

# NAVIGATING THE NC UNFAIR AND DECEPTIVE TRADE PRACTICES ACT

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## Overview

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- Three Part Test for UDTPA Claims
- Questions of Law and Fact
- Damages
- Illustrative Cases



## Information on the UDTPA

- North Carolina General Statute § 75-1.1 *et seq.* (enacted June 14, 1969)
- The statute of limitations for any civil action brought under Chapter 75 is four years (§ 75-16.2)
- When an action is continuing in nature, following the first violation, each week the violation continues is a separate offense for the purpose of the statute of limitations (NC Gen. Stat. §75-8).



## Information on the UDTPA

- The Purpose of the Act was “to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business and between persons engaged in business and the consuming public within this State to the end that good faith and fair dealings between buyers and sellers at all level[s] of commerce be had in this State.” *Bhatti v. Buckland*, 328 N.C. 240, 400 S.E.2d 440 (1991).



## Information on the UDTPA

### **NCGS § 75-1.1**

- (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.



## Information on the UDTPA

### **NCGS § 75-1.1**

- (b) For purposes of this section, “commerce” includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.



## Information on the UDTPA

### **NCGS § 75-1.1**

(c) Nothing in this section shall apply to acts done by the publisher, owner, agent, or employee of a newspaper, periodical or radio or television station, or other advertising medium in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement and when the newspaper, periodical or radio or television station, or other advertising medium did not have a direct financial interest in the sale or distribution of the advertised product or service.



## Information on the UDTPA

### **NCGS § 75-1.1**

(d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim.



## Information on the UDTPA

- Plaintiff need not show fraud, bad faith, or intentional misrepresentation. *Melton v. Family First Mortg. Corp.*, 156 N.C. App. 129, 576 S.E.2d 365 (2003).
- Actions for unfair or deceptive trade practices are distinct from actions for breach of contract
  - Mere breach of contract without more is not enough  
*Southeastern Shelter Corp. v. Btu, Inc.*, 154 N.C. App. 321, 572 S.E.2d 200 (2002)
- UDTPA claims can stand alone without any other causes of action.



## Three Part Test for UDTPA Claims

1. Defendant committed an unfair or deceptive act or practice;
2. Defendant's conduct was in or affecting commerce; and
3. Defendant's conduct caused Plaintiff's injury.



## Three Part Test for UDTPA Claims

Unfair or deceptive act or practice:

- A practice is unfair when it offends established public policy or when the act or practice is “immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.”



## Three Part Test for UDTPA Claims

Unfair or deceptive act or practice:

- A party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position.



## Three Part Test for UDTPA Claims

Unfair or deceptive act or practice:

- For an act or practice to be deceptive it must have “the capacity or tendency to deceive” but proof of actual deception is not required.



## Three Part Test for UDTPA Claims

Unfair or deceptive act or practice:

- Deliberate acts of deceit or bad faith do not have to be shown, rather, the claimant must demonstrate that the act or practice possessed the tendency and capacity to mislead or created the likelihood of deception.



## Three Part Test for UDTPA Claims

Unfair or deceptive act or practice:

- It is not required that the claimant actually relies on the deception in order to prevail; actual reliance is not a factor to be considered.



## Three Part Test for UDTPA Claims

Unfair or deceptive act or practice:

- Unfairness is a broader concept than, and includes the concept of, deceptiveness.
- There is no requirement that the act or practice be both unfair and deceptive.



## Three Part Test for UDTPA Claims

Unfair or deceptive act or practice:

- North Carolina courts base their determination on what is unfair and deceptive on the circumstances of each case.



## Three Part Test for UDTPA Claims

Unfair or deceptive act or practice:

- North Carolina courts will look to whether or not the act or practice violates public policy and consider the act's effect on the average consumer.



## Three Part Test for UDTPA Claims

In or affecting commerce:

- A plaintiff can prove that an act was “in or affecting commerce” by demonstrating that the parties were “engaged in an activity involving an exchange of some type in which a participant could be characterized as a seller.”



## Three Part Test for UDTPA Claims

In or affecting commerce:

- The activity need only to “surround or affect a sale,” it does not need to meet a stricter standard of “inducing a sale.”



## Three Part Test for UDTPA Claims

In or affecting commerce:

- The commerce definition “is intended to include all types of business activities,” but “does not apply to all wrongs in a business setting.”



