

2011

# Martinez v. Best Buy Co., Inc. : Brief of Appellant

Utah Court of Appeals

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Gregory J. Sanders; Patrick C. Burt; Kipp and Christensen PC.

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IN THE UTAH COURT OF APPEALS

<b>Hugo Martinez and Claudia Martinez,</b>  <b>Plaintiffs/Appellants,</b>  <b>vs.</b>  <b>Best Buy Co., Inc.</b>  <b>Defendant/Appellee.</b>	<b>APPELLANTS' OPENING BRIEF</b>          Case No. 20110182-CA
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FILED  
UTAH APPELLATE COURTS

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**vs.**

**Best Buy Co., Inc.**

**Defendant/Appellee.**

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## **Parties to This Appeal**

Plaintiffs/ Appellants

Hugo Martinez  
Claudia Martinez

Defendant/ Appellee

Best Buy Co., Inc.

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2. It was deceptive for Best Buy to fail to provide the Spanish translation of the application, but to get the Martinezes to sign Exhibit 1 which contained a certification that they had been provided with a Spanish translation.
3. It was deceptive for Best Buy to fail to disclose that one of the signature lines was a request to be enrolled in the Account Shield program.
4. It was deceptive for Best Buy to get the Martinezes to sign up for the Account Shield product without disclosing how much it would cost.
5. It was deceptive for Best Buy to get Mrs. Martinez to sign the Account Shield enrollment line without making any meaningful disclosure as to what benefit Mrs. Martinez would obtain from said enrollment.
6. It was deceptive for Best Buy to get Mrs. Martinez to sign the Account Shield enrollment line which contained the false certification that she had read and understood the program summary when Best Buy knew that she had not - because they did nothing to explain it to her.
7. It was deceptive for Best Buy to electronically tell HSBC that Hugo Martinez had agreed to the Account Shield product.

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## TREATISES

National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (7<sup>th</sup> ed. 2008), Section 4.2.3.1, p 190 17, 20, 22, 23

National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (7<sup>th</sup> ed. 2008), Section 2.3.3.5.1, p. 100 25



## **STATEMENT SHOWING JURISDICTION**

Pursuant to Utah Code 78-2-2(3)(a) this civil appeal is within the jurisdiction of the Utah Supreme Court and was transferred to the Utah Court of Appeals pursuant to Utah Code 78-2-2(4).

## **STATEMENT OF ISSUES ON APPEAL**

1. Did the Court improperly apply or construe the Utah Consumer Sales Practices Act's prohibition against "deceptive" acts or practices in her rulings?

Standard of Review: This is an issue of law, and is reviewed for correctness.

*McKay v. Hardy*, 973 P.2d 941 (Utah 1998)

Preserved for Appeal in Plaintiffs' closing argument at the trial, Trial Transcript at R. 283, at pp. 94-100.

2. In a related vein, was it error for the Court to apply contract formation principles rather than the FCC developed definition of "deceptive" when determining whether or not acts committed by Best Buy were "deceptive?"

Standard of Review: This is an issue of law, and is reviewed for correctness.

*McKay v. Hardy*, 973 P.2d 941 (Utah 1998)

Preserved for Appeal in Plaintiffs' closing argument at the trial, Trial Transcript at R. 283, at pp. 94-100.

3. Was it error for the Court to conclude that it was not “deceptive” for Best Buy’s employee to represent to the Martinezes that “in order to get the credit card, you need to sign here and here,” when that was not true because the Martinezes did not in fact need to sign in both of those places on the application in order to get the Best Buy credit card?

Standard of Review: This is an issue of law, and is reviewed for correctness.

*McKay v. Hardy*, 973 P.2d 941 (Utah 1998)

Preserved for Appeal in Plaintiffs’ closing argument at the trial, Trial Transcript at R. 283, at pp. 95-96.

4. Was it error for the Court to conclude that it was not “deceptive” for Best Buy’s employee to fail to explain to the Martinezes the “account shield” product, its cost and/or that by signing in one of the two places on the credit card application, the Martinezes would be purchasing that “account shield” product in addition to obtaining the credit card?

Standard of Review: This is an issue of law, and is reviewed for correctness.

*McKay v. Hardy*, 973 P.2d 941 (Utah 1998)

Preserved for Appeal in Plaintiffs’ closing argument at the trial, Trial Transcript at R. 283, at pp. 96.

5. Was it error for the Court to find that the credit card application disclosed to

the Martinezes that the charge for the “account shield” product was “a portion of the balance based upon the balance of the account” when the document could not be read to verify that is what it said?

Standard of Review: This is an issue of fact. A finding of fact will be adjudged clearly erroneous if it violates the standards set by the appellate court; is against the clear weight of the evidence; or the reviewing court is left with a definite and firm conviction that a mistake has been made, although there is evidence to support the finding. See *Kimball v. Kimball*, 2009 UT App 233, ~ 14; *Shinkoskey v. Shinkoskey*, 2001 UT App 44, ~ 10 n.5, 19 P3d 1005; *Kelley v. Kelley*, 2000 UT App 236, ~ 18.

Preserved for Appeal in Plaintiffs’ closing argument at the trial, Trial Transcript at R. 283, at pp. 99.

6. Was it error for the Court to conclude that it was not deceptive for Best Buy to get the Martinezes to sign up for the “account shield” product without ever telling them what the cost of that product was? Is the credit card application itself deceptive by failing to effectively and clearly disclose the cost of the “account shield” product?

Standard of Review: This is an issue of law, and is reviewed for correctness.

*McKay v. Hardy*, 973 P.2d 941 (Utah 1998)

Preserved for Appeal in Plaintiffs' closing argument at the trial, Trial Transcript at R. 283, at pp. 96, 99.

7. Was it error for the Court to conclude that it was not deceptive for Best Buy to have the Martinezes sign the application containing language that says that by signing it they acknowledge that they were given and/or offered a spanish translation of the agreement, when that was not true? When the evidence was that Best Buy never gave or offered the Martinezes a Spanish translation of the agreement?

Standard of Review: This is an issue of law, and is reviewed for correctness.

*McKay v. Hardy*, 973 P.2d 941 (Utah 1998)

Preserved for Appeal in Plaintiffs' closing argument at the trial, Trial Transcript at R. 283, at pp. 96-97.

8. Was it error for the Court to conclude that Best Buy did not commit a deceptive act by sending an electronic communication to HSBC which represented that both Claudia AND HUGO had purchased the "account shield" product when Hugo's signature was not on that part of the credit card application?

Standard of Review: This is an issue of law, and is reviewed for correctness.

*McKay v. Hardy*, 973 P.2d 941 (Utah 1998)

Preserved for Appeal in Plaintiffs' closing argument at the trial, Trial Transcript at R. 283, at pp. 97.

9. Was it error for the Court to rule that the Martinezes' damages were not the result of Best Buy's deceptive conduct?

Standard of Review: This is an issue of law, and is reviewed for correctness.

*McKay v. Hardy*, 973 P.2d 941 (Utah 1998)

Preserved for Appeal in Plaintiffs' closing argument at the trial, Trial Transcript at R. 283, at pp. 100-01.

### **DETERMINATIVE STATUTES AND RULES**

**Determinative Statutes.** The following Statute is determinative, a copy of which is attached in the Addendum.

Utah Consumer Sales Practices Act – UCA 13-11-1 et seq.

**Determinative Rules.** Appellants do not believe that there are any rules which are determinative.

**Determinative Cases.** *Federal Trade Comm'n v. Algoma Lumber Co.*, 291 U.S. 67 (1934)(The FTC definition of deception does not require intent; a practice can be deceptive even if there is no intent to deceive); *Federal Trade Comm'n v. Freecomm Communications, Inc.*, 401 F. Ed 1192, 1203 (10th Cir. 2005)(key question is not intent to deceive, but 'the likely effect of the [representation] on the

mind of the ordinary consumer')

### **STATEMENT OF CASE**

On March 6, 2008, Claudia and Hugo Martinez – the Appellants – went to a Best Buy store in Riverdale Utah to look at washers and dryers.

