference price is stated or readily ascertainable, and is required by federal or Oregon law to be affixed to the goods, and clear disclosure is made in the same representation that all sales of such goods are not necessarily made at such reference price, if such is in fact the case.

EXAMPLE : This rule is directed at claimed price reductions from the "sticker prices" of automobiles. If a person makes such a price comparison and in fact similar automobiles are sold at less than the "sticker price," that fact must be disclosed clearly in the same representation.

(e) The reference price is stated in a catalogue, so long as the person employing such reference price includes a statement, printed in a manner which a reader of the catalogue is likely to notice, explaining:

(A) The source of the reference price; and

(B) That the reference prices may not continue to be in effect during the entire life of the catalogue, if such is in fact the case. The requirements of this section are satisfied by a single disclosure statement, which applies to the catalogue as a whole, made in conjunction with the explanation to the reader of how to make a purchase from the catalogue.

(f) The reference price is stated and is a price, such as a manufacturer's list price, which the person can document as having been employed in good faith offers to sell the same or similar goods within his market area during the preceding 30 days.

EXAMPLE : Comparing one's current offering price to a manufacturer's list price is valid if the offerer can substantiate that goods have been offered or sold, in good faith, at that list price during the preceding 30 days.

(g) Notwithstanding subsections (6)(a) through (f) of this rule, a person may represent a general price reduction on a variety of merchandise without using a stated or readily ascertainable reference price, so long as:

(A) The amount of reduction is stated expressly, either in terms of a dollar amount or a percentage;

(B) The reduction is from a price or prices at which the person made good faith sales of the same or similar goods at a time in the past which is identified; and

(C) The represented reduction is true as to each item offered for sale.

EXAMPLE : This would permit advertising seasonal clearance sales and the like by means of a general representation as to price reductions, without stating specifically either the reference price or the offering price.

Stat. Auth.: ORS 646
Stats. Implemented: ORS 646.608(1)(u)

Hist.: 1AG 16, f. 7-21-76, ef. 9-1-76

EXHIBIT T

Certified true copy of Exhibit T.

[signature], PARTNER, MORGAN LEWIS 9/22/07

CERTIFIED AT THE CANADIAN EMBASSY
FOR LEGALIZATION OF THE FOREGOING
SIGNATURE OF: STEPHEN PAUL MAHINKA
CERTIFIÉ À L'AMBASSADE DU CANADA
AUX FINS DE LÉGALISER LA SIGNATURE
CI-DESSUS DE:

[signature]

Hélène Bouchard
Consular Program Officer
Agent Consulaire
Canadian Embassy/Ambassade du Canada
Washington, D.C.

Consular Section Consulaire
Canadian Embassy
Ambassade du Canada
501 Pennsylvania Avenue, N.W.
Washington, D.C. 20001

PENNSYLVANIA STATUTES, ANNOTATED BY LEXISNEXIS(TM)

* THIS SECTION IS CURRENT THROUGH ACT 8 OF THE 2003 LEGISLATIVE SESSION *
*** APRIL 2003 ANNOTATION SERVICE ***

PENNSYLVANIA STATUTES
TITLE 73. TRADE AND COMMERCE
CHAPTER 4. FAIR TRADE, AND BUSINESS PRACTICES
UNFAIR COMPETITION, ACTS OR PRACTICES

73 P.S. § **201-2** (2003)

§ **201-2.** Definitions

As used in this act.

(1) "Documentary material" means the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription or other tangible document or recording, wherever situate.

(2) "Person" means natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entities.

(3) "Trade" and "commerce" mean the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth.

(4) "Unfair methods of competition" and "unfair or deceptive acts or practices" mean any one or more of the following:

(i) Passing off goods or services as those of another;

(ii) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;

(iii) Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another;

(iv) Using deceptive representations or designations of geographic origin in connection with goods or services;

(v) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;

(vi) Representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand;

(vii) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another;

(viii) Disparaging the goods, services or business of another by false or misleading representation of fact;

(ix) Advertising goods or services with intent not to sell them as advertised;

(x) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(xi) Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;

(xii) Promising or offering prior to time of sale to pay, credit or allow to any buyer, any compensation or reward for the procurement of a contract for purchase of goods or services with another or others, or for the referral of the name or names of another or others for the purpose of attempting to procure or procuring such a contract of purchase with such other person or persons when such payment, credit, compensation or reward is contingent upon the occurrence of an event subsequent to the time of the signing of a contract to purchase;

(xiii) Promoting or engaging in any plan by which goods or services are sold to a person for a consideration and upon the further consideration that the purchaser secure or attempt to secure one or more persons likewise to join the said plan; each purchaser to be given the right to secure money, goods or services depending upon the number of persons joining the plan. In addition, promoting or engaging in any plan, commonly known as or similar to the so-called "Chain-Letter Plan" or "Pyramid Club." The terms "Chain-Letter Plan" or "Pyramid Club" mean any scheme for the disposal or distribution of property, services or anything of value whereby a participant pays valuable consideration, in whole or in part, for an opportunity to receive compensation for introducing or attempting to introduce one or more additional persons to participate in the scheme or for the opportunity to receive compensation when a person introduced by the participant introduces a new participant. As used in this subclause the term "consideration" means an investment of cash or the purchase of goods, other property, training or services, but does not include payments made for sales demonstration equipment and materials for use in making sales and not for resale furnished at no profit to any person in the program or to the company or corporation, nor does the term apply to a minimal initial payment of twenty-five dollars ($25) or less;

(xiv) Failing to comply with the terms of any written guarantee or warranty given to the buyer at, prior to or after a contract for the purchase of goods or services is made;

(xv) Knowingly misrepresenting that services, replacements or repairs are needed if they are not needed;

(xvi) Making repairs, improvements or replacements on tangible, real or personal property, of a nature or quality inferior to or below the standard of that agreed to in writing;

(xvii) Making solicitations for sales of goods or services over the telephone without first clearly, affirmatively and expressly stating:

(A) the identity of the seller;

(B) that the purpose of the call is to sell goods or services;

(C) the nature of the goods or services; and

(D) that no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment entry method for the prize promotion;

(xviii) Using a contract, form or any other document related to a consumer transaction which contains a confessed judgment clause that waives the consumer's right to assert a legal defense to an action;

(xix) Soliciting any order for the sale of goods to be ordered by the buyer through the mails or by telephone unless, at the time of the solicitation, the seller has a reasonable basis to expect that it will be able to ship any ordered merchandise to the buyer:

(A) within that time clearly and conspicuously stated in any such solicitation; or

(B) if no time is clearly and conspicuously stated, within thirty days after receipt of a properly completed order from the buyer, provided, however, where, at the time the merchandise is ordered, the buyer applies to the seller for credit to pay for the merchandise in whole or in part, the seller shall have fifty days, rather than thirty days, to perform the actions required by this subclause;

(xx) Failing to inform the purchaser of a new motor vehicle offered for sale at retail by a motor vehicle dealer of the following:

(A) that any rustproofing of the new motor vehicle offered by the motor vehicle dealer is optional;

(B) that the new motor vehicle has been rustproofed by the manufacturer and the nature and extent, if any, of the manufacturer's warranty which is applicable to that rustproofing;

The requirements of this subclause shall not be applicable and a motor vehicle dealer shall have no duty to inform if the motor vehicle dealer rustproofed a new motor vehicle before offering it for sale to that purchaser, provided that the dealer shall inform the purchaser whenever dealer rustproofing has an effect on any manufacturer's warranty applicable to the vehicle. This subclause shall not apply to any new motor vehicle which has been rustproofed by a motor vehicle dealer prior to the effective date of this subclause.

(xxi) Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.

LexisNexis (TM) Notes:

CASE NOTES

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Torts: Business & Employment Torts: Unfair Business Practices

Antitrust & Trade Law: Consumer Protection: Deceptive Acts & Practices

1. Where plaintiff investors alleged that they had purchased defendant investment firms' services for their personal portfolio and that they suffered injury due to the firm's fraudulent conduct in handling their account, the complaint stated a claim under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, *73 Pa. Stat. Ann. § 201-1* et seq. and more specifically, under *73 Pa. Stat. Ann. §§ 201-2(3), 201-3, 201-4(i)*-(xxi), 201-9.2(a). *Perry v. Markman Capital Mgmt., 2002 U.S. Dist. LEXIS 19103 (E.D. Pa. Oct. 4 2002).*

2. Despite the insureds' concerns on the subject, the insureds' allegations that their insurers concealed a pre-existing condition policy in the subject insurance policy were sufficient to state a claim under *73 Pa. Cons. Stat. § 201-2(4)(xxi). Piper v. American Nat'l Life Ins. Co., 2002 U.S. Dist. LEXIS 20549 (M.D. Pa. Sept. 25 2002).*

3. Although the automobile Lemon Law, *73 P.S. §§ 1952-63*, did not apply in this case because purchaser did not register the automobile in Pennsylvania, the court found that the dealership violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law, when it falsified a repair receipt, *73 P.S. § 201-2* , and the trial court properly awarded treble damages to purchaser, *73 P.S. § 201-9.2(a). Johnson v. Hyundai Motor Am., 698 A.2d 631, 1997 Pa. Super. LEXIS 2187 (Pa. Super. Ct. 1997).*

4. When determining the appropriate statute of limitations to apply to a claim under the Unfair Trade Practices and Consumer Protection Law (UTPCPL), *73 P.S. § 201-2(4)* (viii), the UTPCPL encompasses an array of practices which might be analogized to passing off, misappropriation, trademark infringement, disparagement, false advertising, fraud, breach of contract, and breach of warranty; such actionable conduct sounds in assumpsit as well as trespass and parallels actions in contract as well as those arising in tort, and therefore, the court is unable to characterize all the various claims under the UTPCPL as fraud or deceit. *Dilucido v. Terminix Int'l, 450 Pa. Super. 393, 676 A.2d 1237, 1996 Pa. Super. LEXIS 1617 (1996).*

5. Towing and mechanic service's brochure that stated that the customer could have his car repaired at any shop after using its towing services was sufficiently fraudulent under *73 P.S. § 201-2(4)*(xvii) when the service thereafter charged the customer 15 percent of its repair estimate when he selected another mechanic to make the repairs. *Hammer v. Nikol, 659 A.2d 617, 1995 Pa. Commw. LEXIS 248 (Pa. Commw. Ct. 1995).*

6. Summary judgment was not appropriate in borrowers' class action against a lender for breach of contract and unfair business practices where the determination of whether an express warranty was breached in violation of *73 P.S. § 201-2(4)(xiv)* depended on the parties' intended definition. *Lebourgeois v. Firstrust Sav. Bank, 25 Phila. 249, 1993 Phila. Cty. Rptr. LEXIS 131 (Pa. C.P. 1993).*

7. Corporation and its officers violated *73 P.S. § 201-2(4)*(xiii) where members of the corporation and/or distributors were compensated by an upward flow of commissions through multi-level down-line organizations. *Commonwealth by Zimmerman v. First Fin. SEC., Inc., 128 Pa. Commw. 581, 564 A.2d 280, 1989 Pa. Commw. LEXIS 633 (1989).*

8. Unfair Trade Practices and Consumer Protection Law, *73 P.S. § 201-1*, was not unconstitutional as *73 P.S. § 201-8* was not a penal statute, *73 P.S. § 201-2* was not void for vagueness, and *73 P.S. §§ 201-2* and *201-3* sufficiently apprised individuals of the proscribed conduct. *Commonwealth by Zimmerman v. National Apt. Leasing Co., 108 Pa. Commw. 300, 529 A.2d 1157, 1987 Pa. Commw. LEXIS 2372 (1987).*

9. The Attorney General has the authority to define and establish by regulation unfair or deceptive acts or practices or unfair method of competition in addition to those expressly defined in the Unfair Trade Practices and Consumer Protection Law Act, *73 P.S. § 201-2(4). Pennsylvania Retailers' Assocs. v. Lazin, 57 Pa. Commw. 232, 426 A.2d 712, 1981 Pa. Commw. LEXIS 1203 (1981).*

10. Utilization by defendants of their many and diversified corporations, organizations, and fictitious names without full disclosure to their prospective customers, or even to their own agents and representatives, was a violation of *73 P.S. § 201-2(4)(ii). Commonwealth v. Tolleson, 14 Pa. Commw. 72, 321 A.2d 664, 1974 Pa. Commw. LEXIS 800 (1974).*

11. Misleading and false statements of defendants concerning the ownership of stock, the ownership of airplanes, and the value and availability of stock violated *73 P.S. § 201-2(4)(iii). Commonwealth v. Tolleson, 14 Pa. Commw. 72, 321 A.2d 664, 1974 Pa. Commw. LEXIS 800 (1974).*

12. In order to induce prospects to purchase memberships, defendants made promises to purchasers about payments, credits, or allowances for the procurement of contracts of purchase with others and about the availability of positions as salesmen; thus, the entire sales system of defendants, at all levels of sale, was an illegal referral sales system under *73 P.S. 201-2(4)(xii). Commonwealth v. Tolleson, 14 Pa. Commw. 72, 321 A.2d 664, 1974 Pa. Commw. LEXIS 800 (1974).*

13. Defendants' use of multiple corporations to promote, sell, and service memberships in the corporations, together with the absence of any disclosure concerning the corporations involved, caused a likelihood of confusion and misunderstanding and was fraudulent conduct in violation of *73 P.S. 201-2(4)*(xiii). *Commonwealth v. Tolleson, 14 Pa. Commw. 72, 321 A.2d 664, 1974 Pa. Commw. LEXIS 800 (1974).*

14. When dealing with prospective purchasers of memberships, defendants or their agents intentionally misrepresented, or without regard for the truthfulness of their statements unintentionally misrepresented, pertinent and necessary facts, including facts concerning the roles of, the status of, the relationship among, and the affiliation of persons with the various corporations owned or controlled by defendants, in violation of *73 P.S. 201-2(4)(v). Commonwealth v. Tolleson, 14 Pa. Commw. 72, 321 A.2d 664, 1974 Pa. Commw. LEXIS 800 (1974).*

15. Failure of defendants to register foreign corporations, unincorporated organizations, and trade names was a pertinent misrepresentation that caused a likelihood of confusion or of misunderstanding in violation of *73 P.S. § 201-2(4)(ii)*, (iii), and (xiii). *Commonwealth v. Tolleson, 14 Pa. Commw. 72, 321 A.2d 664, 1974 Pa. Commw. LEXIS 800 (1974).*

16. Statements of defendants and their agents advising prospects to lie to banks in order to get loans were fraudulent conduct in violation of *73 P.S. 201-2(4)* (xiii). *Commonwealth v. Tolleson, 14 Pa. Commw. 72, 321 A.2d 664, 1974 Pa. Commw. LEXIS 800 (1974).*

Antitrust & Trade Law: Consumer Protection: False Advertising

17. False advertisement claim under *Pa. Stat. Ann. tit. 73, § 201-2(4)(ix)* against the energy company could not be turned into a class action, where each customer had to prove reliance on the commercials and such a question of fact would have predominated over common questions of law and fact, which was prohibited by Pa. R. Civ. P. 1708(a)(1). *Aronson v. Greenmountain, 2002 PA Super 316, 809 A.2d 399, 2002 Pa. Super. LEXIS 2872 (Pa. Super. Ct. 2002).*

18. Where the customer sought to have a class of customers certified in the false advertising claim pursuant to *Pa. Stat. Ann. tit. 73, § 201-2(4)(ix)*, the customer was not entitled to a presumption that the customers relied on the false advertisements, where such a presumption would have allowed the customers to pursue the company for false advertisements that they never even viewed, and no such right existed under § **201-2(4)**(ix). *Aronson v. Greenmountain, 2002 PA Super 316, 809 A.2d 399, 2002 Pa. Super. LEXIS 2872 (Pa. Super. Ct. 2002).*

Antitrust & Trade Law: Price Fixing & Restraints of Trade

19. Bank that issued payroll checks in behalf of an employer did not violate Pennsylvania's Unfair Trade Practices and Consumer Protection Law, *Pa. Stat. Ann. tit. 73, § 201-2(4)(xxi)*, by charging a $3 service fee to cash those checks for employees who did not have a personal account at the bank. *Sexton v. Pnc Bank, 2002 PA Super 33, 792 A.2d 602, 2002 Pa. Super. LEXIS 109, 47 U.C.C. Rep. Serv. 2d (CBC) 280 (Pa. Super. Ct. 2002).*

Antitrust & Trade Law: Trade Practices & Unfair Competition

20. There was no support for insureds' contention that unnecessarily compelling litigation qualified under *Pa. Stat. Ann. tit. 73, § 201-2(4)* as unfair or deceptive acts, and where there was no allegation of any fraud in bringing a declaratory judgment action against the insureds, the allegation did not state a viable claim under the Unfair Trade Practices and Consumer Protection Law, *Pa. Stat. Ann. tit. 73, § 201-1* et seq. *Hardinger v. Motorists Mut. Ins. Co., 2003 U.S. Dist. LEXIS 3199 (E.D. Pa. Feb. 27 2003).*

21. Cable company that failed to automatically credit subscribers for outages within their control did not violate the Unfair Trade Practices and Consumer Protection Law, *73 P.S. § 201-2(4)*, because the subscription agreement could not be construed to imply that the cable company was obligated to provide credits for cable outages when it had no notice that an outage had occurred. *Kaplan v. Cablevision of Pa., Inc., 448 Pa. Super. 306, 671 A.2d 716, 1996 Pa. Super. LEXIS 232, 29 U.C.C. Rep. Serv. 2d (CBC) 425 (1996).*

Banking Law: Bank Activities: Consumer Protection: Truth in Lending

22. Tax preparation service's referral of customers to source for refund anticipation loan did not make it the customers' agent, so the service was not liable to customer for failure to disclose loan terms under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, *73 P.S. § 201-2* et seq. *Basile v. H & R Block, Inc., 563 Pa. 359, 761 A.2d 1115, 2000 Pa. LEXIS 2811 (2000).*

Banking Law: Bank Activities: Consumer Protection: Unfair & Deceptive Credit Practices

23. Where the residential mortgage debtor alleged in her petition that the debt collectors' conduct was deceptive, there was no need to allege all of the elements of common law fraud on the debtor's Pennsylvania Unfair Trade Practices and Consumer Protection Law claim; therefore, the federal district court judge denied the collectors' motion to dismiss the claim. *Flores v. Shapiro, 2002 U.S. Dist. LEXIS 25707* (Oct. 29, 2002).

Business & Corporate Entities: Agency: Agents Distinguished: Fiduciary Relationships

24. In an action for, inter alia, violation of Pennsylvania Unfair Trade Practices and Consumer Protection Law, *73 Pa. Cons. Stat. §§ 201-2* et seq., and breach of fiduciary duty, the appellate court held that a confidential relationship could be established by evidence of either "overmastering influence" or of "weakness, dependence or trust;" the trial court erred in requiring both elements, rather than only one. *Basile v. H & R Block, Inc., 2001 PA Super 136, 777 A.2d 95, 2001 Pa. Super. LEXIS 551 (Pa. Super. Ct. 2001).*

25. Tax preparation service's referral of customers to source for refund anticipation loan did not make it the customers' agent, so the service was not liable to customer for failure to disclose loan terms under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, *73 P.S. § 201-2* et seq. *Basile v. H & R Block, Inc., 563 Pa. 359, 761 A.2d 1115, 2000 Pa. LEXIS 2811 (2000).*

Civil Procedure: Class Actions: Prerequisites

26. False advertisement claim under *Pa. Stat. Ann. tit. 73, § 201-2(4)(ix)* against the energy company could not be turned into a class action, where each customer had to prove reliance on the commercials and such a question of fact would have predominated over common questions of law and fact, which was prohibited by Pa. R. Civ. P. 1708(a)(1). *Aronson v. Greenmountain, 2002 PA Super 316, 809 A.2d 399, 2002 Pa. Super. LEXIS 2872 (Pa. Super. Ct. 2002).*

27. Certification on the claim under *73 P.S. § 201-2(4)* was inappropriate because the court could not assume uniform reliance upon the language of the note and a letter sent by the bank to its borrowers. *Lebourgeois v. Firstrust Sav. Bank, 22 Phila. 223, 1991 Phila. Cty. Rptr. LEXIS 22 (Pa. C.P. 1991).*

Governments: Legislation: Statutes of Limitations: Time Limitations

28. When determining the appropriate statute of limitations to apply to a claim under the Unfair Trade Practices and Consumer Protection Law (UTPCPL), *73 P.S. § 201-2(4)* (viii), the UTPCPL encompasses an array of practices which might be analogized to passing off, misappropriation, trademark infringement, disparagement, false advertising, fraud, breach of contract, and breach of warranty; such actionable conduct sounds in assumpsit as well as trespass and parallels actions in contract as well as those arising in tort, and therefore, the court is unable to characterize all the various claims

under the UTPCPL as fraud or deceit. *Dilucido v. Terminix Int'l, 450 Pa. Super. 393, 676 A.2d 1237, 1996 Pa. Super. LEXIS 1617 (1996).*

Insurance Law: Bad Faith & Extracontractual Liability: Statutory Damages & Penalties

29. There was no support for insureds' contention that unnecessarily compelling litigation qualified under *Pa. Stat. Ann. tit. 73, § 201-2(4)* as unfair or deceptive acts, and where there was no allegation of any fraud in bringing a declaratory judgment action against the insureds, the allegation did not state a viable claim under the Unfair Trade Practices and Consumer Protection Law, *Pa. Stat. Ann. tit. 73, § 201-1* et seq. *Hardinger v. Motorists Mut. Ins. Co., 2003 U.S. Dist. LEXIS 3199 (E.D. Pa. Feb. 27 2003).*

Insurance Law: Claims & Contracts: Unfair Business Practices

30. There was no support for insureds' contention that unnecessarily compelling litigation qualified under *Pa. Stat. Ann. tit. 73, § 201-2(4)* as unfair or deceptive acts, and where there was no allegation of any fraud in bringing a declaratory judgment action against the insureds, the allegation did not state a viable claim under the Unfair Trade Practices and Consumer Protection Law, *Pa. Stat. Ann. tit. 73, § 201-1* et seq. *Hardinger v. Motorists Mut. Ins. Co., 2003 U.S. Dist. LEXIS 3199 (E.D. Pa. Feb. 27 2003).*

Torts: Business & Employment Torts: Deceit & Fraud

31. Where there was proof of a pattern of conduct on the part of contractor, it justified an inference that at the time of contract formation appellant did not intend to adhere to the specific completion schedules and that it constituted fraudulent conduct under *73 P. S. § 201-4*; the grant of a permanent injunction was proper under *73 P. S. § 201-4. Commonwealth v. Burns, 663 A.2d 308, 1995 Pa. Commw. LEXIS 373 (Pa. Commw. Ct. 1995).*

Torts: Business & Employment Torts: Unfair Business Practices

32. In an action for, inter alia, violation of Pennsylvania Unfair Trade Practices and Consumer Protection Law, *73 Pa. Cons. Stat. §§ 201-2* et seq., and breach of fiduciary duty, the appellate court held that a confidential relationship could be established by evidence of either "overmastering influence" or of "weakness, dependence or trust;" the trial court erred in requiring both elements, rather than only one. *Basile v. H & R Block, Inc., 2001 PA Super 136, 777 A.2d 95, 2001 Pa. Super. LEXIS 551 (Pa. Super. Ct. 2001).*

33. *73 P.S. § 201-2(3)* and (4) of the Unfair Trade Practices and Consumer Protection Law, *73 P.S. §§ 201-1* et seq. are not intended to create a cause of action on a doctor's statements to a patient about a course of treatment and its probable results. *Gatten v. Merzi, 397 Pa. Super. 148, 579 A.2d 974, 1990 Pa. Super. LEXIS 2654 (1990).*

TREATISES AND ANALYTICAL MATERIALS

1. *P.L.E. APPEALS § 28*, Pennsylvania Law Encyclopedia, VOLUME 2e, § 28 Rulings Relating to Parties, Copyright 2002, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

2. *P.L.E. FRAUD § 7*, Pennsylvania Law Encyclopedia, VOLUME 16, § 7 Scienter, Copyright 2002, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

3. *P.L.E. TRADE AND COMMERCE § 3*, Pennsylvania Law Encyclopedia, VOLUME 37, § 3 Particular Methods, Copyright 2002, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

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5. *9-143 Pennsylvania Transaction Guide--Legal Forms § 143.60*, Pennsylvania Transaction Guide--Legal Forms, UNIT 3 COMMERCIAL TRANSACTIONS, § 143.60 Magnuson-Moss Warranty--Federal Trade Commission Improvement Act, Copyright 2002, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

6. *10-160 Pennsylvania Transaction Guide--Legal Forms § 160.02*, Pennsylvania Transaction Guide--Legal Forms, UNIT 3 COMMERCIAL TRANSACTIONS, § 160.02 Research Guide, Copyright 2002, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

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PENNSYLVANIA STATUTES, ANNOTATED BY LEXISNEXIS(TM)

* THIS SECTION IS CURRENT THROUGH ACT 8 OF THE 2003 LEGISLATIVE SESSION *
*** APRIL 2003 ANNOTATION SERVICE ***

PENNSYLVANIA CONSOLIDATED STATUTES
TITLE 18. CRIMES AND OFFENSES
PART II. DEFINITION OF SPECIFIC OFFENSES
ARTICLE C. OFFENSES AGAINST PROPERTY
CHAPTER 41. FORGERY AND FRAUDULENT PRACTICES

18 Pa.C.S. § **4107** (2003)

§ **4107.** Deceptive or fraudulent business practices

(a) OFFENSE DEFINED.--A PERSON COMMITS AN OFFENSE IF, IN THE COURSE OF BUSINESS, HE:

(1) uses or possesses for use a false weight or measure, or any other device for falsely determining or recording any quality or quantity;

(2) sells, offers or exposes for sale, or delivers less than the represented quantity of any commodity or service;

(3) takes or attempts to take more than the represented quantity of any commodity or service when as buyer he furnishes the weight or measure;

(4) sells, offers or exposes for sale adulterated or mislabeled commodities. As used in this paragraph, the term "adulterated" means varying from the standard of composition or quality prescribed by or pursuant to any statute providing criminal penalties for such variance or set by established commercial usage. As used in this paragraph, the term "mislabeled" means varying from the standard of trust or disclosure in labeling prescribed by or pursuant to any statute providing criminal penalties for such variance or set by established commercial usage;

(5) makes a false or misleading statement in any advertisement addressed to the public or to a substantial segment thereof for the purpose of promoting the purchase or sale of property or services;

(6) makes a false or misleading written statement for the purpose of obtaining property or credit;

(7) makes a false or misleading written statement for the purpose of promoting the sale of securities, or omits information required by law to be disclosed in written documents relating to securities;

(8) makes a false or misleading material statement to induce an investor to invest in a business venture. The offense is complete when any false or misleading material statement is communicated to an investor regardless of whether any investment is made. For purposes of grading, the "amount involved" is the amount or value of the investment solicited or paid, whichever is greater. As used in this paragraph, the following words and phrases shall mean: "Amount" as used in the definition of "material statement" includes currency values and comparative expressions of value, including, but not limited to, percentages or multiples. "Business venture" means any venture represented to an investor as one where he may receive compensation either from the sale of a product, from the investment of other investors or from any other commercial enterprise. "Compensation" means anything of value received or to be received by an investor. "Invest" means to pay, give or lend money, property, service or other thing of value for the opportunity to receive compensation. The term also includes payment for the purchase of a product. "Investment" means the money, property, service or other thing of value paid or given, or to be paid or given, for the opportunity to receive compensation. "Investor" means any natural person, partnership, corporation, limited liability company, business trust, other association, government entity, estate, trust, foundation or other entity solicited to invest in a business venture, regardless of whether any investment is made. "Material statement" means a statement about any matter which could affect an investor's decision to invest in a business venture, including, but not limited to, statements about:

(i) the existence, value, availability or marketability of a product;

(ii) the number of former or current investors, the amount of their investments or the amount of their former or current compensation;

(iii) the available pool or number of prospective investors, including those who have not yet been solicited and those who already have been solicited but have not yet made an investment;

(iv) representations of future compensation to be received by investors or prospective investors; or

(v) the source of former, current or future compensation paid or to be paid to investors or prospective investors.

"Product" means a good, a service or other tangible or intangible property of any kind; or

(9) obtains or attempts to obtain property of another by false or misleading representations made through communications conducted in whole or in part by telephone involving the following:

(i) express or implied claims that the person contacted has won or is about to win a prize;

(ii) express or implied claims that the person contacted may be able to recover any losses suffered in connection with a prize promotion; or

(iii) express or implied claims regarding the value of goods or services offered in connection with a prize or a prize promotion.

As used in this paragraph, the term "prize" means anything of value offered or purportedly offered. The term "prize promotion" means an oral or written express or implied representation that a person has won, has been selected to receive or may be eligible to receive a prize or purported prize.

(A.1) GRADING OF OFFENSES.--

(1) A violation of this section constitutes:

(i) a felony of the third degree if the amount involved exceeds $ 2,000;

(ii) a misdemeanor of the first degree if the amount involved is $ 200 or more but $2,000 or less;

(iii) a misdemeanor of the second degree if the amount involved is less than $200; or

(iv) when the amount involved cannot be satisfactorily ascertained, the offense constitutes a misdemeanor of the second degree.

(2) Amounts involved in deceptive or fraudulent business practices pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade of the offense.

(3) Where a person commits an offense under subsection (a) and the victim of the offense is 60 years of age or older, the grading of the offense shall be one grade higher than specified in paragraph (1).

(A.2) JURISDICTION.--

(1) The district attorneys of the several counties shall have the authority to investigate and to institute criminal proceedings for any violation of this section.

(2) In addition to the authority conferred upon the Attorney General by the act of October 15, 1980 (P.L. 950, No. 164), known as the Commonwealth Attorneys Act, the Attorney General shall have the authority to investigate and to institute criminal proceedings for any violation of this section or any series of such violations involving more than one county of this Commonwealth or involving any county of this Commonwealth and another state. No person charged with a violation of this section by the Attorney General shall have standing to challenge the authority of the Attorney General to investigate or prosecute the case, and, if any such challenge is made, the challenge shall be dismissed and no relief shall be available in the courts of this Commonwealth to the person making the challenge.

(b) DEFENSES.--IT IS A DEFENSE TO PROSECUTION UNDER THIS SECTION IF THE DEFENDANT PROVES BY A PREPONDERANCE OF THE EVIDENCE THAT HIS CONDUCT WAS NOT KNOWINGLY OR RECKLESSLY DECEPTIVE.

(c) Deleted.

LexisNexis (TM) Notes:

CASE NOTES
Criminal Law & Procedure: Criminal Offenses: Fraud: False Pretenses
Criminal Law & Procedure: Sentencing: Sentencing Guidelines Generally

Criminal Law & Procedure: Criminal Offenses: Fraud: False Pretenses

1. *18 Pa. Cons. Stat. § 4107(a)*, under which defendant was charged with deceptive practices, was constitutional; the wording of the statute was sufficiently definite to put defendant on notice regarding what type of practices defendant was forbidden to employ in defendant's business; therefore the statute was not void for vagueness. *Commonwealth v. Vergotz, 420 Pa. Super. 440, 616 A.2d 1379, 1992 Pa. Super. LEXIS 3273 (1992).*

Criminal Law & Procedure: Sentencing: Sentencing Guidelines Generally

2. Where defendant had entered a plea of guilty to one count of deceptive business practices in relation to the sale of illegal fireworks under *18 Pa. Cons. Stat. § 4107*, the trial court's sentence improperly prohibited defendant from running his business anywhere for a period of one year pursuant to the Unfair Trade Practices and Consumer Protection Law, *73 P.S. §§ 201-4, 201-4.1*, and *42 Pa. Cons. Stat. §§ 9721(a)(1)* to (6), 9754(c)(13) as the trial court lacked the authority to impose such a sentence. *Commonwealth v. Thier, 444 Pa. Super. 78, 663 A.2d 225, 1995 Pa. Super. LEXIS 2245 (1995).*

TREATISES AND ANALYTICAL MATERIALS

1. *P.L.E. CRIMINAL LAW § 1261*, Pennsylvania Law Encyclopedia, VOLUME 20, § 1261 In General, Copyright 2002, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

2. *P.L.E. TELECOMMUNICATIONS § 1*, Pennsylvania Law Encyclopedia, VOLUME 37, § 1 In General, Copyright 2002, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

3. *10-160 Pennsylvania Transaction Guide--Legal Forms § 160.02*, Pennsylvania Transaction Guide--Legal Forms, UNIT 3 COMMERCIAL TRANSACTIONS, § 160.02 Research Guide, Copyright 2002, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

4. *10-160 Pennsylvania Transaction Guide--Legal Forms § 160.03*, Pennsylvania Transaction Guide--Legal Forms, UNIT 3 COMMERCIAL TRANSACTIONS, § 160.03 Legal Background, Copyright 2002, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

5. *10-161 Pennsylvania Transaction Guide--Legal Forms § 161.04*, Pennsylvania Transaction Guide--Legal Forms, UNIT 3 COMMERCIAL TRANSACTIONS, § 161.04 State Statutes, Copyright 2002, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

LAW REVIEWS

1. *45 Vill. L. Rev. 793*, COMMENT: DOES ECONOMIC CRIME PAY IN PENNSYLVANIA? THE PERCEPTION OF LENIENCY IN PENNSYLVANIA ECONOMIC OFFENDER SENTENCING, Peter Fridirici, 2000,

EXHIBIT U

Certified true copy of Exhibit U.

[signature], PARTNER, MORGAN LEWIS 9/22/03

RTIFIED AT THE CANADIAN EMBASSY
R LEGALIZATION OF THE FOREGOING
GNATURE OF: STEPHEN PAUL MAHINKA
RTIFIE A L'AMBASSADE DU CANADA
X FINS DE LEGALISER LA SIGNATURE
EESSUS DE:

[signature]

[illegible] Boudreau
nsular Program Officer
Agent Consulaire
nadian Embassy//Ambassade du Canada
shington, D.C.

Consular Section Consulaire
Canadian Embassy
Ambassade du Canada
501 Pennsylvania Avenue, N.W.
Washington, D.C. 20001

SOUTH DAKOTA CODIFIED LAWS

*** STATUES CURRENT THROUGH THE 2003 SPECIAL SESSION ***

*** ANNOTATIONS CURRENTTHROUGH 2003 SD 23 ***

TITLE 37. TRADE REGULATION
CHAPTER 37-24. DECEPTIVE TRADE PRACTICES AND CONSUMER PROTECTION

=1; GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

S.D. Codified Laws § **37-24-6** (2003)

§ 37-24-6. Deceptive acts or practices -- Each act as Class 2 misdemeanor -- Subsequent acts

It is a deceptive act or practice for any person to:

(1) Knowingly and intentionally act, use, or employ any deceptive act or practice, fraud, false pretense, false promises, or misrepresentation or to conceal, suppress, or omit any material fact in connection with the sale or advertisement of any merchandise, regardless of whether any person has in fact been mislead, deceived, or damaged thereby;

(2) Advertise price reductions without satisfying one of the following:

(a) Including in the advertisement the specific basis for the claim of a price reduction; or

(b) Offering the merchandise for sale at the higher price from which the reduction is taken for at least seven consecutive business days during the sixty-day period prior to the advertisement.

Any person advertising consumer property or services in this state, which advertisements contain representations or statements as to any type of savings claim, including reduced price claims and price comparison value claims, shall maintain reasonable records for a period of two years from the date of sale and advertisement, which records shall disclose the factual basis for such representations or statements and from which the validity of any such claim be established. However, these reasonable record provisions do not apply to the sale of any merchandise which:

(a) Is of a class of merchandise that is routinely advertised on at least a weekly basis in newspapers, shopping tabloids, or similar publications; and

(b) Has a sales price before price reduction that is less than fifteen dollars per item;

(3) Represent a sale of merchandise at reduced rates due to the cessation of business operations and after the date of the first advertisement remain in business under the same, or substantially the same, ownership or trade name, or continue to offer for sale the same type of merchandise at the same location for more than one hundred twenty days;

(4) Give or offer a rebate, discount, or anything of value to an individual as an inducement for selling consumer property or services in consideration of giving the names of prospective purchasers or otherwise aiding in making a sale to another person, if the earning of the rebate, discount, or other thing of value is contingent upon the occurrence of an event subsequent to the time the individual agrees to the sale;

(5) Engage in any scheme or plan for disposal or distribution of merchandise whereby a participant pays a valuable consideration for the chance to receive compensation primarily for introducing one or more additional persons into

participation in the planner's scheme or for the chance to receive compensation when the person introduced by the participant introduces a new participant;

(6) Send, deliver, provide, mail, or cause to be sent, delivered, provided, or mailed any unordered consumer property or service, or any bill or invoice for unordered consumer property or service provided;

(7) Advertise a rate, price, or fee for a hotel, motel, campsite, or other lodging accommodation which is not in fact available to the public under the terms advertised. It is not a violation of this subdivision to establish contract rates which are different than public rates;

(8) Charge a rate, price, or fee for a hotel, motel, campsite, or other lodging accommodation which is different than the rate, price, or fee charged on the first night of the guest's stay unless, at the initial registration of the guest, a written notification of each price, rate, or fee to be charged during the guest's reserved continuous stay is delivered to the guest and an acknowledgment of receipt of the notice is signed by the guest and kept by the innkeeper for the same period of time as is required by § 34-18-21;

(9) Knowingly and intentionally fail to mail to a future guest a written confirmation of the date and rates of reservations made for any accommodation at a hotel, motel, campsite, or other lodging accommodation when a written request for confirmation is received from the future guest;

(10) Refuse to return or reverse the charge for a deposit upon any hotel, motel, campsite, or other lodging accommodation which is canceled by the guest more than thirty days before the date of the reservation. The innkeeper may establish a policy requiring a longer time for notice of cancellation or a handling fee in the event of cancellation, which may not exceed twenty-five dollars, if the policy is in writing and is delivered or mailed to the guest at or near the making of the reservation;

(11) Knowingly advertise or cause to be listed through the internet or in a telephone directory a business address that misrepresents where the business is actually located or that falsely states that the business is located in the same area covered by the telephone directory. This subdivision does not apply to a telephone service provider, an internet service provider, or a publisher or distributor of a telephone directory, unless the conduct proscribed in this subdivision is on behalf of the provider, publisher, or distributor;

(12) Sell, market, promote, advertise, or otherwise distribute any card or other purchasing mechanism or device that is not insurance that purports to offer discounts or access to discounts from pharmacies for prescription drug purchases if:

(a) The card or other purchasing mechanism or device does not expressly state in bold and prominent type, prevalently placed, that discounts are not insurance;

(b) The discounts are not specifically authorized by a separate contract with each pharmacy listed in conjunction with the card or other purchasing mechanism or device; or

(c) The discount or access to discounts offered, or the range of discounts or access to the range of discounts, is misleading, deceptive, or fraudulent, regardless of the literal wording; or

The provisions of this subdivision do not apply to a customer discount or membership card issued by a store or buying club for use in that store or buying club.

(13) Send or cause to be sent an unsolicited commercial electronic mail message that does not include in the subject line of such message "ADV:" as the first four characters. If the message contains information that consists of explicit sexual material that may only be viewed, purchased, rented, leased, or held in possession by an individual eighteen years of age and older, the subject line of each message shall include "ADVas the first eight characters. An unsolicited commercial electronic mail message does not include a message sent to a person with whom the initiator has an existing personal or business relationship or a message sent at the request or express consent of the recipient.

Each act in violation of this section is a Class 2 misdemeanor. Any subsequent conviction of an act in violation of this statute, which occurs within two years is a Class 1 misdemeanor. Any subsequent conviction of an act in violation of this statute, which occurs within two years of a conviction of a Class 1 misdemeanor pursuant to this statute, is a Class 6 felony.

HISTORY: Source: SL 1971, ch 218, § 2 (a); 1977, ch 190, § 294; 1986, ch 324; 1987, ch 281, § 2; 1989, ch 338, § 1; 1992, ch 278, § 1; 1998, ch 243, § 1; 1999, ch 202, § 1; 2001, ch 214, §§ 1, 2; 2002, ch 185, § 1.

NOTES: COMMISSION NOTE.

The Code Commission has made minor changes in phraseology and punctuation in subdivisions (9) to (11), inclusive, for grammatical consistency.

CROSS-REFERENCES.

Penalties for classified misdemeanors, § 22-6-2.

EMPLOYEES ADVERSELY AFFECTED.

An employee is a "person" within the purview of § 37-24-31 who may be adversely affected by practices declared unlawful under this section. *Moss v. Guttormson, 1996 SD 76, 551 NW 2d 14.*

COLLATERAL REFERENCES.

World Wide Web domain as violating state trademark protection statute or state unfair trade practices act, *96 ALR 5th 1.*

USER NOTE: For more generally applicable notes, see notes under the first section of this part, chapter or title.

EXHIBIT V

Certified true copy of Exhibit V.

[signature], PARTNER, MORGAN LEWIS 9/22/03

ERTIFIED AT THE CANADIAN EMBASSY
OR LEGALIZATION OF THE FOREGOING
GNATURE OF: STEPHEN PAUL MAHINKA
ERTIFIE A L'AMBASSADE DU CANADA
OUR FINS DE LEGALISER LA SIGNATURE
-DESSUS DE:

[signature]
[redacted]
nsular Program Officer
Agent Consulaire
nadian Embassy/Ambassade du Canada
shington, D.C.

Consular Section Consulaire
Canadian Embassy
Ambassade du Canada
501 Pennsylvania Avenue, N.W.
Washington, D.C 20001

TEXAS STATUTES AND CODES ANNOTATED BY LEXISNEXIS(TM)

*** THIS DOCUMENT REFLECTS ALL EFFECTIVE LEGISLATION THROUGH 2003 CH. 207 ***
*** ENACTED JUNE 20, 2003 ***
***June 2003 Annotation Service ***

BUSINESS AND COMMERCE CODE
TITLE 2. COMPETITION AND TRADE PRACTICES
CHAPTER 17. DECEPTIVE TRADE PRACTICES
SUBCHAPTER E. DECEPTIVE TRADE PRACTICES AND CONSUMER PROTECTION

Tex. Bus. & Com. Code § **17.46** (2003)

NOTICE: This section contains multiple versions of subsections (b)(24), (b)(25), and (b)(26).

§ **17.46.** Deceptive Trade Practices Unlawful

(a) False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful and are subject to action by the consumer protection division under Sections 17.47, 17.58, 17.60, and 17.61 of this code.