## Three Part Test for UDTPA Claims

In or affecting commerce:

- When determining if the commerce definition is met, the “proper inquiry is not whether a contractual relationship existed between the parties, but rather whether the defendants’ allegedly deceptive acts affected commerce.”



## Three Part Test for UDTPA Claims

Exceptions to in or affecting commerce:

- To establish learned profession exemption from definition of “commerce” a two part test must be satisfied:
  - (1) person or entity performing alleged act must be member of learned profession; and
  - (2) conduct in question must be rendering of professional services.



## Three Part Test for UDTPA Claims

Exceptions to in or affecting commerce :

- The issue of whether accountants in North Carolina are considered members of a learned profession is unanswered.
- In *Jennings v. Lindsey*, the plaintiffs and their accountants embarked upon a joint enterprise which subsequently soured.
- Plaintiffs sued, alleging inter alia that the accountants had committed unfair and deceptive trade practices in violation of the



## Three Part Test for UDTPA Claims

Exceptions to in or affecting commerce :

- The issue of whether or not the accountants were exempt was not addressed.
- The appellate court held only that the claim was improperly dismissed by the trial court since the four year statute of limitations applied to that specific count.
- Perhaps accountants are members of a learned profession, but the joint venture in Jennings exceeded the scope of their professional services.



## Three Part Test for UDTPA Claims

Exceptions to in or affecting commerce :

- Private sale by homeowner of residential property not covered. *Willen v. Hewson*, 622 S.E.2d 187 (N.C. Ct. App. 2005).
- The State or any agency thereof, including cities, may not be sued under UDTPA  
*Rea Constr. Co. v. City of Charlotte*, 121 N.C. App. 369, 465 S.E.2d 342 (1996).



## Three Part Test for UDTPA Claims

Exceptions to in or affecting commerce :

- **Securities transactions are not covered.**  
*Sterner v. Penn*, 159 N.C. App. 626, 583 S.E.2d 670 (2003).
- Employer-employee relationships generally not covered by UDTPA unless conduct involves egregious activities outside the scope of assigned employment duties, and otherwise qualifies as unfair or deceptive practices that were in or affecting commerce.  
*Dalton v. Camp*, 353 N.C. 647, 548 S.E.2d 704 (2001).



## Three Part Test for UDTPA Claims

Exceptions to in or affecting commerce :

- **“Matters of internal corporate management, such as the manner of selection and qualifications for directors, do not affect commerce and therefore do not make out UDTPA claim.”**  
*Wilson v. Blue Ridge Elec. Mbrshp. Corp.*, 157 N.C. App. 355, 578 S.E.2d 692 (2003).



## Three Part Test for UDTPA Claims

### Causation:

- a plaintiff must prove that he has suffered actual injury as a proximate result of the defendant's conduct. *Bob Timberlake Collection, Inc. v. Edwards*, 626 S.E.2d 315 (N.C. Ct. App. 2006)



## Three Part Test for UDTPA Claims

### Causation :

- While reliance on the defendant's unfair or deceptive act is not required to show that the defendant was the proximate cause of the plaintiff's injuries, no NC appellate cases have permitted recovery without reliance.



## Three Part Test for UDTPA Claims

### Causation:

- When a plaintiff's reliance is the causal link between violative conduct and the damages he has occurred, the reliance need not be "reasonable."



## Three Part Test for UDTPA Claims

### Causation:

- An exception to the no reliance requirement is when an unfair or deceptive claim is based upon an alleged misrepresentation by a defendant. The plaintiff must show actual reliance on the alleged misrepresentation in order to establish that the alleged misrepresentation proximately caused plaintiff's injury.



## Questions of Law and Fact

- An action under the UDTPA is a bifurcated process.
- First, a jury determines the facts as to what happened regarding the actions in question.
  - occurrence of alleged conduct
  - damages incurred because of the conduct
  - whether proximate cause exists.



## Questions of Law and Fact

- After the jury decides these facts, a judge applies them under the statute to reach a conclusion of law as to whether or not the defendant engaged in an unfair or deceptive trade practice.