While at the Best Buy store looking at the washers and dryers, a sales person told them that the price for the pair that the Martinezes liked was \$1600. The Martinezes asked about payment options. The sales person told them they could apply for a Best Buy credit card.

The sales person took them to the front of the store and introduced the Martinezes to another Best Buy employee. This employee gave the Martinezes a credit card application and told them to fill out the top part of the application which had identifying information about “1. Applicant” and “2. Joint Applicant.”

Claudia Martinez filled out this top part, entering the information for both herself and Hugo Martinez (name, address, telephone number, social security number, birth date and annual income).

The Best Buy employee took the partially filled out application and came back some time later. He told the Martinezes that they were only approved for a credit limit of \$750 – which would not be enough to purchase the washer and dryer. He asked them if they still wanted to apply for the card. They said that they

did.

The Best Buy employee then said that in order to get the card they need to sign the application in two places ... “here” and “here.”

The Martinezes did not read the application, but merely did as the Best Buy employee instructed them.

Claudia signed in both places.

Hugo signed in only one place.

The Best Buy employee did not give the Martinezes a Spanish translation of the application, nor offer them one. The language of the application had the Martinezes certify unknowingly and falsely that they had been provided or offered a Spanish translation of the application.

The Best Buy employee did not say anything to the Martinezes about the “account shield” portion of the application – much less explain it to them and disclose its cost.

The language of the application does not disclose the cost of the “account shield” product.

The language of the application had Claudia Martinez unknowingly and falsely certify that she had received and read the “account shield” summary.

The Martinezes did not realize or understand that via Claudia’s signature on

the right side of the application, she had agreed to purchase and pay for the “account shield” product.

After the Martinezes had signed the application they left it with the Best Buy employee. Best Buy then sent electronic information to HSBC that the Martinezes had signed up for the credit card and had agreed to purchase the “account shield” product.

This was untrue with respect to Hugo Martinez because (a) he did not sign for the “account shield” product and (b) the language of the application says that only Claudia Martinez agreed to the charge.

The Martinezes purchased an Ipod with the credit card, and then paid it off.

The Martinezes were surprised to receive a statement from HSBC saying that they still owed \$52 on the account even though they had just paid \$30 on a \$50 previous balance.

After contacting HSBC, the Martinezes discovered that they had been charged for the “account shield” product, had not paid for it, and then incurred a late payment fee.

Claudia Martinez contacted HSBC and cancelled the “account keeper” service.

Hugo Martinez’ credit, however, was damaged by HSBC reporting that he



owed and had not paid for the “account shield” product.

Hugo Martinez sued Best Buy herein for among other things violating the Utah Consumer Sales Practices Act by committing various “deceptive acts” in connection with the Best Buy credit card application process.

Approximately two weeks before trial – at a hearing on the parties’ cross motions for summary judgment – the trial court ordered that Claudia Martinez be joined as a co-plaintiff herein.

At the trial, both Claudia and Hugo Martinez’ claims for UCSPA violations were tried.

The Appellants each testified as to what happened at the Best Buy store.

Best Buy brought the manager of a Best Buy store in Salt Lake County as its representative/ witness. Mr. Winther had no knowledge of the events that occurred on March 6, 2008.

Mr. Winther testified that it was Best Buy’s policy to explain the terms of the Credit Card application to applicants and to provide them with Spanish translations or offer them to the applicants.

Mr. Winther testified that he could not read the Martinez’ credit card application fine print, but that he thought that the application disclosed that the charge for the “account shield” product would be a portion of the customer’s

outstanding balance.

After closing arguments, Judge Peuler took a fifteen minute recess and then returned to announce her ruling that Best Buy had not committed any deceptive acts in violation of the UCSPA.

The Martinezes appealed her ruling.

### **STATEMENT OF FACTS**

1. The Appellants, Claudia and Hugo Martinez, are husband and wife. R. 243 at 16
2. On March 6, 2008, the Appellants went to a Best Buy store in Riverdale Utah to look at washers and dryers. R. 243 at 16 - 17.
3. After the Martinezes found a washer and dryer that they liked, they asked a sales person the price. R. 243 at 17
4. The sales person told them that the price for the pair that the Martinezes liked was \$1600. R. 243 at 17
5. The Martinezes asked the sales person "how we can pay that?" R. 243 at 17
6. The sales person told them they could apply for a Best Buy credit card. R. 243 at 17
7. Best Buy benefits two ways from getting customers to apply for and obtain a "Best Buy" credit card: (a) the customers use them to buy products at Best

Buy, and (b) Best Buy does not have to pay HSBC any discount fees on the usage of the card at Best Buy. R. 243 at 57-59

8. The sales person took them to the front of the store and introduced the Martinezes to another Best Buy employee. R. 243 at 17-18
9. This employee gave the Martinezes a credit card application and told them to fill out the top part of the application which had identifying information about "1. Applicant" and "2. Joint Applicant." R. 243 at 18 and Plaintiff's Exhibit 1
10. Claudia Martinez filled out this top part, entering the information for both herself and Hugo Martinez (name, address, telephone number, social security number, birth date and annual income). Ibid.
11. The Best Buy employee took the partially filled out application and went "to the back to check the credit." R. 243 at 19
12. The Best Buy employee came back an hour later and told the Martinezes that they were only approved for a credit limit of \$750. R. 243 at 19
13. He asked them if they still wanted to apply for the card. They said that they did. R. 243 at 19
14. The Best Buy employee then said that in order to get the card they needed to sign the application in two places ... "here" and "here." R. 243 at 19, 78

15. The Martinezes did not read the application, but merely did as the Best Buy employee instructed them. R 243 at. 41, 85
16. Claudia signed in both places. R. 243 at 78, Plaintiff's Exhibit 1
17. Hugo signed in only one place. R 243 at 20, Plaintiff's Exhibit 1
18. The Best Buy employee did not give the Martinezes a Spanish translation of the application, nor offer them one. R. 243 at 20, 42
19. The language just above the applicants' signature line states in part:  
"The Spanish translation has been provided to you for your convenience. ... You acknowledge receipt of the English/ Spanish application and important terms." Plaintiffs' Exhibit 1
20. Best Buy's witnesses, Mr. Winther, testified that Best Buy employees are "trained or expected to explain all aspects of the agreement." R. 243 at 60
21. Mr. Winther admitted given Hugo Martinez' testimony, Best Buy induced the Martinezes to sign Plaintiffs' Exhibit 1 containing the false statement that the Martinezes had been given a Spanish translation. R. 243 at 60
22. Mr. Winther testified that Best Buy employees are trained to ask the customer if they have any questions about the credit card application and then they are to "offer the account shield." R. 243 at 60-61
23. Mr. Winther testified that Best Buy trains "[its] people to explain what [the account shield product] is." R. 243 at 61

24. Mr. Winther testified that Best Buy expects its employees to explain the account shield product to its customers. R. 243 at 61
25. The Best Buy employee did not explain anything about the account shield product during his interaction with the Martinezes before he had them sign “here” and “here” in order to obtain the credit card. R. 243 at 19, 20, 78
26. The language on the credit card application relating to the Account Shield product which Claudia Martinez signed says the following:

**“Account Shield**

**PROTECT YOUR ACCOUNT WITH ACCOUNT SHIELD, AN  
OPTIONAL MONTHLY DEBT CANCELLATION PROGRAM**

If you enroll in our optional Account Shield program, your monthly credit balance or a portion of your balance may be cancelled in the case of a qualifying Total Disability, Involuntary Unemployment, Property Damage or Loss, or Loss of Life event. For Total Disability, the maximum balance that may be cancelled is \$1,000 per month, up to \$10,000, and or Involuntary Unemployment, up to \$1,000 per month for six months. For Loss of Life or Property Damage or Loss, the maximum balance that may be cancelled is \$10,000. To receive a cancellation benefit (for other than Loss of Life or Property Damage or Loss) on your account, you must be employed full-time (but not self-employed, working for a spouse or any other individual living with you on whom you are financially dependent for support and maintenance, or employed on a part-time basis) and working 30 hours or more per week at a single job on the date the event occurs. Account Shield is not insurance and is unavailable in Mississippi, Guam, the Virgin Islands, and Canada.