(b) Except as provided in Subsection (d) of this section, the term "false, misleading, or deceptive acts or practices" includes, but is not limited to, the following acts:

(1) passing off goods or services as those of another;

(2) causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(3) causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another;

(4) using deceptive representations or designations of geographic origin in connection with goods or services;

(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not;

(6) representing that goods are original or new if they are deteriorated, reconditioned, reclaimed, used, or secondhand;

(7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(8) disparaging the goods, services, or business of another by false or misleading representation of facts;

(9) advertising goods or services with intent not to sell them as advertised;

(10) advertising goods or services with intent not to supply a reasonable expectable public demand, unless the advertisements disclosed a limitation of quantity;

(11) making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions;

(12) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;

(13) knowingly making false or misleading statements of fact concerning the need for parts, replacement, or repair service;

(14) misrepresenting the authority of a salesman, representative or agent to negotiate the final terms of a consumer transaction;

(15) basing a charge for the repair of any item in whole or in part on a guaranty or warranty instead of on the value of the actual repairs made or work to be performed on the item without stating separately the charges for the work and the charge for the warranty or guaranty, if any;

(16) disconnecting, turning back, or resetting the odometer of any motor vehicle so as to reduce the number of miles indicated on the odometer gauge;

(17) advertising of any sale by fraudulently representing that a person is going out of business;

(18) advertising, selling, or distributing a card which purports to be a prescription drug identification card issued under Section 19A, *Article 21.07-6, Insurance Code*, in accordance with rules adopted by the commissioner of insurance, which offers a discount on the purchase of health care goods or services from a third party provider, and which is not evidence of insurance coverage, unless:

(A) the discount is authorized under an agreement between the seller of the card and the provider of those goods and services or the discount or card is offered to members of the seller;

(B) the seller does not represent that the card provides insurance coverage of any kind; and

(C) the discount is not false, misleading, or deceptive;

(19) using or employing a chain referral sales plan in connection with the sale or offer to sell of goods, merchandise, or anything of value, which uses the sales technique, plan, arrangement, or agreement in

which the buyer or prospective buyer is offered the opportunity to purchase merchandise or goods and in connection with the purchase receives the seller's promise or representation that the buyer shall have the right to receive compensation or consideration in any form for furnishing to the seller the names of other prospective buyers if receipt of the compensation or consideration is contingent upon the occurrence of an event subsequent to the time the buyer purchases the merchandise or goods;

(20) representing that a guarantee or warranty confers or involves rights or remedies which it does not have or involve, provided, however, that nothing in this subchapter shall be construed to expand the implied warranty of merchantability as defined in Sections 2.314 through 2.318 and Sections 2A.212 through 2A.216 to involve obligations in excess of those which are appropriate to the goods;

(21) promoting a pyramid promotional scheme, as defined by Section 17.461;

(22) representing that work or services have been performed on, or parts replaced in, goods when the work or services were not performed or the parts replaced;

(23) filing suit founded upon a written contractual obligation of and signed by the defendant to pay money arising out of or based on a consumer transaction for goods, services, loans, or extensions of credit intended primarily for personal, family, household, or agricultural use in any county other than in the county in which the defendant resides at the time of the commencement of the action or in the county in which the defendant in fact signed the contract; provided, however, that a violation of this subsection shall not occur where it is shown by the person filing such suit he neither knew or had reason to know that the county in which such suit was filed was neither the county in which the defendant resides at the commencement of the suit nor the county in which the defendant in fact signed the contract;

NOTICE: FIRST OF TWO VERSIONS OF SUBD. (b)(24)
As amended by Acts 2001, ch. 962, § 1.

(24) failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed;

NOTICE: SECOND OF TWO VERSIONS OF SUBD. (b)(24)
As amended by Acts 2001, ch. 1229, § 27.

(24) using the term "corporation," "incorporated," or an abbreviation of either of those terms in the name of a business entity that is not incorporated under the laws of this state or another jurisdiction;

NOTICE: FIRST OF TWO VERSIONS OF SUBD. (b)(25)
As amended by Acts 2001, ch. 962, § 1.

(25) using the term "corporation," " incorporated," or an abbreviation

of either of those terms in the name of a business entity that is not incorporated under the laws of this state or another jurisdiction; or

NOTICE: SECOND OF TWO VERSIONS OF SUBD. (b)(25)
As amended by Acts 2001, ch. 1229, § 27.

(25) taking advantage of a disaster declared by the governor under Chapter 418, Government Code, by:

(A) selling or leasing fuel, food, medicine, or another necessity at an exorbitant or excessive price; or

(B) demanding an exorbitant or excessive price in connection with the sale or lease of fuel, food, medicine, or another necessity; or

NOTICE: FIRST OF TWO VERSIONS OF SUBD. (b)(26)
As amended by Acts 2001, ch. 962, § 1.

(26) taking advantage of a disaster declared by the governor under Chapter 418, Government Code, by:

(A) selling or leasing fuel, food, medicine, or another necessity at an exorbitant or excessive price; or

(B) demanding an exorbitant or excessive price in connection with the sale or lease of fuel, food, medicine, or another necessity.

NOTICE: SECOND OF TWO VERSIONS OF SUBD. (b)(26)
As amended by Acts 2001, ch. 1229, § 27.

(26) selling, offering to sell, or illegally promoting an annuity contract under Chapter 22, Acts of the 57th Legislature, 3rd Called Session, 1962 (Article 6228a-5, Vernon's Texas Civil Statutes), with the intent that the annuity contract will be the subject of a salary reduction agreement, as defined by that Act, if the annuity contract is not an eligible qualified investment under that Act.

(c)(1) It is the intent of the legislature that in construing Subsection (a) of this section in suits brought under Section 17.47 of this subchapter the courts to the extent possible will be guided by Subsection (b) of this section and the interpretations given by the Federal Trade Commission and federal courts to Section 5(a)(1) of the Federal Trade Commission Act [*15 U.S.C.A. § 45*(a)(1)].

(2) In construing this subchapter the court shall not be prohibited from considering relevant and pertinent decisions of courts in other jurisdictions.

(d) For the purposes of the relief authorized in Subdivision (1) of Subsection (a) of Section 17.50 of this subchapter, the term "false, misleading, or deceptive acts or practices" is limited to the acts enumerated in specific subdivisions of Subsection (b) of this section.

HISTORY:

LexisNexis (TM) Notes:

CASE NOTES

Antitrust & Trade Law: Consumer Protection
Antitrust & Trade Law: Consumer Protection: Deceptive Acts & Practices
Antitrust & Trade Law: Consumer Protection: False Advertising
Antitrust & Trade Law: Trade Practices & Unfair Competition
Banking Law: Bank Activities: Consumer Protection
Banking Law: Bank Activities: Consumer Protection: Unfair & Deceptive Credit Practices
Banking Law: Bonds, Guarantees & Letters of Credit
Business & Corporate Entities: Agency: Authority to Act: Agent Authority
Business & Corporate Entities: Agency: Causes of Action & Remedies: Punitive Damages
Civil Procedure: Justiciability: Standing
Civil Procedure: Jurisdiction: Subject Matter Jurisdiction: Jurisdiction Over Action
Civil Procedure: Venue: General Venue
Civil Procedure: Class Actions: Prerequisites
Civil Procedure: Summary Judgment: Supporting Papers & Affidavits
Civil Procedure: Summary Judgment: Burdens of Production & Proof
Civil Procedure: Summary Judgment: Partial Summary Judgment
Civil Procedure: Summary Judgment: Summary Judgment Standard
Civil Procedure: Alternative Dispute Resolution: Mandatory ADR
Civil Procedure: Jury Trials: Jury Instructions
Civil Procedure: Jury Trials: Province of Court & Jury
Civil Procedure: Remedies: Extraordinary Writs
Civil Procedure: Costs & Attorney Fees: Judgment Interest
Civil Procedure: Costs & Attorney Fees: Attorney Fees
Civil Procedure: Injunctions: Preliminary & Temporary Injunctions
Commercial Law (UCC): General Provisions (Article 1): Good Faith
Commercial Law (UCC): Sales (Article 2): Form, Formation & Readjustment
Contracts Law: Contract Conditions & Provisions: Express Warranties
Contracts Law: Contract Conditions & Provisions: Implied Warranties
Contracts Law: Breach: Causes of Action
Contracts Law: Defenses: Fraud & Misrepresentation
Evidence: Procedural Considerations: Inferences & Presumptions
Evidence: Relevance: Parol Evidence Rule
Governments: Legislation: Effect & Operation
Governments: Legislation: Effect & Operation: Operability
Governments: Legislation: Statutes of Limitations: Statutes of Limitations Generally
Governments: Legislation: Statutory Remedies & Rights
Governments: Legislation: Types of Statutes
Healthcare Law: Actions Against Healthcare Workers
Insurance Law: Bad Faith & Extracontractual Liability
Insurance Law: Bad Faith & Extracontractual Liability: Failure to Settle
Insurance Law: Bad Faith & Extracontractual Liability: Statutory Damages & Penalties
Insurance Law: Claims & Contracts
Insurance Law: Claims & Contracts: Estoppel & Waiver
Insurance Law: Claims & Contracts: Fiduciary Responsibilities
Insurance Law: Claims & Contracts: Good Faith & Fair Dealing
Insurance Law: Claims & Contracts: Unfair Business Practices
Insurance Law: Motor Vehicle Insurance: Coverage Generally
Insurance Law: Property Insurance: All-Risk Coverage
Insurance Law: Regulation of Insurance: Claims Investigations & Practices
Real & Personal Property Law: Condominiums, Cooperatives & Homeowner Associations: Condominiums
Real & Personal Property Law: Insurance: Title Insurance
Real & Personal Property Law: Landlord & Tenant: Commercial Leases
Torts: Business & Employment Torts: Bad Faith Breach of Contract
Torts: Business & Employment Torts: Concealment
Torts: Business & Employment Torts: Deceit & Fraud

Torts: Business & Employment Torts: Unfair Business Practices
Torts: Malpractice Liability: Attorneys
Torts: Malpractice Liability: Healthcare Providers
Torts: Products Liability: Breach of Warranty
Torts: Public Entity Liability: Immunity
Torts: Vicarious Liability: Respondeat Superior
Torts: Wrongful Death & Survival
Transportation Law: Private Motor Vehicles: Licensing & Registration

Antitrust & Trade Law: Consumer Protection

1. A representative of an estate is not a consumer under Tex. *Bus. & Com. Code Ann. §§ 17.46(a), 17.50(a)(1),* (2), and (3) because such a cause of action did not survive the death of the original consumer. *Lukasik v. San Antonio Blue Haven Pools, 21 S.W.3d 394, 2000 Tex. App. LEXIS 889 (Tex. App. San Antonio 2000).*

2. Substantial misrepresentations rather than puffery by car dealer justified recovery for mental anguish, and car purchaser was a consumer and could recover under the Deceptive Trade Practices-Consumer Protection Act, Tex. *Bus. & Com. Code Ann. § 17.46(b)(5)* and (7), against auto manufacturer. *Milt Ferguson Motor Co. v. Zeretzke, 827 S.W.2d 349, 1991 Tex. App. LEXIS 3279 (Tex. App. San Antonio 1991).*

Antitrust & Trade Law: Consumer Protection: Deceptive Acts & Practices

3. In an insurance dispute arising from an insurance company's denial of its insured's claim for automobile theft, the insured's claim, that the insurance company violated the Deceptive Trade Practices Act, was dismissed upon partial summary judgment. *Nnunukwe v. State Farm Auto. Ins. Co., 2003 Tex. App. LEXIS 1357 (Tex. App. Houston 14th Dist. Feb. 13 2003).*

4. A reseller of long distance services could not present a valid claim against a telephone carrier for cutting off its billing service under Title II of the Communications Act of 1933, *47 U.S.C.S. §§ 201-224. Brittan Communs. Int'l Corp. v. Southwestern Bell Tel. Co., 313 F.3d 899, 2002 U.S. App. LEXIS 25752 (5th Cir. Tex. 2002).*

5. Because buyers set forth some evidence that the sellers had knowledge that their house did not comply with federal flood regulations, knowledge not shared with the buyers, a genuine issue of fact was raised regarding the challenged elements of the buyers' cause of action against the sellers for a violation of Tex. *Bus. & Com. Code Ann. § 17.46(b)(5),* (25) of the Texas Deceptive Trade Practices-Consumer Protection Act, Tex. *Bus. & Com. Code Ann. § 17.41* et. seq.; thus, summary judgment under Tex. R. Civ. P. 166a(i) was improper. *Osborne v. Coldwell Banker United Realtors, 2002 Tex. App. LEXIS 4930 (Tex. App. Houston 1st Dist. July 11 2002).*

6. Car owners failed to prove any misrepresentation by a car dealership or a car manufacturer in violation of Tex. *Bus. & Com. Code Ann. § 17.46(b)(5)* of the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA), Tex. *Bus. & Com. Code Ann. § 17.41* et seq.; there was no evidence of any deceptive advertising, and the car salesman's statements made to the owners were considered "puffing" and not actionable under the *DTPA. Chandler v. Gene Messer Ford, Inc., 81 S.W.3d 493, 2002 Tex. App. LEXIS 4828 (Tex. App. Eastland 2002).*

7. Car owners failed to prove any non-disclosure by a car dealership or a car manufacturer in violation of Tex. *Bus. & Com. Code Ann. § 17.46(b)(23)* of the Texas Deceptive Trade Practices-Consumer Protection Act, Tex. *Bus. & Com. Code Ann. § 17.41* et seq.; there was no evidence that the dealership or manufacturer knew of the alleged air bag danger, nor was there any evidence that the manufacturer withheld information about the alleged danger. *Chandler v. Gene Messer Ford, Inc., 81 S.W.3d 493, 2002 Tex. App. LEXIS 4828 (Tex. App. Eastland 2002).*

8. A client's claim that her attorney (1) represented that the services the attorney was providing were of a particular quality when they were of another; (2) the attorney's agreement to represent the client conferred rights which it did not;

and (3) the attorney failed to disclose information known to the attorney in an attempt to induce the client to enter into a contract she would not have entered into had that information been disclosed merely restated her legal malpractice claim and did not state a claim under Tex. *Bus. & Com. Code Ann. § 17.46* (Vernon Supp. 2001). *Goffney v. Rabson, 56 S.W.3d 186, 2001 Tex. App. LEXIS 4610 (Tex. App. Houston 14th Dist. 2001).*

9. Trial court improperly granted summary judgment on the purchasers' deceptive trade practices claims on no evidence grounds in home seller's favor because there was some evidence of misrepresentation to establish a violation of Tex. *Bus. & Com. Code Ann. § 17.46(b)(5)* and (7). *Sigler v. Durbec, 2001 Tex. App. LEXIS 2807 (Tex. App. Dallas Apr. 30 2001).*

10. The decisive test of whether a misappropriation occurs under the Texas Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.46(b)* is whether the seller asserts a fact of which the buyer is ignorant or merely states an opinion or judgment on a matter of which the seller has no special knowledge and on which the buyer may be expected also to have an opinion and to exercise his judgment. *Steptoe v. True, 38 S.W.3d 213, 2001 Tex. App. LEXIS 333 (Tex. App. Houston 14th Dist. 2001).*

11. Claim against car dealship and bank for alleged fraudulent concealment and violation of Deceptive Trade Practices Act (Tex. *Bus. & Com. Code Ann. § 17.41* et seq.), which required individualized proof of reliance by claimants as an essential element, and for which the resolution of individual issues would be an overwhelming task for a single jury, was rejected for class certification under Tex. R. Civ. P. 42. *Peltier Enters., Inc. v. Hilton, 51 S.W.3d 616, 2000 Tex. App. LEXIS 8451 (Tex. App. Tyler 2000).*

12. Defendant failed to raise a deceptive trade practice violation under Tex. *Bus. & Com. Code Ann. § 17.46(b)(12)* because his contention that his car was towed in violation of a sign that indicated he could park did not establish the existence of an underlying contract or agreement. *Horn v. A.J.'s Wrecker Serv., Inc., 2000 Tex. App. LEXIS 5607 (Tex. App. Dallas Aug. 22 2000).*

13. In action against automobile manufacturer based upon allegedly-defective motorized seat belt systems in its vehicles, purported common questions of law and fact, including claims of breach of express and implied warranties pursuant to Tex. *Bus. & Com. Code Ann. § 17.50(a)(2)*, alleged use of false, misleading and defective practices as defined in Tex. *Bus. & Com. Code Ann. §§ 17.46* and *17.50*, and breach of implied warranty of merchantability under Tex. *Bus. & Com. Code Ann. § 2.314(b)(3)*, were insufficient to satisfy the commonality requirement for class certification under Tex. R. Civ. P. 42(a)(2). *Nissan Motor Co. v. Fry, 27 S.W.3d 573, 2000 Tex. App. LEXIS 5565 (Tex. App. Corpus Christi 2000).*

14. Given that Texas public policy, as reflected in Tex. *Civ. Prac. & Rem. Code Ann. §§ 171.001* et seq., strongly favors the submission of disputes to arbitration and that claims under §§ 17.46(b)(12) and 17.50 of the Texas Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.41* et seq., fall within the scope of an arbitration agreement, a trial judge was directed to withdraw his order denying a defendant financing company's motion to compel arbitration. *In re Conseco Fin. Servicing Corp., 19 S.W.3d 562, 2000 Tex. App. LEXIS 3822 (Tex. App. Waco 2000).*

15. Insurance agent, who was not a consumer of an insurer's goods and services, could not state a cause of action under Tex. *Ins. Code Ann. art. 21.21* for the insurer's alleged violations of the Deceptive Trade Practices Act (DTPA), Tex. *Bus. & Com. Code § 17.46(b)(5)*, (7), (9), and (23), because the terms of those subsections of the DTPA required consumer status. *Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 2000 Tex. LEXIS 13, 43 Tex. Sup. Ct. J. 348 (Tex. 2000).*

16. Lack of consumer status did not bar an insurance agent from bringing a cause of action under Tex. *Ins. Code Ann. art. 21.21* for an insurer's alleged violations of the Deceptive Trade Practices Act (DTPA) Tex. *Bus. & Com. Code § 17.46(b)(12)*, because that subsection of the DTPA did not require consumer status. *Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 2000 Tex. LEXIS 13, 43 Tex. Sup. Ct. J. 348 (Tex. 2000).*

17. Bank that fulfilled its limited duty to transmit and explain a letter of credit to its recipient on behalf of the issuing bank did not commit an actionable deceptive trade act; thus the recipient had no cause of action against it for making a

misrepresentation where its duty to issue and provide limited instructions were fulfilled. *Bank One, N.A. v. Little, 978 S.W.2d 272, 1998 Tex. App. LEXIS 5629, 38 U.C.C. Rep. Serv. 2d (CBC) 1276 (Tex. App. Fort Worth 1998).*

18. Consumer's breach of contract, fraud, and consumer protection claims brought against satellite installer pursuant to the Texas Deceptive Trade Practices Consumer Protection Act, Tex. *Bus. & Com. Code Ann. §§ 17.46 , 17.50,* were denied because satellite installer did not misrepresent quality of goods or installation and did not breach the contract by demanding full payment. *Moore v. Inman's Corp., 1998 Tex. App. LEXIS 2293 (Tex. App. Dallas Apr. 20 1998).*

19. Seller was subject to liability under Tex. *Bus. & Com. Code Ann. § 17.46(b)(7)* even though seller's misrepresentations were not made knowingly. *Sci Coatings Southwest v. Drawbaugh Corp., 1998 Tex. App. LEXIS 2280 (Tex. App. Dallas Apr. 17 1998).*

20. Junkyard owners failed to establish causation in fact in their action against two attorneys for violation of the Deceptive Trade Practices-Consumer Protection Act, Tex. *Bus. & Com. Code Ann. §§ 17.46 , 17.50,* where the claim was based on the drafting of a bill of sale that reflected a direct sale of the junkyard owners' business rather than a friendly repossession, and the only cause of their damages was the act of the purchaser in suing on an agreement that was unenforceeable under the statute of frauds. *Rodriguez v. Klein, 960 S.W.2d 179, 1997 Tex. App. LEXIS 5767 (Tex. App. Corpus Christi 1997).*

21. Bank's slogan "A Tradition of Excellence and its policy of "knowing its customers" were mere opinion or puffing and did not form the basis of an express warranty under the Texas Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.46(b). Humble Nat'l Bank v. Dcv, Inc., 933 S.W.2d 224, 1996 Tex. App. LEXIS 3833 (Tex. App. Houston 14th Dist. 1996).*

22. Statements about contractual rights and obligations may fall within the ambit of the Deceptive Trade Practices and Consumer Protection Act (DTPA), specifically *Tex. Bus. & Com. Code Ann. 17.46(b)(12)*; a cause is actionable, absent evidence of overreaching or victimizing, when a party makes "factual" representations that prove to be false, while "interpretive" representations that prove to be false would not be actionable; incorrect representations concerning an unambiguous provision may be actionable, while such representations concerning an ambiguous provision are not actionable; and courts should view the totality of the circumstances to determine whether representations are actionable. *Adler Paper Stock v. Houston Refuse Disposal, 930 S.W.2d 761, 1996 Tex. App. LEXIS 3734 (Tex. App. Houston 1st Dist. 1996).*

23. Insured stated a cause of action under Tex. *Bus. and Com. Code Ann. § 17.46(b)(12)* of the Texas Deceptive Trade Practices Act and under Tex. *Ins. Code Ann. art. 21.21, § 16* sufficient to withstand a motion for summary judgment, where the insured alleged that the insurer's agent represented that the retrospective premiums billed to the insured would not exceed 10 to 15 percent of the premiums charged in one year, and where the retrospective premiums that actually were charged did exceed 15 percent. *Garrison Contractors v. Liberty Mut. Ins. Co., 927 S.W.2d 296, 1996 Tex. App. LEXIS 3198 (Tex. App. El Paso 1996).*

24. Adjusters who were hired to provide adjusting services for claims submitted through a governmental trust pool were not subject to Tex. *Bus. & Com. Code Ann. § 17.46* of the Deceptive Trade Practice Act because they were not an insurer subject to § **17.46.** *Coffman v. Scott Wetzel Servs., 908 S.W.2d 516, 1995 Tex. App. LEXIS 2593 (Tex. App. Fort Worth 1995).*

25. Failure to disclose information about goods or services can be a deceptive act if the failure to disclose was intended to induce the consumer to enter into the transaction. *Busse v. Pacific Cattle Feeding Fund #1, 896 S.W.2d 807, 1995 Tex. App. LEXIS 529 (Tex. App. Texarkana 1995).*

26. Application for writ of error was denied, in claim alleging violations of Deceptive Practices--Consumer Protection Act, Tex. *Bus. & Com. Code Ann. §§ 17.46(b)(5)(7)(23),* arising out of purchase of house, because it was barred by statute of limitations. *Smith v. Gray, 907 S.W.2d 444, 1995 Tex. LEXIS 19, 38 Tex. Sup. Ct. J. 346 (Tex. 1995).*

27. Title insurance company was not liable for damages, under Tex. *Bus. & Com. Code §§ 17.41* et seq., based on the buyer's discovery that it did not have title to the real estate purchased, where thee lack of title ownership was caused by

the buyer's own failure to make loan payments to the seller and not by any title defect. *Tri-legends Corp. v. Ticor Title Ins. Co., 889 S.W.2d 432, 1994 Tex. App. LEXIS 2336 (Tex. App. Houston 14th Dist. 1994).*

28. Where a sports car owner and collector was told he would receive the first of a specific type of model but did not, and later learned he was the fifth person to receive such a model, the appeals court agreed with the sports car owner that summary judgment was improper for the dealership he had sued for deceptive trade practices where the summary judgment evidence did not negate or address elements of his cause of action. *Stanley v. Classic Italia, 1994 Tex. App. LEXIS 4040 (Tex. App. Dallas July 25 1994).*

29. Respondent patient's action, brought pursuant to the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code § 17.41* et seq., that was not based on petitioner patient's breach of the accepted standard of medical care, was not precluded by the Medical Liability and Insurance Improvement Act, Tex. *Rev. Civ. Stat. art. 4590i*, § 12.01(a). *Sorokolit v. Rhodes, 889 S.W.2d 239, 1994 Tex. LEXIS 58, 37 Tex. Sup. Ct. J. 680 (Tex. 1994).*

30. Home buyers who prevailed in an action brought under the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.46(b)(23)*, were entitled to elect the theory of measuring attorney's fees that provided the greatest recovery and to receive prejudgment interest. *Morgan v. Ebby Halliday Real Estate, 873 S.W.2d 385, 1993 Tex. App. LEXIS 3435 (Tex. App. Fort Worth 1993).*

31. Tex. *Rev. Civ. Stat. Ann. art. 4590i*, § 12.01(a), did not shield dentist from patient's claim under the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.46(b)(5) &* (7), for knowing misrepresentation concerning dentist's representation that dentures could be made to fit patient. *Jeffery v. Walden, 899 S.W.2d 207, 1993 Tex. App. LEXIS 3553 (Tex. App. Dallas 1993).*

32. Plaintiff consumers' causes of action were pleaded in the language of the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA), specifically Tex. *Bus. & Com. Code Ann. §§ 17.46(b), 17.50*; they were complaining of the conduct of defendant travel companies' agent in making certain representations or failing to make certain disclosures, and they did not mention in their pleading the cruise-ticket contract, and they did not raise an issue as to the content of the cruise-ticket contract or attempt to enforce or challenge rights emanating from the contract; consequently, the appellate court ruled that the consumers' causes of action were solely derived from the DTPA and that, thus, they were entitled to have those causes of action litigated in a Texas court notwithstanding the forum-selection clause in the cruise-ticket contract. *Pozero v. Alfa Travel, Inc., 856 S.W.2d 243, 1993 Tex. App. LEXIS 1966 (Tex. App. San Antonio 1993).*

33. Statement made by appellee was not merely puffing because the statement was very concise and carried the impression that appellee had more knowledge than the buyer and was an expert. *Hedley Feedlot v. Weatherly Trust, 855 S.W.2d 826, 1993 Tex. App. LEXIS 1431 (Tex. App. Amarillo 1993).*

34. Evidence did not support finding that car dealer violated Tex. *Bus. & Com. Code Ann. § 17.46(b)(5)*, (7) because the salesman's statements were too general to be an actionable misrepresentation. *Aguilar v. Autohaus, Inc., 800 S.W.2d 853, 1991 Tex. LEXIS 3, 34 Tex. Sup. Ct. J. 265 (Tex. 1991).*

35. Defendant may be held liable for the deceptive trade practices described in Tex. *Bus. & Com. Code Ann. § 17.46(b)(5)*, (7), (12), even if defendant did not know that the representations made were false or did not intend to deceive anyone. *Eagle Properties, Ltd. v. Scharbauer, 807 S.W.2d 714, 1990 Tex. LEXIS 165, 34 Tex. Sup. Ct. J. 463 (Tex. 1990).*

36. Section **17.46(** b) of the Deceptive Trade Practice Act, Tex. *Bus. & Com. Code Ann. § 17.41* et seq., applied to professional architects' services, as did the implied warranty of good and workmanlike performance of services. *White Budd Van Ness Partnership v. Major-gladys Drive Joint Venture, 798 S.W.2d 805, 1990 Tex. App. LEXIS 2799 (Tex. App. Beaumont 1990).*

37. If the statements alleged to be misrepresentations were, in fact, only puffing or opinion, they could not be actionable representations under Tex. *Bus. & Com. Code Ann. §§ 17.46(b)(5)* and *17.46(b)(7)* of the *Deceptive Trade Practices-Consumer Protection Act. Autohaus, Inc. v. Aguilar, 794 S.W.2d 459, 1990 Tex. App. LEXIS 2294 (Tex. App. Dallas 1990).*

38. Texas Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.46(b)(7)* brands as a false, misleading or deceptive act a representation that goods are of a particular standard, quality, or grade if they are not. Milam Dev. Corp. v. 7*7*0*1 *Wurzbach Tower Council of Co-owners, Inc., 789 S.W.2d 942, 1990 Tex. App. LEXIS 1518 (Tex. App. San Antonio 1990).*

39. Corporate seller of motel had an action under the Deceptive Trade Practices Act, Tex. *Bus. and Com. Code Ann. § 17.46(b)(5)*, (7), and (21) for the wrongful disbursing of escrow funds deposited in connection with the proposed sale of a motel where escrow company failed to adhere to representations concerning the escrow services they would provide. *Commercial Escrow Co. v. Rockport Rebel, Inc., 778 S.W.2d 532, 1989 Tex. App. LEXIS 2263 (Tex. App. Corpus Christi 1989).*

40. Trial court improperly granted a take nothing judgment against the purchaser in a suit against seller of an oven because it did not possess any of the characteristics that it was represented to possess under Tex. *Bus. & Com. Code Ann. § 17.46(b)(5). Rrtm Restaurant Corp. v. Keeping, 766 S.W.2d 804, 1988 Tex. App. LEXIS 3410 (Tex. App. Dallas 1988).*

41. Because the driver purchased gasoline at appellee store and placed it in appellant owner's car, the owner was a consumer under Tex. *Bus. & Com. Code Ann. §§ 17.46(b)(2)*, (5), (7), (19), (23). *Kelly v. Circle K Corp., 1988 Tex. App. LEXIS 2625 (Tex. App. Houston 1st Dist. Oct. 27 1988).*

42. Evidence that real estate agency listed a home for sale as having no known defects, that the home buyer experienced foundational, sewage, and water problems immediately upon purchasing the home, neighbor's testimony that the house's septic tank regularly malfunctioned and that she informed the listing realtor of the problems was sufficient to support a finding that the real estate agency committed a deceptive trade practice, Tex. *Bus. & Com. Code Ann. §§ 17.50(a)(1), 17.46(b)*; real estate agency was jointly and severally liable with the owner under amended Tex. *Bus. & Com. Code § 27.01* for fraudulent inducement because the real estate agency shared in the commission on the property sale. *Century 21 Page One Realty v. Naghad, 760 S.W.2d 305, 1988 Tex. App. LEXIS 2336 (Tex. App. Texarkana 1988).*

43. On a suit under the Deceptive Trade Practices Act, Tex. Bus. & Com. Ann. Code § 17.41 et seq., arising from an agreement to sell a fishing vessel, the trial court abused its discretion under §§ **17.46** (b)(12), (24), when it held that the facts sellers alleged in their motion for a new trial did not constitute a meritorious defense to the buyer's cause of action because the "as is where is" provision of the sale agreement, together with the assertion that no other representations were made regarding the vessel, sufficiently set forth a meritorious defense to either of the buyer's § **17.46**(b) claims. *Gotcher v. Barnett, 757 S.W.2d 398, 1988 Tex. App. LEXIS 1489 (Tex. App. Houston 14th Dist. 1988).*

44. In consumer's suit under the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. §§ 17.46(b)(5), 17.46(b)(7)*, and *17.50(a)(2)* for damages due to a faulty software package made by manufacturer and modified and sold by distributor, the district court erred in granting a directed verdict in favor of software manufacturer where there was at least a scintilla of evidence that manufacturer either made or could be held responsible for the misrepresentation or breach of warranty that was the producing cause of consumer's damages due to manufacturer's being inextricably intertwined with distributor so that manufacturer could be held equally responsible for distributor's misrepresentations. *Custom Controls Co. v. Mds Qantel, Inc., 746 S.W.2d 261, 1987 Tex. App. LEXIS 9113 (Tex. App. Houston 1st Dist. 1987).*

45. Where a party contracted to repair a chimney, was unable to achieve the desired result, and sued to recover the amount due on the contract, a judgment granting a counterclaim based on a violation of the Deceptive Trade Practices-Consumer Protection Act, Tex. *Bus. & Com. Code Ann. §§ 17.41-17.63* was improper; the party did not know at the time of the transaction that the repairs were impractical as required for recovery pursuant to Tex. *Bus. & Com. Code Ann. § 17.46(b)(23)* (now **17.46**(b)(24)). *Brown Found. Repair & Consulting, Inc. v. Henderson, 719 S.W.2d 229, 1986 Tex. App. LEXIS 9070 (Tex. App. Dallas 1986).*

46. Tex. *Bus. & Com. Code Ann. § 17.46(b)(12)*, expressly prohibits representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve. *Tidelands Life Ins. Co. v. Franco, 711 S.W.2d 728, 1986 Tex. App. LEXIS 7542 (Tex. App. Corpus Christi 1986).*

47. Tex. *Bus. & Com. Code Ann. § 17.50* did not require a finding of deceptive trade practice when an express or implied warranty had been knowingly breached; nor that an alleged act be a false, misleading, or deceptive act listed under Tex. *Bus. & Com. Code Ann. § 17.46* to recover penalty damages. *Melody Homes Mfg. Co. v. Barnes, 708 S.W.2d 600, 1986 Tex. App. LEXIS 12952 (Tex. App. Fort Worth 1986).*

48. Where an automobile dealer sued an automobile dealer under the Deceptive Trade Practice -- Consumer Protection Act, Tex. *Bus. & Com. Code Ann. § 17.46*, the trial court properly granted summary judgment under the Certificate of Title Act, former Tex. *Rev. Civ. Stat. Ann. art. 6687-1, §§ 33*, 53, (now Tex. *Transp. Code Ann. §§ 501.071, 501.073*), because the automobile dealer established that it was not the owner of the vehicle at the time of the buyer's purchase. *Najarian v. David Taylor Cadillac, 705 S.W.2d 809, 1986 Tex. App. LEXIS 12177 (Tex. App. Houston 1st Dist. 1986).*

49. Under the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.46*, the president of homebuilders corporation was personally liable to a home buyer for tortious and fraudulent acts committed because he knowingly participated in such acts as a corporate agent. *Great Am. Homebuilders, Inc. v. Gerhart, 708 S.W.2d 8, 1986 Tex. App. LEXIS 12004 (Tex. App. Houston 1st Dist. 1986).*

50. Seller did not commit fraudulent acts in violation of Tex. *Bus. and Com. Code Ann. § 17.46(b)(23)* (now **17.46(** b)(24)) by selling lots it did not own to the buyer and by not disclosing the recording of an invalid assignment of the contract that the seller had with the actual owner of the lots, where the buyer had actual and constructive notice of the ownership of the lots and of the invalidity of the assignment, and where there was no evidence that the seller failed to disclose any material information or fraudulently induced the buyer to execute a contract. *Medallion Homes, Inc. v. Thermar Invest., Inc., 698 S.W.2d 400, 1985 Tex. App. LEXIS 7175 (Tex. App. Houston 14th Dist. 1985).*

51. In a Deceptive Trade Practices Act action, the lower court committed error when it determined that oral misrepresentations about the quality of a remodeled home admissible when a written purchase contract existed, and proof of reliance on the misrepresentations, or intent to deceive, was not required as set forth in Tex.*Bus. & Com. Code Ann. § 17.46(b)(7). Weitzel v. Barnes, 691 S.W.2d 598, 1985 Tex. LEXIS 863, 28 Tex. Sup. Ct. J. 474 (Tex. 1985).*

52. Mortgage broker did not violate the Texas Deceptive Trade Practices Act, Tex. *Bus. and Com. Code Ann. § 17.46* by failing to disclose to a borrower the correct amount of a lender's commitment fee and by failing to disclose to the borrower the differences between terms requested in the loan application and the terms in the written loan commitment, where the broker informed the borrower of the correct amount before the borrower accepted the commitment, where the borrower had the option to refuse the commitment and receive a refund of nearly all of the fees already paid, and where the borrower had a duty to read the commitment before signing it. *First City Mortg. Co. v. Gillis, 694 S.W.2d 144, 1985 Tex. App. LEXIS 6677 (Tex. App. Houston 14th Dist. 1985).*

53. Supplier's contract condition, which limited the buyer's damages to the purchase price of the paint, was enforceable in a contract dispute, however, it did not limit the purchaser's damages in the purchaser's misrepresentation claim under Tex. *Bus. & Com. Code Ann. § 17.46* of the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.01* et seq.; the purchaser was entitled to recover damages for his lost profit. *Reliance Universal v. Sparks Indus. Servs., 688 S.W.2d 890, 1985 Tex. App. LEXIS 6565, 42 U.C.C. Rep. Serv. (CBC) 423 (Tex. App. Beaumont 1985).*

54. In a vendor's action to obtain reimbursement for the cost of defense as a third-party-beneficiary under a manufacturer's insurance policy, Tex. *Ins. Code Ann. art. 21.21, § 16(a)*, applied the Texas Deceptive Trade Practices -- Consumer Protection Act, Tex. *Bus. & Com. Code Ann. § 17.46*, to all insurance companies except county mutuals. *Aetna Cas. & Sur. Co. v. Martin Surgical Supply Co., 689 S.W.2d 263, 1985 Tex. App. LEXIS 6329 (Tex. App. Houston 1st Dist. 1985).*

55. Home buyer established a violation of Tex. *Bus. & Com. Code Ann. § 17.46* against the chairman of the board of a building corporation for misrepresentations in a brochure because the chairman's name was on the brochure and it was not necessary that the corporate veil be pierced in order to impose personal liability. *Barclay v. Johnson, 686 S.W.2d 334, 1985 Tex. App. LEXIS 6188 (Tex. App. Houston 1st Dist. 1985).*

56. Where a passenger had sustained serious injuries in an automobile accident, the insurer and adjuster refused to accept her settlement offer of $50,000, the maximum coverage under the insured's policy, the insurer and adjuster did not inform the insured about the offer, and the passenger obtained a judgment against the insured for $521,453, the

insured had a cause of action against the insurer and adjustor for the heedless and reckless disregard of his rights under Tex. *Bus. & Com. Code Ann. § 17.46* of the Deceptive Trade Practices Act (DTPA), Tex. *Bus. & Com. Code Ann. § 17.41* et seq. *Allstate Ins. Co. v. Kelly, 680 S.W.2d 595, 1984 Tex. App. LEXIS 4757 (Tex. App. Tyler 1984).*

57. Insured lacked standing to file Deceptive Trade Practice Act, Tex. *Bus. & Com. Code Ann. § 17.46* et seq., action against insurance agent involving coverage under group health plan purchased by insured's employer, because insured was not a purchaser of the services. *Sale v. Kennedy, 679 S.W.2d 733, 1984 Tex. App. LEXIS 6532 (Tex. App. El Paso 1984).*

58. On a suit against a homebuilder for breach of a warranty, the trial court properly awarded damages under the Deceptive Trade Practices Act (Act), Tex. *Bus. & Com. Code Ann. §§ 17.46 , 17.50,* because although the Act prior to its amendment limited the type of consumer who could obtain relief under the Act, it did not limit the scope of damages which could be recovered. *Precision Homes, Inc. v. Cooper, 671 S.W.2d 924, 1984 Tex. App. LEXIS 5358 (Tex. App. Houston 14th Dist. 1984).*

59. Trial court properly awarded judgment in favor of a franchisee, who bought a home marketing system from franchisor, against a corporation that had agreed to buy homes from the franchisee, but refused to do so because franchisee was a consumer under the state deceptive trade practices law; evidence of the corporation's relationship with the franchisor proved they were inextricably intertwined, supporting a ruling that the corporation was liable for the franchisor's deceptive practices. *Potere, Inc. v. National Realty Serv., 667 S.W.2d 252, 1984 Tex. App. LEXIS 4907 (Tex. App. Houston 14th Dist. 1984).*

60. In her suit to cancel a lien on homestead property that was part of a simulated sale to obtain a loan and fix a lien, the surviving wife was not a "consumer" within the Deceptive Trade Practices Act, and the transaction could not be a violation of Tex. *Bus. & Com. Code Ann. § 17.46(b)(12),* because she did not seek or acquire any goods or services from the lender. *Fuller v. Preston State Bank, 667 S.W.2d 214, 1983 Tex. App. LEXIS 5647 (Tex. App. Dallas 1983).*

61. Trial court erred when it sustained a builder's hearsay objection to the purchasers' testimony that the builder and his agent had told them that the agreement to purchase the house was binding on the ground that the it was a critical operative fact under the purchasers' alleged cause of action for deceptive trade practices or acts under Tex. *Bus. & Com. Code Ann. § 17.46(b)(5)* of the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.01* et seq. *Beckwith v. Jewell, 1983 Tex. App. LEXIS 5241 (Tex. App. Austin Oct. 26 1983).*

62. Evidence was sufficient to support the trial court's finding that the purchasers of a lot did not have a cause of action against the seller for deceptive sales practices or acts under Tex. *Rev. Civ. Stat. Ann. §§ 17.46(b)(5),* (7), (12), and (23) of the Deceptive Trade Practices Act, Tex. *Rev. Civ. Stat. Ann. § 17.01* on the ground that the purchasers had not demonstrated wrongful intent on the part of the seller; there was no evidence that the seller had taken advantage of any lack of knowledge on the part of the purchasers. *Fike v. Fuller, 1983 Tex. App. LEXIS 5242 (Tex. App. Austin Oct. 26 1983).*

63. The clear import of the Deceptive Trade Practices Act is to provide a remedy to consumers for false or deceptive acts. The language of the statute itself provides that representing that goods are new if they are deteriorated is a false, misleading, or deceptive act or practice under Tex. *Bus. & Com. Code § 17.46(b)(6). Jack Roach Ford v. De Urdanavia, 659 S.W.2d 725, 1983 Tex. App. LEXIS 4967 (Tex. App. Houston 14th Dist. 1983).*

64. A misrepresentation as to the rights, remedies, or obligations conferred by a contract is actionable under Tex. & Com. Code Ann. § 17.46(b)(12) of the Deceptive Trade Practices Act, even where there is no proof of intent to deceive. *Wagner v. Morris, 658 S.W.2d 230, 1983 Tex. App. LEXIS 4920 (Tex. App. Houston 1st Dist. 1983).*

65. Complaint of home buyers in a subdivision that contrary to representations made to them the developer was building houses in the same development which were less expensive and of a different design than plaintiffs' did not come within the purview of the Deceptive Trade Practices Act, Tex. *Bus. and Com. Code Ann. § 17.46(b)(5). Parks v. U.S. Home Corp., 652 S.W.2d 479, 1983 Tex. App. LEXIS 4235 (Tex. App. Houston 1st Dist. 1983).*

66. Home buyers in a subdivision had standing to bring an action against the developer-seller for misrepresentations in connection with their homes under the Deceptive Trade Practices Act, Tex. *Bus. and Com. Code Ann. §§ 17.45(1),*

17.46(b)(5) and *17.50(a)(3). Parks v. U.S. Home Corp., 652 S.W.2d 479, 1983 Tex. App. LEXIS 4235 (Tex. App. Houston 1st Dist. 1983).*