## Damages

- If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for **treble** the amount fixed by the verdict. NCGS § 75-16



## Damages

In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge **may, in his discretion**, allow a reasonable attorney fee to the duly licensed attorney representing the **prevailing party**, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:



## Damages

(1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or

(2) The party instituting the action knew, or should have known, the action was frivolous and malicious. NCGS § 75-16



## Illustrative Cases

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



## Illustrative Cases

- *McLamb v. T.P. Inc.*, 173 N.C. App. 586, 619 S.E.2d 577 (2005).
- Prospective purchasers of homes alleged unfair and deceptive acts against a subdivision's developers relating to the developers returning deposits and not honoring reservations made by the purchasers. However, these acts did not damage the prospective purchasers beyond a mere breach of contract, so the unfair and deceptive trade practice claim failed.



## Illustrative Cases

- *Boyd v. Drum*, 129 N.C. App. 586, 501 S.E.2d 91 (1998).
- Non-payment on the promissory note between Defendant and Plaintiff is not enough to amount to aggravating circumstances. Aggravating circumstances are required in addition to a breach of contract, even when the breach is intentional, to hold someone liable for an unfair or deceptive trade practice. In this case, the non-payment on a contract is a business deal gone sour, and therefore a mere breach of contract rather than an unfair or deceptive act.



## Illustrative Cases

- *Tar Heel Indus., Inc. v. E.I. DuPont de Nemours & Co.*, 91 N.C. App. 51, 370 S.E.2d 449 (1988).
- Defendant properly exercising a contract's termination clause does not constitute an unfair or deceptive trade practice. Plaintiff asserted that Defendant's failure to notify Plaintiff that it was looking for alternatives to the contract was unfair or deceptive. It does not amount to this because there was a termination clause in the contract that did not require Defendant to notify Plaintiff it was looking for alternatives. Rather, Defendant only needed to notify Plaintiff within sixty days if it planned to end the contract, which it did.



## Illustrative Cases

- *Lapierre v. Samco Dev. Corp.*, 103 N.C. App. 551, 406 S.E.2d 646 (1991).
- A deck builder represented that he could build a specific deck for a house in a specific location and with certain dimensions even though the vendor knew it was impossible to build that size deck. Because of this impossibility, the deck the vendor built was of a smaller size than the dimensions represented. The misrepresentations occurred through the vendor's salesmen, sales brochures, and blueprints. The false misrepresentation was sufficient evidence to hold the deck builder liable for an unfair or deceptive trade practice.



## Illustrative Cases

- *Torrance v. AS&L Motors, Ltd.*, 119 N.C. App. 552, 459 S.E.2d 67 (1995).
- A used car salesman told potential buyers a specific car had not been involved in an accident when asked by the buyers, even though the seller knew that statement was false. The buyer then relied on the statement that the car had never been in an accident and purchased the car. Because the car salesman knowingly lied to the buyers about the car's accident history, the act was unfair or deceptive under the statute.



## Illustrative Cases

- *Garlock v. Henson*, 112 N.C. App. 243, 435 S.E.2d 114 (1993).
- In this case the Defendant lied to the Plaintiff about the sale of Plaintiff's bulldozer under Defendant's control multiple times. Additionally, the Defendant forged a bill of sale, and deprived the Plaintiff of the money from the sale of the bulldozer for three years. These facts amount to aggravating circumstances that make a breach of contract an unfair or deceptive trade act. Also, it does not matter that the facts of this case produce both an unfair or deceptive trade act and a breach of contract claim; where the same cause of conduct gives rise to a traditional cause of action and a cause of action for violation of § 75-1.1, the Plaintiff can elect to recover damages under either cause of action, but not both.



## Illustrative Cases

- *Adams v. Aventis, S.A.*, 2003 NCBC 7, 2003 NCBC LEXIS 10 (August 26, 2003)
- Systematic overcharging for product or services resulting in the full amount of the overcharge recovered and trebled).
- *Dean v. Hill*, 171 N.C. App. 479, 615 S.E.2d 699 (2005); *Stolfo v. Kernodle*, 118 N.C. App. 580, 455 S.E.2d 869 (1995).
- Failing to maintain rental property and insisting on full rent resulting in treble damages.



## Illustrative Cases

- *Barbee v. Atl. Marine Sales & Serv.*, 115 N.C. App. 641, 446 S.E.2d 117 (1994).
- When the Plaintiff attempted to have his boat repaired according to his warranty, the Defendant agreed up until it realized that the problem with the boat could not be remedied. Only at this point, and not before, did the Defendant attempt to avoid responsibility for the defective boat by an exception in the warranty. This bad faith refusal to honor a warranty makes the breach of warranty an unfair or deceptive trade act because it amounts to egregious circumstances.



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