YES, please enroll me, the primary cardholder, in the optional Account Shield monthly debt cancellation program. I authorize the monthly charge on my account when I have a balance. I have received and read the Account Shield Summary. I understand that your evaluation of my credit card application will not be influenced by whether I choose to enroll, and I am free to cancel at any time.

YES, PLEASE ENROLL ME AT THIS TIME

/s/ Claudia Martinez” Plaintiff’s Exhibit 1

27. Nowhere in this language is there any disclosure as to what the Martinezes would have to pay for this supposed “product.” Ibid.
28. This language is also stunningly vague as to what exactly the Martinezes would receive if they purchased it. Ibid.
29. Best Buy again induced Claudia Martinez to sign a certification which was untrue – like the false certification that the Martinezes had been provided with a Spanish translation. Ibid.
30. The language of the application had Claudia Martinez unknowingly and falsely certify that she had received and read the “account shield” summary. Ibid.
31. The Martinezes did not realize or understand that via Claudia’s signature on the right side of the application, she had agreed to purchase and pay for the “account shield” product. R. 243 at 80, 81, 83
32. After the Martinezes had signed the application they left it with the Best Buy employee. R. 243 at 79
33. Best Buy then sent electronic information to HSBC that the Martinezes had signed up for the credit card and had agreed to purchase the “account shield” product. R. 243 at 71-72
34. This was untrue with respect to Hugo Martinez because (a) he did not sign for the

- “account shield” product and (b) the language of the application says that only Claudia Martinez agreed to the charge. Plaintiffs’ Exhibit 1, see No. 26
35. The Martinezes purchased an Ipod with the credit card, and then paid it off. R. 243 at 79-80
36. The Martinezes were surprised to receive a statement from HSBC saying that after they had made a \$20 payment on a \$50 balance, they still owed \$52 on the account. R. 243 at 21
37. After contacting HSBC, the Martinezes discovered that they had been charged for the “account shield” product, had not paid for it, and then incurred a late payment fee. Ibid.
38. Claudia Martinez contacted HSBC and cancelled the “account keeper” service. R. 243 at 22
39. Hugo Martinez’ credit, however, was damaged by HSBC reporting that he owed and had not paid for the “account shield” product. R. 243 at 27
40. The Martinezes paid unforeseen late fees, experienced credit damage and emotional and family stress as a result of Best Buy deceiving them into signing the line for the Account Shield product. R. 243 at 81-83
41. Hugo Martinez sued Best Buy herein for among other things violating the Utah Consumer Sales Practices Act by committing various “deceptive acts” in connection with the Best Buy credit card application process. R. 1

42. Approximately one week before trial – at a hearing on the parties’ cross motions for summary judgment – the trial court ordered that Claudia Martinez be joined as a co-plaintiff herein. Docket, R. 242
43. At the trial, both Claudia and Hugo Martinez’ claims for UCSPA violations were tried. R. 243
44. The Appellants each testified as to what happened at the Best Buy store as set forth above.
45. Best Buy brought the manager of a Best Buy store in Salt Lake County as its representative/ witness. Mr. Winther had no knowledge of the events that occurred on March 6, 2008. R. 243 at 56
46. Mr. Winther testified that he could not read the Martinez’ credit card application fine print, but that he thought that the application disclosed that the charge for the “account shield” product would be a portion of the customer’s outstanding balance. R. 243 at 66
47. This testimony by Mr. Winther is contradicted by the clear language of Plaintiffs’ Exhibit 1, quoted in No. 26 above.
48. After closing arguments, Judge Peuler took a fifteen minute recess and then returned to announce her ruling that Best Buy had not committed any deceptive acts in violation of the UCSPA. R. 243 at 118-123
49. The court then executed an Order Dismissing Plaintiffs’ Claims with Prejudice. R.



50. This Order contains purported “findings of fact” Nos. 1-4, but those are not really findings of fact, but rather conclusions of law. See R. 244
51. The Appellants filed their amended notice of appeal on 4/20/11. R. 280

### SUMMARY OF ARGUMENTS

- A. Best Buy is a “supplier” under the Utah Consumer Sales Practice Act (“UCSPA”) and governed by its provisions
- B. The UCSPA prohibits any “deceptive act or practice” in connection with a consumer transaction.
- C. The common definition of “deceptive” is:  
“tending or having power to deceive : misleading” – Merriam -Webster
- D. The Federal Trade Commission has developed case law on the definition of  
“deceptive” in connection with statutes which prohibit deceptive acts or practices:

“The modern concept of deception, as shaped by federal court interpretations of the Federal Trade Commission Act, substantially eliminates [the common law fraud] proof requirements. To show deception under the FTC Act, intent, scienter, actual reliance or damage, and even actual deception are unnecessary. All that is required is proof that a practice has a tendency or capacity (or, under the FTC’s latest formulation, is likely to deceive .... “

National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (7<sup>th</sup> ed. 2008), Section 4.2.3.1, p 190

- E. Judge Peuler incorrectly followed the law of contract formation and enforcement rather than the consumer law relating to deceptive acts or practices in making her

decision that Best Buy did not commit any deceptive acts.

F. Applying the correct CONSUMER LAW principles applicable to DECEPTIVE ACTS OR PRACTICES, Best Buy committed the following deceptive acts:

1. It was deceptive for Best Buy to tell the Martinezes that they needed to sign “here” and “here” – one being the request for Account Shield – in order to apply for the credit card.
2. It was deceptive for Best Buy to fail to provide the Spanish translation of the application, but to get the Martinezes to sign Exhibit 1 which contained a certification that they had been provided with a Spanish translation.
3. It was deceptive for Best Buy to fail to disclose that one of the signature lines was a request to be enrolled in the Account Shield program.
4. It was deceptive for Best Buy to get the Martinezes to sign up for the Account Shield product without disclosing how much it would cost.
5. It was deceptive for Best Buy to get Mrs. Martinez to sign the Account Shield enrollment line without making any meaningful disclosure as to what benefit Mrs. Martinez would obtain from said enrollment.
6. It was deceptive for Best Buy to get Mrs. Martinez to sign the Account Shield enrollment line which contained the false certification that she had read and understood the program summary when Best Buy knew that she had not - because they did nothing to explain it to her.

7. It was deceptive for Best Buy to electronically tell HSBC that Hugo Martinez had agreed to the Account Shield product.
- G. There was insufficient or ineffective evidence to support a factual finding that Best Buy's application disclosed the cost of the Account Shield program.
- H. The deception committed by Best Buy against the Martinezes caused them damage. Judge Peuler's ruling that there damages arose solely from conduct of HSBC was erroneous.
- I. The Martinezes proved that they were damaged by Best Buy's deception and should have been awarded the statutory minimum of \$2,000 each against Best Buy, plus their costs and attorneys fees.

## ARGUMENT

### **A. The UCSPA Applies to Best Buy and Signing Up Customers for Its Credit Card**

UCA Section 13-11-3 has the following critical definitions:

“(6) **"Supplier"** means a seller, lessor, assignor, offeror, broker, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer.

(2) (a) **"Consumer transaction"** means a sale, lease, assignment, award by chance, or other written or oral transfer or disposition of goods, services, or other property, both tangible and intangible (except securities and insurance) to, or apparently to, a person for:

(i) primarily personal, family, or household purposes;”

Best Buy is a “supplier” under the Utah Consumer Sales Practice Act (“UCSPA”) because it “offer[ed]” and/or “solicit[ed ... a] consumer transaction” to and/or with the

Martinezes.