67. In an action for an injunction under the Deceptive Trade Practices Act for alleged misrepresentations made by the developer to home purchasers about the nature of other houses to be built in a development, there was evidence from which the trial court find that the nondisclosure was not motivated by intent to induce the purchase, and, thus, that the buyers did not sustain their burden of proof under Tex. *Bus. and Com. Code Ann. § 17.46(b)(23). Parks v. U.S. Home Corp., 652 S.W.2d 479, 1983 Tex. App. LEXIS 4235 (Tex. App. Houston 1st Dist. 1983).*

68. Purchaser failed to establish a misrepresentation by the seller in violation of Tex. *Bus. & Com. Code Ann. § 17.46* based on the seller's presentation of sketches which included a retaining wall and deck because the contract between the parties clearly indicated that the seller was responsible for the installation of the pool. *Anthony Indus. v. Ragsdale, 1982 Tex. App. LEXIS 4943 (Tex. App. Fort Worth July 22 1982).*

69. In a consumer's claim against a chandelier dealer under the Texas Deceptive Trade Practices -- Consumer Protection Act, Tex. *Bus. & Com. Code Ann. § 17.41 -- 17.63*, for material misrepresentations in violation of Tex. *Bus. & Com. Code Ann. § 17.46*, venue was proper in the county of the consumer's domicile, where the chandeliers had been installed. *Denton v. Brown, 634 S.W.2d 386, 1982 Tex. App. LEXIS 4648 (Tex. App. Waco 1982).*

70. Although the failure to register a title was not an act declared to be false, misleading, or deceptive within the Deceptive Trade Practices Act, acts not listed could still be actionable and bank was not entitled to summary judgment where it failed to show either that no act or practice occurred or that the act or practice was not false, misleading, or deceptive. *Fortner v. Fannin Bank, 634 S.W.2d 74, 1982 Tex. App. LEXIS 4512 (Tex. App. Austin 1982).*

71. Seller's failure to disclose facts, in an action brought under Tex. *Bus. & Com. Code Ann. § 17.46(a)*, was not a deceptive trade practice where the seller had no knowledge of those facts. *Robinson v. Preston Chrysler-plymouth, Inc., 633 S.W.2d 500, 1982 Tex. LEXIS 303, 25 Tex. Sup. Ct. J. 263 (Tex. 1982).*

72. Trial court properly granted an injunction which permanently enjoined defendant used car dealer from committing further violations of the state deceptive trade practices law because defendant's acts of selling cars without a certificate of title amounted to violations of the law and defendant was not entitled to a strict construction of the statute. *Franklin v. State, 631 S.W.2d 519, 1982 Tex. App. LEXIS 3866 (Tex. App. El Paso 1982).*

73. Debtor could allege cause of action against creditor under Texas Deceptive Trade Practices-Consumer Protection Act, Tex. *Bus. & Com. Code Ann. § 17.46(b)(12)* because he qualified as a consumer, but debtor had no action under former Tex. *Rev. Civ. Stat. Ann. art. 5069*, ch. 7 and 14 because Code Construction Act, former Tex. *Rev. Civ. Stat. Ann. art. 5429b-2* did not apply. *Knight v. International Harvester Credit Corp., 627 S.W.2d 382, 1982 Tex. LEXIS 272, 25 Tex. Sup. Ct. J. 135 (Tex. 1982).*

74. Under Tex. *Bus. & Com. Code Ann. §§ 17.46(a), 17.50(a)*, a homeowner was not required to show that a builder who failed to complete the construction of a home acted with intent to deceive the homeowner. *Ybarra v. Saldana, 624 S.W.2d 948, 1981 Tex. App. LEXIS 4458 (Tex. App. San Antonio 1981).*

75. Newspaper advertisement did not amount to a representation prohibited by the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.46(b)(12)*, because it did not constitute a promise or representation on the part of the advertiser that it would buy back a distributorship at the price paid by the purchaser at any time he desired to sell; rather, the advertisement was merely an invitation to the public to come in and strike a bargain upon such terms and conditions as could be agreed upon. *Dowling v. Nadw Mktg., Inc., 625 S.W.2d 392, 1981 Tex. App. LEXIS 4316 (Tex. App. Tyler 1981).*

76. Even if a newspaper advertisement was a false representation in violation of the Deceptive Trade Practices Act (DTPA), Tex. *Bus. & Com. Code Ann. § 17.46(b)(12)*, plaintiff was not entitled to recover because he failed to establish that he was a consumer as defined by the DTPA; pursuant to Tex. *Bus. & Com. Code Ann. § 17.45*; the DTPA applied only to services purchased for other than commercial or business use and the services purchased by plaintiff were for commercial or business use in conducting a distributorship business. *Dowling v. Nadw Mktg., Inc., 625 S.W.2d 392, 1981 Tex. App. LEXIS 4316 (Tex. App. Tyler 1981).*

77. In plaintiff buyer's suit against defendant seller, defendant's failure to disclose facts or information, as a person who had knowledge of those facts or that information, was not a false, misleading or deceptive act or practice under the Deceptive Trade Practices Consumer Protection Act, Tex. Bus. & Com. Code Ann. art. **17.46.** *Preston Chrysler-plymouth, Inc. v. Robinson, 620 S.W.2d 786, 1981 Tex. App. LEXIS 3952 (Tex. Civ. App. Dallas 1981).*

78. Under findings that each attempt to foreclose was a producing cause of damages to the homeowners, the attempt to foreclose was a representation that the builder's and mechanic's lien contract conferred or involved rights and remedies which it did not have and constituted false, misleading, or deceptive acts or practices as set out in Tex. *Bus. & Com. Code Ann. § 17.46(b)(12)* of the *Deceptive Trade Practices Act. Dickinson State Bank v. Ogden, 624 S.W.2d 214, 1981 Tex. App. LEXIS 3886 (Tex. Civ. App. Houston 1st Dist. 1981).*

79. Even though appellees sellers provided a written purchase agreement and title documents which showed that the truck purchased was not an original model, summary judgment was improperly granted under Tex. *Bus. & Com. Code § 17.46(b)(6)* where the evidence did not, as a matter of law, show that sellers did not represent the truck to appellant buyer as an original model. *Gonzalez v. Global Truck & Equip., Inc., 625 S.W.2d 348, 1981 Tex. App. LEXIS 3787 (Tex. Civ. App. Houston 1st Dist. 1981).*

80. Proof of intent is not required to establish an unlisted violation under the Texas Deceptive Trade Practices-Consumer Protection Act, Tex. *Bus. & Comm. Code Ann. § 17.46(b). Hyder-Ingram Chevrolet, Inc. v. Kutach, 612 S.W.2d 687, 1981 Tex. App. LEXIS 3303 (Tex. Civ. App. Houston 14th Dist. 1981).*

81. If an act or practice in dispute is not specifically listed under the Deceptive Trade Practices -- Consumer Protection Act, Tex. *Bus. & Com. Code Ann. § 17.46(b),* it may still be a deceptive trade practice under the Deceptive Trade Practices -- Consumer Protection Act, Tex. *Bus. & Com. Code Ann. § 17.46(a);* in that case, however, the jury is given the definition of a deceptive trade practice, asked if the act or practice occurred, and also asked if the act or practice is a deceptive trade practice. *Prairie Cattle Co. v. Fletcher, 610 S.W.2d 849, 1980 Tex. App. LEXIS 4294 (Tex. Civ. App. Amarillo 1980).*

82. Seed purchaser prevailed under the Texas Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.46(b),* in his action against a seed supplier after the seed that was purchased had less than a rate of 80 percent germination, even though there was conflicting evidence indicating that the crop failure was due to lack of moisture instead of defects in the seeds. *Gold Kist, Inc. v. Massey, 609 S.W.2d 645, 1980 Tex. App. LEXIS 4182, CCH Prod. Liab. Rep. P8893 (Tex. Civ. App. Fort Worth 1980).*

83. Construction company violated Tex. *Bus. & Com. Code Ann. § 17.46* because it accepted the home buyers' down payment and never built the promised home. *R.S. Associates Gen. Bldg. Contractors, Inc. v. Devona, 610 S.W.2d 190, 1980 Tex. App. LEXIS 4125 (Tex. Civ. App. Houston 1st Dist. 1980).*

84. Property owners, to whom a real estate management service represented that it had benefits that it did not have, could recover as adversely affected consumers under Tex. *Bus. & Com. Code Ann. § 17.46(b)(5). Lerma v. Brecheisen, 602 S.W.2d 318, 1980 Tex. App. LEXIS 3553 (Tex. Civ. App. Waco 1980).*

85. Texas Deceptive Trade Practices Act (Act), Tex. *Bus. & Com. Code Ann. §§ 17.46(b)* and *27.01,* did not apply to alleged deceptive acts committed prior to the effective date of the Act, and the trial court erred when it submitted the issues generally in regard to a claim arising from a sale negotiated prior to the Act and closed after the effective date without requiring findings as to which acts were a proper basis for an award. *Johnson v. Willis, 596 S.W.2d 256, 1980 Tex. App. LEXIS 3095 (Tex. Civ. App. Waco 1980).*

86. Driver make out a prima facie case of deceptive trade practices, in violation of Tex. *Ins. Code Ann. art. 21.21, § 4(1)* and Tex. *Bus. & Comm. Code Ann. § 17.46(b)(23),* when he demonstrated that an insurance solicitor who was not driver's agent failed to explain the coverages to driver; as a result driver falsely believed that he had purchased liability insurance. *McNeill v. McDavid Ins. Agency, 594 S.W.2d 198, 1980 Tex. App. LEXIS 2953 (Tex. Civ. App. Fort Worth 1980).*

87. Where an accident victim and an insured driver were involved in an automobile accident, the accident victim did not have a cause of action against the insured's insurance company for violations of the Deceptive Trade Practices-Consumer Protection Act, because the accident victim was not a consumer pursuant to Tex. *Bus. & Com. Code Ann. § 17.50*, as he did not seek or acquire goods or services from the insurance company parties; there was no cause of action under Tex. *Ins. Code Ann. art. 21.21-2* because it did not confer a private cause of action, or Tex. *Ins. Code Ann. art. 21.21*, because the victim was not injured by a deceptive act, pursuant to Tex. *Bus. & Com. Code Ann. § 17.46* . *Hi-line Elec. Co. v. Travelers Ins. Co., 587 S.W.2d 488, 1979 Tex. App. LEXIS 4022 (Tex. Civ. App. Dallas 1979).*

88. In a new home buyers' suit against a seller for treble damages under the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. §§ 17.46* and *17.50*, in which the trial court granted the seller's motion for summary judgment, the 1978 amendment to Tex. R. Civ. P. 166-A(c) precluded the appellate court from reviewing the buyers' contention that the seller's summary judgment proof, including the buyers' own depositions, raised a new factual issue as to the seller's fraudulent intent; the rule amendment restricted the appeals court to reviewing only the sufficiency of the proof to support the specific grounds of summary judgment stated in defendant's motion. *Combs v. Fantastic Homes, Inc., 584 S.W.2d 340, 1979 Tex. App. LEXIS 3858 (Tex. Civ. App. Dallas 1979).*

89. Defenses of bona fide error and opportunity to correct were not available in a private action under the Deceptive Trade Practices and Consumer Protection Act, Tex. *Bus. & Com. Code Ann. § 17.41* et seq. prior to the enactment of former Tex. *Bus. & Com. Code Ann. § 17.50A* in 1977 (now Tex. *Bus. & Com. Code Ann. § 17.505*). *United Postage Corp. v. Kammeyer, 581 S.W.2d 716, 1979 Tex. App. LEXIS 3496 (Tex. Civ. App. Dallas 1979).*

90. Stamp vending machines were tangible chattels within the definition of "goods" found in the Deceptive Trade Practices-Consumer Protection Act, Tex. *Bus. & Com. Code Ann. § 17.46(b)*; therefore, statements made by the seller fell within Tex. *Bus. & Com. Code Ann. § 17.46(b)(5)* as representations that the machines had characteristics, uses, benefits, or qualities that they did not have. *United Postage Corp. v. Kammeyer, 581 S.W.2d 716, 1979 Tex. App. LEXIS 3496 (Tex. Civ. App. Dallas 1979).*

91. Where purchaser alleged tortious misrepresentations in violation of the Texas Deceptive Trade Practices Act (Act), Tex. *Bus. & Com. Code Ann. § 17.46* , were made in the forum county, a basis for venue was established pursuant to Tex. *Bus. & Com. Code Ann. § 17.56* of the Act, and the vendor's plea of privilege was overruled. *Compu-ctr., Inc. v. Compubill, Inc., 580 S.W.2d 88, 1979 Tex. App. LEXIS 3430 (Tex. Civ. App. Houston 1st Dist. 1979).*

92. Defendant's agent had statutory authority to sell insurance policies for defendant and to represent the nature of the coverage, and because the trial court found that his representations were false, the agent's actions constituted a deceptive act or practice for which defendant was liable under Tex. *Bus. & Com. Code Ann.§ 17.46* ; defendant could not claim lack of actual authority as a defense because defendant's agent was acting within the apparent scope of his authority when he sold the policy and when the policy was renewed. *Royal Globe Ins. Co. v. Bar Consultants, Inc., 577 S.W.2d 688, 1979 Tex. LEXIS 260, 22 Tex. Sup. Ct. J. 219 (Tex. 1979).*

93. Tex. *Bus. & Com. Code Ann. § 17.46(b)* provides a laundry list of deceptive trade practices that are unlawful per se; this list is not exclusive and will encompass any type of business practice or action which deceives consumers. An act or practice that is not among those listed in § 17.46(b) requires a jury issue to determine whether the action was deceptive. *Southwest Lincoln-mercury, Inc. v. Ross, 580 S.W.2d 2, 1979 Tex. App. LEXIS 3194, 26 U.C.C. Rep. Serv. (CBC) 686 (Tex. Civ. App. Houston 1st Dist. 1979).*

94. A co-defendant violated a provision of the Deceptive trade Practices act, former Act, Tex. *Rev. Civ. Stat. Ann. art. 17.46(b)(3)*; the co-defendant was a resident of the county wherein plaintiff filed suit, and defendant was a proper party to the suit. *Beacon Natl. Ins. Co. v. Adams, 1978 Tex. App. LEXIS 3944 (Tex. App. Eastland 1978).*

95. The store sold certain furniture to the individuals on a "layaway" basis and when the individuals could not finish paying on the account and they sought a refund of their deposit the store sent the individuals a letter which stated that it could retain all monies paid on the account if the individuals did not pay the entire amount due; the individuals contended that the letter contained statements that were false and misleading and the court agreed. *Leal v. Furniture Barn, Inc., 571 S.W.2d 864, 1978 Tex. LEXIS 396, 22 Tex. Sup. Ct. J. 12 (Tex. 1978).*

96. Insurance company's misrepresentation of coverage to its insured violated the Texas Deceptive Trade Practices and Consumer Protection Act, Tex. *Bus. & Com. Code Ann. §§ 17.41 -- 17.63*, specifically Tex. *Bus. & Com. Code Ann. § 17.46 . Royal Globe Ins. Co. v. Bar Consultants, Inc., 566 S.W.2d 724, 1978 Tex. App. LEXIS 3401 (Tex. Civ. App. Austin 1978).*

97. Because the seller misrepresented the year and model to the buyer, the seller violated Tex. *Bus. & Com. Code Ann. § 17.46(a)* and the jury instruction asking the jury to determine whether the list of acts provided in § 17.46(b) were in fact deceptive was harmless error; the list of prohibited acts provided in § 17.46(b) was deceptive as a matter of law and it was error to ask the jury whether the same acts were in fact deceptive. *Spradling v. Williams, 566 S.W.2d 561, 1978 Tex. LEXIS 346, 21 Tex. Sup. Ct. J. 349 (Tex. 1978).*

98. "Trade" and "commerce" as defined by Tex. *Bus. & Com. Code Ann. § 17.45(6)* was not limited to sellers in the business of selling, and plaintiff could bring action against defendant, pursuant to Tex. *Bus. & Com. Code Ann. § 17.46(a)* for deceptive practices even though defendant was not in the business of selling the product in question. *Singleton v. Pennington, 568 S.W.2d 367, 1977 Tex. App. LEXIS 3803 (Tex. Civ. App. Dallas 1977).*

99. Evidence that a corporation engaged in a deceptive trade practice was sufficient for the trial court to enter a temporary injunction, where the corporation advertised that its device, which was to be attached to spark plugs, reduced pollution by up to 100 percent although independent testing revealed no significant effect on vehicle emissions. *Rei Indus., Inc. v. State, 477 S.W.2d 956, 1972 Tex. App. LEXIS 2877 (Tex. Civ. App. Austin 1972).*

Antitrust & Trade Law: Consumer Protection: False Advertising

100. Defendant failed to raise a deceptive trade practice violation under Tex. *Bus. & Com. Code Ann. § 17.46(b)(12)* because his contention that his car was towed in violation of a sign that indicated he could park did not establish the existence of an underlying contract or agreement. *Horn v. A.J.'s Wrecker Serv., Inc., 2000 Tex. App. LEXIS 5607 (Tex. App. Dallas Aug. 22 2000).*

101. Pursuant to Tex. *Bus. & Com. Code Ann. § 17.46(b)(5)*, a seller misrepresents the condition of goods when he makes a representation of material fact to the consumer that is false, even if the seller is unaware that the representation is false. *Teague v. Bandy, 793 S.W.2d 50, 1990 Tex. App. LEXIS 1413 (Tex. App. Austin 1990).*

102. In an action initiated in accordance with the Texas Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.46* , the trial court properly granted summary judgment in defendant's favor where no evidence existed supporting the contention that defendant's slogan caused plaintiff's damages. *MacDonald v. Texaco, Inc., 713 S.W.2d 203, 1986 Tex. App. LEXIS 7970 (Tex. App. Corpus Christi 1986).*

Antitrust & Trade Law: Trade Practices & Unfair Competition

103. Defendant's agent had statutory authority to sell insurance policies for defendant and to represent the nature of the coverage, and because the trial court found that his representations were false, the agent's actions constituted a deceptive act or practice for which defendant was liable under Tex. *Bus. & Com. Code Ann.§ 17.46* ; defendant could not claim lack of actual authority as a defense because defendant's agent was acting within the apparent scope of his authority when he sold the policy and when the policy was renewed. *Royal Globe Ins. Co. v. Bar Consultants, Inc., 577 S.W.2d 688, 1979 Tex. LEXIS 260, 22 Tex. Sup. Ct. J. 219 (Tex. 1979).*

Banking Law: Bank Activities: Consumer Protection

104. In her suit to cancel a lien on homestead property that was part of a simulated sale to obtain a loan and fix a lien, the surviving wife was not a "consumer" within the Deceptive Trade Practices Act, and the transaction could not be a violation of Tex. *Bus. & Com. Code Ann. § 17.46(b)(12)*, because she did not seek or acquire any goods or services from the lender. *Fuller v. Preston State Bank, 667 S.W.2d 214, 1983 Tex. App. LEXIS 5647 (Tex. App. Dallas 1983).*

Banking Law: Bank Activities: Consumer Protection: Unfair & Deceptive Credit Practices

105. Under the Texas Deceptive Trade Practices Act,, Tex. *Bus. & Com. Code Ann. §§ 17.46* and *17.50*, homeowners were entitled to recovery from a termite inspection company where the company's misrepresentations to the homeowners were a producing cause of their injury. *Big State Exterminating Co. v. Vance, 1988 Tex. App. LEXIS 1075 (Tex. App. Houston 1st Dist. May 12 1988).*

Banking Law: Bonds, Guarantees & Letters of Credit

106. Bank that fulfilled its limited duty to transmit and explain a letter of credit to its recipient on behalf of the issuing bank did not commit an actionable deceptive trade act; thus the recipient had no cause of action against it for making a misrepresentation where its duty to issue and provide limited instructions were fulfilled. *Bank One, N.A. v. Little, 978 S.W.2d 272, 1998 Tex. App. LEXIS 5629, 38 U.C.C. Rep. Serv. 2d (CBC) 1276 (Tex. App. Fort Worth 1998).*

Business & Corporate Entities: Agency: Authority to Act: Agent Authority

107. Defendant's agent had statutory authority to sell insurance policies for defendant and to represent the nature of the coverage, and because the trial court found that his representations were false, the agent's actions constituted a deceptive act or practice for which defendant was liable under Tex. *Bus. & Com. Code Ann.§ 17.46* ; defendant could not claim lack of actual authority as a defense because defendant's agent was acting within the apparent scope of his authority when he sold the policy and when the policy was renewed. *Royal Globe Ins. Co. v. Bar Consultants, Inc., 577 S.W.2d 688, 1979 Tex. LEXIS 260, 22 Tex. Sup. Ct. J. 219 (Tex. 1979).*

Business & Corporate Entities: Agency: Causes of Action & Remedies: Punitive Damages

108. Sales manager's refusal to refund customer's deposit for purchase of car that was never secured from the third party for sale to the customer rendered dealership liable for treble damages and attorney's fees for violating the Deceptive Sales Practices Act, Tex. *Bus. & Comm. Code Ann. § 17.41* et seq., specifically Tex. *Bus. & Comm. Code Ann. § 17.46(b)(14). Williams v. Loftice, 576 S.W.2d 455, 1978 Tex. App. LEXIS 4068 (Tex. Civ. App. Texarkana 1978).*

Civil Procedure: Justiciability: Standing

109. Insurance agent, who was not a consumer of an insurer's goods and services, could not state a cause of action under Tex. *Ins. Code Ann. art. 21.21* for the insurer's alleged violations of the Deceptive Trade Practices Act (DTPA), Tex. *Bus. & Com. Code § 17.46(b)(5)*, (7), (9), and (23), because the terms of those subsections of the DTPA required consumer status. *Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 2000 Tex. LEXIS 13, 43 Tex. Sup. Ct. J. 348 (Tex. 2000).*

110. Lack of consumer status did not bar an insurance agent from bringing a cause of action under Tex. *Ins. Code Ann. art. 21.21* for an insurer's alleged violations of the Deceptive Trade Practices Act (DTPA) Tex. *Bus. & Com. Code § 17.46(b)(12)*, because that subsection of the DTPA did not require consumer status. *Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 2000 Tex. LEXIS 13, 43 Tex. Sup. Ct. J. 348 (Tex. 2000).*

111. Insurance agents were "persons" pursuant to Tex. *Ins. Code Ann. § 21.21*, and an agent who suffered actual damages because of another person's engaging in activities proscribed by § 21.21 or Tex. *Bus. & Com. Code Ann. § 17.46* had standing to bring a cause of action thereunder. *Tweedell v. Hochheim Prairie Farm Mut. Ins. Ass'n, 1 S.W.3d 304, 1999 Tex. App. LEXIS 6487 (Tex. App. Corpus Christi 1999).*

112. Surviving minor daughter of decedents had standing against insurer for fraud, unfair claims practices, and breach of fiduciary duty in dealing with her under Tex. *Ins. Code Ann. art. 21.21* because she was an injured party under Tex. *Bus.*

& Com. Code Ann. § 17.46 . Transport Ins. Co. v. Faircloth, 861 S.W.2d 926, 1993 Tex. App. LEXIS 2574 (Tex. App. Beaumont 1993).

113. Home buyers in a subdivision had standing to bring an action against the developer-seller for misrepresentations in connection with their homes under the Deceptive Trade Practices Act, Tex. *Bus. and Com. Code Ann. §§ 17.45(1), 17.46(b)(5)* and *17.50(a)(3). Parks v. U.S. Home Corp., 652 S.W.2d 479, 1983 Tex. App. LEXIS 4235 (Tex. App. Houston 1st Dist. 1983).*

Civil Procedure: Jurisdiction: Subject Matter Jurisdiction: Jurisdiction Over Action

114. Plaintiff consumers' causes of action were pleaded in the language of the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA), specifically Tex. *Bus. & Com. Code Ann. §§ 17.46(b), 17.50*; they were complaining of the conduct of defendant travel companies' agent in making certain representations or failing to make certain disclosures, and they did not mention in their pleading the cruise-ticket contract, and they did not raise an issue as to the content of the cruise-ticket contract or attempt to enforce or challenge rights emanating from the contract; consequently, the appellate court ruled that the consumers' causes of action were solely derived from the DTPA and that, thus, they were entitled to have those causes of action litigated in a Texas court notwithstanding the forum-selection clause in the cruise-ticket contract. *Pozero v. Alfa Travel, Inc., 856 S.W.2d 243, 1993 Tex. App. LEXIS 1966 (Tex. App. San Antonio 1993).*

Civil Procedure: Venue: General Venue

115. In a consumer's claim against a chandelier dealer under the Texas Deceptive Trade Practices -- Consumer Protection Act, Tex. *Bus. & Com. Code Ann. § 17.41 -- 17.63*, for material misrepresentations in violation of Tex. *Bus. & Com. Code Ann. § 17.46* , venue was proper in the county of the consumer's domicile, where the chandeliers had been installed. *Denton v. Brown, 634 S.W.2d 386, 1982 Tex. App. LEXIS 4648 (Tex. App. Waco 1982).*

116. Trial court's order denying a supplier's plea of privilege to be sued in its county of principal place of business was affirmed where a customer had brought an action under Texas Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. §§ 17.46(b)(5)*, (7), and 17.50 because the customer could bring suit in the county where the supplier met with his customer to solicit the transaction which gave rise to the complaint. *S & S Wholesale Supply, Inc. v. Los Cedros, Inc., 628 S.W.2d 493, 1982 Tex. App. LEXIS 3897 (Tex. App. Corpus Christi 1982).*

Civil Procedure: Class Actions: Prerequisites

117. Claim against car dealship and bank for alleged fraudulent concealment and violation of Deceptive Trade Practices Act (Tex. *Bus. & Com. Code Ann. § 17.41* et seq.), which required individualized proof of reliance by claimants as an essential element, and for which the resolution of individual issues would be an overwhelming task for a single jury, was rejected for class certification under Tex. R. Civ. P. 42. *Peltier Enters., Inc. v. Hilton, 51 S.W.3d 616, 2000 Tex. App. LEXIS 8451 (Tex. App. Tyler 2000).*

118. Nexus required for typicality among class representatives claiming violation of Deceptive Trade Practices Act (Tex. *Bus. & Com. Code Ann. § 17.41* et seq.) by automobile manufacturer, based upon allegedly-defective motorized seat belt systems in its vehicles, was satisfied where the same alleged defect was marketed in substantially the same way for all class members, claims arose from the same course of conduct, and claims were based on the same legal theories, even though two of the class representatives were not entitled to recover damages under one such theory. *Nissan Motor Co. v. Fry, 27 S.W.3d 573, 2000 Tex. App. LEXIS 5565 (Tex. App. Corpus Christi 2000).*

119. In action against automobile manufacturer based upon allegedly-defective motorized seat belt systems in its vehicles, purported common questions of law and fact, including claims of breach of express and implied warranties pursuant to Tex. *Bus. & Com. Code Ann. § 17.50(a)(2)*, alleged use of false, misleading and defective practices as defined in Tex. *Bus. & Com. Code Ann. §§ 17.46* and *17.50*, and breach of implied warranty of merchantability under Tex. *Bus. & Com. Code Ann. § 2.314(b)(3)*, were insufficient to satisfy the commonality requirement for class

certification under Tex. R. Civ. P. 42(a)(2). *Nissan Motor Co. v. Fry, 27 S.W.3d 573, 2000 Tex. App. LEXIS 5565 (Tex. App. Corpus Christi 2000).*

Civil Procedure: Summary Judgment: Supporting Papers & Affidavits

120. Even though appellees sellers provided a written purchase agreement and title documents which showed that the truck purchased was not an original model, summary judgment was improperly granted under Tex. *Bus. & Com. Code § 17.46(b)(6)* where the evidence did not, as a matter of law, show that sellers did not represent the truck to appellant buyer as an original model. *Gonzalez v. Global Truck & Equip., Inc., 625 S.W.2d 348, 1981 Tex. App. LEXIS 3787 (Tex. Civ. App. Houston 1st Dist. 1981).*

Civil Procedure: Summary Judgment: Burdens of Production & Proof

121. Summary judgement in favor of the seller was affirmed, and the seller was entitled to attorney fee's under the contract of sale, where the buyer failed to prove that the seller's representations were false under the provisions of Tex. *Bus. & Com. Code Ann. § 27.01*, since the buyer merely showed that the driveway did not accommodate the turning radius of her particular vehicle, and the buyer failed to prove that the seller's representations were made with the intent of inducing the buyer into purchasing the property, as needed under the provisions of Tex. *Bus. & Com. Code Ann. § 17.46(b)(5)* and (23) of the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.01* et seq *Robbins v. Capozzi, 2002 Tex. App. LEXIS 8033 (Tex. App. Tyler Nov. 8 2002).*

122. Where there was no evidence of any false, misleading, or deceptive act or practice enumerated in Tex. *Bus. & Com. Code Ann. § 17.46* or unconscionability, defined by Tex. *Bus. & Com. Code Ann. § 17.45(5)* as an act or practice which, to a consumer's detriment, took advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree, a trial court did not err in granting the defendants' motion for summary judgment on the plaintiffs' claims under the Texas Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.41*, et seq.. *Hight v. Dublin Veterinary Clinic, 22 S.W.3d 614, 2000 Tex. App. LEXIS 3833 (Tex. App. Eastland 2000).*

123. In an action based upon failure to disclose information in a real estate transaction, error resulted when the trial court granted defendant's motion for summary judgment when defendant failed to establish that plaintiff could not prevail under the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.46(b)(23). Munawar v. Cadle Co., 2 S.W.3d 12, 1999 Tex. App. LEXIS 2678 (Tex. App. Corpus Christi 1999).*

124. Trial court did not err in granting summary judgment in favor of attorneys in a client's action for legal malpractice and violation of the Texas Deceptive Trade Practice Act, Tex. *Bus. & Com. Code § 17.46 (23)* where the client did not properly raise a fact issue on the proximate cause of any damage to the client by the attorneys' actions. *Sipes v. Petry, 812 S.W.2d 428, 1991 Tex. App. LEXIS 2086 (Tex. App. San Antonio 1991).*

125. Summary judgment was not properly granted where appellee failed to conclusively negate the existence of a fact question on appellant's common law fraud action brought under Tex. *Bus. & Com. Code Ann. §§ 17.46 , 17.50*; appellant was a consumer because he was a third-party beneficiary of the contract. *Morgan v. Gornto, Kebodeaux & Bliesse, 1988 Tex. App. LEXIS 112 (Tex. App. Houston 1st Dist. Jan. 28 1988).*

Civil Procedure: Summary Judgment: Partial Summary Judgment

126. In an insurance dispute arising from an insurance company's denial of its insured's claim for automobile theft, the insured's claim, that the insurance company violated the Deceptive Trade Practices Act, was dismissed upon partial summary judgment. *Nnunukwe v. State Farm Auto. Ins. Co., 2003 Tex. App. LEXIS 1357 (Tex. App. Houston 14th Dist. Feb. 13 2003).*

Civil Procedure: Summary Judgment: Summary Judgment Standard

127. Summary judgment was properly granted on the parents claims against their attorneys under Tex. *Bus. & Com. Code § 17.46(b)(4)*, (5), (7) of the Texas Deceptive Trade Practices Act because the parents failed to produce a scintilla of evidence that the attorneys made a representation of fact regarding services that was inaccurate or false. *Francisco v. Foret, 2002 Tex. App. LEXIS 2610 (Tex. App. Dallas Apr. 11 2002).*

128. Summary judgment in former client's favor on her claims for mental anguish, attorney's fees, and damages for her lost vehicle was proper where attorney's error in divorce decree caused her to lose the vehicle and buy another; evidence sufficiently supported market value, attorney's fees expended and anguish expended in the effort to reclaim vehicle. *Wilson v. Dunlap, 2001 Tex. App. LEXIS 8455 (Tex. App. Houston 1st Dist. Dec. 20 2001).*

129. Where a sports car owner and collector was told he would receive the first of a specific type of model but did not, and later learned he was the fifth person to receive such a model, the appeals court agreed with the sports car owner that summary judgment was improper for the dealership he had sued for deceptive trade practices where the summary judgment evidence did not negate or address elements of his cause of action. *Stanley v. Classic Italia, 1994 Tex. App. LEXIS 4040 (Tex. App. Dallas July 25 1994).*

Civil Procedure: Alternative Dispute Resolution: Mandatory ADR

130. Trial court did not err in referring all of the customer's claims to arbitration because claims of unconscionability were for the arbitrator to decide and claims made under the Deceptive Trade Practices-Consumer Protection Act, Tex. *Bus. & Com. Code Ann. § 17.41* were arbitrable. *Smith v. Gateway, Inc., 2002 Tex. App. LEXIS 5438 (Tex. App. Austin July 26 2002).*

131. Given that Texas public policy, as reflected in Tex. *Civ. Prac. & Rem. Code Ann. §§ 171.001* et seq., strongly favors the submission of disputes to arbitration and that claims under §§ **17.46(** b)(12) and 17.50 of the Texas Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.41* et seq., fall within the scope of an arbitration agreement, a trial judge was directed to withdraw his order denying a defendant financing company's motion to compel arbitration. *In re Conseco Fin. Servicing Corp., 19 S.W.3d 562, 2000 Tex. App. LEXIS 3822 (Tex. App. Waco 2000).*

Civil Procedure: Jury Trials: Jury Instructions

132. Trial court abused its discretion under Tex. R. Civ. P. 277 when it submitted the issues generally in regard to a claim arising from a sale negotiated prior to the Texas Deceptive Trade Practices Act (Act) and closed after its effective date without requiring findings as to which acts were a proper basis for an award and which predated the Act and were not actionable. *Johnson v. Willis, 596 S.W.2d 256, 1980 Tex. App. LEXIS 3095 (Tex. Civ. App. Waco 1980).*

Civil Procedure: Jury Trials: Province of Court & Jury

133. Under Deceptive Trade Practices Act (Act), Tex. *Bus. & Com. Code Ann. §§ 17.46* et seq., the question of who was a consumer was a question of law for the court to decide and, therefore, the trial court did not err in deciding that appellees were consumers for purposes of having standing to sue under the Act. *Apple Imports v. Koole, 945 S.W.2d 895, 1997 Tex. App. LEXIS 2595 (Tex. App. Austin 1997).*

Civil Procedure: Remedies: Extraordinary Writs

134. Given that Texas public policy, as reflected in Tex. *Civ. Prac. & Rem. Code Ann. §§ 171.001* et seq., strongly favors the submission of disputes to arbitration and that claims under §§ **17.46(** b)(12) and 17.50 of the Texas Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.41* et seq., fall within the scope of an arbitration agreement, a trial judge was directed to withdraw his order denying a defendant financing company's motion to compel arbitration. *In re Conseco Fin. Servicing Corp., 19 S.W.3d 562, 2000 Tex. App. LEXIS 3822 (Tex. App. Waco 2000).*

Civil Procedure: Costs & Attorney Fees: Judgment Interest

135. Home buyers who prevailed in an action brought under the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.46(b)(23)*, were entitled to elect the theory of measuring attorney's fees that provided the greatest recovery and to receive prejudgment interest. *Morgan v. Ebby Halliday Real Estate, 873 S.W.2d 385, 1993 Tex. App. LEXIS 3435 (Tex. App. Fort Worth 1993).*

Civil Procedure: Costs & Attorney Fees: Attorney Fees

136. Summary judgement in favor of the seller was affirmed, and the seller was entitled to attorney fee's under the contract of sale, where the buyer failed to prove that the seller's representations were false under the provisions of Tex. *Bus. & Com. Code Ann. § 27.01*, since the buyer merely showed that the driveway did not accommodate the turning radius of her particular vehicle, and the buyer failed to prove that the seller's representations were made with the intent of inducing the buyer into purchasing the property, as needed under the provisions of Tex. *Bus. & Com. Code Ann. § 17.46(b)(5)* and (23) of the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.01* et seq *Robbins v. Capozzi, 2002 Tex. App. LEXIS 8033 (Tex. App. Tyler Nov. 8 2002).*

137. Home buyers who prevailed in an action brought under the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.46(b)(23)*, were entitled to elect the theory of measuring attorney's fees that provided the greatest recovery and to receive prejudgment interest. *Morgan v. Ebby Halliday Real Estate, 873 S.W.2d 385, 1993 Tex. App. LEXIS 3435 (Tex. App. Fort Worth 1993).*

Civil Procedure: Injunctions: Preliminary & Temporary Injunctions

138. In an action for an injunction under the Deceptive Trade Practices Act for alleged misrepresentations made by the developer to home purchasers about the nature of other houses to be built in a development, there was evidence from which the trial court find that the nondisclosure was not motivated by intent to induce the purchase, and, thus, that the buyers did not sustain their burden of proof under Tex. *Bus. and Com. Code Ann. § 17.46(b)(23). Parks v. U.S. Home Corp., 652 S.W.2d 479, 1983 Tex. App. LEXIS 4235 (Tex. App. Houston 1st Dist. 1983).*

139. Evidence that a corporation engaged in a deceptive trade practice was sufficient for the trial court to enter a temporary injunction, where the corporation advertised that its device, which was to be attached to spark plugs, reduced pollution by up to 100 percent although independent testing revealed no significant effect on vehicle emissions. *Rei Indus., Inc. v. State, 477 S.W.2d 956, 1972 Tex. App. LEXIS 2877 (Tex. Civ. App. Austin 1972).*

Commercial Law (UCC): General Provisions (Article 1): Good Faith

140. The Texas Deceptive Trade Practices Act, Tex. Bus. & Con. Code Ann. § 17.46(b)(23) requires proof by a consumer that: (1) defendant did not disclose information, (2) the information was known to the defendant, (3) such failure, nondisclosure was intended to induce the consumer to enter into the transaction, and (4) the consumer would not have entered the transaction had the information been disclosed. *Sumrall v. Navistar Fin. Corp., 818 S.W.2d 548, 1991 Tex. App. LEXIS 2991 (Tex. App. Beaumont 1991).*

Commercial Law (UCC): Sales (Article 2): Form, Formation & Readjustment

141. Seller was subject to liability under Tex. *Bus. & Com. Code Ann. § 17.46(b)(7)* even though seller's misrepresentations were not made knowingly. *Sci Coatings Southwest v. Drawbaugh Corp., 1998 Tex. App. LEXIS 2280 (Tex. App. Dallas Apr. 17 1998).*

142. Plaintiffs could not rely on Tex. *Bus. & Com. Code Ann. § 17.46* in arguing against the validity of their arbitration agreement based on fraudulent inducement because the arbitration agreement was not a good or service; therefore, §

17.46 did not apply. *Palm Harbor Homes v. McCoy, 944 S.W.2d 716, 1997 Tex. App. LEXIS 1882 (Tex. App. Fort Worth 1997).*

Contracts Law: Contract Conditions & Provisions: Express Warranties

143. Trial court erred in finding that a real property owner was entitled to recover against a subcontractor under the provisions of the Deceptive Trade Practices Act where there were no implied warranties between the parties, and the subcontractor did not breach any express warranty. *Raymond v. Rahme, 78 S.W.3d 552, 2002 Tex. App. LEXIS 3048 (Tex. App. Austin 2002).*

Contracts Law: Contract Conditions & Provisions: Implied Warranties

144. Trial court erred in finding that a real property owner was entitled to recover against a subcontractor under the provisions of the Deceptive Trade Practices Act where there were no implied warranties between the parties, and the subcontractor did not breach any express warranty. *Raymond v. Rahme, 78 S.W.3d 552, 2002 Tex. App. LEXIS 3048 (Tex. App. Austin 2002).*

Contracts Law: Breach: Causes of Action

145. Appellant petroleum company was required under Tex. *Bus. & Com. Code Ann. § 17.46(b)(12)* to show intent to misrepresent or knowledge that a misrepresentation was untrue in its breach of contract action against appellee drilling company. *Ken Petro. Corp. v. Questor Drilling Corp., 976 S.W.2d 283, 1998 Tex. App. LEXIS 4796, 145 Oil & Gas Rep. 563 (Tex. App. Corpus Christi 1998).*

146. Performance of construction contract to stated job specifications, and completion by a specific contract date were contract provisions and not warranties, conduct must involve more than a mere breach of contract in order to rise to the level of a false, misleading or deceptive act sufficient to invoke the rights and remedies of the *Deceptive Trade Practices-Consumer Protection Act.. Chilton Ins. Co. v. Pate & Pate Enters., 930 S.W.2d 877, 1996 Tex. App. LEXIS 4079 (Tex. App. San Antonio 1996).*

147. Where lessor's demands for payment beyond what was required in a commercial lease, breach of warranty of quiet enjoyment gave rise to a claim by the lessee under Tex. *Bus. & Com. Code Ann. § 17.46 (b) (19). Goldman v. Alkek, 1993 Tex. App. LEXIS 465 (Tex. App. Corpus Christi Feb. 4 1993).*

Contracts Law: Defenses: Fraud & Misrepresentation

148. In the consumers' action against a furniture store that sold the consumers furniture under a retail installment contract, the consumers did not prove that the store's letter, which demanded the amount in the installment contract and ignored an oral modification, was "false or misleading" under Tex. *Bus. & Com. Code Ann. § 17.46(b)(12)* with respect to the rights and remedies provided by the agreement because the consumers did not prove the provisions of the agreement in case of default. *Furniture Barn, Inc. v. Leal, 560 S.W.2d 533, 1978 Tex. App. LEXIS 2808 (Tex. Civ. App. Austin 1978).*

Evidence: Procedural Considerations: Inferences & Presumptions

149. Where evidence showed that seller's mist eliminators did not work as seller represented and seller's statements were not generalizations that were usually held to amount to mere opinion or puffing, rather, the statements were specific representations about which mist eliminator would be appropriate, and how that particular mist eliminator would perform in the future, and the seller possessed superior knowledge about the performance capabilities of the product, accordingly, the buyer presented legally and factually sufficient evidence of a misrepresentation of material fact. *Munters Corp. v. Swissco-Young Indus., 2002 Tex. App. LEXIS 6358 (Tex. App. Houston 1st Dist. Aug. 29 2002).*

Evidence: Relevance: Parol Evidence Rule

150. In an action by an insured against an insurer under The Deceptive Trade Practices Act, Tex. *Bus. and Com. Code Ann. § 17.46* et. seq. and *Tex. Ins, Code Ann. art. 21.21* for oral misrepresentation in the sale of health insurance, under Tex. *Bus. and Com. Code Ann. § 17.46* the insureds were not prohibited by the parol evidence rule of testifying about the oral representations. *Tidelands Life Ins. Co. v. Harris, 675 S.W.2d 224, 1984 Tex. App. LEXIS 5599 (Tex. App. Corpus Christi 1984).*

