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Salesman's Deceptive Statements Constitute an Unfair Trade Practice

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supply companies. The Authority alleged violations of the CFA and sought costs for the replacement or repair of defective roofing materials.

The trial court reasoned that if the legislature had intended to include organizations in the CFA's definition of "person," then it would have specifically listed organizations, such as the Authority, in the statute. Since the CFA listed neither "organization" nor the Authority in its definition of "person," the trial court dismissed the Authority's claims. The Authority appealed.

Expansive statutory language and remedial purpose reveal legislature's intention

On appeal, the Authority argued that the CFA's language demonstrates the legislature's intention that the term "person" should be liberally construed. In addition, the Authority asserted that controlling law dictates an expansive reading of the CFA. The appellate court began its analysis by examining the language of 56:8-1(d), which states:

The term "person" as used in this act shall include any natural person or his legal representative, partnership, corporation, company, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestuis que trustent thereof

Applying principles of statutory construction, the court observed that "includes" is generally a term of expansion rather than limitation. Thus, the court noted that "includes" suggests other items may be includable even though they are not delineated.

In addition, the court commented that the Authority shares characteristics with entities, such as corporations, that are specifically listed in the CFA's definition of "person." For example, the court explained that the Authority can make and execute contracts, borrow money, and acquire real or personal property, much as a "corporation," "company," "business entity," or "association" does.

Furthermore, the court examined the objective of the CFA, which is "to discourage unlawful sales and advertising practices designed to induce consumers to purchase merchandise." Emphasizing the CFA's goal of consumer protection, the court again turned to statutory interpretation. The court recognized that "consumer" is typically defined as "one who uses (economic) goods, and so diminishes or destroys their utilities." Applying this definition, the court found that the Authority is undoubtedly a consumer, since it purchases goods with public funds to benefit certain segments of the populace. The court also concluded that the CFA, as remedial legislation, requires an expansive construction in favor of consumer protection. Accordingly, the court held that the term "person," as defined by the CFA, includes a public authority acting as a consumer; therefore, a public authority may prosecute a consumer fraud claim.

Salesman's deceptive statements constitute an unfair trade practice

by Dana Shannon

In *Torrance v. AS & L Motors, Ltd.*, 459 S.E.2d 67 (N.C. Ct. App. 1995), the North Carolina Court of Appeals held that an automobile salesman's deceptive comments concerning the condition

of a used car constituted an unfair trade practice. In addition, the court determined that the parol evidence rule did not bar evidence of the salesman's misleading statements, which occurred prior to the

plaintiff's execution of an "as is-no warranty" agreement. Although the court affirmed the trial court by allowing the salesman's statements as evidence and by finding an unfair trade practice, the court reversed an

award of attorneys' fees to the plaintiff.

Buyer expressly agrees to purchase without warranty after salesman claims vehicle never "wrecked"

In June 1992, Antoinette Torrance ("Torrance") purchased a 1989 BMW automobile from AS & L Motors ("AS & L") for \$13,181. As part of the purchase agreement, Torrance signed a statement acknowledging that the vehicle came without a warranty, in "as is" condition. The agreement included a provision that "[t]he dealer assumes no responsibility for any repairs regardless of any oral statements about the vehicle." Nonetheless, before executing the agreement, Torrance asked AS & L's sales manager whether the car had ever been in an accident. According to Torrance, the sales manager indicated that the car had never been "wrecked" and that it was in "good condition."

Three weeks later, Torrance detected red paint on the car's windshield. Thereafter, she consulted an auto body repairman who discovered considerable damage on the vehicle's right side. The estimated cost of repair was \$2,500. Upon returning to AS & L and demanding a refund or replacement, Torrance met resistance. She then sued, alleging that AS & L engaged in fraudulent misrepresentation and

unfair and deceptive trade practices in violation of Chapter 75 of the North Carolina General Statutes ("Statute").

After a bench trial, the court found that the salesman's comments constituted an unfair and deceptive trade practice under the Statute. Although the court determined that AS & L did not commit fraud, it concluded that the statements were material to the parties' transaction and that they misled the buyer into purchasing the car. The trial court awarded Torrance \$2,500 in damages, which, pursuant to the statute, it trebled to \$7,500. In addition, the court awarded Torrance \$4,750 in attorneys' fees. AS & L appealed.

Actual proof of deception is not required

On appeal, AS & L first asserted that the trial court erred in admitting parol evidence of the salesman's statements made prior to Torrance's signing of the "as is" agreement. The court stated that the parol evidence rule bars statements offered to "vary, add to, or contradict" a written contract's terms. However, the trial court admitted the salesman's statements to prove an unfair or deceptive trade practice, not to contradict the contractual terms. Therefore, the court of appeals concluded that the parol evidence rule does not preclude admission of such statements,

thereby affirming the trial court's determination of this issue.

Next, AS & L argued that the trial court erred in holding that the salesman's statements constituted an unfair and deceptive practice. In its analysis, the court followed *Marshall v. Miller*, 276 S.E.2d 397 (N.C. 1981), where the court stated that "a practice is deceptive if it has the capacity or tendency to deceive; proof of actual deception is not required" under the statute. Thus, the court stated that a prevailing plaintiff need only show that the defendant's statements had a "capacity or tendency to deceive" and that the plaintiff suffered harm as a proximate result of those statements. The court noted that competent evidence supported the trial court's findings that the statements were material and did mislead the plaintiff. Accordingly, the court affirmed, holding that the salesman's misleading statements constituted an unfair trade practice.

Finally, AS & L argued that the trial court erroneously awarded attorneys' fees to Torrance. The court stated that a trial court may award attorneys' fees under the statute if: 1) the plaintiff prevails; 2) the defendant willfully participated in a deceptive practice or act; and 3) the defendant unjustifiably refused to fully resolve the issue. Since the trial court failed to make these requisite findings, the court reversed and remanded on the issue of attorneys' fees.