The purchase of consumer goods from Best Buy financed by a Best Buy credit card was clearly a "consumer transaction."

A loan for consumer purchases is a "service" covered by the UCSPA. The lending of money to a consumer for consumer purposes is the "sale ... or disposition of goods, services, or other property" – the money given to the consumer in exchange for a note. Numerous cases in other jurisdictions have so held. See *Lavinia v. Hoard Bank*, Clearinghouse No. 26,015 (Vt. Super. Ct. 1976)("Service means to furnish and supply something needed or desired .... Thus anyone supplying money, a need, would be one who serves"); *Stafford v. Cross Country Bank*, 262 F. Supp. 2d 776 (W.D. Ky. 2003)(Credit is a Service); *Flores v. Shapiro & Kreisman*, 246 F. Supp. 2d 427 (E.D. Pa. 2002)(UDAP covers loans that finance goods or services for personal use)

As a result, Best Buy's actions on March 6, 2008 in connection with soliciting and/or offering the Best Buy credit card to the Martinezes were subject to and governed by the UCSPA.

**B. Best Buy Violated the UCSPA if it Committed a "Deceptive Act or Practice" In Connection With the Martinezes' Application for a Best Buy Credit Card**

The UCSPA states the following:

"13-11-4. Deceptive act or practice by supplier. (1) A deceptive act or practice by a supplier in connection with a consumer transaction violates this chapter whether it occurs before, during, or after the transaction."

Judge Peuler got around applying this provision to Best Buy's actions on March 6, 2008 by borrowing contract formation principles and applying them to this situation. As argued below, this was error.

Any "deceptive act or practice by a supplier" violates the statute.

**C. It is Important Not to Read Into the Term "Deceptive" More Than Is There – or to Impose a Higher Standard Than is Meant by Its Common Definition**

As soon as a consumer lawyer sues a supplier for violating the UCSPA's prohibition against committing "deceptive" acts or engaging in "deceptive" practices, the immediate question is – What does the term "deceptive" mean?

The answer to this question is not really that difficult to determine.

**The common definition of "deceptive" is:**

**"tending or having power to deceive : misleading" – Merriam -Webster**

Does "deceptive" mean "fraud?" No, of course not. Deception is a lesser concept.

It is something which "tends" to deceive.

Is there a scienter requirement? Do you have to prove an intent to deceive? Again

– no. Deception is a much less stringent concept to prove:

"The modern concept of deception, as shaped by federal court interpretations of the Federal Trade Commission Act, substantially eliminates [the common law fraud] proof requirements. To show deception under the FTC Act, intent, scienter, actual reliance or damage, and even actual deception are unnecessary. All that is required is proof that a practice has a tendency or capacity (or, under the FTC's latest formulation, is likely to deceive ...."

National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (7<sup>th</sup> ed. 2008), Section 4.2.3.1, p 190

The FTC definition of deception does not require intent; a practice is deceptive even if there is no intent to deceive. Ibid., p. 193 Citing *Federal Trade Comm'n v. Algoma Lumber Co.*, 291 U.S. 67 (1934); *Federal Trade Comm'n v. Freecomm Communications, Inc.*, 401 F. Ed 1192, 1203 (10<sup>th</sup> Cir. 2005)(key question is not intent to deceive, but 'the likely effect of the claim on the mind of the ordinary consumer')

This means that the Martinezes did not have to show that the Best Buy employee had an intention to deceive them. All they had to show is that his actions did in fact "tend to deceive," or "tend to mislead" them.

**D. The UCSPA Specifically Instructs Courts to Follow the Federal Trade Commission's Rulings in Construing and Applying the Provisions of the UCSPA**

This Court might wonder why the Martinezes cite to rulings and precedence developed by the FTC – such as the cases quoted in the immediately preceding section.

In the purposes section of the UCSPA, it states as follows:

13-11-2. Construction and purposes of act. This act shall be construed liberally to promote the following policies:

- (1) to simplify, clarify, and modernize the law governing consumer sales practices;
- (2) to protect consumers from suppliers who commit deceptive and unconscionable sales practices;
- (3) to encourage the development of fair consumer sales practices;

- (4) to make state regulation of consumer sales practices not inconsistent with the policies of the Federal Trade Commission Act relating to consumer protection;
- (5) to make uniform the law, including the administrative rules, with respect to the subject of this act among those states which enact similar laws”

The legislature has specifically stated that in determining what would be “deceptive” under the UCSPA, the Courts here in Utah are to look for guidance to the FTC.

It is highly relevant, therefore, that the FTC has developed case law on the definition of “deceptive” which provides – as quoted above – that:

“The modern concept of deception, as shaped by federal court interpretations of the Federal Trade Commission Act, substantially eliminates [the common law fraud] proof requirements. To show deception under the FTC Act, intent, scienter, actual reliance or damage, and even actual deception are unnecessary. All that is required is proof that a practice has a tendency or capacity (or, under the FTC’s latest formulation, is likely to deceive .... “

National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (7<sup>th</sup> ed. 2008), Section 4.2.3.1, p 190

This means that the Martinezes did not have to show that the Best Buy employee had an intention to deceive them. All they had to show is that his actions did in fact “tend to deceive,” or “tend to mislead” them.

#### **E. The Principles of Contract Formation Do Not Trump or Eliminate the Straight Forward Application of the UCSPA to Best Buy’s Conduct**

Plaintiffs made it clear that it was not pursuing a breach of contract claim against Best Buy. Rather, Plaintiffs limited the trial to their claim that Best Buy’s actions violated the UCSPA’s prohibition against committing deceptive acts or practices.

Unfortunately, Judge Peuler was not able to disentangle herself and her analysis from contract formation law.

17 ... This was set for  
18 trial on two causes of action, breach of contract and a  
19 statutory cause of action on deceptive practices. There was  
20 a contract between plaintiffs and Best Buy which resulted in  
21 the plaintiffs having and using a credit card to make  
22 purchases that they obtained. Plaintiff has abandoned it's  
23 breach of contract claim, so I'm not going to address that  
24 any further. **However, whether there was or not a deception,**  
25 **I think, arises out of that contract. And so, it's**  
119

**1 important to talk about contract in that context.**  
2 The deceptive acts that were alleged by the  
3 plaintiff were as follows: And I will just read them as I  
4 wrote them down. Number one. When they filled out the  
5 application they, meaning Best Buy, said you need to sign  
6 here and here. In essence, in order to get the credit card,  
7 you need to sign here and here. That's not true. They did  
8 not need to sign in both places. **It seems to me in looking**  
9 **at that particular statement, or that allegation, a party to**  
10 **a written contract can not rely on a misrepresentation if**  
11 **the misrepresentation is contrary to the clear terms of the**  
12 **document that they are asked to sign.**

R. 243 at pp. 119-20

The bolded portion of this excerpt from Judge Peuler's ruling demonstrate that Judge Peuler applied a contract formation analysis in making her conclusions of law.

This was clear legal error.

The Martinezes in all likelihood would not be able to escape liability under the contract with HSBC in which Best Buy induced them to enter because "a party to a written contract can not rely on a misrepresentation made by the other party which is contrary to the clear terms of the document that" they signed.



However, this case is not about contract formation and just because the Martinezes could not break the contract based upon a claim of misrepresentation does not mean that they can not prevail on their UCSPA claim.

It is like pleading a fraud claim, a negligent misrepresentation claim and a breach of warranty claim – and not being able to prove the elements of fraud. Just because you can not prove fraud does not mean that you can not prevail on the alternate theories of negligent misrepresentation or breach of warranty.