Governments: Legislation: Effect & Operation

151. Debtor could allege cause of action against creditor under Texas Deceptive Trade Practices-Consumer Protection Act, Tex. *Bus. & Com. Code Ann. § 17.46(b)(12)* because he qualified as a consumer, but debtor had no action under former Tex. *Rev. Civ. Stat. Ann. art. 5069*, ch. 7 and 14 because Code Construction Act, former Tex. *Rev. Civ. Stat. Ann. art. 5429b-2* did not apply. *Knight v. International Harvester Credit Corp., 627 S.W.2d 382, 1982 Tex. LEXIS 272, 25 Tex. Sup. Ct. J. 135 (Tex. 1982).*

Governments: Legislation: Effect & Operation: Operability

152. Texas Deceptive Trade Practices Act (Act), Tex. *Bus. & Com. Code Ann. §§ 17.46(b)* and *27.01*, did not apply to alleged deceptive acts committed prior to the effective date of the Act, and the trial court erred when it submitted the issues generally in regard to a claim arising from a sale negotiated prior to the Act and closed after the effective date without requiring findings as to which acts were a proper basis for an award. *Johnson v. Willis, 596 S.W.2d 256, 1980 Tex. App. LEXIS 3095 (Tex. Civ. App. Waco 1980).*

Governments: Legislation: Statutes of Limitations: Statutes of Limitations Generally

153. Summary judgment for a physician in a patient's medical malpractice action was appropriate where the patient failed to plead correctly a deceptive trade practices cause of action under Tex. *Bus. Com. Code Ann. § 17.46(b)* that was not barred by the *Medical Liability and Insurance Improvement Act. Wright v. Fowler, 991 S.W.2d 343, 1999 Tex. App. LEXIS 2640 (Tex. App. Fort Worth 1999).*

154. Application for writ of error was denied, in claim alleging violations of Deceptive Practices--Consumer Protection Act, Tex. *Bus. & Com. Code Ann. §§ 17.46(b)(5)(7)(23)*, arising out of purchase of house, because it was barred by statute of limitations. *Smith v. Gray, 907 S.W.2d 444, 1995 Tex. LEXIS 19, 38 Tex. Sup. Ct. J. 346 (Tex. 1995).*

Governments: Legislation: Statutory Remedies & Rights

155. Trial court entered judgment against appellant business for a violation of the Deceptive Trade Practices-Consumer Protection Act, Tex. Bus. & Com. Code Ann. art. **17.46,** where business' advertisement was misleading regarding repair of campers and trailers. *Mallory v. Custer, 537 S.W.2d 141, 1976 Tex. App. LEXIS 2835 (Tex. Civ. App. Austin 1976).*

Governments: Legislation: Types of Statutes

156. Tex. *Bus. & Com. Code Ann. § 17.46(b)(22)* is neither a jurisdictional statute nor a venue statute, rather the statute provides a remedy at law for damages incurred because of a deceptive act. *Hoelscher v. Gfh Fin. Servs., Inc., 814 S.W.2d 842, 1991 Tex. App. LEXIS 2281 (Tex. App. Dallas 1991).*

Healthcare Law: Actions Against Healthcare Workers

157. Tex. *Rev. Civ. Stat. Ann. art. 4590i*, § 12.01(a), did not shield dentist from patient's claim under the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.46(b)(5)* & (7), for knowing misrepresentation concerning dentist's representation that dentures could be made to fit patient. *Jeffery v. Walden, 899 S.W.2d 207, 1993 Tex. App. LEXIS 3553 (Tex. App. Dallas 1993).*

Insurance Law: Bad Faith & Extracontractual Liability

158. Adjusters who were hired to provide adjusting services for claims submitted through a governmental trust pool were not subject to Tex. *Bus. & Com. Code Ann. § 17.46* of the Deceptive Trade Practice Act because they were not an insurer subject to § 17.46. *Coffman v. Scott Wetzel Servs., 908 S.W.2d 516, 1995 Tex. App. LEXIS 2593 (Tex. App. Fort Worth 1995).*

Insurance Law: Bad Faith & Extracontractual Liability: Failure to Settle

159. Insurance company's bona fide dispute over whether property damage coverage existed meant a sufficient basis did not exist to sue it for violations of the Deceptive Business Practices Act where the dispute was not resolved until a court first ruled on the issue and the insurance company was not shown to have made misrepresentations regarding whether it actually though that coverage applied. *Travelers Indem. Co. v. Page & Assocs. Constr. Co., 2002 Tex. App. LEXIS 4545 (Tex. App. Amarillo June 25 2002).*

160. Where an insurer mistakenly denied coverage for insured's damages and then corrected its mistake when it realized that insured in fact had personal injury protection, the insured's contractual rights were unaffected, and, in the absence of any evidence of a knowing or intentional attempt to deceive, neither the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.46(a)*, nor Tex. *Ins. Code Ann. art. 21.21, § 16* applied. *General Accident, Fire & Life Assurance Corp. v. Legate, 578 S.W.2d 505, 1979 Tex. App. LEXIS 3265 (Tex. Civ. App. Texarkana 1979).*

Insurance Law: Bad Faith & Extracontractual Liability: Statutory Damages & Penalties

161. Common law cause of action can serve as the basis for a violation under Tex. *Bus. & Com. Code Ann. § 17.46* or under Tex. *Ins. Code Ann. art. 21.21, § 16. Allied Gen. Agency, Inc. v. Moody, 788 S.W.2d 601, 1990 Tex. App. LEXIS 1283 (Tex. App. Dallas 1990).*

162. Claimant was permitted to recover treble damages under Tex. *Ins. Code Ann. art. 21.21* from an insurer because the insurer failed to comply with the terms of the parties' worker's compensation compromise settlement agreement in violation of Tex. *Bus. & Com. Code Ann. § 17.46* ; the insurer represented to the claimant in the agreement that it would provide benefits and then failed to do so; the court held that misrepresentations as to coverage and benefits were precisely the sort of conduct which gave rise to a Tex. *Bus. & Com. Code Ann. § 17.46* cause of action. *Aetna Cas. & Sur. Co. v. Marshall, 724 S.W.2d 770, 1987 Tex. LEXIS 280, 30 Tex. Sup. Ct. J. 155 (Tex. 1987).*

163. Husband and wife's recovery of actual damages plus interest in an action for violation of Tex. *Ins. Code § 21.21(16)* did not preclude their causes of action under § 21.21(16) or under Tex. *Bus. & Com. Code § 17.46* because it did not constitute recovery for the same act or practice. *Mayo v. John Hancock Mut. Life Ins. Co., 711 S.W.2d 5, 1986 Tex. LEXIS 538, 29 Tex. Sup. Ct. J. 400 (Tex. 1986).*

164. Tex. *Ins. Code Ann. art. 21.21, § 16(a)* makes actionable three types of conduct: first, any practice declared in Tex. *Ins. Code Ann. art. 21.21, § 4* to be unfair methods of competition and unfair and deceptive acts or practices; second, any practice defined by Tex. *Bus. & Com. Code Ann. § 17.46* as an unlawful deceptive trade practice; and third, any practice declared in the rules or regulations lawfully adopted by the State Board of Insurance to be unfair methods of competition and unfair and deceptive acts or practices. *Chitsey v. National Lloyd's Ins. Co., 698 S.W.2d 766, 1985 Tex. App. LEXIS 12420 (Tex. App. Austin 1985).*

165. Insurance company's misrepresentation of coverage to its insured violated the Texas Deceptive Trade Practices and Consumer Protection Act, Tex. *Bus. & Com. Code Ann. §§ 17.41 -- 17.63*, specifically Tex. *Bus. & Com. Code Ann. § 17.46 . Royal Globe Ins. Co. v. Bar Consultants, Inc., 566 S.W.2d 724, 1978 Tex. App. LEXIS 3401 (Tex. Civ. App. Austin 1978).*

Insurance Law: Claims & Contracts

166. In case where appellant insureds brought suit against appellee insurer after appellee insurer denied liable for maternity expenses, after appellant insureds recovered on the insurance policy under Tex. *Ins. Code Ann. art. 3.62*, they could not recover under Tex. *Bus. & Com. Code Ann. § 17.46* of the Deceptive Trade Practices Act, because Tex. *Bus. & Com. Code Ann. § 17.43* did not allow such double recovery. *Mayo v. John Hancock Mut. Life Ins., 695 S.W.2d 724, 1985 Tex. App. LEXIS 12077 (Tex. App. Dallas 1985).*

Insurance Law: Claims & Contracts: Estoppel & Waiver

167. Taking of the so-called coverage statement, which was used to perfect appellee's noncoverage defense, was a misleading and deceptive act or practice in the conduct of the adjuster-investigator's trade, and the adjuster-investigator's acts and practices violated Tex. *Bus. & Com. Code Ann. §§ 17.46(a)* and *17.46(b)(12)*. As a result, the acts or practices were unlawful and subject to the consumer protection division. *McGuire v. Texas Farmers Ins. Co., 727 S.W.2d 1, 1987 Tex. App. LEXIS 7045 (Tex. App. Beaumont 1987).*

Insurance Law: Claims & Contracts: Fiduciary Responsibilities

168. Surviving minor daughter of decedents had standing against insurer for fraud, unfair claims practices, and breach of fiduciary duty in dealing with her under Tex. *Ins. Code Ann. art. 21.21* because she was an injured party under Tex. *Bus. & Com. Code Ann. § 17.46 . Transport Ins. Co. v. Faircloth, 861 S.W.2d 926, 1993 Tex. App. LEXIS 2574 (Tex. App. Beaumont 1993).*

169. Taking of the so-called coverage statement, which was used to perfect appellee's noncoverage defense, was a misleading and deceptive act or practice in the conduct of the adjuster-investigator's trade, and the adjuster-investigator's acts and practices violated Tex. *Bus. & Com. Code Ann. §§ 17.46(a)* and *17.46(b)(12)*. As a result, the acts or practices were unlawful and subject to the consumer protection division. *McGuire v. Texas Farmers Ins. Co., 727 S.W.2d 1, 1987 Tex. App. LEXIS 7045 (Tex. App. Beaumont 1987).*

Insurance Law: Claims & Contracts: Good Faith & Fair Dealing

170. Surviving minor daughter of decedents had standing against insurer for fraud, unfair claims practices, and breach of fiduciary duty in dealing with her under Tex. *Ins. Code Ann. art. 21.21* because she was an injured party under Tex. *Bus. & Com. Code Ann. § 17.46 . Transport Ins. Co. v. Faircloth, 861 S.W.2d 926, 1993 Tex. App. LEXIS 2574 (Tex. App. Beaumont 1993).*

Insurance Law: Claims & Contracts: Unfair Business Practices

171. On an insureds' counterclaim under the Texas Deceptive Trade Practices Act for bad faith delay in determining that a water damage claim was not covered under the insureds' commercial property insurance policy, an insurer was entitled to summary judgment where the fact that it took the insurer a year and nine months to deny the claim was not sufficient by itself to raise a genuine issue of material fact as to bad faith. *General Star Indem. Co. v. Brooke Trust, 2001 U.S. Dist. LEXIS 25193* (Sept. 10, 2001).

172. The list of false, misleading, or deceptive acts or practices contained in Tex. *Bus. & Com. Code Ann. § 17.46* is not exclusive, but an act or practice which is not among those listed in § 17.46 requires a jury to determine as a fact

whether it was "deceptive." *Spradling v. Williams, 566 S.W.2d 561, 564 (Tex. 1978). American Cas. Co. v. White, 1997 Tex. App. LEXIS 3218 (Tex. App. Houston 14th Dist. June 19 1997).*

173. Jury findings that an insurer told a third party, who was involved in an accident with the insured, that the insurer would pay for repairs, but then reneged on that agreement, supported a jury verdict for damages under Tex. *Bus. & Com. Code Ann. § 17.46(b)(12). Webb v. Int'l Trucking Co., 909 S.W.2d 220, 1995 Tex. App. LEXIS 2368 (Tex. App. San Antonio 1995).*

174. Recovery under Tex. *Bus. & Com. Code Ann. § 17.46(b)(12)* may be predicated upon misrepresentation of insurance coverage. *Webb v. Int'l Trucking Co., 909 S.W.2d 220, 1995 Tex. App. LEXIS 2368 (Tex. App. San Antonio 1995).*

175. Jury's affirmative answer to a question, which did not ask whether the insurer failed to exercise good faith, but instead asked whether the jury found the insurer's handling of the insureds' claim to be "an unfair practice in the business of insurance," did not support a cause of action under Tex. *Bus. & Com. Code Ann. § 17.46(a)*; while a practice not listed in the statute could still be actionable as an "unlisted practice" thereunder, a finding to the effect that that the insurer committed acts that were false, misleading, or deceptive was required before liability could be imposed for the violation of an unlisted deceptive trade practice, and no such finding had been made. *Spencer v. Eagle Star Ins. Co., 780 S.W.2d 837, 1989 Tex. App. LEXIS 3056 (Tex. App. Austin 1989).*

176. Taking of the so-called coverage statement, which was used to perfect appellee's noncoverage defense, was a misleading and deceptive act or practice in the conduct of the adjuster-investigator's trade, and the adjuster-investigator's acts and practices violated Tex. *Bus. & Com. Code Ann. §§ 17.46(a)* and *17.46(b)(12)*. As a result, the acts or practices were unlawful and subject to the consumer protection division. *McGuire v. Texas Farmers Ins. Co., 727 S.W.2d 1, 1987 Tex. App. LEXIS 7045 (Tex. App. Beaumont 1987).*

177. Actions of appellee's adjuster-investigator injured appellant and, as a matter of law, were unfair and deceptive practices in the business of insurance, as well as a condemned practice as defined by Tex. *Bus. & Com. Code Ann. § 17.46 . McGuire v. Texas Farmers Ins. Co., 727 S.W.2d 1, 1987 Tex. App. LEXIS 7045 (Tex. App. Beaumont 1987).*

178. In a vendor's action to obtain reimbursement for the cost of defense as a third-party-beneficiary under a manufacturer's insurance policy, Tex. *Ins. Code Ann. art. 21.21, § 16(a)*, applied the Texas Deceptive Trade Practices -- Consumer Protection Act, Tex. *Bus. & Com. Code Ann. § 17.46* , to all insurance companies except county mutuals. *Aetna Cas. & Sur. Co. v. Martin Surgical Supply Co., 689 S.W.2d 263, 1985 Tex. App. LEXIS 6329 (Tex. App. Houston 1st Dist. 1985).*

179. In an action by an insured against an insurer under The Deceptive Trade Practices Act, Tex. *Bus. and Com. Code Ann. § 17.46* et. seq. and *Tex. Ins, Code Ann. art. 21.21* for oral misrepresentation in the sale of health insurance, under Tex. *Bus. and Com. Code Ann. § 17.46* the insureds were not prohibited by the parol evidence rule of testifying about the oral representations. *Tidelands Life Ins. Co. v. Harris, 675 S.W.2d 224, 1984 Tex. App. LEXIS 5599 (Tex. App. Corpus Christi 1984).*

Insurance Law: Motor Vehicle Insurance: Coverage Generally

180. In an insurance dispute arising from an insurance company's denial of its insured's claim for automobile theft, the insured's claim, that the insurance company violated the Deceptive Trade Practices Act, was dismissed upon partial summary judgment. *Nnunukwe v. State Farm Auto. Ins. Co., 2003 Tex. App. LEXIS 1357 (Tex. App. Houston 14th Dist. Feb. 13 2003).*

Insurance Law: Property Insurance: All-Risk Coverage

181. Defendant did not engage in a deceptive trade practice as envisioned by the Deceptive Trade Practices Act merely by referring to the homeowner's policy as coverage on an "all-risk basis," and plaintiff's deposition testimony showed

that he was aware that exclusions applied to his "all-risk" insurance policy. *Muniz v. State Farm Lloyds, 974 S.W.2d 229, 1998 Tex. App. LEXIS 2751 (Tex. App. San Antonio 1998).*

Insurance Law: Regulation of Insurance: Claims Investigations & Practices

182. Insurance agent, who was not a consumer of an insurer's goods and services, could not state a cause of action under Tex. *Ins. Code Ann. art. 21.21* for the insurer's alleged violations of the Deceptive Trade Practices Act (DTPA), Tex. *Bus. & Com. Code § 17.46(b)(5)*, (7), (9), and (23), because the terms of those subsections of the DTPA required consumer status. *Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 2000 Tex. LEXIS 13, 43 Tex. Sup. Ct. J. 348 (Tex. 2000).*

183. Lack of consumer status did not bar an insurance agent from bringing a cause of action under Tex. *Ins. Code Ann. art. 21.21* for an insurer's alleged violations of the Deceptive Trade Practices Act (DTPA) Tex. *Bus. & Com. Code § 17.46(b)(12)*, because that subsection of the DTPA did not require consumer status. *Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 2000 Tex. LEXIS 13, 43 Tex. Sup. Ct. J. 348 (Tex. 2000).*

Real & Personal Property Law: Condominiums, Cooperatives & Homeowner Associations: Condominiums

184. Error as to the percentage ownership in common elements of two condominiums was not a deceptive trade practice violation under Tex. *Bus. & Com. Code Ann. § 17.46(b)(5)* and did not entitle purchasers to rescind a sales transaction because the deed to the condominiums complied with the Texas Condominium Act, Tex. *Prop. Code Ann. § 81.101* et seq. at the time of the sale. *Janicek v. Home Sav. of Am., 1996 Tex. App. LEXIS 505 (Tex. App. Houston 14th Dist. Feb. 8 1996).*

Real & Personal Property Law: Insurance: Title Insurance

185. Tex. *Ins. Code Ann. art. 9.34* does not give rise to a private cause of action for damages, and is not enforceable through Tex. *Ins. Code Ann. art. 21.21, § 16(a)*; writing a title policy without making or causing to be made a determination of insurability of title in accordance with sound title underwriting practices, is not one of the false, misleading, or deceptive acts or practices defined by Tex. *Bus. & Comm. Code Ann. § 17.46 . Stewart Title Guar. Co. v. Becker, 930 S.W.2d 748, 1996 Tex. App. LEXIS 3717 (Tex. App. Corpus Christi 1996).*

186. Although Tex. *Ins. Code Ann. art. 21.21, § 16(a)* provides a private cause of action for any practice defined by the Deceptive Trade Practices Act, Tex. *Bus. & Comm. Code Ann. § 17.46* , unfair claim settlement practices is not among the enumerated items defined by § **17.46** as an unlawful deceptive trade practice and, therefore, they are not actionable under Tex. *Ins. Code Ann. art. 21.21, § 16(a). Stewart Title Guar. Co. v. Becker, 930 S.W.2d 748, 1996 Tex. App. LEXIS 3717 (Tex. App. Corpus Christi 1996).*

187. Title firm's alleged misrepresentation to land buyer after issuing a title commitment, that the lien did not apply to the property, raised a valid deceptive trade practices claim under the Texas Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.41* et seq., as title firm had a duty to know if representation was true. V. *Stewart Title Guar. Co., 851 S.W.2d 933, 1993 Tex. App. LEXIS 1206 (Tex. App. Beaumont 1993).*

Real & Personal Property Law: Landlord & Tenant: Commercial Leases

188. Where lessor's demands for payment beyond what was required in a commercial lease, breach of warranty of quiet enjoyment gave rise to a claim by the lessee under Tex. *Bus. & Com. Code Ann. § 17.46 (b) (19). Goldman v. Alkek, 1993 Tex. App. LEXIS 465 (Tex. App. Corpus Christi Feb. 4 1993).*

Torts: Business & Employment Torts: Bad Faith Breach of Contract

189. In purchaser's appeal from an order of summary judgment, the court affirmed because sellers' failure to disclose information regarding defects in the home was not the producing cause of purchaser's damages under the Texas Deceptive Trade Practices-Consumer Protection Act, Tex. *Bus. & Com. Code Ann. § 17.41*, specifically Tex. *Bus. & Com. Code Ann. § 17.46(b)*, because the alleged deception did not cause purchaser's actual damages. *Dubow v. Dragon, 746 S.W.2d 857, 1988 Tex. App. LEXIS 717 (Tex. App. Dallas 1988).*

Torts: Business & Employment Torts: Concealment

190. In purchaser's appeal from an order of summary judgment, the court affirmed because sellers' failure to disclose information regarding defects in the home was not the producing cause of purchaser's damages under the Texas Deceptive Trade Practices-Consumer Protection Act, Tex. *Bus. & Com. Code Ann. § 17.41*, specifically Tex. *Bus. & Com. Code Ann. § 17.46(b)*, because the alleged deception did not cause purchaser's actual damages. *Dubow v. Dragon, 746 S.W.2d 857, 1988 Tex. App. LEXIS 717 (Tex. App. Dallas 1988).*

Torts: Business & Employment Torts: Deceit & Fraud

191. Summary judgement in favor of the seller was affirmed, and the seller was entitled to attorney fee's under the contract of sale, where the buyer failed to prove that the seller's representations were false under the provisions of Tex. *Bus. & Com. Code Ann. § 27.01*, since the buyer merely showed that the driveway did not accommodate the turning radius of her particular vehicle, and the buyer failed to prove that the seller's representations were made with the intent of inducing the buyer into purchasing the property, as needed under the provisions of Tex. *Bus. & Com. Code Ann. § 17.46(b)(5)* and (23) of the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.01* et seq *Robbins v. Capozzi, 2002 Tex. App. LEXIS 8033 (Tex. App. Tyler Nov. 8 2002).*

192. Patient's claim for physician misrepresentation failed when she did not produce a signed writing by the physician, which contained the representation or promise relied upon in her breast reduction surgery. *Smith v. Elliott, 68 S.W.3d 844, 2002 Tex. App. LEXIS 443 (Tex. App. El Paso 2002).*

193. The decisive test of whether a misappropriation occurs under the Texas Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.46(b)* is whether the seller asserts a fact of which the buyer is ignorant or merely states an opinion or judgment on a matter of which the seller has no special knowledge and on which the buyer may be expected also to have an opinion and to exercise his judgment. *Steptoe v. True, 38 S.W.3d 213, 2001 Tex. App. LEXIS 333 (Tex. App. Houston 14th Dist. 2001).*

194. Under Tex. *Bus. & Com. Code Ann. § 17.46(b)(23)* the prohibition against failing to disclose material information requires a showing of intentional misconduct. *Kline v. Alpha Romeo Distribs. of N. Am., Inc., 2000 Tex. App. LEXIS 5466 (Tex. App. San Antonio Aug. 16 2000).*

195. In an action based upon failure to disclose information in a real estate transaction, error resulted when the trial court granted defendant's motion for summary judgment when defendant failed to establish that plaintiff could not prevail under the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.46(b)(23). Munawar v. Cadle Co., 2 S.W.3d 12, 1999 Tex. App. LEXIS 2678 (Tex. App. Corpus Christi 1999).*

196. Bank's slogan "A Tradition of Excellence and its policy of "knowing its customers" were mere opinion or puffing and did not form the basis of an express warranty under the Texas Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.46(b). Humble Nat'l Bank v. Dcv, Inc., 933 S.W.2d 224, 1996 Tex. App. LEXIS 3833 (Tex. App. Houston 14th Dist. 1996).*

197. Error as to the percentage ownership in common elements of two condominiums was not a deceptive trade practice violation under Tex. *Bus. & Com. Code Ann. § 17.46(b)(5)* and did not entitle purchasers to rescind a sales transaction because the deed to the condominiums complied with the Texas Condominium Act, Tex. *Prop. Code Ann. § 81.101* et seq. at the time of the sale. *Janicek v. Home Sav. of Am., 1996 Tex. App. LEXIS 505 (Tex. App. Houston 14th Dist. Feb. 8 1996).*

198. Take nothing judgment based on instructed verdicts against claims of fraud, and under the Texas Deceptive Trade Practices-Consumer Protection Act, was improper where sufficient evidence existed to raise fact issues. *Padgett v. Bert Ogden Motor's, 869 S.W.2d 532, 1993 Tex. App. LEXIS 3332 (Tex. App. Corpus Christi 1993).*

199. Title firm's alleged misrepresentation to land buyer after issuing a title commitment, that the lien did not apply to the property, raised a valid deceptive trade practices claim under the Texas Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.41* et seq., as title firm had a duty to know if representation was true. V. *Stewart Title Guar. Co., 851 S.W.2d 933, 1993 Tex. App. LEXIS 1206 (Tex. App. Beaumont 1993).*

200. Where a purchaser did not establish that a seller intended to induce, pursuant to Tex. *Bus. & Com. Code Ann. § 17.46(b)(23),* the purchaser could not recover for false representations. *Sweco, Inc. v. Cont'l Sulfur & Chem., 808 S.W.2d 112, 1991 Tex. App. LEXIS 488, 14 U.C.C. Rep. Serv. 2d (CBC) 1034 (Tex. App. El Paso 1991).*

201. Trial court erred when it granted judgment notwithstanding the verdict to the automobile dealership on the issue of damages in the purchaser's action for fraudulent misrepresentation under Tex. *Bus. & Com. Code § 17.46(b)(12)* of the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.41* et seq.; the court reinstated the award of damages to the purchaser because the evidence showed that the jury could have reasonably concluded that the purchaser bought the motorcycle dealership with the specific understanding that he would be able to purchase inventory from the manufacture, and the automobile dealership's misrepresentations on this point was a producing cause of the purchaser's subsequent damages. *Best v. Ryan Auto Group, Inc., 786 S.W.2d 670, 1990 Tex. LEXIS 37, 33 Tex. Sup. Ct. J. 314 (Tex. 1990).*

202. Car salesman's false representation to a prospective buyer concerning an overall of a used vehicle, constituted a deceptive trade practice under Tex. *Bus. & Com. Code Ann. § 17.46 . Texarkana Mack Sales, Inc. v. Flemister, 741 S.W.2d 558, 1987 Tex. App. LEXIS 8809 (Tex. App. Texarkana 1987).*

203. Pleadings by an oil exploration firm, in its action against a supplier for deceptive trade practices and knowing and intentional misrepresentation of the limitations of its drilling rig, alleging that the firm would show that the supplier's actions and misrepresentations regarding the rig's ability to perform constituted a deceptive trade practice in violation of Tex. Bus. & Com. Code Ann. arts. 17.45(5) and **17.46(** b), and that the supplier's knowing and intentional misrepresentations merited treble damages under Tex. Bus. & Com. Code Ann. art. 17.50(b)(1), were sufficient to support the trial court's judgment that the firm had established its claim under the *Deceptive Trade Practices Act. Pool Co. v. Salt Grass Exploration, Inc., 681 S.W.2d 216, 1984 Tex. App. LEXIS 6494 (Tex. App. Houston 1st Dist. 1984).*

204. Where deception regarding termite treatment occurred before enactment of consumer protection act and where the only deceptive acts shown after enactment occurred shortly before a termite infestation was discovered, an award of the full costs of repair to homeowner was improper. *Hill & Hill Exterminators, Inc. v. McKnight, 678 S.W.2d 515, 1984 Tex. App. LEXIS 5637 (Tex. App. Houston 14th Dist. 1984).*

205. The contention of a building contractor that the evidence was insufficient to support a finding that it was guilty of intentional or knowing misconduct under the Deceptive Trade Practices and Consumer Protection Act, Tex. *Bus. & Com. Code Ann. § 17.41* et seq., was without merit; misrepresentations as to the warranties extended to homeowners who entered into an agreement with the contractor to build their home were sufficient to be a violation of § **17.46(** b)(7), which did not require intent or knowledge before a violation could be found. *Jim Walter Homes, Inc. v. Mora, 622 S.W.2d 878, 1981 Tex. App. LEXIS 4113 (Tex. App. Corpus Christi 1981).*

206. Allegation of a breach of contract, without more, as a matter of law, did not constitute a false, misleading or deceptive act with the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.46(b)(5),* and Tex. *Bus. & Com. Code Ann. § 17.50(a)(3),* and the failure to perform a promise did not constitute a misrepresentation that violated the Deceptive Trade Practices Act either. *Coleman v. Hughes Blanton, Inc., 599 S.W.2d 643, 1980 Tex. App. LEXIS 3288 (Tex. Civ. App. Texarkana 1980).*

207. Trial court did not err in granting the attorney's motion for a directed verdict on the Deceptive Trade Practices-Consumer Protection Act (DTPA), Tex. *Bus. & Com. Code Ann. § 17.41-.63*, claims as the evidence presented at trial supported the submission of a breach of contract question, but was not legally sufficient to support submission of a question concerning whether the attorney's agreement to obtain a release of the marital debt on the ranch constituted a false, misleading or deceptive act under the DTPA, and moreover, whatever the nature of the attorney's representations to the client concerning the characteristics and qualities of his services, the client expressly agreed to settle her divorce proceeding against his advice. *Lowe v. De La Garza, 2003 Tex. App. LEXIS 3580 (Tex. App. Houston 1st Dist. Apr. 24 2003).*

208. The district court's order affirming an arbitration award in favor of the homeowners was upheld because: (1) the Residential Construction Liability Act, Tex. *Prop. Code Ann. § 27.001* et seq., did not preclude the parties to a residential construction contract from agreeing to forms of alternative dispute resolution other than mediation under the provisions of Tex. *Prop. Code Ann. § 27.0041(b)*, Tex. *Civ. Prac. & Rem. Code Ann. § 154.023*, (2) the district court correctly construed the contract as requiring binding arbitration because the obvious intent of the parties was to submit any claims to binding arbitration, (3) the contractor waived its right to object to arbitration on appeal because it failed to object to the arbitration proceeding, and (4) the contractor's plea in abatement was not valid under Tex. *Prop. Code Ann. § 27.004(d)(1)* because the statute required verified allegations of lack of notice in order to trigger the automatic abatement, nothing in the contractor's verification attested to the facts of the plea in abatement, and no affidavit was filed in support of abatement. *High Valley Homes, Inc. v. Fudge, 2003 Tex. App. LEXIS 3273 (Tex. App. Austin Apr. 17 2003).*

209. Generally, claims may be made under Tex. *Bus. & Com. Code Ann. § 17.46(b)(5)* for misrepresentations regarding characteristics of goods or services, under § 17.46(b)(7) for misrepresentations as to the quality of goods or services, and under § 17.46(b)(24) for failing to disclose information about goods or services if the failure to disclose was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed. *Wayne Duddlesten, Inc. v. Highland Ins. Co., 2003 Tex. App. LEXIS 3157 (Tex. App. Houston 1st Dist. Apr. 10 2003).*

210. In an action by a worker's compensation insured against its insurers, alleged misrepresentations of the insurers pertaining to the payment of claims could provide the basis for a breach of contract claim, but not to support an action under the Deceptive Trade Practices Act or the insurance code. *Wayne Duddlesten, Inc. v. Highland Ins. Co., 2003 Tex. App. LEXIS 3157 (Tex. App. Houston 1st Dist. Apr. 10 2003).*

211. Relatives of a deceased mother and her four year old son could not show that they were entitled to recover under the Texas Deceptive Trade Practices Act, Tex. *Bus. & Com. Code § 17.46* et seq., where they produced no evidence that the manufacturer of a utility lighter, alleged to have caused the fatal fire, made misrepresentations or omitted important facts regarding the utility lighter. *Flock v. Scripto-Tokai Corp., 319 F.3d 231, 2003 U.S. App. LEXIS 1761, CCH Prod. Liab. Rep. P16517 (5th Cir. Tex. 2003).*

212. Where evidence showed that seller's mist eliminators did not work as seller represented and seller's statements were not generalizations that were usually held to amount to mere opinion or puffing, rather, the statements were specific representations about which mist eliminator would be appropriate, and how that particular mist eliminator would perform in the future, and the seller possessed superior knowledge about the performance capabilities of the product, accordingly, the buyer presented legally and factually sufficient evidence of a misrepresentation of material fact. *Munters Corp. v. Swissco-Young Indus., 2002 Tex. App. LEXIS 6358 (Tex. App. Houston 1st Dist. Aug. 29 2002).*

213. Trial court did not err in referring all of the customer's claims to arbitration because claims of unconscionability were for the arbitrator to decide and claims made under the Deceptive Trade Practices-Consumer Protection Act, Tex. *Bus. & Com. Code Ann. § 17.41* were arbitrable. *Smith v. Gateway, Inc., 2002 Tex. App. LEXIS 5438 (Tex. App. Austin July 26 2002).*

214. Trial court erred in finding that a real property owner was entitled to recover against a subcontractor under the provisions of the Deceptive Trade Practices Act where there were no implied warranties between the parties, and the subcontractor did not breach any express warranty. *Raymond v. Rahme, 78 S.W.3d 552, 2002 Tex. App. LEXIS 3048 (Tex. App. Austin 2002).*

215. The statutory exemption granted to the rendering of professional services did not apply to violations of Tex. *Bus. & Com. Code Ann. § 17.46(b)(23)* under the provisions of Tex. *Bus. & Com. Code Ann. § 17.49(c)(2)*; and summary judgment on the parents' claims against their attorneys for breach of fiduciary duty and violation of one provision of the deceptive trade practices act were reversed and remanded because the parents produced more than a scintilla of evidence in support of their claims. *Francisco v. Foret, 2002 Tex. App. LEXIS 2610 (Tex. App. Dallas Apr. 11 2002).*

216. Summary judgment was properly granted on the parents claims against their attorneys under Tex. *Bus. & Com. Code § 17.46(b)(4)*, (5), (7) of the Texas Deceptive Trade Practices Act because the parents failed to produce a scintilla of evidence that the attorneys made a representation of fact regarding services that was inaccurate or false. *Francisco v. Foret, 2002 Tex. App. LEXIS 2610 (Tex. App. Dallas Apr. 11 2002).*

217. Statements were actionable under Tex. *Bus. & Com. Code Ann. § 17.46(b)(5)*, and not mere puffery; a fabricator of mist eliminators committed a deceptive business practice by representing that data on how its mist eliminators would perform when installed was accurate, and that its mist eliminators were appropriate for the buyer's needs, but the eliminators failed when installed. *Munters Corp. v. Swissco-young Indus., 2002 Tex. App. LEXIS 2631 (Tex. App. Houston 1st Dist. Apr. 11 2002).*

218. Where there was no evidence of any false, misleading, or deceptive act or practice enumerated in Tex. *Bus. & Com. Code Ann. § 17.46* or unconscionability, defined by Tex. *Bus. & Com. Code Ann. § 17.45(5)* as an act or practice which, to a consumer's detriment, took advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree, a trial court did not err in granting the defendants' motion for summary judgment on the plaintiffs' claims under the Texas Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.41*, et seq.. *Hight v. Dublin Veterinary Clinic, 22 S.W.3d 614, 2000 Tex. App. LEXIS 3833 (Tex. App. Eastland 2000).*

219. Law firm's advice that a client should sign a settlement agreement and that the settlement agreement would protect the client's rights was too vague to support the plaintiff's claim that the law firm committed violations of the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.46(b)(5)*, (12). *Douglas v. Delp, 987 S.W.2d 879, 1999 Tex. LEXIS 38, 42 Tex. Sup. Ct. J. 431 (Tex. 1999).*

220. In an action brought under the Texas Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.46(a)*, by a salesman against his employer, an insurance company, the court reversed a jury verdict entered in the salesman's favor because the salesman was not a "consumer" within the meaning of the Act, as defined by Tex. *Bus. & Com. Code Ann. § 17.45(4). Metropolitan Life Ins. Co. v. Haney, 987 S.W.2d 236, 1999 Tex. App. LEXIS 1864 (Tex. App. Houston 14th Dist. 1999).*

221. In purchasers' suit against lender stemming from lender's actions to collect on the contract and note pledged by the bankrupt contractor building purchaser's home, the district court erred in granting summary judgment in favor of lender for purchaser's cause of action under the Deceptive Trade Practices Act, specifically, Tex. *Bus. & Com. Code § 17.46(b)(12)* where lender failed to negate that it used false, misleading, or deceptive practices in representing that an agreement conferred rights or obligations that it did not because lender not only failed in its demand to reduce the amount owed by the amount necessary to complete the building of the home, lender demanded more principal than was due. *Meininger v. Lufkin Fed. S&l Ass'n, 1997 Tex. App. LEXIS 5043 (Tex. App. Amarillo Sept. 19 1997).*

222. In purchasers' suit against lender stemming from lender's actions to collect on the contract and note pledged by the bankrupt contractor building purchaser's home, the district court erred in granting summary judgment in favor of lender for purchaser's cause of action under the Deceptive Trade Practices Act, specifically, Tex. *Bus. & Com. Code § 17.46(b)(12)*, where lender failed to negate that its demand letters were as a matter of law not a producing cause of purchasers' damages because an affidavit by purchasers that stated purchasers were unwilling to pay any amount regardless of the amount demanded was only attached to purchasers' response to summary judgment and was not properly before the district court pursuant to Tex. R. Civ. P. 166a to support lender's motion. *Meininger v. Lufkin Fed. S&l Ass'n, 1997 Tex. App. LEXIS 5043 (Tex. App. Amarillo Sept. 19 1997).*

223. Jury findings that an insurer told a third party, who was involved in an accident with the insured, that the insurer would pay for repairs, but then reneged on that agreement, supported a jury verdict for damages under Tex. *Bus. & Com. Code Ann. § 17.46(b)(12). Webb v. Int'l Trucking Co., 909 S.W.2d 220, 1995 Tex. App. LEXIS 2368 (Tex. App. San Antonio 1995).*

224. To be actionable under Tex. *Bus. & Com. Code § 17.46(b)(23)* of the Deceptive Trade Practices Act, a failure to disclose material information necessarily requires that the defendant have known the information and have failed to bring it to the plaintiff's attention. *Doe v. Boys Clubs, 907 S.W.2d 472, 1995 Tex. LEXIS 80, 38 Tex. Sup. Ct. J. 732 (Tex. 1995).*

225. Daughter of decedents with whom an insurer negotiated a settlement based on the liability of its insured did not have a claim under § 17.46(b)(23) of the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.46(b)(23),* because the insurer in negotiating with the daughter was neither inducing a consumer into a transaction nor withholding information concerning goods and services. *Transport Ins. Co. v. Faircloth, 898 S.W.2d 269, 1995 Tex. LEXIS 32, 38 Tex. Sup. Ct. J. 424 (Tex. 1995).*

226. There can be no claim under the Texas Deceptive Trade Practices Consumer Protection Act (DTPA), Tex. *Bus. & Com. Code Ann. § 17.46* , against a physician for damages for personal injury or death if the damages result, or are alleged to result, from the physician's negligence; however, if the alleged DTPA claim is not based on the physician's breach of the accepted standard of medical care, section 12.01(a) of the Medical Liability and Insurance Improvement Act, Tex. *Rev. Civ. Stat. Ann. art. 4590i,* does not preclude suit for violation of the *DTPA. Walden v. Jeffery, 907 S.W.2d 446, 1995 Tex. LEXIS 23, 38 Tex. Sup. Ct. J. 374, 26 U.C.C. Rep. Serv. 2d (CBC) 344 (Tex. 1995).*

227. A seller has no duty to disclose facts he does not know, nor is a seller liable for failing to disclose what he only should have known; even under the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code §§ 17.41* et seq., a seller is not liable for failing to disclose information he did not actually know. *Prudential Ins. Co. of Am. v. Jefferson Assocs., 896 S.W.2d 156, 1995 Tex. LEXIS 28, 38 Tex. Sup. Ct. J. 366 (Tex. 1995).*

228. Buyers had a cause of action under the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. §§ 17.46 , 17.50,* against a real estate agent who responded to the buyers that he did not know the identity of the previous owner of the house, but admitted the day after the closing that he had known that the house had belonged to an accused child molester when the buyers inquired. *Sanchez v. Guerrero, 885 S.W.2d 487, 1994 Tex. App. LEXIS 1775 (Tex. App. El Paso 1994).*

229. To prevail at trial under Tex. *Bus. & Com. Code Ann. § 17.46(b)(23),* the plaintiff must prove a failure to disclose information concerning goods or services, which was known at the time of the transaction, which was intended to induce them into a transaction, and that they would have not entered into the transaction if the information had been disclosed. *O'Hern v. Hogard, 841 S.W.2d 135, 1992 Tex. App. LEXIS 2876 (Tex. App. Houston 14th Dist. 1992).*

230. Tex. *Bus. & Com. Code Ann. § 17.46(b)(22)* is neither a jurisdictional statute nor a venue statute, rather the statute provides a remedy at law for damages incurred because of a deceptive act. *Hoelscher v. Gfh Fin. Servs., Inc., 814 S.W.2d 842, 1991 Tex. App. LEXIS 2281 (Tex. App. Dallas 1991).*

231. Evidence that companies used deceptive trade practices under Tex. *Bus. & Com. Code Ann. §§ 17.46 (b)(5),* (7), (12) and Tex. *Bus. & Com. Code Ann. § 17.50(b)(1)* in financing and selling repossessed motor homes was sufficient where it showed that the companies knowingly sold vehicles at inflated prices and without disclosing true odometer mileage. *Green Tree Acceptance, Inc. v. Holmes, 803 S.W.2d 458, 1991 Tex. App. LEXIS 110 (Tex. App. Fort Worth 1991).*

232. Corporate seller of motel had an action under the Deceptive Trade Practices Act, Tex. *Bus. and Com. Code Ann. § 17.46(b)(5),* (7), and (21) for the wrongful disbursing of escrow funds deposited in connection with the proposed sale of a motel where escrow company failed to adhere to representations concerning the escrow services they would provide. *Commercial Escrow Co. v. Rockport Rebel, Inc., 778 S.W.2d 532, 1989 Tex. App. LEXIS 2263 (Tex. App. Corpus Christi 1989).*

233. In insured's action against a title guarantee company, the court found that there was adequate evidence to support a finding that the company engaged in unfair settlement practices, in violation of Tex. *Ins. Code Ann. art. 21.21 § 16* , and deceptive trade practices, in violation of Tex. *Bus. & Com. Code Ann. § 17.46* ; actual damages were properly awarded, pursuant to Tex. *Ins. Code Ann. art. 21.21 § 16(b)(1). Stewart Title Guar. Co. v. Sterling, 772 S.W.2d 242, 1989 Tex. App. LEXIS 1318 (Tex. App. Houston 14th Dist. 1989).*

