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Proposal to Extend the Little FTC Acts to Small Businesses, 96 HARV. L. REV. 1621, 1634 (1983). Thus, the DTPA applies to commercial transactions of businesses of all sizes. *Id.* at 1636. The reasoning behind this policy is that transactions involving wholesalers and retailers have elements of both consumer and business transactions. *Id.* at 1631. For example, small businesses often deal with the same suppliers that serve consumers, and the boundary between consumer goods and business purchases is not always clear. *Id.* Therefore, Texas recognizes that small businesses can be consumers; however, this classification only exists if the business acquires goods or services. *Id.*

The Griffiths did not acquire any goods or services and, therefore, did not fit the classification of "consumer." The appellate court looked to *Pennington* and determined that any misrepresentation by Levi, to be actionable, must pertain to the goods or services that the Griffiths acquired from Levi. In this case, the Griffiths sold their services as retailers to Levi; however, they acquired nothing from Levi. Therefore, the Griffiths did not fall within the scope of protection under the DTPA.

In conclusion, the appellate court affirmed the judgment of the district court in dismissing the complaint and holding that the Griffiths' were not entitled to recovery on any claim.

Alleged "kickbacks" do not violate RICO

by Philip J. Tortorich

Recently, the Northern District of Illinois held that Mercury Finance Co. did not violate the Racketeer Influenced and Corrupt Organizations Act ("RICO") when it bought a finance contract at a lower rate than indicated to the customer. ***Perino v. Mercury Finance Co.*, 912 F. Supp. 313 (N. D. Ill. 1995).**

On May 20, 1993, Joseph Perino ("Perino") purchased a car from Mancari Chrysler Plymouth, Inc. ("Mancari"). Mancari arranged financing for Perino with Mercury Finance Company ("MFC"). Perino was informed that the annual percentage rate ("APR") from MFC was 41.04%. After Perino signed the contract, MFC purchased the contract from Mancari at a lower rate than that quoted to Perino. The two companies split the difference between the two rates; for example, if MFC purchased the contract back ("buy rate") from Mancari for roughly 30%, then MFC and Mancari would split the 10% difference between the APR and the buy rate. Neither MFC nor Mancari disclosed this discounted transaction to Perino. About a year after signing, Perino became disabled and unable to make regular payments on the installment contract. A few months later, MFC repossessed Perino's car even though Perino attempted to make payments through his disability insurance. Consequently, Perino filed a complaint in federal court which alleged that MFC violated RICO and the mail fraud statute along with several other state law claims. MFC moved to dismiss the complaint for failure to state a cause of action.

RICO claim dismissed

The heart of Perino's claim was that MFC adopted a policy of entering into "secret agreements" with Mancari and other dealers in which: (1) MFC purchased retail installment contracts at a rate less than the rate at which the purchaser had originally signed; (2) MFC allowed the dealers to charge their customers more than MFC's interest rates to the dealers; (3) MFC and the dealers would split the difference; and (4) the dealers' customers would not be told that the dealers kept the difference. Perino contended that MFC's "kickback" scheme violated RICO. The court disagreed.

The court held that the defendant's conduct was neither fraudulent nor an illegal "kickback." Perino's allegations focused on the fact that MFC never disclosed the activity to the customer. The court noted that disclosure issues are resolved under the Truth-in-Lending Act ("TILA"), which does not require disclosures of the sort alleged. The TILA only requires that a customer be informed of: (1) the name of the creditor; (2) the amount financed; and (3) the APR. MFC fulfilled all of the required disclosures. Furthermore, the court held that the discounted sale was specifically authorized by, and in compliance with, the TILA.

In reaching its decision, the court discussed *Balentine v. Union Mortgage Co.*, No. 91 C 8213, 1994 WL 34256 (N.D. Ill. 1994). In *Balentine*, the plaintiff brought an action for fraud under the Illinois Consumer Fraud and Deceptive Business Practices Act, alleging that the defendant unlawfully engaged in the purchase of retail installment contracts from a home improvement dealer at 15 - 40 % less than their face value. This discount was not disclosed to the consumer. The court held that the defendant's actions complied with the TILA. According to *Balentine*, this discount was not a finance charge, but rather a "cost of doing business."

Similarly, the discount offered by MFC was a "cost of doing business." Because a "cost of doing business" is not required to be disclosed, MFC did not violate the TILA. Therefore, the court dismissed the plaintiff's complaint for failure to state a claim because MFC's action did not violate the TILA. After the dismissal of the federal cause of action, the court lacked the necessary independent jurisdiction to rule on the state law claims. Therefore, the court dismissed the state law claims as well.

In order to establish a RICO claim, a plaintiff must establish "conduct of an enterprise through a pattern of racketeering activity."

Motion to alter or amend the judgment

After the court granted MFC's motion for summary judgment, Perino filed a motion to alter or amend the decision, dismissing his complaint and requesting leave to file a second amended complaint to demonstrate that MFC's conduct violated Illinois law. Perino argued that the first amended complaint did not adequately convey to the court the fact that Mancari acted as an agent of Perino in obtaining the financing. Perino contended that MFC forced Mancari to breach the duty it owed Perino, because Mancari acted as Perino's agent, thus, constituting commercial bribery. The court stated, however, that even upon a review of the second amended complaint, a cause of action against MFC for violating RICO or the mail fraud statute would not be found because the claim did not fulfill the minimum pleading requirements.

In order to establish a RICO claim, a plaintiff must establish "conduct of an enterprise through a pattern of racketeering activity." "Racketeering activity" requires that at least two predicate acts be committed within a ten year period. While mail fraud is considered a predicate act, Perino made no allegation of any predicate act. Furthermore, mail fraud requires that a plaintiff establish that the defendant (1) participated in a scheme to defraud and (2) mailed or knowingly caused to be mailed a letter or other material for the purpose of executing the scheme. According to the court, Perino failed to meet the requirements of both the RICO and the mail fraud claims because Perino failed to allege any scheme to defraud. Perino's allegations focused on the fact that MFC did not disclose the "kickback" to him. Since MFC did not violate the TILA, this argument could not stand without a scheme to defraud. Thus, Perino could not succeed on either the RICO or the mail fraud cause of action. Further, assuming Perino could establish a cause of action for fraud, the court held that the charge of commercial bribery would not constitute racketeering activity. In Illinois, commercial bribery carries a maximum fine of $5,000. In order to constitute racketeering activity, the state offense must be punishable by imprisonment for more than one year. However, commercial bribery is not punishable by more than one year imprisonment. Thus, the court concluded that a RICO violation was not triggered. In light of these reasons, the court denied Perino's motion to alter or amend the judgment.