The UCSPA itself directs this Court:

“(2) to protect consumers from suppliers who commit deceptive and unconscionable sales practices (UCA 13-11-3)

Further, contract law should not preempt the UCSPA’s clear application unless it is clear that the legislature intended for one scheme to overrule the UDAP statute.

National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (7th ed. 2008), Section 2.3.3.5.1, p. 100

Given the strong and sweeping remedial purpose of the typical UDAP statute, it should ordinarily be presumed that the UDAP statute applies to a practice. See *Lemelledo v. Beneficial Mgmt. Corp.*, 150 N.J. 255, 696 A. 2d 546 (1997)

This is especially true since the rights, remedies and prohibitions created by UDAP statutes are intended to be cumulative to those created by other sources of law. National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (7th ed. 2008), Section 2.3.3.5.1, p. 100

Finally, it can not be emphasized enough that UCSPA “shall be construed liberally to ... (2) to protect consumers from suppliers who commit deceptive and unconscionable sales practices.”

Judge Peuler’s ruling eviscerated the UCSPA for no legitimate reason and in violation of the clear language of the Act itself.

**F. Applying the Correct Consumer Law Principles, Best Buy Clearly Committed Numerous Deceptive Acts Which Violated the UCSPA**

Once one takes off the improper “contract formation law” blinders/ lens which Judge Peuler followed in making her rulings, and once one applies the correct consumer and FTC law principles relating to prohibited “deceptive” practices, it becomes self evident that Best Buy committed the following deceptive acts:

1. It was deceptive for Best Buy to tell the Martinezes that they needed to sign “here” and “here” – one being the request for Account Shield – in order to apply for the credit card.
2. It was deceptive for Best Buy to fail to provide the Spanish translation of the application, but to get the Martinezes to sign Exhibit 1 which contained a certification that they had been provided with a Spanish translation.
3. It was deceptive for Best Buy to fail to disclose that one of the signature lines was a request to be enrolled in the Account Shield program.
4. It was deceptive for Best Buy to get the Martinezes to sign up for the Account Shield product without disclosing how much it would cost.
5. It was deceptive for Best Buy to get Mrs. Martinez to sign the Account Shield enrollment line without making any meaningful disclosure as to what benefit Mrs. Martinez would obtain from said enrollment.
6. It was deceptive for Best Buy to get Mrs. Martinez to sign the Account

Shield enrollment line which contained the false certification that she had read and understood the program summary when Best Buy knew that she had not - because they did nothing to explain it to her.

7. It was deceptive for Best Buy to electronically tell HSBC that Hugo Martinez had agreed to the Account Shield product.

**G. There was insufficient or ineffective evidence to support a factual finding that Best Buy's application disclosed the cost of the Account Shield program.**

The following evidence related to the issue of whether the Best Buy credit card application – Plaintiffs' Exhibit 1 – disclosed the cost of the Account Shield product:

BY MR. STEFFENSEN:

3 Q Is there anything on the account shield side that  
4 explains how much it would cost?

5 A (Inaudible) copy's not great, so I can't really  
6 read. It just says a portion of your balance based on your  
7 balance is different.

8 Q Does it say what portion?

9 A No.

10 Q So, there's no disclosure whatsoever what this  
11 thing is going to cost, right?

12. A It's based on the balance of the account.

13. Q You would agree with me that a customer reading  
14 that would have no idea how much it would actually cost him?

15 A Exact dollar amount, I mean, like I say, it's  
16 based on what the balance would be.

17 Q But there's no --

18. A So --

19. Q That's it, right, based on the balance?

20. A Looks like 99 cents per hundred dollar.

21 Q But it doesn't say that?

22. I mean, I couldn't read it where it says -- I  
23 can't read the whole thing, so --

Winther testimony R. 243 at 66

Based on this testimony, Judge Peuler ruled that the application disclosed the cost.

This ruling is contrary to the evidence because the application speaks for itself as follows, and entirely contradicts Winther's testimony:

### **"Account Shield**

#### **PROTECT YOUR ACCOUNT WITH ACCOUNT SHIELD, AN OPTIONAL MONTHLY DEBT CANCELLATION PROGRAM**

If you enroll in our optional Account Shield program, your monthly credit balance or a portion of your balance may be cancelled in the case of a qualifying Total Disability, Involuntary Unemployment, Property Damage or Loss, or Loss of Life event. For Total Disability, the maximum balance that may be cancelled is \$1,000 per month, up to \$10,000, and or Involuntary Unemployment, up to \$1,000 per month for six months. For Loss of Life or Property Damage or Loss, the maximum balance that may be cancelled is \$10,000. To receive a cancellation benefit (for other than Loss of Life or Property Damage or Loss) on your account, you must be employed full-time (but not self-employed, working for a spouse or any other individual living with you on whom you are financially dependent for support and maintenance, or employed on a part-time basis) and working 30 hours or more per week at a single job on the date the event occurs. Account Shield is not insurance and is unavailable in Mississippi, Guam, the Virgin Islands, and Canada.

YES, please enroll me, the primary cardholder, in the optional Account Shield monthly debt cancellation program. I authorize the monthly charge on my account when I have a balance. I have received and read the Account Shield Summary. I understand that your evaluation of my credit card application will not be influenced by whether I choose to enroll, and I am free to cancel at any time"

#### **Plaintiffs' Exhibit 1**

Appellants note that the Court and witness claimed that they could not read the language of Exhibit 1, but still purported to rule/ testify that it disclosed the cost of the Account Shield product.

In preparing this Brief, Appellants' counsel was able to take the pdf image of

Exhibit 1 and enlarge it utilizing Adobe Professional by 400% so that it could be read and correctly transcribed.

The Court could have and should have taken the time to do the same before ruling as it did.

**H. The UCSPA Allows the Martinezes to Recover Actual Damages Sustained as a Result of the Deceptive Acts or Practices of Best Buy**

The deception committed by Best Buy against the Martinezes caused them damage. UCA 13-11-19 provides as follows:

(2) A consumer who suffers loss as a result of a violation of this chapter may recover, but not in a class action, actual damages or \$2,000, whichever is greater, plus court costs

The Martinezes would not have been charged by HSBC for the Account Shield product if Best Buy had not induced Claudia to sign the “enrolment” line through deception. The Martinezes clearly suffered “loss as a result” of Best Buy’s violation of the UCSPA.

The Martinezes testified as to their damages. It was obvious that they suffered damages.

Judge Peuler’s ruling that their damages arose solely from conduct of HSBC was erroneous.

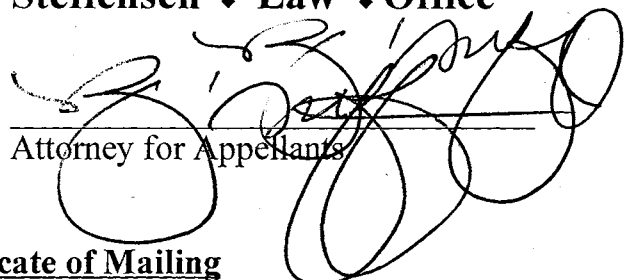
The Martinezes are each entitled to judgment against Best Buy for the \$2,000 statutory minimum damages, plus their costs of court and attorneys fees.

**Relief Sought** – Plaintiffs/Appellants request the following relief:

1. Reversal of Judge Peuler's rulings that Best Buy did not commit any deceptive acts against the Martinezes and the dismissal of plaintiffs' complaint.
2. Remand of the case with direction that judgment be entered in favor of each of the plaintiffs and against Best Buy for the \$2,000 statutory minimum damages plus costs and attorneys fees; and a direction that the Court determine and award the Martinezes their costs and attorneys fees.

DATED this 16th day of November, 2011.