234. To come within Tex. *Bus. & Com. Code Ann. § 17.46(b)*, proof is required that a failure to disclose was intended to induce the consumer to enter into a transaction in which the consumer would not have entered had the information been disclosed. *Parker v. Carnahan, 772 S.W.2d 151, 1989 Tex. App. LEXIS 826 (Tex. App. Texarkana 1989).*

235. Record in buyers' lawsuit filed under the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA), Tex. *Bus. & Com. Code Ann. §§ 17.41-17.63* that included testimony that realtor's salesman told buyer that the property at issue was eligible for financing by the Veteran's Board, coupled with evidence that it was in fact ineligible, supported the jury's finding that realtor misrepresented the property and caused a misunderstanding as to sponsorship, approval, and certification of the property, which constituted deceptive trade practices as defined by Tex. *Bus. & Com. Code Ann. § 17.46(b)(2)*, (b)(5) of the *DTPA. Danny Darby Real Estate, Inc. v. Jacobs, 760 S.W.2d 711, 1988 Tex. App. LEXIS 2957 (Tex. App. Dallas 1988).*

236. Acts in violation of any one of the subsections Tex. *Bus. & Com. Code Ann. § 17.46(b)* of the Deceptive Trade Practices-Consumer Protection Act (DTPA), Tex. *Bus. & Com. Code Ann. §§ 17.41-17.63*, where those acts are a producing cause of the consumer's damages, are sufficient to sustain a judgment in favor of the consumer under Tex. *Bus. & Com. Code Ann. § 17.50. Danny Darby Real Estate, Inc. v. Jacobs, 760 S.W.2d 711, 1988 Tex. App. LEXIS 2957 (Tex. App. Dallas 1988).*

237. Home buyers were not entitled to judgment in their deceptive trade practice suit under Tex. *Bus. & Com. Code Ann. § 17.46(b)(23)* (now **17.46** (b)(24)) against a real estate firm that sold them the property, because there was no evidence showing that the real estate firm had knowledge of defects in the house's foundation or showing that the firm took advantage of the buyers' lack of knowledge, which would constitute unconscionable conduct under § 17.45(5), given the buyers' possession, prior to the purchase, of an inspection report revealing a foundation problem. *Pfeiffer v. Ebby Halliday Real Estate, Inc., 747 S.W.2d 887, 1988 Tex. App. LEXIS 863 (Tex. App. Dallas 1988).*

238. In purchaser's appeal from an order of summary judgment, the court affirmed because sellers' failure to disclose information regarding defects in the home was not the producing cause of purchaser's damages under the Texas Deceptive Trade Practices-Consumer Protection Act, Tex. *Bus. & Com. Code Ann. § 17.41*, specifically Tex. *Bus. & Com. Code Ann. § 17.46(b)*, because the alleged deception did not cause purchaser's actual damages. *Dubow v. Dragon, 746 S.W.2d 857, 1988 Tex. App. LEXIS 717 (Tex. App. Dallas 1988).*

239. Car salesman's false representation to a prospective buyer concerning an overall of a used vehicle, constituted a deceptive trade practice under Tex. *Bus. & Com. Code Ann. § 17.46 . Texarkana Mack Sales, Inc. v. Flemister, 741 S.W.2d 558, 1987 Tex. App. LEXIS 8809 (Tex. App. Texarkana 1987).*

240. The federal Shipping Act, *46 U.S.C.S. § 1701* et seq., does not preempt the Texas Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.46 . Zachry-dillingham v. American President Lines, 739 S.W.2d 420, 1987 Tex. App. LEXIS 8781, 1988 A.M.C. 2015 (Tex. App. San Antonio 1987).*

241. In action against a developer, who misrepresented the size of the lot sold to purchasers, purchaser was not entitled to damages under Tex. Bus. & com. Code Ann. § **17.46** because purchasers received the benefit of their bargain and there was no evidence of the loss of value. *Leyendecker & Assocs. v. Wechter, 683 S.W.2d 369, 1984 Tex. LEXIS 428, 28 Tex. Sup. Ct. J. 131 (Tex. 1984).*

242. In a customer's suit against a car dealer under the Texas Deceptive Trade Practices Act, Tex. *Bus. & Com. COde Ann.§ 17.46(b)(12)* and (14), the car dealer waived his objection to the sufficiency of a special jury issue by failing to set forth the specific basis for it in the trial court. *George Pharis Chevrolet, Inc. v. Polk, 661 S.W.2d 314, 1983 Tex. App. LEXIS 5393 (Tex. App. Houston 1st Dist. 1983).*

243. Evidence was adduced at trial to be probative and supportive of the determination of unconscionability, related to the sale of interests in oil and gas, where a well of approximately 7,000 feet had been reached without obtaining any prospect of commercial production. *Vick v. George, 671 S.W.2d 541, 1983 Tex. App. LEXIS 4778, 96 Oil & Gas Rep. 158 (Tex. App. San Antonio 1983).*

244. In mobile home park purchaser's suit against sellers alleging violations of the Deceptive Trade Practices Act (DTPA), Tex. *Bus. & Com. Code Ann. § 17.41* et seq., stemming from deficiencies in the water system, sellers' failure to disclose was a basis for recovery under the DTPA even though former Tex. *Bus. & Com. Code Ann. § 17.46(b)(23)*, which specifically included failure to disclose amongst the "laundry list" of deceptive acts and practices, was added to the DTPA by amendment after the parties' transaction because under Tex. *Bus. & Com. Code Ann. § 17.46(b)*, acts constituting false or deceptive acts or practices were not limited to those enumerated therein, and the failure to disclose violation was considered included within the ambit of Tex. *Bus. & Com. Code Ann. § 17.46(a)* before its inclusion in the "laundry list." *Cobb v. Dunlap, 656 S.W.2d 550, 1983 Tex. App. LEXIS 4710 (Tex. App. Corpus Christi 1983).*

245. Contractor entitled to a reversal of an award under Deceptive Trade Practices Act, Tex. *Bus. & Comm. Code Ann. §§ 17.46(b)(7)* and *17.50*, which was inapplicable when representations about ability to build pool were not violative of act when none were made about the drainage defect at issue. *Anthony Indus., Inc. v. Ragsdale, 643 S.W.2d 167, 1982 Tex. App. LEXIS 5309 (Tex. App. Fort Worth 1982).*

246. Trial court's order denying a supplier's plea of privilege to be sued in its county of principal place of business was affirmed where a customer had brought an action under Texas Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. §§ 17.46(b)(5)*, (7), and 17.50 because the customer could bring suit in the county where the supplier met with his customer to solicit the transaction which gave rise to the complaint. *S & S Wholesale Supply, Inc. v. Los Cedros, Inc., 628 S.W.2d 493, 1982 Tex. App. LEXIS 3897 (Tex. App. Corpus Christi 1982).*

247. Under findings that each attempt to foreclose was a producing cause of damages to the homeowners, the attempt to foreclose was a representation that the builder's and mechanic's lien contract conferred or involved rights and remedies which it did not have and constituted false, misleading, or deceptive acts or practices as set out in Tex. *Bus. & Com. Code Ann. § 17.46(b)(12)* of the *Deceptive Trade Practices Act. Dickinson State Bank v. Ogden, 624 S.W.2d 214, 1981 Tex. App. LEXIS 3886 (Tex. Civ. App. Houston 1st Dist. 1981).*

248. Comment made by the seller that the boat was in perfect condition when he bought it, which was untrue, was within the prohibitions of Tex. *Bus. & Com. Code Ann. § 17.46(b)(5). Pennington v. Singleton, 606 S.W.2d 682, 1980 Tex. LEXIS 380, 23 Tex. Sup. Ct. J. 587 (Tex. 1980).*

249. Allegation of a breach of contract, without more, as a matter of law, did not constitute a false, misleading or deceptive act with the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.46(b)(5)*, and Tex. *Bus. & Com. Code Ann. § 17.50(a)(3)*, and the failure to perform a promise did not constitute a misrepresentation that violated the Deceptive Trade Practices Act either. *Coleman v. Hughes Blanton, Inc., 599 S.W.2d 643, 1980 Tex. App. LEXIS 3288 (Tex. Civ. App. Texarkana 1980).*

250. Tex. *Bus. & Com. Code Ann. § 17.50 (b)(1)* mandates that the franchisee's damages award be trebled, in the franchisee's suit against the franchisor for breach of contract, fraud, and for deceptive practices under Tex. *Bus. & Com. Code Ann. § 17.46* ; while the jury, by its verdict, assessed no damages for breach of contract, the jury did find that the actions of the franchisor constituted deceptive trade practices, as its representations were of material facts, were false, and made with intent to induce the franchisee to enter the contract with the franchisor, and that the franchisee was damaged thereby. *Staley v. Terns Serv. Co., 595 S.W.2d 882, 1980 Tex. App. LEXIS 3068 (Tex. Civ. App. Waco 1980).*

251. An insured was entitled to no coverage under its policy with an insurance company under an errors and omissions insurance policy where the insured's violations of the Deceptive Trade Practices -- Consumer Protection Act, Tex. *Bus. & Com. Code Ann. § 17.46* were excluded from coverage by the exclusion for dishonesty, intentional fraud, criminal or malicious acts. *St. Paul Ins. Co. v. Bonded Realty, Inc., 578 S.W.2d 191, 1979 Tex. App. LEXIS 3254 (Tex. Civ. App. El Paso 1979).*

252. Trial court entered judgment against appellant business for a violation of the Deceptive Trade Practices-Consumer Protection Act, Tex. Bus. & Com. Code Ann. art. **17.46,** where business' advertisement was misleading regarding repair of campers and trailers. *Mallory v. Custer, 537 S.W.2d 141, 1976 Tex. App. LEXIS 2835 (Tex. Civ. App. Austin 1976).*

253. In an action against a used car dealer claiming that the dealer misrepresented the mileage on the car or turned it back, there was insufficient evidence that defendant knowingly sold the car to the plaintiff with the wrong mileage under Tex. *Bus. and Com. Code Ann. §§ 17.41, 17.44, 17.45(9),* and *17.46(a),* (b)(16), and (c), where defendant purchased the car from another dealer who represented substantially the same mileage. *Shepherd v. Eagle Lincoln Mercury, Inc., 536 S.W.2d 92, 1976 Tex. App. LEXIS 2647 (Tex. Civ. App. Eastland 1976).*

Torts: Malpractice Liability: Attorneys

254. The statutory exemption granted to the rendering of professional services did not apply to violations of Tex. *Bus. & Com. Code Ann. § 17.46(b)(23)* under the provisions of Tex. *Bus. & Com. Code Ann. § 17.49(c)(2);* and summary judgment on the parents' claims against their attorneys for breach of fiduciary duty and violation of one provision of the deceptive trade practices act were reversed and remanded because the parents produced more than a scintilla of evidence in support of their claims. *Francisco v. Foret, 2002 Tex. App. LEXIS 2610 (Tex. App. Dallas Apr. 11 2002).*

Torts: Malpractice Liability: Healthcare Providers

255. Patient's claim for physician misrepresentation failed when she did not produce a signed writing by the physician, which contained the representation or promise relied upon in her breast reduction surgery. *Smith v. Elliott, 68 S.W.3d 844, 2002 Tex. App. LEXIS 443 (Tex. App. El Paso 2002).*

256. There can be no claim under the Texas Deceptive Trade Practices Consumer Protection Act (DTPA), Tex. *Bus. & Com. Code Ann. § 17.46* , against a physician for damages for personal injury or death if the damages result, or are alleged to result, from the physician's negligence; however, if the alleged DTPA claim is not based on the physician's breach of the accepted standard of medical care, section 12.01(a) of the Medical Liability and Insurance Improvement Act, Tex. *Rev. Civ. Stat. Ann. art. 4590i,* does not preclude suit for violation of the *DTPA. Walden v. Jeffery, 907 S.W.2d 446, 1995 Tex. LEXIS 23, 38 Tex. Sup. Ct. J. 374, 26 U.C.C. Rep. Serv. 2d (CBC) 344 (Tex. 1995).*

257. Respondent patient's action, brought pursuant to the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code § 17.41* et seq., that was not based on petitioner patient's breach of the accepted standard of medical care, was not precluded by the Medical Liability and Insurance Improvement Act, Tex. *Rev. Civ. Stat. art. 4590i,* § 12.01(a). *Sorokolit v. Rhodes, 889 S.W.2d 239, 1994 Tex. LEXIS 58, 37 Tex. Sup. Ct. J. 680 (Tex. 1994).*

258. Tex. *Rev. Civ. Stat. Ann. art. 4590i,* § 12.01(a), did not shield dentist from patient's claim under the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.46(b)(5)* & (7), for knowing misrepresentation concerning dentist's representation that dentures could be made to fit patient. *Jeffery v. Walden, 899 S.W.2d 207, 1993 Tex. App. LEXIS 3553 (Tex. App. Dallas 1993).*

Torts: Products Liability: Breach of Warranty

259. In action against automobile manufacturer based upon allegedly-defective motorized seat belt systems in its vehicles, purported common questions of law and fact, including claims of breach of express and implied warranties pursuant to Tex. *Bus. & Com. Code Ann. § 17.50(a)(2),* alleged use of false, misleading and defective practices as defined in Tex. *Bus. & Com. Code Ann. §§ 17.46* and *17.50,* and breach of implied warranty of merchantability under Tex. *Bus. & Com. Code Ann. § 2.314(b)(3),* were insufficient to satisfy the commonality requirement for class certification under Tex. R. Civ. P. 42(a)(2). *Nissan Motor Co. v. Fry, 27 S.W.3d 573, 2000 Tex. App. LEXIS 5565 (Tex. App. Corpus Christi 2000).*

260. On a product liability claim for personal injuries and property damage, the trial court improperly granted summary judgment in favor of the manufacturer under the Texas Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. §§ 2.314, 2.315,* and *17.46(b)(19)* (now **17.46(** b)(20)) on the issue of beach of an implied warranty because no reliance on the manufacturer's misrepresentation was necessary. *Khan v. Velsicol Chem. Corp., 711 S.W.2d 310, 1986 Tex. App. LEXIS 7767, 1 U.C.C. Rep. Serv. 2d (CBC) 1114 (Tex. App. Dallas 1986).*

Torts: Public Entity Liability: Immunity

261. In a corporation's action for damages against a municipal landlord for violations of the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.41* et seq., breach of express and implied warranties, and fraud in a real estate transaction, the municipality was not shielded from liability by the Tort Claims Act, Tex. *Civ. Prac. & Rem. Code Ann. §§ 101.021, 101.025*, because the action did not involve a tort claim. *Kerrville Hrh, Inc. v. City of Kerrville, 803 S.W.2d 377, 1990 Tex. App. LEXIS 3191 (Tex. App. San Antonio 1990).*

Torts: Vicarious Liability: Respondeat Superior

262. Under the Deceptive Trade Practices Act, Tex. *Bus. & Com. Code Ann. § 17.46*, the president of homebuilders corporation was personally liable to a home buyer for tortious and fraudulent acts committed because he knowingly participated in such acts as a corporate agent. *Great Am. Homebuilders, Inc. v. Gerhart, 708 S.W.2d 8, 1986 Tex. App. LEXIS 12004 (Tex. App. Houston 1st Dist. 1986).*

Torts: Wrongful Death & Survival

263. A representative of an estate is not a consumer under Tex. *Bus. & Com. Code Ann. §§ 17.46(a), 17.50(a)(1)*, (2), and (3) because such a cause of action did not survive the death of the original consumer. *Lukasik v. San Antonio Blue Haven Pools, 21 S.W.3d 394, 2000 Tex. App. LEXIS 889 (Tex. App. San Antonio 2000).*

Transportation Law: Private Motor Vehicles: Licensing & Registration

264. Trial court properly entered a take-nothing judgment in favor of car dealer where buyer received buyer's guide that stated on its face that the car had a salvage title and was a water-damaged car, buyer knew the car did not have a rebuilt title, and buyer testified he understood that to mean he would buy the car, fix it, get it inspected by the State and get a reconditioned title for it. *Roberts v. D & W Auto, 2002 Tex. App. LEXIS 2982 (Tex. App. Texarkana Apr. 30 2002).*

265. Where an automobile dealer sued an automobile dealer under the Deceptive Trade Practice -- Consumer Protection Act, Tex. *Bus. & Com. Code Ann. § 17.46*, the trial court properly granted summary judgment under the Certificate of Title Act, former Tex. *Rev. Civ. Stat. Ann. art. 6687-1, §§ 33*, 53, (now Tex. *Transp. Code Ann. §§ 501.071, 501.073*), because the automobile dealer established that it was not the owner of the vehicle at the time of the buyer's purchase. *Najarian v. David Taylor Cadillac, 705 S.W.2d 809, 1986 Tex. App. LEXIS 12177 (Tex. App. Houston 1st Dist. 1986).*

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ENTERPRISE-LAREDO ASSOCIATES, ENTERPRISE DEVELOPMENTASSOCIATES, MEYER STEINBERG, ROBERT JAMES, LONE STAR MALL ASSOCIATES, RELATEDLONE STAR, INC.; and THE CENTER COMPANIES, Appellants, v. HACHAR'S, INC,Appellee
Appeal No. 04-90-00714-CV

COURT OF APPEALS OF TEXAS, FOURTH DISTRICT, SAN ANTONIO

839 S.W.2d 822; 1992 Tex. App. LEXIS 2317

June 17, 1992, Delivered
June 17, 1992, Filed

SUBSEQUENT HISTORY: [**1]

Motion for Rehearing Denied: August 27, 1992.

PRIOR HISTORY: Appeal from the 49th District Court of Webb County. Trial Court No. 38,780. Honorable Manuel R. Flores, Judge Presiding

DISPOSITION: AFFIRMED AS REFORMED

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, general partners of commercial real estate management company, sought review of a judgment from the 49th District Court of Webb County, Texas, which granted judgment in favor of appellee commercial tenant for a breach of the lease agreement and violation of Deceptive Trade Practices Act.

OVERVIEW: Appellants, general partners of commercial real estate management company, sought review of verdict in favor of appellee commercial tenant for violation of the Deceptive Trade Practices Act and breach of contract. The court affirmed a reformed judgment, and held that the DTPA did not apply because both parties were sophisticated, well-represented business people, and the claim was for breach of contract, not a false, misleading, or deceptive act. Appellee had sued, based on appellant's overcharging of certain fees throughout the entire lease period, about nine years. The court held that the contract between the parties included a clause that described how the common area maintenance charge would be figured and that the part that stated appellee would not be charged more than any "mall tenants" referred only to tenants who did not own their own space in the mall. Further, the court held that the rider the parties were disputing did not create an express warranty, but a condition of the contract. The court held that the statute of limitations period did not begin until appellee knew, or in the exercise of reasonable diligence, should have known about the overcharges.

OUTCOME: The court affirmed with reformation to delete additional damages under the Deceptive Trade Practices Act because the Act did not apply, as there were no false, misleading or deceptive acts. The court held that appellants did breach the lease agreement and affirmed the trial court's judgment.

CORE TERMS: lease, mall, rider, ward, tenant, warranty, prejudgment interest, express warranty, landlord, overcharge, lease agreement, breach of contract, seller, consumer, settlement agreement, motion to recuse, space, letter agreement, court erred, deceptive, unconscionable, waive, compounded, audit, discover, annually, year-end, recusal, discovery rule, breach of warranty

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure: Trials: Bench Trials
Civil Procedure: Appeals: Standards of Review: Substantial Evidence Rule
Civil Procedure: Appeals: Standards of Review: Clearly Erroneous Review
[HN1] Although conclusions of law are always reviewable, findings of fact are reviewable where a statement of facts is contained in the record. The findings and judgment of the trial court are controlling on the reviewing court when there is evidence of probative force to support them. The finding of facts are reviewable for legal and factual sufficiency of the evidence, and the conclusions of law are reviewable when attacked as a matter of law.

Real & Personal Property Law: Landlord & Tenant: Commercial Leases
Contracts Law: Breach: Causes of Action

[HN2] The Deceptive Trade Practices Act does not apply when the sole issue concerns a breach of contract question between sophisticated, well-represented business people as to the proper interpretation of a clause.

Antitrust & Trade Law: Consumer Protection: Deceptive Acts & Practices
[HN3] A mere breach of contract allegation, without more, is not a false, misleading or deceptive act in violation of the Deceptive Trade Practices Act.

Antitrust & Trade Law: Consumer Protection: Deceptive Acts & Practices
Real & Personal Property Law: Landlord & Tenant: Commercial Leases
Contracts Law: Breach: Causes of Action
[HN4] The distinction between a breach of contract claim and a Deceptive Trade Practices Act violation appears when an alternative interpretation of the contract is asserted, and the dispute arises out of the performance of the contract. The DTPA is not violated when such a distinction exists, and traditional contract principles are applied to the dispute.

Antitrust & Trade Law: Consumer Protection: Deceptive Acts & Practices
[HN5] To be actionable under the DTPA, the warranty must be established independently of the act. An express warranty is created when a seller makes an affirmation of fact or a promise to the purchaser, which relates to the sale and warrants a conformity to the affirmation as promised. An express warranty may be created in the context of real estate sales or service contracts in the same manner as it is created in a sale of goods. An express warranty in this context is any representation of fact or promise as to the title, quality, or condition of existing or future goods or services. A breach of an express warranty is also likely to establish liability as a deceptive trade practice under one of the subsections of section 17.46(b) of the Deceptive Trade Practices Act.

Antitrust & Trade Law: Consumer Protection: Deceptive Acts & Practices
[HN6] See *Tex. Bus. & Com. Code Ann. § 2.313(a)* (1968).

Contracts Law: Contract Interpretation: Ambiguities & Contra Proferentem
[HN7] A court will construe a contract as a matter of law if it is unambiguous. A contract is unambiguous when it is worded in such a way that it can be given a definite or certain legal meaning or interpretation. If the meaning of the contract is uncertain and doubtful, or if the contract is reasonably susceptible to more than one meaning, the contract is ambiguous. Whether the contract is ambiguous is a question of law for the court to determine by viewing the contract as a whole in light of the circumstances present when the contract was made.

Antitrust & Trade Law: Consumer Protection: Deceptive Acts & Practices
Contracts Law: Contract Conditions & Provisions
[HN8] Waiver is defined as an intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right. Ordinarily, the existence of a waiver is a question of fact, based upon what is said and done. In determining if a waiver has in fact occurred, the court must examine the acts, words or conduct of the parties, and it must be unequivocally manifested that it is the intent of the party to no longer assert the right.

Civil Procedure: Pleading & Practice: Defenses, Objections & Demurrers: Affirmative Defenses
Torts: Business & Employment Torts: Concealment
[HN9] A defendant is estopped from relying on limitations as an affirmative defense when the defendant is under a duty to make a disclosure but fraudulently conceals the existence of the cause of action from the party to whom it belongs. The estoppel effect ends when the party learns of facts or circumstances that would lead a reasonably prudent person to inquire and thereby discover the concealed cause of action. The injured party must show that the defendant had actual knowledge that a wrong occurred and that there was a determined purpose to conceal the wrong. Fraudulent concealment cannot be found when the person does not know of the concealed facts.

Civil Procedure: Pleading & Practice: Defenses, Objections & Demurrers: Affirmative Defenses
Contracts Law: Breach: Causes of Action
[HN10] In applying the limitation statutes, a cause of action is generally said to accrue when the wrongful act affects an injury, regardless of when the plaintiff learned of such injury. An exception to the general rule is known as the discovery rule and the rule is used to determine when the cause of action accrued. The discovery rule tolls the running of the limitations period until the time the injured party discovers or though the use of reasonable care and diligence should have discovered the injury. In a breach of contract action, limitations begin to run from the time of the breach, or from the time the plaintiff knew or should of known of the breach, whichever is the later.

Contracts Law: Remedies: Compensatory Damages
Civil Procedure: Costs & Attorney Fees: Judgment Interest
[HN11] Prejudgment interest may be awarded on a breach of contract claim. Prejudgment interest is awarded

to compensate the plaintiff for the loss of the opportunity to invest and earn interest on the amount of damages.

Civil Procedure: Costs & Attorney Fees: Judgment Interest

[HN12] *Tex. Rev. Civ. Stat. Ann. art. 5069-1.05* § 2 (1992) provides that all judgments, together with taxable court costs, of the courts of this state earn interest, compounded annually.

Civil Procedure: Appeals: Standards of Review: Abuse of Discretion

[HN13] An abuse of discretion standard is applied in reviewing the denial of the motion to recuse judge. Tex. R. Civ. P. 18a(g).

Civil Procedure: Trials: Disqualification & Recusal
Civil Procedure: Appeals: Standards of Review: Abuse of Discretion

[HN14] The test for abuse of discretion is whether the trial court acted without reference to any guiding rules and principles. The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in similar circumstances does not demonstrate that an abuse of discretion has occurred.

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FOR APPELLEE: Susman, Stephen D., McCartt, James T., SUSMAN GODREY, 5100 First Interstate Bank Plaza, 1000 Louisiana, Houston, TX 77002, Morales, Jr., Richard G., Willett, Mark D., PERSON, WHITWORTH, RAMOS, BORCHERS & MORALES, P.O. Drawer 6668, Laredo, TX 78042-6668.

JUDGES: Sitting: Shirley W. Butts, Justice, Alfonso Chapa, Justice, concur with results, Fred Biery, Justice

OPINIONBY: FRED BIERY

OPINION: [*825] OPINION

This is an appeal from a nonjury trial in which the court awarded to Hachar's, Inc., the appellee, the sum of $3,110,224.62 for actual damages, $200,000 in attorney's fees for the trial and additional fees on appeal, and declaratory relief. The court found that the appellants, Enterprise-Laredo Associates, Enterprise Development Associates, [**2] Meyer Steinberg, Robert James, Lone Star Mall Associates, Related Lone Star, Inc., and The Center Company (collectively referred to Enterprise) breached the lease agreement and violated the Deceptive Trade Practices Act. n1 Enterprise challenges [*826] the court's rulings with respect to the actual damage award and the declaratory relief.

----------Footnotes----------

n1 To facilitate the reading of the opinion all appellants will be referred to as Enterprise. However, the relationship among the appellants is as follows:

1. Enterprise-Laredo Associates--a New York limited partnership organized to acquire the land for Mall del Norte.

2. Enterprise Development Associates is the general partner of Enterprise-Laredo Associates and is a New York partnership.

3. Meyer Steinberg and Robert James are the general partners of Enterprise Development Associates.

4. Lone Star Mall Associates is a New York limited partnership and it purchased much of the fee in Mall del Norte in 1984.

5. Related Lone Star, Inc. is the general partner in Lone Star Mall Associates.

6. Center Companies is a Minnesota corporation. Enterprise Development Associates subcontracted many of its management functions to Center Companies in 1984.

----------End Footnotes----------

[**3]

In 1975, Enterprise was preparing to build a shopping mall, Mall Del Norte, in Laredo, Texas, and negotiated with Sears, Roebuck & Co. and Hachar to open stores therein. Sears decided not to lease space at the mall but instead purchased its own land and constructed its own building at the mall site. Having purchased the land, Sears entered into a Reciprocal Construction Operation and Reciprocal Easement Agreement (REA) with Enterprise. Unlike Sears, Hachar chose to lease space at the mall and retained an experienced shopping center attorney to represent it in the lease negotiations.

A form lease was drafted by Enterprise as a preliminary document, and both sides negotiated changes. The parties acknowledge the lease was subject to extensive negotiations and revisions. One such revision was the inclusion of Rider 12.21, n2 which was a most-favored-nation provision, n3 relating to the basic common area maintenance charge (CAM charge) in lieu of the originally proposed CAM charge. The CAM charge was to be based on the percentage of square footage occupied by the tenant. n4 The lease was signed by Hachar's, Inc. on September 24, 1975, and Enterprise signed the lease on January[**4] 21, 1976.

----------Footnotes----------

n2 Although both parties acknowledge that the Rider was inserted, a dispute exists as to whether the language inserted by Enterprise but never initialled by Hachar is binding upon Hachar.

n3 A traditional most favored nation clause is an unconditionally worded clause prohibiting, in this case Enterprise, from making a later CAM charge arrangement with another lessee/tenant on terms more favorable than the CAM charge arrangement entered into with Hachar without giving Hachar the benefit of the later and more favorable arrangement. See *Fisher Bros. v. Phelps Dodge Indus., Inc., 614 F. Supp. 377, 381 (E.D. Pa. 1985).*

n4 The portion of the original lease concerning the percentage read in part as follows:

It is understood and agreed that the cost of the aforesaid services, and expenses exceed the basic minimum charge, in which event Tenant shall pay Landlord, within thirty days after receipt of an itemized bill therefor, rendered for the preceding calendar year, Tenant's pro rate share of such annual excess based upon the percentage which the demised premises bears to the total of leasable Mall Area in the Shopping Center (counting Hall Area Tenants without entrances on the mall at 75% of their leaseable square footage).

----------End Footnotes----------

[**5]

Hachar moved into its leased space in 1978 and began paying rent and CAM charges. In accordance with the lease, Hachar was billed each month for the rent and the estimated CAM charge, and at the end of each year, the CAM charge was recalculated and any adjustments were made. This procedure continued until problems arose in 1987.

The year-end CAM invoice for 1986 was sent to Hachar in April of 1987 and reflected a substantial increase in the total CAM expense. The substantial increase in the total CAM charge resulted in a corresponding rise in Hachar's charge. Hachar, for the first time since the inception of the lease, exercised its right to seek an audit of the CAM charges which disclosed that the most-favored-nation clause in Rider 12.21 had not been properly followed. After Hachar's discovery was brought to Enterprise's attention, Enterprise reviewed the documents and acknowledged that it had not given Hachar the benefit of the lower CAM charge paid by Dillard. However, Hachar demanded that it be given the benefit of the lower CAM charge paid by Montgomery Ward because Ward was a "mall tenant" pursuant to Hachar's interpretation of the lease agreement. Enterprise denied[**6] that Ward was a "mall tenant" under the terms of the Rider because unlike Hachar, Ward owned its own space in the [*827] same manner as did Sears. Consequently, Ward and Sears paid such items as ad valorem taxes separately whereas the CAM charges for lessees included a pro rata share of ad valorem taxes.

The CAM dispute, however, was not the first disagreement between the parties. Throughout the 1980's, Hachar raised several complaints concerning items and events at the mall, including complaints about the location of the Easter Bunny and Santa Claus in front of his store, a leaking roof, and whether the mall had a right to have a kiosk. At one point, Hachar withheld monies allegedly owed to Enterprise under the lease. The parties were able to resolve these disputes, and a settlement agreement was prepared wherein the parties agreed to "waive any other violations of the Lease by Landlord that may have occurred prior to March 31, 1987." Approximately one month after the settlement agreement was signed, the CAM charge dispute arose. The parties were not able to settle the CAM controversy and Hachar filed suit.

In its petition, Hachar alleged that its CAM charge had been[**7] miscalculated and asserted claims for breach

of contract, breach of warranty, DTPA violations, and misrepresentation. Hachar also requested a declaratory judgment that its CAM charge should be based upon Montgomery Ward's charge or alternatively, upon Dillard's charge. After a nonjury trial, the judge ruled that Hachar's CAM charge should have been based on Montgomery Ward's charge and awarded damages accordingly. Following the court's ruling but prior to the entry of judgment, Enterprise filed a motion to recuse the judge based upon an incident which occurred at the mall several months before trial and involved members of the judge's family. The trial judge refused to recuse himself. The motion was referred to another judge who denied the motion and imposed a $5,000 sanction against Enterprise. The final judgment was entered and this appeal perfected.

Enterprise asserts in its twenty-two points of error, grouped into six categories, that the court erred in: (1) interpreting the controlling instruments; (2) failing to sustain affirmative defenses based upon the settlement agreement; (3) failing to sustain the plea of limitations; (4) concluding the DTPA had been violated and[**8] applying the 1977 version requiring automatic trebling of damages; (5) awarding and trebling prejudgment interest; and (6) denying the motion to recuse.

In point of error thirteen, Enterprise contends the trial court erred in finding and concluding that it violated the DTPA because such a finding is based upon an erroneous legal interpretation of the lease agreement, and the evidence is legally and factually insufficient to support the finding. [HN1] Although conclusions of law are always reviewable, findings of fact are reviewable where, as here, a statement of facts is contained in the record. *Middleton v. Kawasaki Steel Corp., 687 S.W.2d 42, 44* (Tex. App.--Houston [14th Dist.] 1985), writ ref'd n.r.e., *699 S.W.2d 199 (Tex. 1985).* The findings and Judgment of the trial court are controlling on the reviewing court when there is evidence of probative force to support them. *Mercer v. Bludworth, 715 S.W.2d 693, 697* (Tex. App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.). The finding of facts are reviewable for legal and factual sufficiency of the evidence, and the conclusions of law are reviewable when attacked as a matter of law. Id.

The trial court found that[**9] "under Rider 12.21 of the lease agreement [Enterprise] had expressly warranted that Hachar would not be required to pay a CAM charge greater (on a square footage basis) than 'that paid by any other Mall Tenant.'" In addition, from the inception of the lease agreement, the court found that Hachar had been charged CAM charges in excess of those required by the lease agreement, and that the most serious error was Enterprise's failure to honor the express warranty in Rider 12.21. The court found the assessment and collection of the grossly excessive CAM charges and the continuation to do so at every opportunity, took advantage of Hachar's lack of knowledge of the facts to a grossly unfair degree. In [*828] addition, the trial court found that Enterprise made false and misleading statements concerning the amount of price reductions that were supposedly being made available to Hachar in the lease agreement and the CAM charge invoices. The court concluded that Enterprise violated the DTPA, section 17.50(a)(2) by breaching the express warranty contained in Rider 12.21, by engaging in an unconscionable course of action in violation of section 17.50(a)(3), and by making false or misleading[**10] statements of fact concerning the existence of or amount of price reductions in violation of section 17.46(b)(11). Enterprise contends that [HN2] the DTPA does not apply because the sole issue concerns a breach of contract question between sophisticated, well-represented business people as to the proper interpretation of Rider 12.21. We agree.

Mr. Hachar testified that he learned in 1987 that he had not been billed in accordance with Rider 12.21. As previously mentioned, this discovery was made after Hachar's comptroller plugged the year-end adjustment figure for 1986 into his graph. The adjustment showed an inordinate increase which the comptroller was not authorized to pay. After the comptroller brought the increase to Mr. Hachar's attention, Mr. Hachar looked into the matter of the CAM charges more carefully. Further investigation revealed that Enterprise had not complied with the most-favored-nation clause, and upon bringing the noncompliance to the attention of Enterprise, Hachar was billed in accordance with Dillard's CAM charge. However, when Hachar tried to make its own adjustments for the CAM overcharges for the previous years, Enterprise responded with a notice to quit. [**11]

Hachar filed suit in February of 1988, and in April of 1989, Enterprise acknowledged that it should have charged Hachar on the basis of the Dillard CAM charge and offered to reimburse Hachar for the amounts overcharged, the legal interest on the differences each year, and reasonable attorney's fees. Hachar declined the offer, intending instead to pursue its remedies in court, and asserting that the CAM charges should be based on the amount paid by Montgomery Ward. According to Hachar's interpretation of the lease, "mall tenant" included all stores having an opening onto the mall even if the store owned its property as opposed to a traditional tenant situation involving a lease. Thereafter, Hachar amended its petition to include allegations of DTPA violations. Enterprise does not dispute that it overcharged Hachar but claims that the CAM charges should be based on those paid by Dillard. Therefore, what remains in

dispute is simply whether Montgomery Ward is a "mall tenant" pursuant to the lease agreement.

[HN3] A mere breach of contract allegation, without more, is not a "false, misleading or deceptive act" in violation of the DTPA. *Ashford Dev., Inc. v. USLife Real Estate Serv. [**12] Corp., 661 S.W.2d 933, 935 (Tex. 1983); Gulf States Underwriters, Inc. v. Wilson, 753 S.W.2d 422, 430* (Tex. App.--Beaumont 1988, writ denied). It is therefore critical to differentiate a "mere breach of contract claim" from a breach which involves "something more" in the way of a misrepresentation or fraud claim to invoke the DTPA. *Quitta v. Fossati, 808 S.W.2d 636, 644* (Tex. App.--Corpus Christi 1991, writ denied). Although Hachar may have alleged fraud and/or misrepresentation, its counsel freely admitted at trial that:

Your Honor, the Court of course understands that the problem here is that by both sides [sic] admission, no one knew or understood at the time this document [letter agreement] was being negotiated or at the time it was being executed, that for a number of years since 1978 or '77, the Defendant had overcharged Hachar's on its CAM charge. I mean, there was an overcharge and neither side understood about it. . . .

. . . .

. . . Neither party knew about the injury in this case.

[HN4]

The distinction between a breach of contract claim and a DTPA violation appears "when an alternative interpretation of the contract is asserted, and the dispute[**13] arises out of the performance of the contract." The DTPA is not violated when such a [*829] distinction exists, and traditional contract principles are applied to the dispute. Id.

Enterprise relies on the decision in *Group Hosp. Servs., Inc. v. One & Two Brookriver Center, 704 S.W.2d 886* (Tex. App.--Dallas 1986, no writ), to support its contention that "a DTPA claim cannot be based upon an allegedly erroneous interpretation of a contract." In the Group Hosp. decision, the parties had entered into an agreement to lease space in an officer tower. *Group Hosp., 704 S.W.2d at 888.* Three parts of the lease were in dispute and the tenant claimed that the landlord had violated the DTPA by representing that the agreement conferred or involved rights, remedies, or obligations which it did not have in violation of section 17.46(12) of the DTPA. The court found that recovery under section 17.46(12) was uniformly predicated on factual rather than interpretive misrepresentations. The court went on to state that "we should guard against allowing every breach of contract claim to be elevated into a DTPA claim. We believe that a case must contain some element of overreaching[**14] or victimizing the unwary in order to create a DTPA claim. Both parties to this contract were responsible business people, well advised by counsel." In the case before us, both Hachar and Enterprise are sophisticated business people and well represented by counsel. n5 Even Hachar admits that "much of this appeal involves an interpretive dispute (Is Hachar entitled to the Ward CAM charge, or only the Dillard charge?)," but then asserts that "the parties' course of dealing has not been a continuing good faith disagreement over the meaning of Rider 12.21. To the contrary, unknown to Hachar until late 1987, the defendants utterly failed to honor their obligations under the warranty." However, as previously noted, Hachar's counsel openly admitted that at the time the 1987 settlement agreement was being negotiated, no one knew of or understood about the overcharges. In response, Hachar contends that the Group Hosp. decision does not apply to this case because that decision involved a section 17.46(b)(12) laundry list violation and not a breach of warranty action.

----------Footnotes----------

n5 As previously noted, Hachar was represented by a lease expert in negotiating the lease. The record also reflects that Mr. Hachar is a graduate of Wharton School of Financing at the University of Pennsylvania and is the owner of Hachar's Real Estate Corporation and Las Palmas Shopping Center. Mr. Hachar testified that he owns commercial real estate buildings in which he is the landlord, and for twenty or more years he has been owning and leasing real estate and has entered into written leases as a usual course of conduct as a businessman.

----------End Footnotes----------

[**15]

The DTPA violations asserted in this case include a section 17.46(b)(11) violation, a breach of warranty action under section 17.50(a)(2), and an unconscionable course of conduct under section 17.45(5)(A). Under section 17.46(b)(11), the making of false or misleading statements of fact concerning the amount of price reductions are prohibited. *TEX. BUS. & COM. CODE ANN. § 17.46(b)(11)* (Vernon 1987). In order to violate this subsection, false factual statements must be made about the reasons for, existence of, or the amount of the

price reduction. DAVID F. BRAGG, PHILIP K. MAXWELL & JOE K. LONGLEY, TEXAS CONSUMER LITIGATION § 3.05.011 (2nd ed. 1983). This section of the act appears to be concerned with price advertising because it is an effective method to promote products and services and has been the subject of considerable abuse. n6 Id. Unlike most of the [*830] abuses in the pricing area, conveying the false impression that the seller is bankrupt, liquidating its inventory, going out of business or losing its lease, the evidence presented at trial focused on the definition of "mall tenant" and whether the prior settlement waiver precluded any of the recovery sought. [**16] There was no evidence to support the assertion that Enterprise made a false or misleading statement concerning the price of the CAM charge as set out in the Rider provision. n7 The Rider did not specifically set out a price to be charged for the CAM charge but rather set the basis upon which it would be calculated. Therefore, the only disagreement which remains is the interpretive dispute as to whether the CAM charge formula is to be based upon Montgomery Ward or Dillard. Based upon the facts and circumstances of this case, we hold the dispute does not rise above the level of an interpretation dispute; therefore the DTPA does not apply.

----------Footnotes----------

n6 The subsection of the DTPA concerning pricing violations was developed mainly to prevent price advertising abuse. The following explanation is helpful in determining what type of violations were intended to be covered:

Representing that goods for sale are the inventory of a bankrupt or otherwise distressed party is unlawful if untrue, since such representations convey the false impression that the seller has secured the goods at substantial savings which will likely be passed on in part to the consumer. For much the same reason, it is unlawful to falsely represent that a sale is being held because the seller is bankrupt, is liquidating his inventory, is losing his lease, or is going out of business. The use of the words such as "discount, sale, special, or similar words which impliedly compare the selling price to a regular or prevailing price or which suggest that real savings are being offered are unlawful if there is no regular or prevailing price or if the reduced price is only nominally lower than the regular or prevailing price.

DAVID F. BRAGG, PHILIP K. MAXWELL & JOE K. LONGLEY, TEXAS CONSUMER LITIGATION § 3.05.011 (2nd ed. 1983).

[**17]

n7 The evidence indicated that Hachar's lease was the only lease Enterprise had which contained the most-favored-nations clause.

