RESOURCES

Business Liability for Unfair and Deceptive Trade Practices

How does a business know when it is committing an "Unfair and Deceptive Trade Practice"? Unfortunately, most of the time a business first becomes aware of the possibility after a plaintiff files a complaint against the business.

A plaintiff who succeeds on a claim for Unfair and Deceptive Trade Practices ("UDTP") will have his or her actual damages trebled/tripled. Additionally, a successful plaintiff may recovery reasonable attorneys' fees (award is within the discretion of the judge). Clearly this is sufficient motivation for the plaintiff, who believes they have been harmed in the course of a commercial transaction, to assert an UDTP claim.

North Carolina's UDTP statute requires a plaintiff asserting a claim to prove that (1) the business committed an unfair or deceptive act or practice; (2) that the alleged act was in or affecting commerce; and (3) the alleged act was the proximate cause of the plaintiff's actual injury. Acts that amount to UDTP include but are not limited to: misrepresentation of a condition or product, systematic overcharging, failing in good faith to settle insurance claims, bad faith refusal to honor a warranty, and promissory fraud.

Recently, in the case of *Bumper v. Community Bank of Northern Virginia*, the North Carolina Supreme Court was faced with a deciding whether the plaintiff had asserted a claim based on misrepresentation or a claim based on systematic overcharging. The Court ultimately had to decide whether an action for misrepresentation under Chapter 75 required reliance by borrowers who accused the lender of collecting a fee for a discounted loan without actually charging a discounted interest rate. The Court of Appeals had affirmed the trial court's grant of summary judgment in the plaintiffs' favor stating: "[w]here the undisputed evidence showed that defendant charged plaintiffs a loan discount fee for a loan that did not have a discounted interest rate, summary judgment in favor of the plaintiffs on their Chapter 75 claim was proper." The Court of Appeals interpreted the plaintiffs' claim as one based on systematic overcharging and not one based on misrepresentation.

The Supreme Court, disagreeing with the Court of Appeals interpretation of the plaintiffs' claim, reversed the decision and reiterated that a plaintiff asserting a UDTP claim stemming from an alleged misrepresentation must demonstrate reliance on the misrepresentation. The Court went on to explain that the plaintiffs' reliance must be both "actual reliance" and "reasonable reliance." Actual reliance means that the plaintiff must have affirmatively incorporated the alleged misrepresentation into his or her decision-making process such that if it were not for the misrepresentation, the plaintiff would likely have avoided the injury altogether. The reasonable reliance was defined in the negative: reliance is not reasonable where the plaintiff could have discovered the truth of the matter through reasonable diligence, but failed to investigate. Applying the proper test to the plaintiffs' claim, the Court noted that there were material factual issues on whether the plaintiffs had in fact relied on the discount rate or whether they were just concerned about the total closing costs. This factual question was for a jury to decide; therefore, the case was remanded for trial. The *Bumper* decision will have impact on UDTP claims currently pending in the courts, as well as for claims asserted for years to come.

One way a business can avoid committing an UDTP is by looking at past cases. Below are some illustrative cases:

Boyd v. Drum, 129 N.C. App. 586 (1998) (holding that a breach of contract, even when the breach is intentional, to hold a defendant liable for UDTP).

Tar Heel Indus., Inc. v. E.I. DuPont de Nemours & Co, 91 N.C. app. 51 (1998) (holding that defendant's exercising a termination clause in a contract was not UDTP where the defendant did not inform the plaintiff that it was

looking for a less expensive alternative supplier).

Willen v. Hewson, 174 N.C. App. 714 (2005) (holding that private sale by homeowner of residential property is not within the scope of UDTP).

Rea Constr. Co. v. City of Charlotte, 121 N.C. App.369 (1996) (holding that the State or any agency thereof, including cities, may not be sued for UDTP).

McDonald Bros., Inc. v. Tinder Wholesale, LLC, 395 F. supp. 2d 255 (MDNC 2005) (holding defendant liable for UDTP where plaintiff noticed defects in the lumber products provided by defendant, the defendant initially agreed to cover the damage under the warranty but later gave an estimate for the repairs asserting that the plaintiff had waived any warranties and refused to cover the damage).

Lapierre v. Samco Dev. Corp., 103 N.C. App. 551 (1991) (holding defendant liable for UDTP where deck builder represented he could build a specific sized deck even though he knew it was impossible to build a deck that size).

Dean v. Hill, 171 N.C. App. 479 (2005) (defendant held liable for UDTP where defendant failed to maintain the rental property but still insisted plaintiff pay full rent).

Bhatti v. Buckland, 328 N.C. 240 (1991) (exemption of private sale by homeowner of residential property from UDTP claims did not apply where individual sold two lots for residential construction).

Bottom line, UDTP claims present a complex and challenging body of law dealing with transactions between persons engaged in business, whether with other businesses or the consuming public. Businesses should proceed with candor when making representations to a prospective customer, especially when the prospective customer may be relying upon the representations in deciding whether to engage in the transaction with the business.

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