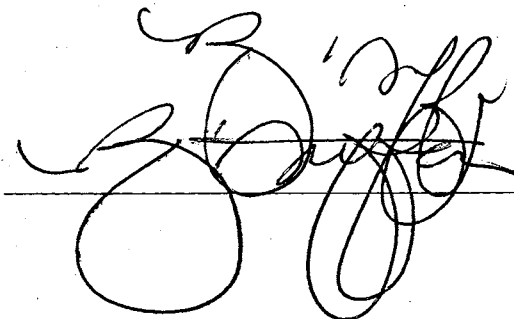
**Steffensen ♦ Law ♦ Office**

  
\_\_\_\_\_  
Attorney for Appellants

**Certificate of Mailing**

I hereby certify that on the 16<sup>th</sup> day of November, 2011, that I caused two (2) true and correct copies of the foregoing instrument to be ☒ mailed, postage prepaid; and/or ☐ hand delivered by ☐ fax and/or by ☐ courier; to each of the following:

Gregory J. Sanders  
Patrick C. Burt  
Kipp and Christian PC  
10 Exchange Place, 4<sup>th</sup> Floor  
Salt Lake City, Utah 84111  
Fax 801 359 9004

  
\_\_\_\_\_

## **Appellants' Appendix**

- A. Plaintiffs' Exhibit 1 – the Best Buy Credit Card Application
- B. Transcript Excerpts with Judge Peuler's Oral Ruling
- C. Order of Dismissal (with Findings and Conclusions)

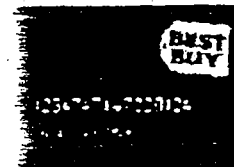
## A. Plaintiffs' Exhibit 1 – the Best Buy Credit Card Application



**Best Buy Credit Card Application****1. APPLICANT** (complete form may result in decline of your application)**For US Residents Only. Check box if you are married:****"WRITE OR BLACK INK ONLY"**

Home Phone	First Name	Middle Initial	Last Name	Initial Sale Amount
1801 1655-3050	Claudia	F	Martinez	\$3,000.00
Urbanization	Current Address	Apt. #	City	State
1870W	4650 S	F	Provo	UT
Date of Birth (MM/DD/YY)	Social Security Number	Business Phone		
01/30/64	646-46-3086	( )		
E-Mail Address (optional)	Annual Income*	Check if you have a: <input checked="" type="checkbox"/> Checking Account <input type="checkbox"/> Savings Account		
	\$18,000			

By providing your email address, you also consent to receive e-mails relating to offers and services from Best Buy Co., Inc. and its subsidiaries.

**Get what you want. Today.****2. JOINT APPLICANT** (to spouse of applicant) (complete name and address only)

Home Phone	First Name	Middle Initial	Last Name
1801 1 577-4465	Hugo	D	Martinez
Urbanization	Current Address	Apt. #	City
Same above			
Date of Birth (MM/DD/YY)	Social Security Number	Business Phone	Annual Income*
9/4/60	646-46-3082	( )	\$24,000

\*ADDITIONAL NOTICE: Can include all sources. You need not disclose alimony, child support or separate maintenance income if you do not wish to have it considered as a basis for approving the application.

**Account Shield™****PROTECT YOUR ACCOUNT WITH ACCOUNT SHIELD™, AN OPTIONAL MONTHLY DEBT CANCELLATION PROGRAM.**

If you enroll in our optional Account Shield program, your monthly credit card balance or a portion of your balance may be cancelled in the case of a qualifying Total Disability, involuntary Unemployment, Property Damage or Loss, or Loss of Life event. For Total Disability, the maximum balance that may be cancelled is \$1,000 per month up to \$10,000, and for involuntary Unemployment, up to \$1,000 per month for six months. For Loss of Life or Property Damage or Loss, the maximum balance that may be cancelled is \$10,000. To receive a cancellation benefit (for other than Loss of Life or Property Damage or Loss) on your account, you must be employed full-time (not self-employed, working for a spouse or any other individual living with you or whom you are financially dependent for support and maintenance, or employed on a part-time basis) and working 30 hours or more per week at a single job on the date the event occurs. Account Shield is not insurance and is unavailable in Mississippi, Georgia, the Virgin Islands, and Canada.

YES, please enroll me, the primary cardholder, in the optional Account Shield monthly debt cancellation program. I authorize the monthly charge to my account when I have a balance. I have received and read the Account Shield Summary. I understand that your evaluation of my credit card application will not be influenced by whether I choose to enroll, and I am free to cancel at any time.

YES, PLEASE ENROLL ME AT THIS TIME!

**3. APPLICANT AND JOINT APPLICANT SIGN HERE**

All of the information furnished on this application is, to the best of your knowledge, complete and accurate. You agree that you are furnishing all such information on this application to Best Buy, and to HSBC Bank America, N.A. ("we", "us"), the issuer of the Best Buy credit card. You agree that we may obtain a credit bureau report on you and we may check any of the information provided on this application from whatever source we choose. By completing and signing this application, you are applying for a credit line in its highest amount we deem appropriate, regardless of any initial sale amount, and you are requesting a Card issued to you by us which will allow you to make purchases under this Account. By signing, using or permitting others to use the Card, (i) signing or permitting others to sign sales slips, (ii) making or permitting others to make purchases by telephone, internet, or any other means, you agree to the terms and conditions of the Cardholder Agreement and Disclosure Statement, (which includes the information provided) which shall be used in you with the credit card. If based on your creditworthiness, we determine you do not qualify for Program A, you agree we may consider you (as an account) with the terms and conditions of Program B. If approved for Program B, you agree to its terms and conditions. If this is a joint credit application, you understand that each applicant has the right to use the Account and that you shall be liable for all purchases made under the Account by any joint applicant. The grant of a purchase money security interest in the goods purchased on your Account. You understand that we may provide information relating to our transactions and experiences with you to others, including Best Buy, whether or not you are approved for credit. You may prohibit the sharing of such information by calling us at 1-800-265-3804. The Spanish translation has been provided for your convenience. In case of conflict, the English version is the binding contract and will govern. You acknowledge receipt of the English/Spanish application and signature form. Some terms and conditions may only be available/provided in English.

Applicant's Signature: Claudia Date (MM/DD/YY): 3/6/08 Joint Applicant's Signature: Hugo Date (MM/DD/YY): 3/6/08

**4. ACKNOWLEDGEMENT OF DISCLOSURE** This section must be completed if applicant is approved for Program B

YOU ACKNOWLEDGE YOU HAVE RECEIVED AND READ THE PROGRAM B DISCLOSURE.

X Claudia 3/6/08  
 APPLICANT'S SIGNATURE DATE (MM/DD/YY)

(For Best Buy Use Only)	MERCHANT #88	ORG #169	CREDIT LIMIT	750	CIRCLE ONE: <input checked="" type="checkbox"/> APPROVED <input type="checkbox"/> DECLINED
	MERCHANT #2				
APPLICATION #	080306011885				
I.D. Verified by (Employee I.D.#)	687036				
I.D. # Photo ID (Applicant)	Type	DL	I.D. #	16443368	
Date	03/01/08 Exp. Date 1/30/09				
I.D. # Credit Card (Applicant)	Type	<input checked="" type="checkbox"/> MC <input type="checkbox"/> VISA <input type="checkbox"/> MEX <input type="checkbox"/> DISCOVER	Exp. Date	12/1/08 to 11/08	

Signature: Claudia Date (MM/DD/YY): 3/6/08  
 SIGN HERE TO ENROLL DATE

NO, I DO NOT WISH TO ENROLL AT THIS TIME.