----------End Footnotes----------

The court also found that Enterprise failed to honor the express warranty in Rider 12.21. There are no true DTPA warranties, nor does the DTPA define the term "warranty." *La Sara Grain Co. v. First Nat'l Bank, 673 S.W.2d 558, 565 (Tex. 1984).* n8 [HN5] To be actionable under the DTPA, the warranty must be established "independently of the act." Id. An express warranty is created when "a seller makes an affirmation of fact or a promise to the purchaser, which relates to the sale and warrants a conformity to the affirmation as promised." *McCrea v. Cubilla Condominium Corp. N.V., 685 S.W.2d 755, 757* (Tex. App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.). An express warranty may be created in the context of real estate sales or service contracts in the same manner as it is created in a sale of goods. An express warranty in this context is "any representation of fact or promise as to the title, quality, or condition of existing or future goods or services." [**18] Michael Curry, Common Law Warranties, in STATE BAR OF TEXAS, ADVANCED DTPA - CONSUMER LAW SEMINAR I-7 to I-8 (1989). A breach of an express warranty is also likely to establish liability as a deceptive trade practice under one of the subsections of section 17.46(b). DAVID F. BRAGG, PHILIP K. MAXWELL & JOE K. LONGLEY, TEXAS CONSUMER LITIGATION § 5.08 (2nd ed. 1983). Therefore, the fact that Hachar chose to claim a breach of an express warranty rather than assert a section 17.46(b)(12) laundry list claim, that Enterprise represented that the agreement conferred rights which it did not have, is not dispositive as to whether the Group Hosp. decision is applicable. In fact, the "mere breach of contract" rule, as relied on in Group Hosp., has been applied without examining the section of the Act claimed to have been violated. *Ashford Dev., Inc. v. USLife Real Estate Serv. Corp., 661 S.W.2d 933, 935 (Tex. 1983).* However, before reaching the applicability of the Group

Hosp. decision, we need to consider if the language of Rider 12.21 did create an express warranty.

----------Footnotes----------

n8 It is unfortunate that the DTPA does not define the term warranty because its meaning at canon law is ambiguous. *La Sara Grain, 673 S.W.2d at 565 n.4.* "Karl Llewellyn, the father of the Uniform Commercial Code, complained that, 'To say warranty is to say nothing definite as to legal effect.'" Id.

----------End Footnotes----------

[**19]

The language of Rider 12.21 is as follows:

Landlord warrants that Tenant shall not be required to pay a charge for the use of common areas and common facilities greater on a square footage basis than that [required to be] paid by any other Mall Tenant. n9

According to Black's Law Dictionary, the term "warrant" means to "engage or promise that a certain fact or state of facts, in relation to the subject-matter, is, or shall be, as it is represented to be." BLACK's LAW DICTIONARY 1421 (5th ed. 1979). In the [*831] commercial sales setting, a warranty is defined as

a statement or representation made by seller of goods, contemporaneously with and as a part of contract of sale, though collateral to express object of sale, having reference to character, quality or title of goods, and by which seller promises or undertakes to insure that certain facts are or shall be as he then represents them. A promise or agreement that the article sold has certain qualities or that seller has good title thereto. A statement of fact respecting the quality or character of goods sold, made by the seller to induce the sale, and relied on by the buyer." Id. at 1423 (emphasis[**20] added).

As the above definition indicates, warranties commonly extend to the character, quality, or title of goods. n10 In considering whether a warranty had been created, one court stated the following:

'Warranty' is said to be an express or implied agreement 'by which the seller undertakes to vouch for the title, quality or condition of the thing sold.' 'Warranties usually go to the quality, quantity, capacity, condition (or) fitness of property for the purposes for which it is sold. . . ., (Citations omitted.)

Detroit Automatic Scale Co. v. G.B.R. Smith Milling Co., 217 S.W. 198, 199 (Tex. Civ. App.--Dallas 1919, no writ); see *Church v. Ortho Diagnostic Sys., Inc., 694 S.W.2d 552, 555* (Tex. App.--Corpus Christi 1985, writ ref'd n.r.e) (term "warranty" contemplates contract made and to induce sale, seller undertakes to vouch for quality, quantity, title or condition of thing sold); see also *Southwestern Bell Telephone Co. v. FDP Corp., 811 S.W.2d 572, 576 (Tex. 1991)* (assurance that new advertisement would be published correctly after previous advertisement contained an error an express warranty); *National Bugmobiles, Inc. v. Jobi Properties,[**21] 773 S.W.2d 616, 621* (Tex. App.--Corpus Christi 1989, writ denied) (any additional treatment called for within one year from the date of this warranty found an express warranty); *Blackwood v. Tom Benson Chevrolet Co., 702 S.W.2d 732, 734* (Tex. App.--San Antonio 1985, no writ) (phrase "all work guaranteed for 90 days or 4,000 miles, whichever comes first" found to be express warranty); *Rinehart v. Sonitrol, Inc., 620 S.W.2d 660, 662-63* (Tex. Civ. App.--Dallas 1981, writ ref'd n.r.e.) (provision characterized as a "performance warranty" relating to burglar alarm an express warranty). Rider 12.21 in the contract referred to the basis on which the CAM charge was to be calculated and did not relate to the character, quality, or title of the leased space which was the subject of the agreement. What appears to be troubling, however, is the use of the phrase "landlord warrants." Although it is clear that the use of formal words such as "warrant" or "guarantee" are not necessary to create an express warranty, it is unclear if the converse is true--allowing the mere use of the words "warrant" or "guarantee" to automatically create an express warranty actionable under the DTPA. [**22] n11 *TEX. BUS. & COM. CODE ANN. § 2.313(b)* (Vernon 1968). We hold that the use of form words such as "warranty" or "guarantee" do not automatically create an express warranty.

----------Footnotes----------

n9 The parties are in disagreement as to whether the bracketed language is a part of the contract because it was inserted after Mr. Hachar had signed the lease and was never initialed by him.

n10 [HN6] *Section 2.313* of the Texas Business and Commerce Code sets forth its requirements for creating express warranties as follows:

(a) Express warranties by the seller are created as follows:

(1) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(2) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(3) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

TEX. BUS. & COM. CODE ANN. § 2.313(a) (Vernon 1968).

[**23]

n11 During the nineteenth century warranties were created only if the words warrant or guarantee were used. *Southwestern Bell Telephone Co. v. FDP Corp., 811 S.W.2d 572, 575 (Tex. 1991)*(historical review of common law warranty).

----------End Footnotes----------

The evidence indicates that although the negotiations went back and forth between [*832] the parties concerning Rider 12.21, it probably was James Bryant, Hachar's attorney, who wrote the rider. Mr. Bryant testified that "To the best of my recollection, it was my language." In addition, in a letter Mr. Bryant wrote to Mr. Hachar concerning the proposed lease, Mr. Bryant stated that "as a major tenant, you should be entitled to reasonable assurance that in no event shall you be paying higher common area charges than are paid by any other tenant in the center." From the above evidence and the negotiations of the parties, we hold the rider was simply another condition or covenant of the contractual agreement and not an express warranty.

As previously noted, the DTPA was not intended to turn every contract dispute into a DTPA action. In this case, both parties[**24] were represented by counsel, there was no overreaching or victimization by one party over the other, and the dispute centered on the interpretation of "Mall Tenant." When the DTPA was enacted in 1973, its purpose was to better protect the consumer. John H. Hill, Introduction, *8 ST. MARY's L.J. 609, 612 (1977).* "If the conduct could mislead the 'ignorant, the unthinking and the credulous,' it violates the law." *Id. at 613;* n12 see *Nagy v. First Nat'l Gun Banque Corp., 684 S.W.2d 114, 116* (Tex. App.--Dallas 1984, writ ref'd n.r.e.) (test to determine whether statement is deceptive is whether statement has tendency to deceive the ignorant, the unthinking, the credulous who are governed by appearances and general impressions); see also *Weitzel v. Barnes, 691 S.W.2d 598, 601 (Tex. 1985)* (Gonzalez, J., dissenting) (legislature's intent in enacting DTPA to protect the uneducated, unsophisticated, and poor against false, misleading and deceptive practices); *Spradling v. Williams, 566 S.W.2d 561, 563 (Tex. 1978)* (federal standard originally used to interpret DTPA--law not made for protection of experts but for public--vast multitude including ignorant, unthinking, [**25]and credulous who do analyze but are governed by appearances and impressions in making purchases). There is no evidence in the record to support the proposition that Hachar is Poor, uneducated, or unsophisticated. We recognize that the DTPA was amended in 1975 to include partnerships and corporations within the definition of consumer, but the original intent of the DTPA, "to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection" still remains. *TEX. BUS. & COM. CODE ANN. § 17.44* (Vernon 1987). In dealing with breaches of warranty under the DTPA, it has been suggested that because deceptive and unconscionable acts are inherent wrongs that occur in the making of the contract, the DTPA should only apply to breaches of warranty that are inherently wrong, such as deceptive or unconscionable acts. John Hawkins, Comment, Breach of Warranty and Treble Damages Under the Texas Deceptive Trade Practices and Consumer Protection Act, *28 BAYLOR L. REV. 395, 398 (1976).* The economical procedures to secure such protection" still remains. [**26] *TEX. BUS. & COM. CODE ANN. § 17.44* (Vernon 1987). In dealing with breaches of warranty under the DTPA, it has been suggested that because deceptive and unconscionable acts are inherent wrongs that occur in the making of the contract, the DTPA should only apply to breaches of warranty that are inherently wrong, such as deceptive or

unconscionable acts. John Hawkins, Comment, Breach of Warranty and Treble Damages Under the Texas Deceptive Trade Practices and Consumer Protection Act, *28 BAYLOR L. REV. 395, 398 (1976)*. The evidence in the case before us shows that when the oversight was called to the attention of Enterprise, it acknowledged its mistake and modified its behavior by adjusting the CAM charge to that paid by Dillard. Thereafter, the dispute arose regarding the status of Montgomery Ward as a mall tenant under the lease. Again, we come full circle to the lease interpretation [*833] problem which we find is not a violation of the DTPA. n13

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n12 A study was done in 1975 which revealed that:

> twenty-one percent of all Texas adults are either incapable of conducting modern day activities, such as property filling out a check, or are doing so with difficulty. Another thirty-one percent are only minimally competent to handle day-to-day matters of living. The sad truth is that 2,399,000 Texas adults are incompetent in basic consumer skills, such as being able to figure their change from a twenty dollar bill when looking t a cash register receipt, while 1,682,000 have difficulty figuring how much is deducted from their paychecks--even with the numbers in front of them. Unless we are willing to require basic consumer education and unless we are willing to foot the bill to make it meaningful, consumers will never be able to protect themselves adequately from unwise purchase or deceptive sales practices.
>
> John H. Hill, Introduction, *8 ST. MARY'S L.J. 609, 615-16 (1977)*.

[**27]

n13 We are also aware of the argument which takes issue with the mere breach of contract rule. Mark L. Kincaid, Rules of Judicial Construction--Making and Arguing the Law in DTPA Cases in STATE BAR OF TEXAS, ADVANCED DTPA - CONSUMER LAW SEMINAR Q-25 (1991). It is argued that the breach of contract rule would mean that a consumer who wins on contract theories creates a defense to liability under the DTPA. Such a holding is inconsistent with the mandate of the DTPA's liberal construction to protect consumers and is inconsistent with the cumulative remedies provision of section 17.43. Id. To allow the mere breach rule to prevail provides a defense to the DTPA conflicting with the rule that the DTPA is not a codification of the common law and the primary purpose of the DTPA to provide consumers with remedies without the burden of proof and overcoming numerous defenses. The decisions using the mere breach rule are loose talk and in fact, the La Sara Grain decision was resolved on a different ground. The Ashford Dev. decision is mentioned but not distinguished. Id.

----------End Footnotes----------

In[**28] addition, the court found that Enterprise engaged in an unconscionable course of conduct under section 17.45(5)(A). Because we find that this case fits the principle that a simple breach of contract claim is not a DTPA violation, this construction has also been extended to cover allegations of unconscionable acts as well. *Gulf States Underwriters, Inc. v. Wilson, 753 S.W.2d 422, 430* (Tex. App.--Beaumont 1988, writ denied). Accordingly, point of error thirteen is sustained. The remaining three points of error under this group do not need to be addressed as they relate to error involving the application of the DTPA. n14

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n14 Point of error fourteen involved the automatic trebling of all damages, even though some of the damages were sustained after the 1979 amendments became effective. Point of error fifteen concerned error in the court's finding that Enterprise engaged in "knowing" conduct which resulted in the trebling of damages for overcharges occurring after the 1979 amendment. Point of error sixteen claimed error in the court's failure to sustain Enterprise's bona fide error defense to the DTPA claim.

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In points of error one through four (group I pertaining to the legal interpretation of the instruments), Enterprise

contends the court erred in: (1) enforcing Rider 12.21 because there was no agreement as to the rider's language; (2) finding and concluding that Enterprise breached the rider; (3) interpreting the term "mall tenant" in the rider to include Montgomery Ward and all other stores with an entrance onto the mall; and (4) finding and concluding that Hachar was entitled to a declaratory judgment.

In point of error three, Enterprise contends the court erred in finding and concluding that Montgomery Ward is a mall tenant under the terms of the lease agreement. In its findings of fact, the court stated that the evidence established that "in accordance with contemporaneous usage in the business, the Defendant's own usage, the business sense of the parties' bargain, and legal usage – the term "Mall Tenant" includes every occupant at Mall del Norte with an entrance onto the enclosed mall." Enterprise contends that because the lease does not specifically define "Mall Tenant," the term is a question of law. Enterprise also asserts that the interpretation by Hachar, that Montgomery [**30]Ward and every other store with an entrance onto the mall is a "Mall Tenant," is an untenable construction. Enterprise states that the only permissible interpretation is that "Mall Tenant" means a tenant of Enterprise and excludes anyone not directly leasing space from Enterprise or anyone who owns its space, i.e. Sears and Montgomery Ward. Enterprise relies on the fact that the lease defines "Mall Area" as "that portion of the 'Shopping Center' which is owned by Landlord" (emphasis added), and the fact that it is undisputed that Enterprise does not own the space occupied by Sears and Montgomery Ward.

The lease specifically lists Enterprise-Laredo Associates as the landlord under the fundamental lease provisions. In section 2.1 of the lease, landlord is defined as "the lessee or owner of tracts of land described in Schedule A-2 and shown on Schedule A-1 (with the exception of the southerly tract owned by Sears, Roebuck & Company." [sic] In addition, it is undisputed that Montgomery Ward did not purchase its property until after the lease was signed. Enterprise also contends that in [*834] agreeing under Rider 12.21 to charge Hachar no more than the CAM charged to any[**31] other "Mall Tenant," Enterprise could only be reasonably expected to be bound by charges to its own tenants.

[HN7] A court will construe a contract as a matter of law if it is unambiguous. *Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983).* A contract is unambiguous when it is worded in such a way that it can be given a definite or certain legal meaning or interpretation. Id. If the meaning of the contract is uncertain and doubtful, or if the contract is reasonably susceptible to more than one meaning, the contract is ambiguous. Whether the contract is ambiguous is a question of law for the court to determine by viewing the contract as a whole in light of the circumstances present when the contract was made. *Id. at 394.*

In viewing the contract as a whole, in light of the circumstances present when the contract was made, we find that the contract was not ambiguous. The lease specifically defined "Mall Area" as that portion of the shopping center owned by the landlord. Enterprise-Laredo Associates was listed as the landlord in the fundamental lease provisions. Additionally, because it owned its own tract of land, Sears was excluded under the landlord definition in section [**32]2.1 of the lease. Having excluded Sears from the definition of landlord under the lease, it is clear that any other entity purchasing land would be also be excluded. Further, because "Mall Area" was defined as that portion of the shopping center owned by the landlord, it follows that "Mall Tenant" is one who leases from the landlord. In addition, Hachar was made aware of the Reciprocal Easement Agreement with Sears which further clarified the "Mall Tenant" definition. n15 Testimony was also presented that Hachar's, Inc. received services under its lease agreement which are not provided to Sears or Wards; for example Hachar's pays taxes on a pro rata basis, receives liability and fire insurance, and parking lot utilities whereas Sears and Montgomery Ward pay for these expenses on their own. As a result, Montgomery Ward is not a "Mall Tenant" under the provisions of the lease. Point of error three is sustained. The amount of actual damages therefore will be reformed to be based on the CAM charge paid by Dillard, as stipulated by the parties.

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n15 In the Sears and Montgomery ward Reciprocal Easement Agreements a definition of malt tenant was included and defined "mall tenant" as an occupant other than a department store occupying 60,000 or less square feet of gross leasable area in the developer building. A department store was characterized as an occupant with a lease space containing more than 60,000 square feet in gross leasable area. Because the Montgomery ward and Sears stores contained over 60,000 square feet, they were department stores whereas Hachar's store, with an area of 55,000 square feet, was a mall tenant according to the Sears agreement. Mr. Hachar testified that it was his understanding that his attorney, Mr. Bryant, reviewed the Sears reciprocal agreement. However, Mr. Bryant testified that to the

best of his recollection he never saw the Sears agreement.

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[**33]

In point of error one, Enterprise contends that there was no agreement with respect to Rider 12.21 and therefore, no judgment could be based upon the agreement. The evidence at trial indicated that Mr. Hachar signed the lease agreement first and sent it to Enterprise's counsel, Mr. Kassner. Upon receipt of the lease, Mr. Kassner noticed that several changes needed to be made including the insertion of the words "required to be" immediately before the Rider language "paid by any other Mall Tenant" and sent a letter to Mr. Hachar's counsel, Mr. Bryant, requesting the change. n16 Mr.Bryant responded that he "could live with" the insertion and would recommend it to Mr. Hachar. From that point forward, no mention was made about the Rider and Mr. Hachar never initialled the change. However, in its original petition and in all of its amended pleadings, Hachar quoted the Rider language as containing the "required to be" language, but at trial, Mr. Hachar stated that he did not initial the revision, did not agree to it in the [*835] past, and did not agree to it now or in the future. Enterprise contends the "required to be" language was a material alteration to the contract and[**34] when an offeree's acceptance materially changes or qualifies the terms of an offer it is rejected, and the change constitutes a counteroffer. The material alteration in this case completely negated any meeting of the minds between the parties, a fundamental prerequisite to the creation of any agreement. Therefore, Enterprise contends there was no agreement (notwithstanding ten years of operating under the "non-agreement") and we should strike the rider provision from the agreement. We disagree.

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n16 Section 12.21 Landlord warrants that Tenant shall not be required to pay a charge for the use of common areas and common facilities greater on a square footage basis than that "required to be" paid by any other Mall Tenant.

----------End Footnotes----------

Having held that the CAM charges were to be based upon those paid by Dillard, because Montgomery Ward did not fall under the interpretation of "Mall Tenant," we must determine if "required to be" language is a material alteration. The "required to be" language is at issue because Dillard's[**35] CAM charge was composed of two components, an interior and an exterior charge. From 1978 to 1982, Enterprise did not ask Dillard to pay the exterior component of the CAM charge. After the suit was filed, Enterprise did bill Dillard for the 1978-1982 charges, but Dillard did not pay. Hachar contends that even if the focus is on the Dillard CAM charges, it would be entitled to damages based on the difference between Hachar's payments and Dillard's actual payments, and the amount would be the same regardless of the "required to be" language. The parties stipulated, at trial, the overcharged amount in the event the CAM charge is to be based upon the Dillard's charge. n17 Therefore, we hold that the "required to be" language did not materially alter the lease. Point of error one is overruled.

----------Footnotes----------

n17 The parties stipulated that in the event the CAM charge is based on that paid by Dillard, the overcharge amount would be $312,575.26.

----------End Footnotes----------

In points of error five through eight (group II), Enterprise contends that the[**36] court erred in: (1) failing to sustain the affirmative defenses of waiver, release, estoppel, and accord and satisfaction based upon the settlement agreement; (2) concluding the affirmative defenses based upon the settlement agreement are barred by the DTPA; (3) concluding the affirmative defenses were not available with respect to the DTPA claim; and (4) finding and concluding the settlement agreement was induced by fraudulent representations.

The settlement agreement at issue was executed in February of 1987. In that agreement, Hachar agreed to

pay Enterprise $144,566.79 in payment for the 1984 real estate taxes, 1985 CAM charges, and the 1985 real estate taxes. In addition, Hachar agreed to waive damages that may have occurred as a result of Enterprise's violation of the lease regarding the use of Center Court; to waive damages caused by Enterprise's failure to maintain the roof of Hachar's store; and "to waive any other violations of the Lease by [Enterprise] that may have occurred prior to March 31, 1987." At trial, the court found that Hachar was not yet aware of the CAM overcharges when it signed the letter agreement, and the consideration for the letter agreement was[**37] fixed without any regard for the overcharges. The court also found that the letter agreement was based upon Enterprise's false representations as to the amount of CAM charges due. The court held that the letter agreement did not constitute a waiver, release, or accord and satisfaction of any claim alleged in this suit; and did not estop Hachar from asserting its claims. In addition, the court concluded that the common law defenses were not applicable in the DTPA cause of action, and even if the agreement had the effect that Enterprise now urges, the agreement was voidable because it was induced by Enterprise's material fraudulent misrepresentation.

[HN8] Waiver is defined as "an intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right." *Sun Exploration & Prod. Co. v. Benton, 728 S.W.2d 35, 37 (Tex. 1987).* Ordinarily, the existence of a waiver is a question of fact, based upon what is [*836] said and done. *Lang v. Lee, 777 S.W.2d 158, 164* (Tex. App.--Dallas 1989, no writ). In determining if a waiver has in fact occurred, the court must examine the acts, words or conduct of the parties, and it must be "unequivocably manifested" [**38]that it is the intent of the party to no longer assert the right. *Marriott Corp. v. Azar, 697 S.W.2d 60, 65* (Tex. App.--El Paso 1985, writ ref'd n.r.e.).

Hachar's position at trial and on appeal is that the letter agreement used the term "waiver," not "release," and because Hachar was not aware of the CAM overcharges at the time it signed the agreement, the waiver did not encompass the overcharges. In response, Enterprise contends that the effect of the settlement agreement cannot be determined simply by taking the term "waiver" out of context. Instead, the parties' intent must be ascertained from the entire instrument and in light of the surrounding circumstances. Enterprise asserts it is clear from the face of the agreement that more than a narrow waiver of claims was intended because in addition to listing the specific known claims, the parties included additional language to cover any other violations that may have occurred prior to March 31, 1987. According to one of the joint venturers, Robert James, the waiver letter was the end result of ten years of problems, and the purpose for the waiver letter was to "shake hands. Start over. See if there was some way that[**39] we could handle this situation. I didn't know the difference between a waiver or a release. I did my best to get something signed and I said, 'Get whatever you have to give them, and get this done so we can just start over and then see what we can do.'" Mr. James further testified that he wanted to end it amicably and in such a way that operations could continue in an amicable manner in the future.

Conversely, Mr. Morales, the attorney who represented Hachar in the waiver negotiations, testified that the landlord's waiver was put in the lease first, and its purpose was to get a waiver regarding Hachar's withholding of funds without conceding that a lease violation had occurred. He used the words "may have occurred" because he did not want to admit that there had been a lease violation but wanted a blanket waiver. When he inquired into whether Enterprise would agree to the landlord's waiver he was told he could get it if Hachar were to give Enterprise the same thing. The evidence also indicated that the letter agreement was negotiated by attorneys and as Hachar asserts, they knew the difference between a waiver and a release. Hachar also relies on the subsequent conduct of Enterprise, [**40] in not asserting the waiver/release provision when the CAM charge dispute first arose and in waiting for almost two years after the suit was filed before asserting the defenses of release and waiver to support its contention that the letter agreement was indeed a waiver and not a release.

Based upon the foregoing evidence, we conclude that the letter agreement constituted a waiver and as such, Hachar could not waive the CAM overcharges. Point of error five is overruled. Having already held that the DTPA did not apply, we need not address points of error six and seven. n18 We also need not address point of error eight because we have already held the settlement agreement did not waive the CAM overcharges.

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n18 Points of error six and seven concern the availability of Enterprise's affirmative defenses with respect to the DTPA claim.

----------End Footnotes----------

In points of error nine through twelve, Enterprise contends the court erred in failing to sustain its limitations defense. More specifically, Enterprise contends the court erred[**41] in finding that Hachar did exercise reasonable diligence in discovering the overcharges; in finding and concluding that limitations did not begin to run on Hachar's claims until 1987; and in finding and concluding that Enterprise fraudulently concealed the overcharges.

It is undisputed that Enterprise recalculated the CAM charge at the end of each year and sent Hachar a final statement for [*837] the year. Mr. Hachar related that the overcharge discovery was made in 1987 when the year end adjustment was received by the comptroller, and the CAM charge increases were inordinate. The comptroller was not allowed to pay any dramatic increases so he brought it to Mr. Hachar's attention. Mr. Hachar "decided that it was time that we looked into the matter a little more carefully, why there was [sic] such increases when in actuality with the growth of the mall tenancy these charges should have decreased."

The trial court found that Hachar reasonably relied upon Enterprise to assess and collect the proper CAM charges. The court found that Enterprise's had superior knowledge of its own billing practices, and knew the amount of CAM charges paid by the other mall tenants. The court[**42] also found that Enterprise concealed the fact that the CAM charges were excessive. The court concluded that the limitations period did not begin to run until 1987 because it was not until that time that Hachar knew, or in the exercise of reasonable diligence, should have known about the overcharges. Moreover, the court concluded that Enterprise had succeeded in fraudulently concealing its misconduct until 1987.

[HN9] A defendant is estopped from relying on limitations as an affirmative defense when the defendant is under a duty to make a disclosure but fraudulently conceals the existence of the cause of action from the party to whom it belongs. *Borderlon v. Peck, 661 S.W.2d 907, 908 (Tex. 1983).* The estoppel effect ends when the party learns of facts or circumstances that would lead a reasonably prudent person to inquire and thereby discover the concealed cause of action. *Leeds v. Cooley, 702 S.W.2d 213, 215* (Tex. App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.). The injured party must show that the defendant had actual knowledge that a wrong occurred and that there was a determined purpose to conceal the wrong. Id. Fraudulent concealment cannot be found when[**43] the person does not know of the concealed facts. *Nichols v. Smith, 489 S.W.2d 719, 723* (Tex. Civ. App.--Fort Worth 1973), aff'd, *507 S.W.2d 518 (Tex. 1974).* Even Hachar recognized that it was not until 1987 that Enterprise became aware of the favored-nations provision, so there is no evidence to support the fraudulent concealment finding. Point of error twelve is sustained.

With respect to the breach of contract action, a four-year statute of limitations applies. *TEX. CIV. PRAC. & REM. CODE ANN. § 16.004* (Vernon 1986). [HN10] In applying the limitation statutes, a cause of action is generally said to accrue "when the wrongful act affects an injury, regardless of when the plaintiff learned of such injury." *Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 351 (Tex. 1990).* An exception to the general rule is known as the discovery rule and the rule is used to determine when the cause of action accrued. Id. The discovery rule tolls the running of the limitations period until the time the injured party discovers or though the use of reasonable care and diligence should have discovered the injury. Id. In a breach of contract action, limitations begin to run from the[**44] time of the breach, or from the time the plaintiff knew or should of known of the breach, whichever is the later. *El Paso Assocs., Ltd. v. J.R. Thurman & Co., 786 S.W.2d 17, 20* (Tex. App.--El Paso 1990, no writ).

Hachar asserts that it reasonably relied on Enterprise to properly calculate the CAM charges and had no reason to audit the CAM expenses until 1987. When Hachar did request an audit, the initial response by Enterprise was to offer its CAM records in Minneapolis. It was not until Hachar's attorney contacted the attorney for Enterprise, that the records were offered in Laredo. Even if Hachar had exercised its right to audit earlier, Hachar contends that it would not have discovered the overcharge as the right to audit merely allowed Hachar to confirm that Enterprise paid the total CAM expenses that they claimed to have paid and not to check the amount of CAM charges paid by the competitor stores. Hachar may have been able to discover a violation of section 5.3 of the [*838] lease but not Rider 12.21 which is the basis of its cause of action.

Enterprise contends limitations began to run at the time of the final CAM charge accounting for each respective year, [**45] and Hachar failed to exercise due diligence in discovering the overcharge. Under the express terms of the lease agreement, Enterprise billed Hachar for the CAM charge each and every year beginning in 1978. The bill or year-end accounting was submitted after a recalculation was performed at the end of each year. Therefore, limitations began to run each year as the final accounting was made and was not tolled until Hachar "decided" to question the accounting in 1987. In addition, because the lease agreement gave Hachar the absolute right to audit its CAM charges each and every year, the discovery rule does not apply. n19 Hachar's lack

of diligence is evidenced by the fact that the year-end adjustment report, provided to Hachar each year by Enterprise, clearly reflected that Sears and Ward were excluded from the amount of gross leasable area upon which Hachar's CAM charge was based. n20 Therefore, Enterprise asserts that Hachar was on notice of the CAM overcharge whether it occurred pursuant to section 5.3 of the lease agreement or section 12.21 of the rider.

----------Footnotes----------

n19 Additional language was inserted into the preprinted form lease in section 5.3 of the lease which provided in part: "Tenant may audit Landlord's records annually to verify common area charges."

[**46]

n20 Enterprise contends that from the beginning Hachar had in its possession a plat which showed the amount of gross leasable area, including Sears, to be approximately 580,000 square feet. At that time, Montgomery Ward was not yet in existence. A review of the year-end adjustments sent to Hachar each year showed the leaseable area, as defined in the lease, to be in a range from 527,293 to 529,599 square feet. Based on this information, Hachar was on notice that both Sears and Montgomery Ward were not included in the leaseable mall area used to compute the CAM charges.

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There is no dispute that both parties were aware of Rider 12.21 when the lease agreement was signed. Although Hachar contends that it relied on Enterprise to properly calculate the CAM charge, there is no evidence of a confidential relationship between the parties and even if one existed, the discovery rule does not excuse a party from exercising reasonable diligence in protecting its own interests. *Johnson v. Abbey, 737 S.W.2d 68, 70* (Tex. App.--Houston [14th Dist.] 1987, no writ). The rule expressly mandates the [**47]exercise of reasonable diligence to discover facts of negligence or omission. *Black v. Wills, 758 S.W.2d 809, 815* (Tex. App.--Dallas 1988, no writ). The burden is on the party seeking to benefit from the discovery rule to establish its applicability. *Woods v. William M. Mercer, Inc., 769 S.W.2d 515, 518 (Tex. 1988).*

Whether reasonable diligence was exercised to discover the fraud is usually a question of fact unless the evidence is such that reasonable minds may not differ as to its effect, then it becomes a question of law. *Wakefield v. Bevly, 704 S.W.2d 339, 346* (Tex. App.--Corpus Christi 1985, no writ). The judge as the trier of fact determined that Hachar did exercise reasonable diligence. The evidence showed that Enterprise was in charge of preparing the year-end reports and recalculating the CAM charges. Mr. Hachar testified that the increases over the years were not so inordinate as to put Hachar on notice of any problem until 1987. The 1987 increases seemed unreasonable because the tenancy in the mall had grown which should have resulted in decreased CAM charges. In addition, Enterprise admits that even it did not "discover" the error until 1987 so to [**48]require Hachar to have discovered it earlier seems to require more than an exercise of reasonable diligence. We find sufficient evidence to support the trial court's ruling that Hachar's claim is not barred by limitations and overrule points of error nine through eleven.

In points of error seventeen through nineteen, Enterprise asserts the court erred in its calculation of prejudgment interest. More specifically, Enterprise claims the prejudgment interest should not have been compounded annually (point of error seventeen); prejudgment interest is not a component [*839] of actual damages (point of error eighteen), and the compounded prejudgment interest should not have been trebled (point of error nineteen). We need not address points eighteen and nineteen as they deal with damages recovered pursuant to the DTPA, and we have held the DTPA inapplicable.

Enterprise asserts, in point of error seventeen, that the court erred in awarding Hachar prejudgment interest compounded annually. Enterprise claims the only possible justification for the award of prejudgment interest is under the equitable prejudgment interest theory expounded in *Cavnar v. Quality Control Parking, Inc.,[**49] 696 S.W.2d 549 (Tex. 1985).* Following the Cavnar opinion, the supreme court used the postjudgment rate of interest, as specified in *TEX. REV. CIV. STAT. ANN. art. 5069-1.05,* § 3 (Vernon 1987), as the prejudgment rate of interest to be used in contract cases when the damages were not ascertainable from the face of the parties' contract. *Rio Grande Land & Cattle Co. v. Light, 758 S.W.2d 747, 748 (Tex. 1988); Perry Roofing Co. v. Olcott, 744 S.W.2d 929, 930-31 (Tex. 1988).* Enterprise contends that because the Rio Grande and Perry Roofing cases did not involve a DTPA claim and because Hachar elected to take its judgment under

the DTPA, prejudgment interest is not authorized, and prejudgment interest is not necessary to make Hachar whole. Alternatively, even if prejudgment interest is authorized, Enterprise maintains that it should not have been compounded. Compound interest is disfavored in the law and *TEX. REV. CIV. STAT. ANN. art. 5069-1.05*, § 3 does not authorize the compounding of prejudgment interest.

Having already determined that the DTPA is not applicable, we hold that [HN11] prejudgment interest may be awarded on a breach of contract claim. See *McCann [**50] v. Brown, 725 S.W.2d 822, 825* (Tex. App.--Fort Worth 1987, no writ) (courts have equitable as well as statutory authority to award prejudgment interest in a contract action). Prejudgment interest is awarded to compensate the plaintiff for the loss of the "opportunity to invest and earn interest on the amount of damages." *Matthews v. De Soto, 721 S.W.2d 286, 287 (Tex. 1986); Commonwealth Lloyd's Ins. Co. v. Thomas, 825 S.W.2d 135, 150* (Tex. App.--Dallas 1992, n.w.h.). We also find the trial court was correct in compounding the prejudgment interest. *OKC Corp. v. UPG, Inc., 798 S.W.2d 300, 308* (Tex. App.--Dallas 1990, writ denied) (annual compounding of prejudgment interest upheld in a contractual dispute); see *Winograd v. Willis, 789 S.W.2d 307, 312* (Tex. App.--Houston [14th Dist.] 1990, writ denied) (article 5069-1.05 § 2 as amended requires prejudgment interest to be compounded annually).

When the contract is silent as to the measure of damages, article 5069-1.05 provides the rate to be used in calculating prejudgment interest awards. *Rio Grande Land & Cattle Co., 758 S.W.2d at 748; OKC Corp., 798 S.W.2d at 308.* [HN12] Section 2 of article 5069-1.05[**51] provides that "all judgments, together with taxable court costs, of the courts of this state earn interest, compounded annually. . . ." *TEX. REV. CIV. STAT. ANN. art. 5069-1.05* § 2, (Vernon Supp. 1992). Section 6 of the same article provides for prejudgment to be computed as simple interest, but this section concerns judgments in wrongful death, personal injury, and property damage cases. Id. at § 6(a), (g). The article also provides for computation of prejudgment interest as simple interest in condemnation cases. Id. at § 7. In amending article 5069-1.05, it appears the legislature has singled out the types of cases requiring prejudgment interest to be computed as simple interest. There is no language in the statute which precludes courts from following the supreme court decisions in Rio Grande Land and Perry Roofing and awarding prejudgment interest using the rate set out in section 2 of article 5069-1.05. We hold the trial court was correct in awarding prejudgment interest and requiring it to be compounded annually. Points of error seventeen and nineteen are overruled.

In points of error twenty through twenty-two, Enterprise contends the trial court[**52] erred in denying its motion to recuse the trial judge. Enterprise contends it was denied a fair trial and in addition, contends [*840]the court erred in imposing sanctions on it for bringing the motion to recuse. Hachar asserts that Enterprise did not timely file its motion, and the motion for recusal was lacking in merit. Hachar maintains that the sanctions award was appropriate because the motion was brought without sufficient cause and for delay.

The incident that prompted Enterprise to file its motion for recusal happened in August of 1988, approximately six months after Hachar had filed its suit against Enterprise. n21 The incident involved a member of the trial judge's family. It was not until almost two years later, on July 30, 1990, that trial on the merits took place. Enterprise claims that it was not until the trial was over that the incident was brought to its attention.

----------Footnotes----------

n21 The lawsuit was filed in February of 1988, and the incident occurred on August 20, 1988.

----------End Footnotes----------

Rule 18a of the Texas[**53] Rules of Civil Procedure provides that "at least ten days before the date set for trial or other hearing in any court . . . any party may file with the clerk of the court a motion stating grounds why the judge before whom the case is pending should not sit in the case." The rule also provides that if a judge is assigned to the case within the ten days prior to trial, the motion is to be filed at the earliest practicable time prior to the commencement of the trial. TEX. R. CIV. P. 18a(e). These procedural requirements are mandatory and the failure to comply waives the right to complain. *Vickery v. Texas Carpet Co., 792 S.W.2d 759, 763* (Tex. App.--Houston [14th Dist.] 1990, writ denied).

Enterprise contends it was not aware of the incident until after the trial primarily because the trial judge did not advise them of the incident. In addition, it contends that Rule 18b requires a judge to recuse himself in any proceeding in which his impartiality might reasonably be questioned or in which he has a personal bias or

prejudice concerning a party. TEX. R. CIV. P. 18b(2)(a), (b). Enterprise concludes that it could not reasonably be doubted that the judge was required to[**54] recuse himself in this matter.

In support of its assertion that it could properly file a motion to recuse the judge after the trial because of its lack of knowledge, Enterprise relies on the concurring opinions of Justices Spears and Gonzalez in *Sun Exploration & Prod. Co. v. Jackson, 783 S.W.2d 202 (Tex. 1989)*. Justice spears favored allowing Sun to present its motion for recusal in that case because Sun did not know of the trial judge's relationship with the Jacksons and their attorney and therefore could not waive its right to request a recusal. *Id. at 206-07* (Spears, J., concurring). Justice Gonzalez proposed that Rule 18(a) should allow a late filing of a motion to recuse if it is grounded on reasons not known and good cause is shown thereby making make Rule 18(a) comparable to the appellate rule concerning recusal. *Id. at 208 n.3* (Gonzalez, J., concurring); see TEX. R. APP. P. 15(a). However, we have not found that Rule 18a has been amended to allow late filing.

In addition, a hearing was held concerning the motion to recuse. Another judge presided at that hearing and denied the motion to recuse. [HN13] An abuse of discretion standard is applied in reviewing[**55] the denial of the motion. TEX. R. CIV. P. 18a(g).

At the hearing, the recusal motion judge heard evidence concerning the incident that happened at the mall. There was evidence that the general manager at Mall del Norte, the person who brought this incident to Enterprise's attention after trial, had been a party to the original suit, although non-suited in 1989, and had been present during the trial. The mall manager testified that she did not notify Enterprise or its counsel of the incident at the mall because, "well, the lady did not come to talk to me and I thought we do have incidents similar to this at the Mall . . ." She also testified that she found out the particular trial judge was going to try the case about ten days before the trial. At one point during the hearing, the recusal motion judge stated:

The Court is being asked to assume that [the trial judge] remembered, recalled [*841]the incident, when it occurred at the Mall, and that he should have timely advised or informed counsel of the incident one. The Court, as I understand it, and correct me if I'm wrong, is also being asked to assume that the members of the Mall or the defendants in this case[**56] did not, themselves, or did themselves recall the incident but did not apprise counsel of the incident in a timely manner before the Bench trial. I believe those are crucial issues. If I'm mistaken, correct me.

[HN14]

The test for abuse of discretion is whether the trial court acted without reference to any guiding rules and principles. *Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241-42 (Tex. 1985)*, cert. denied, *476 U.S. 1159, 90 L. Ed. 2d 721, 106 S. Ct. 2279 (1986)*. "The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstances does not demonstrate that an abuse of discretion has occurred. *Id. at 242*. The recusal motion judge in this instance heard testimony from the mall manager and other individuals involved in the incident and determined that the incident did not merit a recusal. Enterprise has failed to show how the judge abused his discretion. Points of error twenty and twenty-one are overruled.

In point of error twenty-two, Enterprise contends the court erred in imposing sanctions on it for bringing the motion to recuse. Under Rule 18a(h), if the [**57]recusal motion judge determined that the motion to recuse is brought for the purpose of delay and without sufficient cause, the judge may, in the interest of justice, impose sanctions. TEX. R. CIV. P. 18a(h). Although Enterprise claimed that it did not bring the motion for the purpose of delay, the judge found otherwise. In its brief, Enterprise addresses this point in a footnote claiming that because counsel stipulated that interest would run from the time of trial until the time judgment was entered, it erased any suggestion that the motion was brought for delay. We do not find the court abused its discretion it awarding sanctions and likewise, overrule point of error twenty-two.

Accordingly, the judgment of the trial court is reformed to delete additional damages under the DTPA. The judgment is further reformed to reflect actual damages, as stipulated by the parties, in the amount of $312,576.26 plus prejudgment and postjudgment interest, and attorney's fees in the amount of $220,000. As reformed, the judgment of the trial court is affirmed.

FRED BIERY,

Justice

EXHIBIT W

Certified true copy of Exhibit W.

[signature], PARTNER, MORGAN LEWIS 9/22/03

CERTIFIED AT THE CANADIAN EMBASSY
FOR LEGALIZATION OF THE FOREGOING
SIGNATURE OF: STEPHEN PAUL MAHINKA
CERTIFIE A L'AMBASSADE DU CANADA
AUX FINS DE LEGALISER LA SIGNATURE
CI-DESSUS DE:

[signature]

Nadine Bouchard
Consular Program Officer
Agent Consulaire
Canadian Embassy/Ambassade du Canada
Washington, D.C.

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ANNOTATED REVISED CODE OF WASHINGTON

*** (STATUTES CURRENT THROUGH THE 2002 GENERAL ELECTION(2003 CH 2)) ***

*** (ANNOTATIONS CURRENT THROUGH MAY 23 2003) ***

TITLE 19. BUSINESS REGULATIONS -- MISCELLANEOUS
CHAPTER 19.86. UNFAIR BUSINESS PRACTICES -- CONSUMER PROTECTION

=1; GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

Rev. Code Wash. (ARCW) § **19.86.020** (2003)

STATUS: CONSULT SLIP LAWS CITED BELOW FOR RECENT CHANGES TO THIS DOCUMENT
<=2> LEXSEE 2003 Wa. HB 1930 -- See section 6.

§ 19.86.020. Unfair competition, practices, declared unlawful

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

HISTORY: 1961 c 216 § 2.

NOTES: CROSS REFERENCES.
Hearing instrument dispensing, advertising, etc. -- Application: RCW 18.35.180.

JUDICIAL DECISIONS

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Burden of proof
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--Intent
--Reliance
Doctrine of avoidable consequences
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-- --In general
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Jurisdiction

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Pleading requirements
Specific applications
--Automobile rental
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-- --Condominiums
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-- --Mortgages
--Shoplifting
Standard of review
Sureties
--Travel agencies
--Wrongful repossession
Waiver

CONSTITUTIONALITY.

"Unfair methods of competition," for purposes of this act and other similar legislation, is not an unconstitutionally vague term although it is not legislatively defined and is only defined by the courts with regard to the specific facts of each case. Whether a particular method of competition is "fair" should be determined in the light of the conduct with which a person is charged, and is generally a question of fact. *Ivan's Tire Serv. Store, Inc. v. Goodyear Tire & Rubber Co., 10 Wn. App. 110, 517 P.2d 229 (1973)*, aff'd, *86 Wn.2d 513, 546 P.2d 109 (1976).*

Inasmuch as this act requires a judicial finding of a violation before any penalties attach, insignificant procedural differences between this act and federal counterparts do not result in constitutional deficiencies. *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc., 82 Wn.2d 265, 510 P.2d 233 (1973).*

The phrases "unfair methods of competition" and "unfair or deceptive acts or practices" as used in this act, when tested in light of the conduct with which an accused is charged, and considering their well established meaning in both

common law and comparable federal trade regulations, meet constitutional requirements of certainty. *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc., 82 Wn.2d 265, 510 P.2d 233 (1973).*

The phrases "unfair methods of competition" and "unfair or deceptive acts or practices" have sufficiently well established meanings in common law and federal trade law to meet due process requirements of certainty. *State v. Reader's Digest Ass'n, 81 Wn.2d 259, 501 P.2d 290 (1972),* appeal dismissed, *411 U.S. 945, 93 S. Ct. 1927, 36 L. Ed. 2d 406 (1973),* modified on other grounds, *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 719 P.2d 531 (1986).*

ARBITRATION.

All claims, either statutory or nonstatutory, arising under a written brokerage agreement containing an arbitration clause, must be settled by arbitration in accordance with the terms of the agreement. *Garmo v. Dean, Witter, Reynolds, Inc., 101 Wn.2d 585, 681 P.2d 253 (1984).*

BURDEN OF PROOF.

--CONSPIRACY.

A violation of this section does not require a finding of conspiracy; thus, unilateral conduct which is unfair and anticompetitive may constitute a violation of this section. *State v. Black, 100 Wn.2d 793, 676 P.2d 963 (1984).*

--GOOD FAITH.

A defendant's good faith is irrelevant in a determination of whether a deceptive or unfair practice exists. *Tradewell Stores, Inc. v. T.B. & M., Inc., 7 Wn. App. 424, 500 P.2d 1290 (1972).*

--INTENT.

A claim for relief under this section need not be supported by proof of misrepresentation. *Testo v. Russ Dunmire Oldsmobile, Inc., 16 Wn. App. 39, 554 P.2d 349 (1976).*

--RELIANCE.

Claimant need not prove consumer reliance to establish an unfair or deceptive practice. *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc., 87 Wn.2d 298, 553 P.2d 423 (1976),* appeal dismissed, *430 U.S. 952, 97 S. Ct. 1594, 51 L. Ed. 2d 801 (1977).*

DOCTRINE OF AVOIDABLE CONSEQUENCES.

The doctrine of avoidable consequences applies in damage actions authorized by this act. *Young v. Whidbey Island Bd. of Realtors, 96 Wn.2d 729, 638 P.2d 1235 (1982).*

ELEMENTS.

--IN GENERAL.

The elements required to prove a violation of this chapter are: (1) defendant committed an unfair or deceptive act; (2) the act occurred in the conduct of trade or commerce; (3) the act has an impact on the public interest; (4) plaintiff's injury was caused by defendant's act. *Northwest Strategies, Inc v. Buck Medical Servs., Inc., 927 F. Supp. 1343 (W.D. Wash. 1996).*

Where there was no evidence that competitor's conduct was likely to injure anyone else, and where there was no evidence of a specific legislative declaration of public interest impact, competitor's alleged theft of buffet restaurant chain's recipes and job manuals did not violate this section. *Buffets, Inc. v. Klinke, 73 F.3d 965 (9th Cir. 1996).*

To prevail in a private action under this act, a plaintiff must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or practice; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) a causal link between the unfair or deceptive acts and the injury suffered by plaintiff. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 719 P.2d 531 (1986); United Van Lines v. Hertz Penske Truck Leasing, Inc., 710 F. Supp. 283 (W.D. Wash. 1989); Aubrey's R.V. Ctr., Inc. v. Tandy Corp., 46 Wn. App. 595, 731 P.2d 1124 (1987).*

--INJURY.

Widower from whom refund of overpayment of money paid to a nursing home for his wife's care was unlawfully withheld failed to prove more than nominal monetary damages, but this did not keep him from proving sufficient injury

through the wrongful retention of his property to state a claim under the *Consumer Protection Act. Sorrel v. Eagle Healthcare, Inc., 110 Wn. App. 290, 38 P.3d 1024 (2002),* review denied, *147 Wn.2d 1016, 56 P.3d 992 (2002).*

Hospitals were not entitled to recover unreimbursed health care costs for services to patients whose injuries were caused by smoking because expenses for personal injuries are not injuries to business or property under this act. *Association of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc., 79 F. Supp. 2d 1219 (W.D. Wash. 1999),* aff'd, *241 F.3d 696,* (9th Cir. 2001).

This act does not authorize an action for declaratory judgment and does not provide a remedy for a person who fails to prove actual damages. *Girard v. Myers, 39 Wn. App. 577, 694 P.2d 678 (1985).*

--PUBLIC INTEREST.

-- --IN GENERAL.

Whether the public has an interest in any given action is to be determined by the trier of fact from several factors, depending upon the context in which the alleged acts were committed. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 719 P.2d 531 (1986).*

The public interest element of a private action is satisfied per se by a showing that a statute has been violated which contains a specific legislative declaration of public interest impact. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 719 P.2d 531 (1986).*

The presence of public interest is demonstrated when the proof establishes that (1) the defendant by unfair or deceptive acts or practices in the conduct of trade or commerce has induced the plaintiff to act or refrain from acting; (2) the plaintiff suffers damage brought about by such action or failure to act; and (3) the defendant's deceptive acts or practices have the potential for repetition. *Anhold v. Daniels, 94 Wn.2d 40, 614 P.2d 184 (1980).*

Plaintiff must show public impact of defendant's conduct to bring action under this chapter. *Lightfoot v. MacDonald, 86 Wn.2d 331, 544 P.2d 88 (1976).*

-- --NOT SHOWN.

Where there was no indication that other individuals were susceptible to the same sort of injury suffered by the plaintiff individual, that individual was representative of bargainers subject to exploitation and unable to protect himself, or that the company's conduct impacted the public interest, the individual could not meet the public interest element in the *Washington Consumer Protection Act. Goel v. Jain, 259 F. Supp. 2d 1128 (W.D. Wash. 2003).*

Although plaintiff established an unfair and deceptive act, and a violation of chapter 46.71 RCW, she failed to make the required showing of public interest impact that is required for recovery under this chapter. *Campbell v. Seattle Engine Rebuilders & Remanufacturing, Inc., 75 Wn. App. 89, 876 P.2d 948 (1994).*

-- --SPECIFIC EXAMPLES.

Financing arrangement offered to buyer by seller of mobile homes was an isolated communication not having the capacity to deceive a substantial portion of the public, and thus did not violate this act. *Henery v. Robinson, 67 Wn. App. 277, 834 P.2d 1091 (1992),* review denied, *120 Wn.2d 1024, 844 P.2d 1018 (1993).*

A transaction between a realtor and purchaser of property was considered a private dispute for the purposes of this act. *Pacific N.W. Life Ins. Co. v. Turnbull, 51 Wn. App. 692, 754 P.2d 1262,* review denied, *111 Wn.2d 1014 (1988).*

A necessary component of trade name infringement is that the plaintiff establish that the name used is likely to confuse the public. This confusion of the public, absent some unusual or unforseen circumstances, will be sufficient to meet the public interest requirement of this act. *Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 733 P.2d 208 (1987).*

Where a seller's acts were not shown to be part of a generalized course of conduct and where there was not a showing of repeated acts, there was no violation of this act because the acts did not impact the public interest. *Aubrey's R.V. Ctr., Inc. v. Tandy Corp., 46 Wn. App. 595, 731 P.2d 1124 (1987).*

Fact that construction contractor had failed satisfactorily to perform construction contracts on more than one occasion did not signify a protracted course or pattern of unfair or deceptive conduct; therefore, although the contractor's actions may have been improper, they did not constitute the kind of generalized conduct impacting the public interest which gives rise to a violation of this act. *Burton v. Ascol, 105 Wn.2d 344, 715 P.2d 110 (1986).*

Post-sale dealings of manufacturer and retail seller of motorcycle with purchaser did not constitute a violation of this act since they were not "unfair" and since most took place after the lawsuit was commenced, making it a private dispute rather than one "within the sphere of trade or commerce" as required by the act. *Blake v. Federal Way Cycle Ctr., 40 Wn. App. 302, 698 P.2d 578,* review denied, *104 Wn.2d 1005 (1985).*

Where defendant vendor did not rely upon title insurance policy which it purchased, any injury incurred by defendant was not the result of the negligence of the title insurance company; thus, defendant's cause of action against the company

under the public interest test of this act would fail. *Transamerica Title Ins. Co. v. Johnson, 103 Wn.2d 409, 693 P.2d 697 (1985).*

Failure of married couple, licensed real estate brokers and agents, to disclose to prospective purchasers the actual owner of property the couple was leasing was unlawful, but was not a violation of this act, it being a single, isolated transaction not involving the public, since the property was not listed nor were there representations made to the public by other means of advertising. *Cordell v. Stroud, 38 Wn. App. 861, 690 P.2d 1195 (1984),* review denied, *103 Wn.2d 1015 (1985).*

Claim of unfair competition based upon trade name infringement was not actionable under this act where complaint set forth no specific facts to establish that any of the defendant's competitors or any of its customers or other members of the public were likely to be harmed by the defendant's advertising practices, or that the defendant was motivated other than by legitimate business concerns. *Money Savers Pharmacy, Inc. v. Koffler Stores, Inc., 37 Wn. App. 602, 682 P.2d 960 (1984).*

Where plaintiff did not show that attorney's breach of contract which injured no one but herself had sufficient public impact to qualify as act or practice prohibited by this chapter, action was properly dismissed. *Lightfoot v. MacDonald, 86 Wn.2d 331, 544 P.2d 88 (1976).*

--TRADE OR COMMERCIAL ENDEAVOR.

The submission of a bid proposal to a county is not trade or commerce. *Northwest Strategies, Inc v. Buck Medical Servs., Inc., 927 F. Supp. 1343 (W.D. Wash. 1996).*

Since an attorney's defamatory allegation was neither an entrepreneurial nor commercial endeavor, it could not give rise to a claim under this act. *Demopolis v. Peoples Nat'l Bank, 59 Wn. App. 105, 796 P.2d 426 (1990).*

--UNFAIR OR DECEPTIVE ACT.

-- --IN GENERAL.

A false statement which is communicated to only one customer but which is contained in a standard form contract, sales materials, or routine sales presentation has the capacity to deceive a substantial portion of the consuming public so as to satisfy the "unfair" or "deceptive act" element of a private cause of action under this act. *Potter v. Wilbur-Ellis Co., 62 Wn. App. 318, 814 P.2d 670 (1991).*

Suits based on conduct harmful to consumers (but not competitors) arise under the prohibition of unfair and deceptive practices, not unfair competition. *Boggs v. Whitaker, Lipp & Helea, Inc., 56 Wn. App. 583, 784 P.2d 1273,* review denied, *114 P.2d 1018, 791 P.2d 535 (1990).*

One who offers an opinion as to the future, knowing of but not disclosing facts that would lead a reasonable person to question the opinion, is chargeable with an unfair or deceptive act in violation of this act. *Robinson v. McReynolds, 52 Wn. App. 635, 762 P.2d 1166 (1988).*

Whether a plaintiff-consumer has been actually deceived is irrelevant. *Testo v. Russ Dunmire Oldsmobile, Inc., 16 Wn. App. 39, 554 P.2d 349 (1976).*

An unfair or deceptive act is proved if the defendant's actions possessed a tendency or capacity to mislead. *Testo v. Russ Dunmire Oldsmobile, Inc., 16 Wn. App. 39, 554 P.2d 349 (1976).*

"Unfair or deceptive acts or practices," as that term is used in this act, includes only those acts or practices which are designed to effect a sale. *Johnston v. Beneficial Mgt. Corp. of Am., 85 Wn.2d 637, 538 P.2d 510 (1975),* modified on other grounds, *Salois v. Mutual of Omaha Ins. Co., 90 Wn.2d 355, 581 P.2d 1349 (1978).*

In determining whether a method of competition is unfair for purposes of this act, a trier of fact may consider improper use of a competitor's customer lists, intent to destroy his business, and other factors relating to the good faith of the parties. *Ivan's Tire Serv. Store, Inc. v. Goodyear Tire & Rubber Co., 10 Wn. App. 110, 517 P.2d 229 (1973),* aff'd, *86 Wn.2d 513, 546 P.2d 109 (1976).*

-- --SPECIFIC EXAMPLES.

Plaintiff failed to present evidence from which a reasonable trier of fact could conclude that an accounting firm committed an unfair or deceptive act or practice that could deceive a substantial portion of the public, where the only evidence of public contact was eight unidentified recipients of the proposal letter. *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 40 P.3d 1206 (2002).*

Because plaintiffs established antitrust standing, the motion to dismiss their claims under RCW 19.86.030 and under the unfair methods of competition provision of this section was denied. *Hairston v. Pacific-10 Conference, 893 F. Supp. 1485 (W.D. Wash. 1994),* aff'd, *101 F.3d 1315 (9th Cir. 1996).*

Evidence was sufficient to support an inference that storage company engaged in an act or practice designed to make the public think that it operated a safe storage facility where it placed a yellow page advertisement stating, "We Have Safe Storage All Locked Up" and where, in a separate flier, it was stated that managers lived on site to ensure safety and security. These acts or practices were unfair or deceptive since resident managers were not on site from November, 1988 to February, 1989, since the facility's fence was weakly constructed and easily breached, and since the security computer system on the gate may not have been operable. *Eifler v. Shurgard Capital Mgt. Corp., 71 Wn. App. 684, 861 P.2d 1071 (1993).*

For purpose of establishing violation, store owner's mere involvement in having to defend against sign maker's collection action and having to prosecute a counterclaim under this act was insufficient to show injury to her business, but evidence that her dispute with the sign maker took her away from normal store business three hours each month for four years did support inference that her business was harmed. *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc., 64 Wn. App. 553, 825 P.2d 714,* review denied, *120 Wn.2d 1002, 838 P.2d 1143 (1992).*

Although trial court found no intent to deceive, and although the consumers who testified were not deceived, it was not error for the court to find that defendant's conduct had a tendency to mislead or deceive. *State v. A.N.W. Seed Corp., 116 Wn.2d 39, 802 P.2d 1353 (1991).*

Where usurious loan was secured by a deed of trust on residential real property which was then sold subject to the deed of trust, claim under this act by purchaser against lender, based upon purchaser's alleged injury resulting from having to protect against lender's foreclosure action after payments on the loan were stopped, was rejected, the alleged injury being insufficient to satisfy the injury element of a private claim under this act. *Demopolis v. Galvin, 57 Wn. App. 47, 786 P.2d 804,* review denied, *115 Wn.2d 1006, 796 P.2d 1263 (1990).*

Defamatory statements in complaints made to the consumer protection division of the state attorney general's office are not absolutely privileged but are qualifiedly privileged as communications made to a public officer; a qualified privilege can be forfeited by acting with reckless disregard as to the truth or falsity of the statements. *Story v. Shelter Bay Co., 52 Wn. App. 334, 760 P.2d 368 (1988).*

Complaint by purchaser of property seeking declaration that trust and resale agreement was void and unenforceable, which complaint contained a very general prayer for damages, was not cognizable under this act, there being no proof of damages since the property had substantially increased in value by the time of trial; accordingly, purchaser was entitled to attorney's fees under the act. *Girard v. Myers, 39 Wn. App. 577, 694 P.2d 678 (1985).*

A contractor's business practice of providing estimates to purchasers, with which estimates he is unable to substantially comply due to reasons which should be reasonably foreseeable in light of the contractor's knowledge and experience, is an "unfair or deceptive act or practice" which satisfies the inducement element for determining impact upon the public interest. *Eastlake Constr. Co. v. Hess, 102 Wn.2d 30, 686 P.2d 465 (1984).*

While statements made in advertising may be literally or technically true, an advertisement may still be framed in such a setting so as to mislead or deceive; advertising statements may also be misleading or deceptive by innuendo or by double meaning. *State v. Burlison, 38 Wn. App. 487, 685 P.2d 1115,* review denied, *103 Wn.2d 1002 (1984).*

False representations made by electrical contractor did not constitute a violation of this act because the false representations were not the reason the complaining party hired the contractor. *Crane & Crane, Inc. v. C & D Elec., Inc., 37 Wn. App. 560, 683 P.2d 1103,* review denied, *102 Wn.2d 1003 (1984).*

Supplier's labeling of seed as having an 85 percent germination rate when in fact it had been tested at 83 percent did not give purchaser a private cause of action under this act. *Haner v. Quincy Farm Chems., Inc., 97 Wn.2d 753, 649 P.2d 828 (1982).*

A contractor engages in an "unfair or deceptive" act by estimating or representing probable completion or repair dates to purchasers which he is unable to substantially comply with due to reasons which should be reasonably forseeable in light of the contractor's knowledge and experience. *Keyes v. Bollinger, 31 Wn. App. 286, 640 P.2d 1077 (1982).*

The act of advertising to the public the sale of a new car, but selling one that had been repaired and repainted, was an unfair and deceptive act. *Tallmadge v. Aurora Chrysler Plymouth, Inc., 25 Wn. App. 90, 605 P.2d 1275 (1979),* overruled on other grounds, *Demopolis v. Galvin, 57 Wn. App. 47, 786 P.2d 804 (1990).*

Where misrepresentation was claimed but not shown, there was no basis for recovery under this act. *Okkerse v. Westgate Mobile Homes, Inc., 18 Wn. App. 45, 566 P.2d 944 (1977),* review denied, *90 Wn.2d 1001 (1978).*

The wrongful appropriation of a trade name is an unfair and deceptive practice under this section. *Tradewell Stores, Inc. v. T.B. & M., Inc., 7 Wn. App. 424, 500 P.2d 1290 (1972); Wine v. Theodoratus, 19 Wn. App. 700, 577 P.2d 612 (1978); Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 733 P.2d 208 (1987).*

JURISDICTION.

In antitrust and restraint of trade case brought under this act against boards of realtors, neither the doctrine of exhaustion of remedies nor the doctrine of primary jurisdiction required the matter to be referred to an administrative

agency prior to being heard by the courts. *State v. Tacoma-Pierce County Multiple Listing Serv., 95 Wn.2d 280, 622 P.2d 1190 (1980).*

JURY INSTRUCTIONS.

Trial court erred in refusing to instruct the jury on the reasonableness defense to a claim under this act. *Travis v. Washington Horse Breeders Ass'n, 111 Wn.2d 396, 759 P.2d 418 (1988).*

PER SE VIOLATIONS.

--IN GENERAL.

A legislatively declared per se unfair trade practice establishes only two of the five elements of a private action: an unfair or deceptive trade or commerce. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 719 P.2d 531 (1986).*

Prior decisions suggesting that either the legislature or the judiciary may declare a public interest impact are modified to the extent that they conflict with the rule that a legislative declaration of public interest is required to per se satisfy the public interest element of a private action. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 719 P.2d 531 (1986).*

Unless there is a specific legislative declaration of a public interest, the public interest requirement of this statute is not per se satisfied even though defendant is engaging in an unfair or deceptive act or practice in the conduct of trade or commerce. *Haner v. Quincy Farm Chems., Inc., 97 Wn.2d 753, 649 P.2d 828 (1982).*

Claim under this act may be based on a per se violation of statute or on deceptive practices unregulated by statute but involving the public interest. *Lidstrand v. Silvercrest Indus., 28 Wn. App. 359, 623 P.2d 710 (1981); Adams v. Whited, 31 Wn. App. 413, 642 P.2d 412 (1982).*

To recover for a per se violation of this act, plaintiffs must prove: (1) the existence of a pertinent statute, (2) its violation, (3) that the violation was the proximate cause of damages sustained, and (4) that they are within the class the statute sought to protect. *Dempsey v. Joe Pignataro Chevrolet, Inc., 22 Wn. App. 384, 589 P.2d 1265 (1979).*

A violation of a statute designed to protect the public is an unfair or deceptive practice condemned by this act under the per se doctrine. *Dempsey v. Joe Pignataro Chevrolet, Inc., 22 Wn. App. 384, 589 P.2d 1265 (1979).*

--GOOD FAITH DEFENSE..

An unfair practice that occurs "in good faith under an arguable interpretation of existing law" is not actionable under the consumer protection act; thus, a defendant could assert a good-faith defense with respect to the plaintiffs' allegation that it committed per se unfair acts or practices. *Watkins v. Peterson Enters., Inc., 57 F. Supp. 2d 1102 (E.D. Wash. 1999).*

--SPECIFIC EXAMPLES.

The Washington State Securities Act, on which the individual relied for his per se argument, did not contain the necessary legislative declaration of public interest impact to state a claim under the Washington Consumer Protection Act, chapter 19.86 *RCW. Goel v. Jain, 259 F. Supp. 2d 1128 (W.D. Wash. 2003).*

A violation of RCW 19.16.250 of the collection agency act is a per se unfair trade practice. *Watkins v. Peterson Enters., Inc., 57 F. Supp. 2d 1102 (E.D. Wash. 1999).*

An insurer's breach of its duty of good faith constitutes a per se violation of this act; the remedy includes costs, attorney fees and treble damages. *Gingrich v. Unigard Sec. Ins. Co., 57 Wn. App. 424, 788 P.2d 1096 (1990).*

A jury's special finding that insurance company failed to exercise good faith in handling insurance claim, based upon proof of a violation of the insurance commissioner's administrative code regulations, supported the court's determination of a per se unfair act or practice under this act. *Evergreen Int'l, Inc. v. American Cas. Co., 52 Wn. App. 548, 761 P.2d 964 (1988).*

Insurance company's refusal to make payment on supersedeas bond constituted a per se violation of this act. *Nyby v. Allied Fid. Ins. Co., 42 Wn. App. 543, 712 P.2d 861 (1986).*

Violation of statute prohibiting operation of aircraft in a faulty, careless, or negligent manner did not ipso facto constitute a per se violation of this act. *Harrison v. Whitt, 40 Wn. App. 175, 698 P.2d 87,* review denied, *104 Wn.2d 1009 (1985).*

Injury suffered by plaintiff due to the accidental discharge of a revolver carried with the hammer resting on a loaded cylinder did not give rise to a consumer protection claim against the manufacturer since the manufacturer did not induce plaintiff to carry the revolver in that manner and since no specific statutory declaration of public interest existed upon

which a per se violation of the act could be based. *Smith v. Sturm, Ruger & Co., 39 Wn. App. 740, 695 P.2d 600,* review denied, *103 Wn.2d 1041 (1985).*

Violation of the real estate brokers and salesman act does not constitute a per se violation of this act. *Cordell v. Stroud, 38 Wn. App. 861, 690 P.2d 1195 (1984),* review denied, *103 Wn.2d 1015 (1985).*

Since the legislature has not enacted a statute restricting enforcement of due-on-sale clauses, the attempt to enforce such a clause did not constitute a per se violation of consumer protection law. *Perry v. Island Sav. & Loan Ass'n, 101 Wn.2d 795, 684 P.2d 1281 (1984).*

Violation of statute governing electricians and electrical installations was not a per se violation of this act because the statute did not contain a specific declaration of public interest. *Crane & Crane, Inc. v. C & D Elec., Inc., 37 Wn. App. 560, 683 P.2d 1103,* review denied, *102 Wn.2d 1003 (1984).*

Violations of real estate brokers and salesman statute do not constitute a per se violation of this act. *Sato v. Century 21 Ocean Shores Real Estate, 101 Wn.2d 599, 681 P.2d 242 (1984).*

Nonjudicial repossession of motor vehicle by unsecured party was a per se violation of this act. *Sherwood v. Bellevue Dodge, Inc., 35 Wn. App. 741, 669 P.2d 1258 (1983),* modified on other grounds, *676 P.2d 557 (Wn. Ct. App. 1984).*

A violation of the mobile-home landlord-tenant act (chapter 59.20 RCW) does not constitute a per se violation of this act. *Moolick v. Lawson, 33 Wn. App. 665, 655 P.2d 1185 (1982),* review denied, *State v. Dougherty, 99 Wn.2d 1023 (1983).*

Violation of the Uniform Commercial Code (Title 62A RCW) is not a per se showing of public interest sufficient to bring a private action under this act. *Haner v. Quincy Farm Chems., Inc., 97 Wn.2d 753, 649 P.2d 828 (1982).*

Housing contractor's failure to obtain final inspection and approval of house as required by city ordinance did not constitute a per se violation of this act. *Keyes v. Bollinger, 31 Wn. App. 286, 640 P.2d 1077 (1982).*

Violations of retail installment sales act were not unfair or deceptive practices under this act where no public injury was shown. *Lookebill v. Mom's Mobile Homes, Inc., 16 Wn. App. 817, 559 P.2d 600,* review denied, *88 Wn.2d 1017 (1977).*

PLEADING REQUIREMENTS.

Mortgage company's complaint against defendant publishers, alleging violations of the Federal Truth in Lending Act, *15 U.S.C.S. § 1601* et seq., the Washington Mortgage Broker Practices Act, RCW 19.146.010 et seq., and the Washington Consumer Protection Act, RCW 19.86.010 et seq., were grounded in fraud, and thus had to pled with particularity under Fed. R. Civ. P. 9(b). *Fid. Mortg. Corp. v. Seattle Times Co., 213 F.R.D. 573 (W.D. Wash. 2003).*

SPECIFIC APPLICATIONS.

--AUTOMOBILE RENTAL.

Where a truck lessor provided what the lessee requested and gave him an opportunity to inspect it, there was no deceptive act or practice for purposes of this act. The lessee's claim that the lessor's contract limiting liability was deceptive was without foundation. *United Van Lines v. Hertz Penske Truck Leasing, Inc., 710 F. Supp. 283 (W.D. Wash. 1989).*

--BLOOD BANK.

Blood bank's action in allegedly not disclosing its detection of HIV in plaintiff's blood for over a year and then allegedly publicly stating that no AIDS contaminated blood was transfused did not constitute a prima facie claim under this act. *Howell v. Spokane & Inland Empire Blood Bank, 114 Wn.2d 42, 785 P.2d 815 (1990).*

--BOATS.

Seller's alleged failure to tell purchaser of boat engine that the engine had been dropped did not give rise to a claim under this act. *Veeder v. NC Mach. Co., 720 F. Supp. 847 (W.D. Wash. 1989).*

Exclusion clause contained in this act prior to 1974 which exempted from the act actions or transactions regulated by other state regulatory bodies did not prevent application of the act to two California residents who fraudulently sold California property to Washington residents using real estate brokers licensed pursuant to the Washington brokers act. *Allen v. American Land Research, 95 Wn.2d 841, 631 P.2d 930 (1981).*

--COLLECTION AGENCIES.

Collection agency committed a per se violation of this act when it violated the collection agency act (chapter 19.16 RCW) by persisting in an attempt to recover attorney fees from a debtor despite the fact that the underlying lawsuit

between the collection agency and the debtor had been settled. *Evergreen Collectors v. Holt, 60 Wn. App. 151, 803 P.2d 10 (1991).*

--COOPERATIVES.

A nonprofit corporation operating on a cooperative basis, functioning as a marketing agent for dairy farmers, did not engage in a predatory practice by raising its prices; furthermore, any violation of antitrust laws resulting from the action of the cooperative in relation to another cooperative would not justify recovery for damage caused by higher milk prices in the absence of a causal connection between the antitrust violation and the higher prices. *Consolidated Dairy Prods. Co. v. Bar-T Ranch Dairy, Inc., 97 Wn.2d 167, 642 P.2d 1240 (1982).*

--CORPORATE AGENTS.

If a corporate officer participates in wrongful conduct, or knowingly approves of it, he is liable for penalties. *Grayson v. Nordic Constr. Co., 92 Wn.2d 548, 599 P.2d 1271 (1979).*

A deceptive practice in violation of this act is a type of wrongful conduct which justifies imposing personal liability on a participating corporate officer. *Grayson v. Nordic Constr. Co., 92 Wn.2d 548, 599 P.2d 1271 (1979).*

--CROP SPRAYING.

Where aerial application of herbicides was negligent but did not amount to anything unfair or deceptive, the conduct was not a violation of this act. *Harrison v. Whitt, 40 Wn. App. 175, 698 P.2d 87,* review denied, *104 Wn.2d 1009 (1985).*

--DEALING IN STOLEN PROPERTY.

Although party who unknowingly purchased stolen diamond was liable for conversion due to his subsequent sale of the diamond, his conduct did not violate the *Consumer Protection Act. Merchant v. Peterson, 38 Wn. App. 855, 690 P.2d 1192 (1984).*

--DISCRIMINATION.

No section of this act refers to an employer-employee relationship. The fact that there are no reported Washington cases involving a Consumer Protection Act claim by an employee may mean that the act does not apply to employer-employee disputes. *Smith v. K-Mart Corp., 899 F. Supp. 503 (E.D. Wash. 1995).*

--EMPLOYMENT.

The plaintiff established a prima facie "unfair practice" where he demonstrated that he was expelled from a credit union because he had assisted credit union employees in their law suit against the credit union for age and gender discrimination. *Galbraith v. TAPCO Credit Union, 88 Wn. App. 939, 946 P.2d 1242 (1997),* review denied, *135 Wn.2d 1006, 959 P.2d 125 (1998).*

--FRANCHISE INVESTMENTS.

Although violations of the franchise investment protection act (chapter 19.100 RCW) are per se unfair trade practices under this act, such violations do not automatically establish a violation of this act. *Nelson v. National Fund Raising Consultants, Inc., 120 Wn.2d 382, 842 P.2d 473 (1992).*

Franchisor's markup on goods sold to franchisee was a deceptive practice under this act because it had the capacity to deceive; actual deception is not required to establish a violation under this act. *Nelson v. National Fund Raising Consultants, Inc., 120 Wn.2d 382, 842 P.2d 473 (1992).*

--INSURANCE.

-- --IN GENERAL.

Bad faith will not be found where the legal sufficiency of the insurer's reasons for denying coverage is unclear. *Overton v. Consolidated Ins. Co., 101 Wn. App. 651, 6 P.3d 1178 (2000),* , aff'd in part *145 Wn.2d 417, 38 P.3d 322 (2002).*

The denial of coverage alone does not constitute the bad faith necessary for a violation of the consumer protection act. *Ranes v. Paul Revere Life Ins. Co., 32 F.3d 1393 (9th Cir. 1994).*

An incorrect denial of coverage does not constitute an unfair trade practice if the insurer has reasonable justification for denying coverage. *Starczewski v. Unigard Ins. Group, 61 Wn. App. 267, 810 P.2d 58,* review denied, *117 Wn.2d 1017, 818 P.2d 1099 (1991).*

An action may be brought for violation of this act based on isolated violations of the insurance commissioner's administrative code regulations. *Industrial Indem. Co. v. Kallevig, 54 Wn. App. 558, 774 P.2d 1230 (1989),* modified on other grounds, *114 Wn.2d 907, 792 P.2d 520 (1990).*

A denial of coverage based on a reasonable interpretation of an insurance policy is not bad faith and, even if incorrect, does not violate this act if the insurer's conduct was reasonable. *Transcontinental Ins. Co. v. Washington Pub. Utils. Dist. Util. Sys., 111 Wn.2d 452, 760 P.2d 337 (1988).*

Denial of coverage due to a debatable question of coverage is not bad faith giving rise to a violation of this act. *Felice v. St. Paul Fire & Marine Ins. Co., 42 Wn. App. 352, 711 P.2d 1066 (1985),* review denied, *105 Wn.2d 1014 (1986).*

Unfair or deceptive acts or practices in the insurance business are unlawful, against public policy, and privately actionable under this act. *Federated Am. Ins. Co. v. Strong, 102 Wn.2d 665, 689 P.2d 68 (1984).*

Actions by an insurer done without reasonable justification are done without the good faith mandated by statute and are sufficient to constitute a violation of this act, but mere denial of coverage due to a debatable question of coverage is not bad faith. *Whistman v. West Am. of Ohio Cas. Group of Ins. Cos., 38 Wn. App. 580, 686 P.2d 1086 (1984).*

Mere denial of coverage by insurance company due to a debatable question of coverage is not bad faith giving rise to a violation under this act. *Smith v. Ohio Cas. Ins. Co., 37 Wn. App. 71, 678 P.2d 829 (1984).*

-- --GOOD FAITH.

A medical care provider that provided services to insureds could not bring direct claims against an insurer for the insured's breach of RCW 48.01.030, which imposes a duty of good faith in insurance transactions. *Pain Diagnostics & Rehabilitation Assocs., P.S. v. Brockman, 97 Wn. App. 691, 988 P.2d 972 (1999).*

In order to make a showing of bad faith sufficient enough to invoke the protection of this chapter, the insurance company must have acted in a away that was both unlawful and contrary to public policy; as a matter of law, the denial of coverage alone is insufficient to show bad faith. *Farmers Ins. Co. v. Romas, 88 Wn. App. 801, 947 P.2d 754 (1997),* review denied, *135 Wn.2d 1007, 959 P.2d 125 (1998).*

-- --SPECIFIC EXAMPLES.

Where an insured under commercial liability policies was improperly denied a defense and coverage for negligence in connection with construction work, but there was sufficient ambiguity as to the application of the policy to preclude a bad faith claim, the insured's unfair or deceptive act or practice claim also failed. *DeWitt Constr. Inc. v. Charter Oak Fire Ins. Co., 307 F.3d 1127 (9th Cir. 2002).*

An excess insurer subrogated to the rights of an insured could bring a claim under this act which the insured could have brought against the primary insurer. *First State Ins. Co. v. Kemper Nat'l Ins. Co., 94 Wn. App. 602, 971 P.2d 953,* review denied, *138 Wn.2d 1009, 989 P.2d 1136 (1999).*

An insured guilty of material fraud may not sue an insurer for either a violation under this act or, implicitly, bad faith. *Wickswat v. Safeco Ins. Co., 78 Wn. App. 958, 904 P.2d 767 (1995),* review denied, *128 Wn.2d 1017, 911 P.2d 1342 (1996).*

Where there was evidence that the insured attempted to defraud its insurer during the claims process, the trial court correctly directed the jury not to consider defendant's bad faith and violation claims under this section if it found that he intentionally misrepresented or concealed material facts during the claims process. *Wickswat v. Safeco Ins. Co., 78 Wn. App. 958, 904 P.2d 767 (1995),* review denied, *128 Wn.2d 1017, 911 P.2d 1342 (1996).*

Where insurance company refused coverage under conditional receipt because it reasonably and correctly believed that total disability occurred more than one year after the conditional receipt terminated, where it accepted payments for 18 months because it had no way of knowing that insured's health had changed prior to delivery, and where it did not delay responding to claim for frivolous reasons, there was no violation of this section. *Ranes v. Paul Revere Life Ins. Co., 32 F.3d 1393 (9th Cir. 1994).*

Property insurer's denial of amounts necessary to comply with building codes under a "repair or replace" type of clause may give rise to a violation under this act. *Starczewski v. Unigard Ins. Group, 61 Wn. App. 267, 810 P.2d 58,* review denied, *117 Wn.2d 1017, 818 P.2d 1099 (1991).*

Insurance company which issued a policy requiring it to reimburse a county for attorney fees may have made a mistake by not paying promptly and then seeking contribution from other insurers, but that did not make its actions frivolous or unfounded considering the vexing coverage questions and the fact that other companies also had an obligation to contribute to defense costs; thus, company's actions did not violate this act. *Insurance Co. v. Highlands Ins. Co., 59 Wn. App. 782, 801 P.2d 284 (1990),* review denied, *116 Wn.2d 1032, 813 P.2d 583 (1991).*

Insurer's violation of the Washington administrative code 284-30-370, standards for prompt investigation of claims, did not constitute a violation of this act, since no evidence suggested that the insurer committed the violation with such

frequency as to indicate a general business practice. *Underwriters at Lloyds v. Denali Seafoods, Inc., 729 F. Supp. 721 (W.D. Wash. 1989)*, aff'd, *927 F.2d 459 (9th Cir. 1991).*

Insurer violated this act by failing for five months to respond to pollution liability insurance policy claim by oil company which during that period had repeatedly asked the insurer for permission to proceed with clean-up operations. *Wolf Bros. Oil Co. v. International Surplus Lines Ins. Co., 718 F. Supp. 839 (W.D. Wash. 1989).*

An attempt by homeowners' warranty corporation to deny a homeowner's claim based upon policy provision requiring claims to be made within 30 days of the expiration of the warranty period violated this act because a statute made such provisions unenforceable. *Nguyen v. Glendale Constr. Co., 56 Wn. App. 196, 782 P.2d 1110 (1989),* review denied, *114 Wn.2d 1021, 792 P.2d 533 (1990).*

Insurer's practice of back dating insurance policy coverage upon receipt of late payments did not constitute an unfair trade practice under this act. *Saunders v. Lloyd's of London, 113 Wn.2d 330, 779 P.2d 249 (1989).*

Insurer acted without reasonable justification in denying a claim by its insured, a restaurant owner, for damages caused by a restaurant fire, based primarily on the insured's apparent motive and opportunity to set the fire; accordingly, breach of contract and violations under this act were upheld against the insurer. *Industrial Indem. Co. v. Kallevig, 54 Wn. App. 558, 774 P.2d 1230 (1989),* modified on other grounds, *114 Wn.2d 907, 792 P.2d 520 (1990).*

Insured's fraudulent listing of items on insurance claim form precluded any recovery under this act for the insurance company's bad faith in processing the claim. *Mutual of Enumclaw Ins. Co. v. Cox, 110 Wn.2d 643, 757 P.2d 499 (1988).*

Insured had cause of action under this act for insurer's bad faith in handling a claim for underinsured motorist coverage. *Escalante v. Sentry Ins. Co., 49 Wn. App. 375, 743 P.2d 832 (1987),* review denied, *109 Wn.2d 1025 (1988).*

Where denial of insurance coverage resulted from an investigation conducted by an adjustor under the reasonable assumption that the claim was being pursued under a fire insurance policy rather than a homeowners policy, the denial did not constitute a violation of this act. *Villella v. Public Employees Mut. Ins. Co., 106 Wn.2d 806, 725 P.2d 957 (1986).*

Trial court's dismissal of claim against insurance company for bad faith denial of its duty to defend was not error as a matter of law. *Castle & Cooke, Inc. v. Great Am. Ins. Co., 42 Wn. App. 508, 711 P.2d 1108,* review denied, *105 Wn.2d 1021 (1986).*

Extreme uncertainty as to whether insured's death was caused by accident or suicide raised a debatable question of coverage under life insurance policy; thus, insurance company's refusal pursuant to suicide exclusion clause to make payment to the policy beneficiary did not violate this act. *Gould v. Mutual Life Ins. Co., 735 F.2d 1165 (9th Cir. 1984),* cert. denied, *471 U.S. 1017, 105 S. Ct. 2023, 85 L. Ed. 2d 304 (1985).*

Evidence was insufficient to establish that buyer's purchase through realtor of one lot when he thought he had purchased the adjacent lot constituted a violation under this act by the realtor. *Sato v. Century 21 Ocean Shores Real Estate, 101 Wn.2d 599, 681 P.2d 242 (1984).*

A personal injury protection endorsement in an automobile insurance policy which stated that the insurance company would not be responsible for attorney's fees on any sums which it was able to recover through intercompany arbitration did not violate this act or RCW 48.18.190. *Richter, Wimberley & Ericson v. Honore, 29 Wn. App. 507, 628 P.2d 1311 (1980),* review denied, *95 Wn.2d 1012 (1981).*

Insurance company's reliance on the single estimate of one of its experienced adjustors in dispute with insured was reasonable and did not constitute breach of its duty to deal in good faith. *Pruitt v. Alaska Pac. Assurance Co., 28 Wn. App. 802, 626 P.2d 528 (1981).*

Allegation that insurance agent was guilty of fraud and bad faith in inducing plaintiff to subscribe to insurance which in fact offered no coverage stated a cause of action under this act, RCW 19.86.170 notwithstanding. *Rounds v. Union Bankers Ins. Co., 22 Wn. App. 613, 590 P.2d 1286 (1979).*

Allegation that insurance company acted in bad faith in rescinding policy without reasonable justification stated cause of action under this act. *Levy v. North Am. Co. for Life & Health Ins., 90 Wn.2d 846, 586 P.2d 845 (1978).*

-- --STANDARD OF REVIEW.

To sustain a verdict that an insurer violated this act, there must be evidence that the insurer acted without reasonable justification in handling a claim by the insured; conversely, a denial of coverage, although incorrect, based on reasonable conduct of the insurer, does not constitute an unfair trade practice. *Industrial Indem. Co. v. Kallevig, 54 Wn. App. 558, 774 P.2d 1230 (1989),* modified on other grounds, *114 Wn.2d 907, 792 P.2d 520 (1990).*

-- --STANDING.

A third party claimant may not sue an insurer directly for breach of the insurer's duty of good faith under a liability policy or under this act. *Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 715 P.2d 1133 (1986).*

Only an insured may bring an action for a per se violation of this act based upon statute requiring contractors to file evidence of insurance with the state; thus, assignee of insurance policy could not bring such an action. *Kagele v. Aetna Life & Cas. Co., 40 Wn. App. 194, 698 P.2d 90,* review denied, *103 Wn.2d 1042 (1985).*

Where real estate vendor purchased title insurance policy and where the title company was negligent in its duty to perform a reasonable title search, the vendor could not bring an action for a per se violation of this act because the vendor was not the insured under the policy. *Transamerica Title Ins. Co. v. Johnson, 103 Wn.2d 409, 693 P.2d 697 (1985).*

A beneficiary of a life insurance policy can have a cause of action against the insurer under this act for bad faith in settling the claim. *Gould v. Mutual Life Ins. Co., 37 Wn. App. 756, 683 P.2d 207 (1984).*

The right to file an action alleging that an insurance company's wrongful refusal to pay constitutes a per se violation of this act is limited to the insured. *Rice v. Life Ins. Co. of N. Am., 25 Wn. App. 479, 609 P.2d 1387,* review denied, *93 Wn.2d 1027 (1980).*

--INVESTMENT SERVICES.