Signature:  Date (MM/DD/YY): 1/1  
 SIGN HERE TO DECLINE DATE

0022BEST-BUY/CARD307 (1-08)

**PROTECT YOUR ACCOUNT WITH ACCOUNT SHIELD™, AN  
OPTIONAL MONTHLY DEBT CANCELLATION PROGRAM.**

If you enroll in our optional Account Shield program, your monthly credit card balance or a portion of your balance may be cancelled in the case of a qualifying Total Disability, Involuntary Unemployment, Property Damage or Loss, or Loss of Life event. For Total Disability, the maximum balance that may be cancelled is \$1,000 per month, up to \$10,000, and for Involuntary Unemployment, up to \$1,000 per month for six months. For Loss of Life or Property Damage or Loss, the maximum balance that may be cancelled is \$10,000. To receive a cancellation benefit (for other than Loss of Life or Property Damage or Loss) on your account, you must be employed full-time (but not self-employed, working for a spouse or any other individual living with you on whom you are financially dependent for support and maintenance, or employed on a part-time basis) and working 30 hours or more per week of a single job on the date the event occurs. Account Shield is not insurance and is unavailable in Mississippi, Guam, the Virgin Islands, and Canada.

YES, please enroll me, the primary cardholder, in the optional Account Shield monthly debt cancellation program. I authorize the monthly charge to my account when I have a balance. I have received and read the Account Shield Summary. I understand that your evaluation of my credit card applications will not be influenced by whether I choose to enroll, and I am free to cancel at any time.

**YES, PLEASE ENROLL ME AT THIS TIME!**



*Claudia*

(MM/DD/YY)

316108

SIGN HERE TO ENROLL

DATE

# Account Shield

## PROTECT YOUR ACCOUNT WITH ACCOUNT SHIELD™, AN OPTIONAL MONTHLY DEBT CANCELLATION PROGRAM

If you enroll in our optional Account Shield program, your monthly credit card balance or a portion of your balance may be cancelled in the case of a qualifying Total Disability, Involuntary Unemployment, Property Damage or Loss, or Loss of Life event. For Total Disability, the maximum balance that may be cancelled is \$1,000 per month up to \$10,000, and for Involuntary Unemployment, up to \$1,000 per month or six months. For Loss of Life or Property Damage or Loss, the maximum balance that may be cancelled is \$10,000. To receive a cancellation benefit (for other than Loss of Life or Property Damage or Loss) on your account, you must be employed full-time (but not self-employed, working for a spouse or any other individual living with you on whom you are financially dependent for support and maintenance, or employed on a part-time basis) and working 30 hours or more per week at a single job on the date the event occurs. Account Shield is not insurance and is available in Mississippi, Guam, the Virgin Islands, and Canada.

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YES, PLEASE ENROLL ME AT THIS TIME!

→ *Clarissa*

04/16/08

3 / 6 / 08

The information furnished on this application is, to the best of your knowledge, complete and accurate. You agree that you are authorizing the Bank to obtain credit reports on you and we may check any of the information provided on this application from whatever source we desire. By completing and signing this application, you are applying for a credit limit in the highest amount we deem appropriate, regardless of any initial sale amount, and you are requesting a Card issued to you by us which will allow you to make purchases under this Account. By a) signing, using or allowing others to use this Card, b) signing or permitting others to sign sales slips; c) ordering or permitting others to make purchases by telephone, Internet, or any other means, you agree to the terms and conditions of the Cardholder Agreement and Disclosure Statement, (which includes an arbitration provision) which shall be sent to you with the credit card. If, based on your creditworthiness, we determine you do not qualify for Program A, you agree we may consider you for an account with the terms and conditions of Program B. If approved for Program B, you agree to its terms and conditions. If this is a joint credit application, you understand that each applicant has the right to use the Account and that you shall be liable for all purchases under the Account by any joint applicant. You grant us a purchase money security interest in the goods purchased on your Account. You understand that we may provide information relating to our transactions and experiences with you to others, including Best Buy, whether or not you are approved for credit. You may prohibit the sharing of such information by calling us at 1-800-365-3804. The Spanish translation has been provided for your convenience. In case of conflict, the English version is the binding one and will govern. See acknowledgment receipt of the English/Spanish application and important terms. Some future correspondence may only be available/provided in English.

Applicant's Signature

Date (MM/DD/YY)

Joint Applicant's Signature

Date (MM/DD/YY)

► *Claudia*

3 / 6 / 08

*[Signature]*

3 / 6 / 08

**KNOWLEDGE OF DISCLOSURE: This section must be completed if applicant is approved for Program B**

## B. Transcript Excerpts with Judge Peuler's Oral Ruling

1 for me.

2 MR. STEFFENSEN: Well, thank you. If it would  
3 have lasted for two weeks, I'm sure we finally would have  
4 found a way.

5 THE COURT: Yeah, I think you guys would have been  
6 butting heads at the end of two weeks, you know, because  
7 that's what usually happens in lengthy trials. But,  
8 fortunately, that wasn't the case here.

9 Let me just tell you what I looked at. I looked  
10 at the Consumer Sales Practices Act. I looked at all of my  
11 notes that I took. And I looked at exhibits that were  
12 received during the course of the trial. So, based upon all  
13 of that, here's my ruling.

14 And, in short, I find in favor of the defendant,  
15 and find that there was no violation of the Consumer Sales  
16 Practices Act. Let me take a step back for a moment and go  
17 through what I need to talk to you about. This was set for  
18 trial on two causes of action, breach of contract and a  
19 statutory cause of action on deceptive practices. There was  
20 a contract between plaintiffs and Best Buy which resulted in  
21 the plaintiffs having and using a credit card to make  
22 purchases that they obtained. Plaintiff has abandoned it's  
23 breach of contract claim, so I'm not going to address that  
24 any further. However, whether there was or not a deception,  
25 I think, arises out of that contract. And so, it's

1 important to talk about contract in that context.

2       The deceptive acts that were alleged by the  
3 plaintiff were as follows: And I will just read them as I  
4 wrote them down. Number one. When they filled out the  
5 application they, meaning Best Buy, said you need to sign  
6 here and here. In essence, in order to get the credit card,  
7 you need to sign here and here. That's not true. They did  
8 not need to sign in both places. It seems to me in looking  
9 at that particular statement, or that allegation, a party to  
0 a written contract can not rely on a misrepresentation if  
1 the misrepresentation is contrary to the clear terms of the  
2 document that they are asked to sign.

3       The evidence from the plaintiffs is that the Best  
4 Buy representative said that. And so I accept that as true.  
5 However, that is contrary to the clear language in the  
6 contract which the plaintiffs both said they didn't read and  
7 didn't ask any questions about. So, they can not rely on  
8 that statement even if false to allege a deceptive act.

9       Number two is, the deception was an admission that  
0 Best Buy failed to explain the account shield, the product  
1 cost or by signing they would be bound. Again, whether it's  
2 affirmative or an omission, I don't think that parties to a  
3 contract can rely on something that is clearly different  
4 from the terms that are written in the contract. Let me say  
5 this: No one in here has had a clear enough copy for

anybody to read anything from the contract except a few words here and there. So, it is what it is. I can't read it any more than the witnesses could. But Mr. Winther, who was the representative for Best Buy, did say that, and I wrote it down, "it says a portion of the balance based upon the balance of the account." Now, while it may or may not have the exact dollar amount, and I don't know if it does, there's, apparently, an indication and language in that provision that would reflect a charge, which, again, the plaintiffs could have read at the time they were at Best Buy or asked questions about. And I don't think I can go any further on that because I was not provided with a copy that was clear enough for me to read or for any of the witnesses to read.

Number three. The allegation is in order to cover themselves, meaning Best Buy, the contract says we acknowledge that we got a Spanish translation. Best Buy got them to sign a document that Best Buy knew was false. I don't think there's any evidence that Best Buy knew the statement was false. The only evidence was from plaintiffs that one was not offered and they did not ask for one. There's no evidence of any intentional act on the part of Best Buy. And as I look at the Consumer Sales Practices Act, every indication of deceptive act has, includes the concepts of knowingly or intentionally. And, finally, on



1 that one, there's no evidence that Best Buy lied about  
2 anything to get the plaintiffs to sign.