Dismissal of bondholders' claims against investment advisors who rendered services to the issuer of the bonds was proper since the claims involved the advisors' exercise of professional judgment, not the entrepreneurial aspects of their services. *Haberman v. Washington Pub. Power Supply Sys., 109 Wn.2d 107, 744 P.2d 1032 (1987),* appeal dismissed, *American Express Travel Related Servs. Co. v. Washington Pub. Power Supply Sys., 488 U.S. 805, 109 S. Ct. 35, 102 L. Ed. 2d 15 (1988).*

Bank's wrongful action in allowing a guardian to deposit his ward's check into his personal account rather than the trust account did not violate this act. *Smith v. Olympic Bank, 103 Wn.2d 418, 693 P.2d 92 (1985).*

--LIVESTOCK.

Sale of unfit horse at public auction of race horses following advertisements promoting the horses as truly outstanding was an unfair or deceptive act or practice in trade or commerce affecting the public interest, constituting a violation of this act. *Travis v. Washington Horse Breeders Ass'n, 111 Wn.2d 396, 759 P.2d 418 (1988).*

Sale by Washington horse breeders association of horse with a heart defect which could have been discovered by a routine physical violated this act. *Travis v. Washington Horse Breeders Ass'n, 47 Wn. App. 361, 734 P.2d 956 (1987).*

--MECHANICS LIENS.

Wrongful assertion by repairman of a possessory lien against owner's automobile was per se violation of this act entitling owner to attorney fees. *Webb v. Ray, 38 Wn. App. 675, 688 P.2d 534,* review denied, *103 Wn.2d 1010 (1984).*

--MEDICAL MALPRACTICE.

Medical malpractice claimant failed to establish a necessary element of a private violation, injury to business or property. *Thomas v. Wilfac, Inc., 65 Wn. App. 255, 828 P.2d 597,* review denied, *119 Wn.2d 1020, 838 P.2d 692 (1992).*

Claims under this act against hospital for brain damage suffered by minor child during hospitalization were properly dismissed; neither claim involved the entrepreneurial aspect of the hospital's operation, including the assertion that the hospital allowed the attending physician hospital privileges in order to draw a larger clientele. *Burnet v. Spokane Ambulance, 54 Wn. App. 162, 772 P.2d 1027,* review denied, *113 Wn.2d 1005, 777 P.2d 1050 (1989).*

Claim against a doctor for allegedly holding himself out as a pediatric neurologist when he was not board certified was properly dismissed where plaintiffs failed to show that board certification was necessary, where there was no evidence that the doctor held himself out as board certified nor that the plaintiffs relied on that qualification when choosing him, and where nothing in plaintiff's argument related to the doctor's entrepreneurial practices. *Burnet v. Spokane Ambulance, 54 Wn. App. 162, 772 P.2d 1027,* review denied, *113 Wn.2d 1005, 777 P.2d 1050 (1989).*

--MEDICAL PRACTICE.

The entrepreneurial aspects of a medical practice constitute "trade" and "commerce" within the meaning of this section and may support a private action for damages under the Consumer Protection Act, chapter 19.86 *RCW. State Farm Fire & Cas. Co. v. Huynh, 92 Wn. App. 454, 962 P.2d 854 (1998).*

--MOBILE HOMES.

Seller did not "disseminate" statements made to buyer regarding financing of mobile home, since the same statements were not made to other buyers; therefore, seller did not violate former RCW 46.70.080 or commit a per se violation of

this act. *Henery v. Robinson, 67 Wn. App. 277, 834 P.2d 1091 (1992),* review denied, *120 Wn.2d 1024, 844 P.2d 1018 (1993).*

Purchasers of mobile home were properly awarded actual damages, treble damages and attorney fees against the seller and lender for breach of contract and violation of this act; there was substantial evidence to show that seller delivered the wrong mobile home and then refused to remove it from the purchaser's property, with the lender breaching its contract to oversee the mobile home site preparation work and refusing to reconvey title to real estate given to secure the loan. *Mason v. Mortgage Am., Inc., 114 Wn.2d 842, 792 P.2d 142 (1990).*

--PRICING VIOLATIONS.

Below-cost pricing constitutes a violation of this act if it violates federal antitrust law. *Seattle Rendering Works, Inc. v. Darling-Delaware Co., 104 Wn.2d 15, 701 P.2d 502 (1985).*

Plaintiff in suit for below-cost pricing suffered no damage, and trial court's finding of a violation of this act could therefore not be sustained. *Seattle Rendering Works, Inc. v. Darling-Delaware Co., 104 Wn.2d 15, 701 P.2d 502 (1985).*

A plaintiff in a suit for below-cost pricing must prove that the defendant has a substantial share of the market and has set his retail price below his average variable cost in order to establish price fixing in violation of federal antitrust law and this act. *Seattle Rendering Works, Inc. v. Darling-Delaware Co., 104 Wn.2d 15, 701 P.2d 502 (1985).*

A supplier selling directly to the same customers as one of its dealers is not engaging in an unfair method of competition within the meaning of this act merely because it sells its products directly to customers at a price that the dealer cannot meet and still receive a reasonable profit, so long as the supplier does not require the dealer to sell at a price higher than it charges itself. *Ivan's Tire Serv. Store, Inc. v. Goodyear Tire & Rubber Co., 10 Wn. App. 110, 517 P.2d 229 (1973),* aff'd, *86 Wn.2d 513, 546 P.2d 109 (1976).*

--REAL ESTATE AND FIXTURES.

Real estate agency practice of allowing its agents access to files containing third-party purchase offers, thereby allowing an listing agent wishing to buy the property a competitive advantage, did not constitute an unfair or deceptive act for the purposes of this chapter. *Sing v. John L. Scott, Inc., 134 Wn.2d 24, 948 P.2d 816 (1997).*

-- --IN GENERAL.

Where claim against real estate agent's estate was for breach of partnership agreement, but where claim against real estate company was based upon representation made by the agent to a purchaser in violation of this act, reduction of damages awarded in the consumer protection action against the company by the amount of the settlement of the partnership claim against the agent's estate was unnecessary. *Robinson v. McReynolds, 52 Wn. App. 635, 762 P.2d 1166 (1988).*

Negligent conduct of real estate broker and real estate agent in the sale of real property later found unsuitable for development because of its prior use as a garbage dump did not affect the public interest and, thus, did not violate this act, particularly since the purchasers had sufficient sophistication to remove them from the class of bargainers subject to exploitation. *Pacific N.W. Life Ins. Co. v. Turnbull, 51 Wn. App. 692, 754 P.2d 1262,* review denied, *111 Wn.2d 1014 (1988).*

Title insurance company, acting as escrow agent, did not violate this act by failing to advise plaintiffs of certain possible tax ramifications of the transaction or by not referring the matter to a tax expert. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 719 P.2d 531 (1986).*

If brokerage agent's statement to his client that the client had to assume certain liabilities in order to close the sale of his property was untrue and if such statements were motivated by his need to protect his personal interest, the agent violated his fiduciary duty; client could therefore initiate an action against the agent under this act. *Harstad v. Frol, 41 Wn. App. 294, 704 P.2d 638 (1985).*

Where land in residential development was owned by the shareholders of a development corporation, some of whom were builders, as a joint venture, and where the development occupied a miniscule portion of the geographic market area for residential housing, the setting of a minimum price for the sale of lots and imposition of a six percent real estate commission paid to the development corporation did not constitute per se violations of this act. *Ballo v. James S. Black Co., 39 Wn. App. 21, 692 P.2d 182 (1984).*

Since no real and substantial potential for repetition was shown, act of real estate agent and broker in misrepresenting ownership of property they were leasing was not a de facto violation of this act. *Cordell v. Stroud, 38 Wn. App. 861, 690 P.2d 1195 (1984),* review denied, *103 Wn.2d 1015 (1985).*

Although defendant real estate closing agent violated statute prohibiting unauthorized practice of law, such violation was not the proximate cause of adverse tax consequences to plaintiffs arising out of property transaction, nor were the

closing agent's actions unfair or deceptive since defendant did not hold himself out as an attorney or tax specialist but rather as a closing agent and performed his duties in this respect exactly as instructed; accordingly, defendant's conduct did not violate this act. *State v. Sauve, 33 Wn. App. 181, 652 P.2d 967 (1982),* aff'd, *100 Wn.2d 84, 666 P.2d 894 (1983).*

This act applied to sale by real estate agent of property which he knew had drainage and sewage problems which were not disclosed to the buyer. *McRae v. Bolstad, 32 Wn. App. 173, 646 P.2d 771 (1982),* aff'd, *101 Wn.2d 161, 676 P.2d 496 (1984).*

Requirement by a multiple listing association that members pay dues and attend an orientation course in order to have access to its multiple listing service was not unlawful. *Young v. Whidbey Island Bd. of Realtors, 96 Wn.2d 729, 638 P.2d 1235 (1982).*

-- --COMMISSION DISPUTES.

A commission dispute between rival realty agencies was essentially a private dispute not affecting the public interest, and therefore neither party was entitled to a recovery under this act. *Broten v. May, 735 P.2d 86 (1987).*

Nonconspiratorial conduct on the part of several real estate brokerage companies to reduce commission splits to a broker who had adopted a new flat-rate brokerage service was motivated by legitimate business concerns and therefore did not violate this act. *State v. Black, 100 Wn.2d 793, 676 P.2d 963 (1984).*

Agreement whereby lots owned by a construction company would be sold through a real estate company which would receive for its services a six percent commission on the purchase price paid by the purchaser was not an illegal arrangement. *Ridgeview Properties v. Starbuck, 96 Wn.2d 716, 638 P.2d 1231 (1982).*

Failure of a real estate brokerage company to inform the purchaser of an individual development lot of the company's overall policy for the payment of real estate commissions by other purchasers in the same development did not violate this act. *Smith v. Galland & Assocs., 24 Wn. App. 632, 602 P.2d 1197 (1979).*

Sale of a development lot on the condition that the purchaser would pay a six percent commission on the value of the home to be built on the lot was not unfair or deceptive or illegal. *Smith v. Galland & Assocs., 24 Wn. App. 632, 602 P.2d 1197 (1979).*

-- --CONDOMINIUMS.

This act did not apply to suit by condominium homeowners against builder-vendor for construction defects where the express terms of the contract with the builder-vendor delegated the risks among the parties and formed part of the basis for their bargain. *Stuart v. Coldwell Banker Com. Group, Inc., 109 Wn.2d 406, 745 P.2d 1284 (1987).*

Wrongful refusal of builder to make repairs to common-area patio of condominium which plaintiff owned as a tenant in common did not constitute a violation of this act. *Rouse v. Glascam Bldrs., Inc., 101 Wn.2d 127, 677 P.2d 125 (1984).*

-- --DUE ON SALE CLAUSES.

There was no violation of consumer protection law in saving and loan association's attempt in only one case to enforce a due-on-sale clause under an arguable interpretation of existing law. *Perry v. Island Sav. & Loan Ass'n, 101 Wn.2d 795, 684 P.2d 1281 (1984).*

Where borrowers made no showing that they were induced to act based on a due-on-sale clause in a deed of trust, nor that they had suffered any damage as a result of the clause, enforcement of the due-on-sale clause by a bank when the borrower assigned his interest in the property did not violate this act. *Magney v. Lincoln Mut. Sav. Bank, 34 Wn. App. 45, 659 P.2d 537,* review denied, *99 Wn.2d 1023 (1983).*

It was not a violation of this act for a state chartered mutual savings bank to enforce a due-on-sale provision in a deed of trust when the borrower later assigned his interest in the property and where there was no increased risk to the lender. *Magney v. Lincoln Mut. Sav. Bank, 34 Wn. App. 45, 659 P.2d 537,* review denied, *99 Wn.2d 1023 (1983).*

-- --HOUSES.

A class of plaintiffs' allegation that a builder failed to disclose known defects in the exterior finish that it used, and that the builder failed to conform to industry standards with regard to that finish, presented a genuine issue of material fact under the Consumer Protection Act so as to survive a motion for summary judgment. *Griffith v. Centex Real Estate Corp., 93 Wn. App. 202, 969 P.2d 486 (1998).*

House builder's listing of house for sale to general public knowing that its septic tank system was inadequate satisfied the public interest test for a violation of this act. *Luxon v. Caviezel, 42 Wn. App. 261, 710 P.2d 809 (1985).*

Sale by construction company of home which had a national warranty company sign in the window but was not in fact covered by the warranty did not constitute a violation of this act due to lack of evidence establishing a potential for

repetition of the misrepresenation. *Jackson v. Harkey, 41 Wn. App. 472, 704 P.2d 687,* review denied, *104 Wn.2d 1023 (1985).*

Finding that a builder breached his contract by failing to do a workmanlike job is insufficient in law to warrant application of this act. *Pilch v. Hendrix, 22 Wn. App. 531, 591 P.2d 824 (1979).*

-- --MORTGAGES.

The four elements necessary to find a Consumer Protection Act violation were present with respect to real estate company's practice of disbursing earnest money. *Edmonds v. John L. Scott Real Estate, Inc., 87 Wn. App. 834, 942 P.2d 1072 (1997),* review denied, *134 Wn.2d 1027, 958 P.2d 313 (1998).*

The trial court did not abuse its discretion in assessing a civil penalty of $500,000 for 250 separate violations of the Mortgage Broker Practices Act, which were per se violations of the Consumer Protection Act; sufficient undisputed evidence supported such determination. *State v. WWJ Corp., 88 Wn. App. 167, 941 P.2d 717 (1997),* modified, *138 Wn.2d 595, 980 P.2d 1257 (1999).*

--SHOPLIFTING.

In an action arising from defendant store's detention of plaintiff on suspicion of shoplifting, the trial court erred in granting summary judgment to the defendant on plaintiff's claim under this act, where plaintiff successfully established all the elements of his prima facie case, except whether or not defendant's conduct affected the public interest, and the trial court refused to allow discovery of evidence about defendant's conduct in other shoplifting incidents. *Demelash v. Ross Stores, Inc., 105 Wn. App. 508, 20 P.3d 447 (2001).*

STANDARD OF REVIEW.

The question of whether particular actions give rise to a violation of this act is reviewable as a question of law rather than as a question of fact. *Keyes v. Bollinger, 31 Wn. App. 286, 640 P.2d 1077 (1982).*

SURETIES.

Since the term of a limited guaranty whereby guarantor waived virtually all of his surety defenses was clear, unambiguous and not unfair, it did not violate this act. *Seattle First Nat'l Bank v. West Coast Rubber, Inc., 41 Wn. App. 604, 705 P.2d 800,* review denied, *104 Wn.2d 1026 (1985).*

Unauthorized addition by bank to the terms of a limited guaranty for the purpose of clarifying its possession of collateral was not a violation of this act. *Seattle First Nat'l Bank v. West Coast Rubber, Inc., 41 Wn. App. 604, 705 P.2d 800,* review denied, *104 Wn.2d 1026 (1985).*

--TRAVEL AGENCIES.

Ticket broker violated this act by (1) purchasing frequent flyer tickets containing the words "void if sold" and instructing subsequent purchasers to say that the tickets were a gift, and (2) by failing to instruct the purchasers that the tickets were subject to forfeiture if misstatements were discovered; consequently, broker was permanently enjoined from the practice. *Northwest Airlines v. Ticket Exch., Inc., 793 F. Supp. 976 (W.D. Wash. 1992).*

--WRONGFUL REPOSSESSION.

Plaintiff could recover damages under this act for wrongful repossession of her automobile and, separately, for the intentional infliction of mental distress during the repossession. *Sherwood v. Bellevue Dodge, Inc., 35 Wn. App. 741, 669 P.2d 1258 (1983),* modified on other grounds, *676 P.2d 557 (Wn. Ct. App. 1984).*

WAIVER.

Waiver of breach of contract claim for construction delays did not constitute waiver of claim under this act for those delays since the act affords a right to recover damages independent of underlying contract rights. *Keyes v. Bollinger, 31 Wn. App. 286, 640 P.2d 1077 (1982).*

RESEARCH REFERENCES

GONZAGA LAW REVIEW.

When is bad faith claim handling an unfair trade practice? Actions against insurers under Washington's Consumer Protection Act. *28 Gonz. L. Rev. 11.*

Per se violations of the Washington consumer protection act: caveat empty. *23 Gonz. L. Rev. 309.*

Insurance law: reservation of rights. *23 Gonz. L. Rev. 205.*

Proposal for consumer credit reform. *13 Gonz. L. Rev. 1.*
Actionable conduct under Consumer Protection Act. *12 Gonz. L. Rev. 621.*

UNIVERSITY OF PUGET SOUND LAW REVIEW.
Automatic consumer protection act recovery for lack of informed consent: Quinby v. Fine. 11 U. of Puget Sound L. Rev. 347.

WASHINGTON LAW REVIEW.
New limits to the application of the Consumer Protection Act. *61 Wash. L. Rev. 275.*
Washington lawyers under the purview of the state consumer protection act. *60 Wash. L. Rev. 925.*
Washington Consumer Protection Act -- public interest and the private litigant. *60 Wash. L. Rev. 201.*
Private suits under Washington Consumer Protection Act: The public interest requirement. *54 Wash. L. Rev. 795.*
Lottery approach to promotional schemes. *42 Wash. L. Rev. 668.*

ALR.
Constitutional right to jury trial in cause of action under state unfair or deceptive trade practice law. *54 ALR5th 631.*
Liability on implied warranties in sale of used motor vehicle. *47 ALR5th 677.*
Coverage of leases under state consumer protection statutes. *89 ALR4th 854.*
Coverage of insurance transactions under state consumer protection statutes. *77 ALR4th 991.*
Implied warranty coverage for service transactions under state consumer protection and deceptive trade statutes. *72 ALR4th 282.*
What goods or property are "used," "secondhand," or the like, for purposes of state consumer laws prohibiting claims that such items are new. *59 ALR4th 1193.*
Failure to deliver ordered merchandise to customer on date promised as unfair or deceptive trade practice. *7 ALR4th 1257.*
Reasonableness of offer of settlement under state deceptive trade practice and consumer protection acts. *90 ALR3d 1350.*
Practices forbidden by state deceptive trade practice and consumer protection acts. *89 ALR3d 449.*
Scope and exemptions of state deceptive trade practices and consumer protection acts. *89 ALR3d 399.*
Unfair competition by imitation in sign or design of business place. *86 ALR3d 884.*
Trade dress simulation of cosmetic products as unfair competition. *86 ALR3d 505.*
Application of state antitrust laws to athletic leagues or associations. *85 ALR3d 970.*
Validity, construction, and effect of state legislation regulating or controlling bait and switch or disparagement advertising or sales practices. *50 ALR3d 1008.*

TEXTBOOKS AND TREATISES.
Washington Insurance Law; Thomas V. Harris (Michie).

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, part, article, chapter or title.

ANNOTATED REVISED CODE OF WASHINGTON

*** (STATUTES CURRENT THROUGH THE 2002 GENERAL ELECTION(2003 CH 2)) ***

*** (ANNOTATIONS CURRENT THROUGH MAY 23 2003) ***

TITLE 9. CRIMES AND PUNISHMENTS
CHAPTER 9.04. ADVERTISING, CRIMES RELATING TO

=1; GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

Rev. Code Wash. (ARCW) § **9.04.010** (2003)

§ 9.04.010. False advertising

Any person, firm, corporation or association who, with intent to sell or in any wise dispose of merchandise, securities, service, or anything offered by such person, firm, corporation or association, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, makes, publishes, disseminates, circulates, or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public in this state, in a newspaper or other publication, or in the form of a book, notice, hand-bill, poster, bill, circular, pamphlet, or letter, or in any other way, an advertisement of any sort regarding merchandise, securities, service, or anything so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading, shall be guilty of a misdemeanor: PROVIDED, That the provisions of this section shall not apply to any owner, publisher, agent, or employee of a newspaper for the publication of such advertisement published in good faith and without knowledge of the falsity thereof.

HISTORY: 1913 c 34 § 1; RRS § 2622-1.

JUDICIAL DECISIONS

DECEPTION.
False advertisement that market value of piano had depreciated fifty percent would not deceive public and did not violate this section. *State v. Massey, 95 Wash. 1, 163 P. 7 (1917).*

POLICE POWER.
This section does not prevent cities from exercising police power in regard to deceptive advertising. *City of Seattle v. Proctor, 183 Wash. 299, 48 P.2d 241 (1935).*

RESEARCH REFERENCES

ALR.
Who may be liable in civil action, under § 12(1) of Securities Act of 1933 *(15 U.S.C. § 77l(1))*, for selling or offering securities for sale in violation of registration or prospectus provisions of Act--post-Pinter cases. *105 ALR Fed 725.*

NOTES APPLICABLE TO ENTIRE TITLE

CROSS REFERENCES.
Civil disorder, proclamation of state of emergency, governor's powers, penalties: RCW 43.06.200 through 43.06.270.

Criminal justice training commission -- Education and training boards: Chapter 43.101 RCW.
Explosives: Chapter 70.74 RCW.
Health care false claim act: Chapter 48.80 RCW.
Limitation of actions: RCW 9A.04.080.
Miscellaneous crimes, see list after chapter 9.91 RCW digest.
Threats against governor or family: RCW 9A.36.090.
Victims of crimes, compensation: Chapter 7.68 RCW.
Washington Criminal Code: Title 9A RCW.

TEXTBOOKS AND TREATISES.
Washington Criminal Practice in Courts of Limited Jurisdiction; Linda S. Portnoy, Eileen P. Farley (Michie).

NOTES APPLICABLE TO ENTIRE CHAPTER

CROSS REFERENCES.
Apple advertising: Chapter 15.24 RCW.
Attaching advertisements to utility poles: RCW 70.54.090, 70.54.100.
Attorneys at law, advertising: Rules of court: RPC 7.2.
Banks and trust companies:
-- advertising legal services: RCW 30.04.260.
-- using words indicating: RCW 30.04.020.
Buildings, placing advertising matter on: Chapter 9A.48 RCW.
Charitable solicitations, regulation, application of chapter 9.04 RCW: RCW 19.09.340.
Contraceptives or means of abortion, advertising: RCW 9.68.030.
Dentistry, advertising restrictions: RCW 18.32.665, 18.32.755.
Egg law, advertising violations: Chapter 69.25 RCW.
Elections, advertising violations:
-- initiative or referendum petition signers: RCW 29.79.490.
-- recall petition signers: RCW 29.82.220.
Employment agencies, false advertising: Chapter 19.31 RCW.
Food, drugs, and cosmetics: Chapter 69.04 RCW.
Hearing instrument dispensing, advertising, etc.
-- application: RCW 18.35.180.
Indecent articles: RCW 9.68.030.
Insurance, unlawful advertising practices: Chapter 48.30 RCW.
Optometry advertising: RCW 18.53.140, 18.53.150.
State parks, advertising prohibited: RCW 79A.05.165.

TEXTBOOKS AND TREATISES.
The Law of Evidence in Washington; Robert H. Aronson (Michie).
Washington Criminal Practice in Courts of Limited Jurisdiction; Linda S. Portnoy, Eileen P. Farley (Michie).

ANNOTATED REVISED CODE OF WASHINGTON

*** (STATUTES CURRENT THROUGH THE 2002 GENERAL ELECTION(2003 CH 2)) ***

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TITLE 9. CRIMES AND PUNISHMENTS
CHAPTER 9.04. ADVERTISING, CRIMES RELATING TO

=1; GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

Rev. Code Wash. (ARCW) § **9.04.050** (2003)

§ 9.04.050. False, misleading, deceptive advertising

It shall be unlawful for any person to publish, disseminate or display, or cause directly or indirectly, to be published, disseminated or displayed in any manner or by any means, including solicitation or dissemination by mail, telephone, electronic communication, or door-to-door contacts, any false, deceptive or misleading advertising, with knowledge of the facts which render the advertising false, deceptive or misleading, for any business, trade or commercial purpose or for the purpose of inducing, or which is likely to induce, directly or indirectly, the public to purchase, consume, lease, dispose of, utilize or sell any property or service, or to enter into any obligation or transaction relating thereto: PROVIDED, That nothing in this section shall apply to any radio or television broadcasting station which broadcasts, or to any publisher, printer or distributor of any newspaper, magazine, billboard or other advertising medium who publishes, prints or distributes, such advertising in good faith without knowledge of its false, deceptive or misleading character.

HISTORY: 2000 c 33 § 1; 1961 c 189 § 1.

NOTES: SEVERABILITY -- 1961 C 189: "If any provision of this act is declared unconstitutional, or the applicability thereof to any person or circumstances is held invalid, the constitutionality of the remainder of the act and the applicability thereof to other persons and circumstances shall not be affected thereby." [1961 c 189 § 5.]

CROSS REFERENCES.
Blind made products, false advertising: RCW 19.06.030, 19.06.040.
Highway advertising control act of 1961, Scenic Vistas Act of 1971: Chapter 47.42 RCW.

EFFECT OF AMENDMENTS.
2000 c 33 § 1, effective June 8, 2000, inserted "electronic communication" in the first sentence.

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, part, article, chapter or title.

EXHIBIT X

Certified true copy of Exhibit X.

[signature], PARTNER, MORGAN LEWIS 3/22/03

CERTIFIED AT THE CANADIAN EMBASSY
FOR LEGALIZATION OF THE FOREGOING
SIGNATURE OF: STEPHEN PAUL MAHINKA
CERTIFIÉ À L'AMBASSADE DU CANADA
AUX FINS DE LÉGALISER LA SIGNATURE
CI-DESSUS DE:

[signature]

Consular Program Officer
Agent Consulaire
Canadian Embassy/Ambassade du Canada
Washington, D.C.

Consular Section Consulaire
Canadian Embassy
Ambassade du Canada
501 Pennsylvania Avenue, N.W.
Washington, D.C. 20001

WISCONSIN ADMINISTRATIVE CODE

* THIS DOCUMENT IS CURRENT THROUGH WIS. ADMN. REGISTER NO. 571, 07/31/03 *

AGRICULTURE, TRADE AND CONSUMER PROTECTION
CHAPTER ATCP 124. PRICE COMPARISON ADVERTISING

Wis. Adm. Code ATCP 124.05 (2003)

ATCP 124.05 Seller's offered prices.

(1) No price comparison may be made by a seller based on a price at which the seller has offered for sale but has not sold consumer property or services unless:

(a) The price is a price at which such property or services were actually offered for sale by the seller for at least 4 weeks during the last 90 days immediately preceding the date on which the price comparison is stated in the advertisement; or

(b) The price is a price at which such property or services were actually offered for sale by the seller for at least 4 weeks during any other 90-day period, and the advertisement clearly discloses the date, time, or seasonal period of such offer.

(2) Notwithstanding sub. (1), no price comparison may be made by a seller based on a price which exceeds the seller's cost plus the percentage markup regularly used by the seller in the actual sale of such property or services, or consumer property or services of similar class or kind, in the seller's recent and regular course of business.

HISTORY: Cr. Register, July 1973, No. 211, effective January 1, 1974, except that for advertisements in catalogs it shall take effect July 1, 1974; am. Register, January, 1978, No. 265, eff. 2-1-78.

WISCONSIN ADMINISTRATIVE CODE

* THIS DOCUMENT IS CURRENT THROUGH WIS. ADMN. REGISTER NO. 571, 07/31/03 *

AGRICULTURE, TRADE AND CONSUMER PROTECTION
CHAPTER ATCP 124. PRICE COMPARISON ADVERTISING

Wis. Adm. Code ATCP **124.04** (2003)

ATCP **124.04** Seller's actual sale prices.

(1) No price comparison may be made by a seller based on a price at which consumer property or services were sold by the seller unless:

(a) The price is a price at which such property or services were actually sold by the seller in the last 90 days immediately preceding the date on which the price comparison is stated in the advertisement; or

(b) The price is a price at which such property or services were actually sold by the seller during any other period, and the advertisement discloses with the price comparison the date, time or seasonal period when such sales were made.

(2) Notwithstanding sub. (1), no price comparison under this section may be made by a seller based on a price which exceeds the seller's cost plus the percentage markup regularly used by the seller in the actual sale of such property or services, or consumer property or services of similar class or kind, in the seller's recent and regular course of business.

HISTORY: Cr. Register, July, 1973, No. 211, effective January 1, 1974; except that for advertisements in catalogs it shall take effect July 1, 1974; am. Register, January, 1978, No. 265, eff. 2-1-78.

State of Wisconsin, Plaintiff-Appellant andCross-Respondent, v. **Menard**, Inc., a domestic corporation,Defendant-Respondent and Cross-Appellant
No. 84-474

Court of Appeals of Wisconsin

121 Wis. 2d 199; 358 N.W.2d 813; 1984 Wisc. App. LEXIS 4397

September 4, 1984, Submitted on briefs
October 9, 1984, Decided

SUBSEQUENT HISTORY: [***1]

Petition to review denied.

PRIOR HISTORY:
Appeal and Cross-Appeal from a judgment of the circuit court for Eau Claire county: William D. O'Brien, Judge.

DISPOSITION: By the Court. -- Judgment affirmed in part, reversed in part, and cause remanded. No costs to either party.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant state sought review of the decision of the Circuit Court for Eau Claire County (Wisconsin) that entered judgment imposing forfeitures on respondent corporation for eight violations of Wis. Admin. Code ch. Ag. 124, that regulated price comparison advertising. The corporation cross-appealed the judgment on the basis that summary judgment should not have been granted finding it guilty of improper price comparisons.

OVERVIEW: The lower court entered judgment against the corporation and imposed forfeitures for eight violations of Wis. Admin. Code ch. Ag. 124, that regulated price comparison advertising. The corporation affirmed the summary judgment because the corporation was guilty of improper price comparisons. The court reversed and remanded for further consideration of the number of violations the corporation committed because each publication of an advertisement had to comply with Wis. Admin. Code ch. Ag. 124. The court found that a violation occurred each time an improper advertisement was published and that each newspaper edition constituted a separate publication. The court found that treating each publication as a separate violation was not a denial of due process because the audience size exposed was not intended to define a violation. The court found no discriminatory classification existed because advertisers in small newspapers were not treated differently from advertisers in large newspapers. The court found Wis. Admin. Code ch. Ag. 124 was not unconstitutionally vague because it clearly defined the conduct prohibited and the trier of fact did not have to apply its own standards of guilt.

OUTCOME: The court affirmed the finding that the corporation had violated the state regulation that prohibited improper price comparisons in advertising but reversed and remanded for further consideration of how many forfeitures should be imposed.

CORE TERMS: advertisement, forfeiture, newspaper, separate violation, regulation, circulation, advertisers, summary judgment, treating, classification, audience, equal protection, order issued, discriminatory, statute authorizing, cross-appeal, separately, edition

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure: Remedies: Forfeitures
[HN1] *Wis. Stat. § 100.26(6)*, requires a forfeiture of not less than $100 nor more than $10,000 for each violation of an order issued under *Wis. Stat. § 100.20*.

Civil Procedure: Remedies: Forfeitures
[HN2] An advertisement, must be considered in the context of (1) whether a seller or competitor has actually sold goods or services at the prices compared, (2) within a specified period of time, and (3) within the trade area that the price comparison is made pursuant to Wis. Adm. Code § Ag 124.03-124.07. Because each publication of an advertisement must be considered separately for compliance with Wis. Adm. Code § Ag 124, a violation occurs each time an improper advertisement is published. Each newspaper edition constitutes a separate

publication. Treating each publication of an advertisement as a separate violation is consistent with the requirement that no double forfeiture be imposed for the same conduct. Publishing the same advertisement in different newspapers requires independent acts. Similarly, running an advertisement in consecutive editions involves separate choices. Prosecuting each publication as a separate offense does not constitute multiple charges because of these independent acts.

Governments: Legislation: Overbreadth & Vagueness
[HN3] The test for due process is whether the means chosen have a reasonable and rational relationship to the purpose or object of the enactment.

Civil Procedure: Remedies: Forfeitures
[HN4] Wis. Adm. Code § Ag 124.02(1) defines an advertisement as any "oral, written or graphic representation made in connection with the solicitation of business." This definition indicates an intention to protect the public from deceptive advertising regardless of the audience size. Defining a violation without regard to a newspaper's circulation size is consistent with the objective of requiring a high degree of diligence to avoid the conduct proscribed by the regulation.

Governments: Legislation: Interpretation
[HN5] The test for evaluating equal protection claims is whether there is a reasonable and practical ground for the classification.

Governments: Legislation: Overbreadth & Vagueness
[HN6] A regulation is void for vagueness if it does not provide fair notice of the conduct prohibited or include standards for ascertaining culpability.

Administrative Law: Agency Rulemaking: Rule Application & Interpretation
[HN7] Administrative regulations enacted pursuant to statutory rule-making authority have the force and effect of law.

COUNSEL: For the appellant and cross-respondent the cause was submitted on the briefs of Bronson C. La Follette, attorney general, and William C. Wolford, assistant attorney general.

For the respondent the cause was submitted on the brief of Herrick, Hart, Duchemin, Danielson & Guettinger, S.C., and Dennis M. Sullivan of Eau Claire.

For the cross-appellant the cause was submitted on the briefs of Clifford D. Bobholz of Eau Claire.

JUDGES: Foley, P.J., Dean and Cane, JJ.

OPINIONBY: CANE

OPINION: [*201] [**814] The state appeals a judgment imposing forfeitures on **Menard**, Inc., for eight violations of Wis. Admin. Code, ch. Ag 124 (1981), which regulates price comparison advertising. The primary issue on appeal is what constitutes a separate violation of ch. Ag 124. The state argues that each publication of an improper advertisement constitutes a separate violation for which a forfeiture must be imposed. The[***2] trial court considered each of eight distinct advertisements as one violation, regardless of the number of publications. Because each publication of an advertisement must comply with ch. Ag 124, the part of the judgment [**815] determining the number of violations is reversed.

Menard cross-appeals the judgment on the basis that summary judgment should not have been granted finding it guilty of improper price comparisons. **Menard** contends that the state must prove a violation of both the statute authorizing the administrative regulation and the regulation. The summary judgment on the liability issue is affirmed because the state need only prove a violation of ch. Ag 124.

Menard advertised kitchen cabinets sold by its stores in Eau Claire, Wausau, La Crosse, Oshkosh, and Green Bay. It printed advertisements for each store in several area newspapers. **Menard's** prices were compared to manufacturer list prices in the advertisements. The state commenced this forfeiture action against **Menard** because the price comparisons allegedly violated ch. Ag [*202] 124. The trial court decided on summary judgment that the advertisements did include prohibited price comparisons and imposed [***3]forfeitures for eight separate violations.

[HN1] *Section 100.26(6)*, Stats., requires a forfeiture of not less than $100 nor more than $10,000 for each violation of an order issued under *sec. 100.20*, Stats. Chapter Ag 124 is covered by this forfeiture statute because it is an order issued by the Department of Agriculture, Trade, and Consumer Protection pursuant to *sec. 100.20(2)*, Stats. Section 100.26(6) does not define what constitutes a separate violation.

We conclude that each publication of an advertisement must be separately considered to determine whether it violates ch. Ag 124. **Menard** contends that each distinct advertisement should be considered one violation regardless of the number of publications. [HN2] An advertisement, however, must be considered in the context of (1) whether a seller or competitor has actually

sold goods or services at the prices compared, (2) within a specified period of time, and (3) within the trade area that the price comparison is made. See secs. Ag 124.03-124.07 (1981). Because each publication of an advertisement must be considered separately for compliance with ch. Ag 124, a violation occurs each time an improper advertisement is published. Each[***4] newspaper edition constitutes a separate publication.

Treating each publication of an advertisement as a separate violation is consistent with the requirement that no double forfeiture be imposed for the same conduct. See *State v. Braun, 103 Wis. 2d 617, 630, 309 N.W.2d 875, 882 (Ct. App. 1981).* Publishing the same advertisement in different newspapers requires independent acts. Similarly, running an advertisement in consecutive editions involves separate choices. Prosecuting [*203] each publication as a separate offense does not constitute multiple charges because of these independent acts. See *State v. Stepniewski, 105 Wis. 2d 261, 279, 314 N.W.2d 98, 106 (1982).*

Menard also argues that treating each publication as a separate violation denies due process because no consideration is made of the circulation size of the publication. We disagree. [HN3] The test for due process is "'whether the means chosen have a reasonable and rational relationship to the purpose or object of the enactment.'" *Oliver v. Travelers Insurance Co., 103 Wis. 2d 644, 647, 309 N.W.2d 383, 385 (Ct. App. 1981).* Treating each publication as a separate violation is reasonable because the audience[***5] size exposed to an improper price comparison is not intended to define a violation under ch. Ag 124. [HN4] Section Ag 124.02(1) defines an advertisement as any "oral, written or graphic representation made in connection with the solicitation of business." This definition indicates an intention to protect the public from deceptive advertising regardless of the audience size. See *State v. Automatic Merchandisers, 64 Wis. 2d 659, 663, 221 N.W.2d 683, 686 (1974).* Defining a violation without regard to a newspaper's circulation size is consistent with the objective of requiring a high degree of diligence to avoid the conduct proscribed by the regulation. See *State v. Collova, 79 Wis. 2d 473, 481, 255 N.W.2d 581, 585 (1977).*

[**816] **Menard** also challenges the counting formula on equal protection grounds. It claims that advertisers in small circulation newspapers are discriminated against vis-a-vis advertisers in large circulation newspapers. [HN5] The test for evaluating equal protection claims is whether "there is a reasonable and practical ground for the classification." *Oliver, 103 Wis. 2d at 647, 309 N.W.2d at 385.* [*204] The existence of a discriminatory classification[***6] is hard to fathom in this case because all acts causing an improper advertisement to be published are treated as violations. Publishing the advertisement, irrespective of audience size, constitutes the violation. n1 Thus, no discriminatory classification exists because advertisers in small newspapers are not treated differently from advertisers in large newspapers.

----------Footnotes----------

n1 The fact that each violation may produce a different impact is accommodated by the range of forfeitures allowed for each violation. *Section 100.26(6)*, Stats., provides that a forfeiture of not less than $100 nor more than $10,000 may be imposed for each violation.

----------End Footnotes----------

Menard also contends that ch. Ag 124 is unconstitutionally vague because it does not define what constitutes a single violation. [HN6] A regulation is void for vagueness if it does not provide fair notice of the conduct prohibited or include standards for ascertaining culpability. *State v. Popanz, 112 Wis. 2d 166, 172-73, 332 N.W.2d 750, 754 (1983).* In this case, ch. Ag 124 clearly [***7]defines the conduct prohibited, and the trier of fact does not have to apply its own standards of guilt. The fact that **Menard** did not know how many separate violations it committed does not make ch. Ag 124 unconstitutional. One disposed to violate the law need not know in advance exactly what the consequences will be. *State v. Coubal, 248 Wis. 247, 264, 21 N.W.2d 381, 388 (1946).*

Finally, in its cross-appeal, **Menard** claims that the state must prove a violation of the statute authorizing ch. Ag 124, as well as the regulation. We disagree. [HN7] Administrative regulations enacted pursuant to statutory rule-making authority have the force and effect of law. *State ex rel. Staples v. Department of Health and Social Services, 115 Wis. 2d 363, 367, 340 N.W.2d 194, 196 [*205] (1983).* Because the validity of ch. Ag 124 was not attacked, the state only had to prove that **Menard** violated the regulation. **Menard** did not dispute that it violated the requirements of ch. Ag 124.

Accordingly, this court reverses that part of the judgment relating to the number of forfeitures imposed on **Menard.** The matter is remanded to the trial court for further consideration of the number of violations[***8] that **Menard** committed and imposition of forfeitures. The summary judgment on the issue of **Menard's** liability for violating ch. Ag 124 is affirmed.

By the Court. -- Judgment affirmed in part, reversed in part, and cause remanded. No costs to either party.

EXHIBIT Y

Certified true copy of Exhibit Y.

[signature], PARTNER, MORGAN LEWIS 9/22/03

CERTIFIED AT THE CANADIAN EMBASSY
FOR LEGALIZATION OF THE FOREGOING
SIGNATURE OF: STEPHEN PAUL MAHINKA
CERTIFIE A L'AMBASSADE DU CANADA
AUX FINS DE LEGALISER LA SIGNATURE
CI-DESSUS DE:

[signature]
[redacted]
Consular Program Officer
L'Agent Consulaire
Canadian Embassy/Ambassade du Canada
Washington, D.C.

Consular Section Consulaire
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CODE OF VIRGINIA

*** THIS DOCUMENT IS CURRENT THROUGH THE 2003 REGULAR SESSION ***

*** April 2003 Annotation Service ***

TITLE 59.1. TRADE AND COMMERCE
CHAPTER 17.7. COMPARISON PRICE ADVERTISING ACT

=1; GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

Va. Code Ann. § 59.1-207.41 (2003)

§ 59.1-207.41. Advertising former price of goods or services

No supplier shall in any manner knowingly advertise a former price of any goods or services unless:

1. Such former price is the price at or above which substantial sales were made in the recent regular course of business; or

2. Such former price was the price at which such goods or services or goods or services of substantially the same kind, quality, or quantity and with substantially the same service were openly and actively offered for sale for a reasonably substantial period of time in the recent regular course of business honestly, in good faith and not for the purpose of establishing a fictitious higher price on which a deceptive comparison might be based; or

3. Such former price is based on a markup that does not exceed the supplier's cost plus the usual and customary markup used by the supplier in the actual sale of such goods or services or goods or services of substantially the same kind, quality, or quantity and with substantially the same service, in the recent regular course of business; or

4. The date on which substantial sales were made, or the goods or services were openly and actively offered for sale for a reasonably substantial period of time at the former price is advertised in a clear and conspicuous manner.

HISTORY: 1992, c. 768.

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TITLE 59.1. TRADE AND COMMERCE
CHAPTER 17.7. COMPARISON PRICE ADVERTISING ACT

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Va. Code Ann. § **59.1-207.40** (2003)

§ 59.1-207.40. Definitions

In addition to the definitions listed in § 59.1-198, as used in this chapter, the following terms shall have the following meanings:

"Former price" or "comparison price" means the direct or indirect comparison in any advertisement whether or not expressed wholly or in part in dollars, cents, fractions, or percentages, and whether or not such price is actually stated in the advertisement.

"Substantial sales" means a substantial aggregate volume of sales of identical or comparable goods or services at or above the advertised comparison price in the supplier's trade area.

HISTORY: 1992, c. 768.

NOTES: RESEARCH REFERENCES. --Rosden and Rosden, The Law of Advertising (Matthew Bender).

THE COMMISSIONER OF COMPETITION	- and -	SEARS CANADA INC.	Tribunal File No: CT-2002-004
Applicant		Respondent	

THE COMPETITION TRIBUNAL

AFFIDAVIT OF

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(Sworn September 19, 2003)

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