3         Number four is, both were joint applicants but  
4 Best Buy got only one of two necessary signatures. So, the  
5 Credit Keeper portion can't be binding on both if only one  
6 signed. I think this is the part of the agreement that goes  
7 to any issues that the plaintiffs have with HSBC. I was  
8 able to read enough of the credit shield language to  
9 recognize that it did indicate that the primary account  
10 holder was to sign that portion, or the primary cardholder,  
11 excuse me, was to sign that portion. Whether that makes it  
12 an effective contract that with HSBC is not before me today.  
13 And I don't make any ruling on that. I simply think that  
14 any damages that go from that, goes to HSBC, not Best Buy.

15         And number five. The allegation was that there  
16 was no disclosure of the price and was deceptive to get  
17 anyone to sign up without telling them what the cost was.  
18 Again, I didn't have a clear copy of the contract. And so,  
19 I couldn't read it. And the only evidence as to anything in  
20 that portion of the document was what Mr. Winther testified  
21 about. So, I rely on his testimony to find that there was  
22 at least some indication that there would be a charge.

23         So, those are the things I have looked at. I do  
24 not find that there was a deceptive act on the part of Best  
25 Buy. I also think that, clearly, any damages that the

1 plaintiffs suffered or as a result of the charges they  
2 received are from HSBC, and not any act on the part of Best  
3 Buy.

4 That's my ruling. I'm going to ask defendant's  
5 counsel to please prepare findings, conclusions and an order  
6 consistent with that. And I will -- I am not prepared to  
7 talk about the issue of attorney's fees today. I will  
8 certainly entertain that if I receive an appropriate motion  
9 and, you know, if we can talk about it. And I'll make a  
10 ruling at that time. But I'm not prepared to do that today.  
11 Is there anything I left out?

12 MR. STEFFENSEN: Thank you, Your Honor.  
13 Appreciate your time.

14 THE COURT: Okay. Thank you very much for your  
15 appearance. We'll be in recess.

16 MR. BURT: Thank you, Your Honor.

## C. Order of Dismissal (with Findings and Conclusions)

FILED DISTRICT COURT  
Third Judicial District

JAN 31 2011

By R. J. G. [Signature]  
SALT LAKE COUNTY  
Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

HUGO MARTINEZ and CLAUDIA  
MARTINEZ,

Plaintiff,

vs.

BEST BUY CO., INC.,

Defendant.

:  
: **ORDER DISMISSING PLAINTIFFS'**  
: **CLAIMS WITH PREJUDICE**  
:

:  
: Civil No. 090905510  
:

:  
: Judge Sandra Peuler  
:

The Court, having held trial on December 3, 2010 and listened to all evidence presented by all parties, the Court dismisses plaintiffs' claims with prejudice for the reasons below.

**FINDINGS OF FACT**

1. On March 6, 2008, Mr. and Mrs. Martinez applied for a Best Buy credit card. As part of the application, Mrs. Martinez also signed the application a second time under the section requesting credit monitoring services, provided by a non-party HSBC. Mr. and Mrs. Martinez allege that they did not want or intend to sign up for the credit monitoring services.

2. Originally, this case was brought by plaintiff Hugo Martinez and consisted of three causes of action against Best Buy. These causes of action included (1) Breach of Contract; (2) Violation of the Utah Consumers Sales Practices Act; and (3) Declaratory Relief. Through the Court's November 29, 2010 Minute Entry Order, Mrs. Claudia Martinez was added as a plaintiff. Also, through the parties' stipulation, plaintiffs' first and third causes of action were dismissed/waived.

3. At the time of trial, the only remaining cause of action was that of alleged violation of the Utah Consumer Sales Practices Act (the "Act").

4. At trial, plaintiffs alleged five violations of the Act. As to each, the Court finds as follows:

A. **Alleged:** Plaintiffs allege Best Buy violated the Act by instructing them to sign where they did on the application and that they never intended to sign up for the credit monitoring services in connection with their application for the Best Buy Credit card.

**Finding:** The Court finds that plaintiffs cannot rely on representation of the Best Buy employee when the terms of the contract are in front of them and clearly laid out, and those terms are in contrast to the Best Buy employee's representations.

B. **Alleged:** Plaintiffs allege that Best Buy violated the Act by omitting explanation of the credit monitoring services portion of the application.

**Finding:** The Court finds that plaintiffs are responsible to understand the terms to which they sign and are bound to those terms.

C. **Alleged:** Plaintiffs allege that Best Buy violated the Act by not providing a Spanish version of the application to plaintiffs despite language in the application that a Spanish version was made available.

**Finding:** The Court finds that there was no intentional act on Best Buy's part in not providing the Spanish version. Plaintiffs did not ask for a Spanish version and testified that a Spanish version was not necessary. The Court finds that the Act requires intent and there was none by Best Buy here.

D. **Alleged:** Plaintiffs allege Best Buy violated the Act because only Mrs. Martínez signed the contract for the credit monitoring services and therefore Mr. Martinez cannot be bound.

**Finding:** The Court finds that the contract states that only the signature of the primary account holder, which is Mrs. Martinez. Further, the Court finds this issue goes to plaintiffs' contract with the non-party HSBC and not Best Buy and any damages alleged from the credit monitoring services should be brought against HSBC and not Best Buy.

E. **Alleged:** Plaintiffs allege Best Buy violated the Act because the contract does not disclose the price of the credit monitoring services.

**Finding:** The Court finds the contract, although not clear, states that the services are a calculated portion of whatever balance is on the credit card.

### **CONCLUSIONS OF LAW**

Based on the above findings of fact, the Court makes the following conclusions of law:

1. The Court concludes, as a matter of law, Best Buy did not commit any deceptive act under the Act.

2. Because Best Buy did not commit any deceptive act, the Court concludes, as a matter of law, Best Buy has not violated the Act.

3. The Court concludes, as a matter of law, plaintiffs' damages, if any, were caused by HSBC and not by Best Buy.

4. Because Best Buy did not violate the Act and because plaintiffs' damages, if any, were a result of HSBC's alleged conduct, the Court concludes, as a matter of law, plaintiffs' claims against Best Buy are dismissed with prejudice.

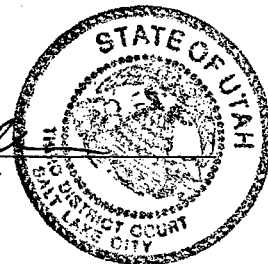
5. The Court is not currently prepared to address Best Buy's request for an award of reasonable attorney's fees and court costs. Therefore, the Court does not rule on this issue, but grants Best Buy leave to submit a motion for such fees and costs for the Court's consideration.

Based on the foregoing findings of facts and conclusions of law, the Court **ORDERS, ADJUDICATES AND DECREES** that plaintiffs' cause(s) of action are dismissed with prejudice, leaving the issue of an award of Best Buy's attorney's fees and costs open for further consideration.

**SO ORDERED** this 31 day of January, 2011.

BY THE COURT:

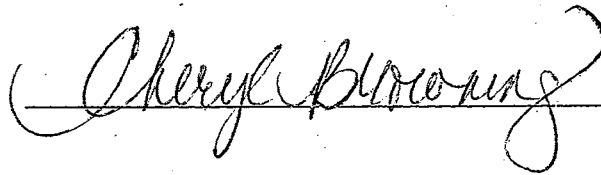
  
Honorable Sandra Peuler



**CERTIFICATE OF MAILING**

The undersigned hereby certifies that on the 10<sup>th</sup> day of December, 2010, a true and correct copy of the foregoing **ORDER DISMISSING PLAINTIFFS' CLAIMS WITH PREJUDICE** was mailed, first class, postage pre-paid to the following:

Brian W. Steffensen  
STEFFENSEN LAW OFFICE  
448 East 400 South, Suite 100  
Salt Lake City, Utah 84111

A handwritten signature in cursive script, reading "Cheryl Blomberg", written over a horizontal line.