

2011

Martinez v. Best Buy Co., Inc. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

HUGO AND CLAUDIA
MARTINEZ,

:

Plaintiffs and Appellants,

:

:

vs.

: Appeal No. 20110182-CA

BEST BUY CO., INC,

:

Defendant and Appellee.

:

BRIEF OF APPELLEES

On Appeal From Order Dismissing Plaintiff's Complaint After Bench Trial
By The Third Judicial District Court, Salt Lake County, State of Utah
Judge Sandra Peuler

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FILED
UTAH APPELLATE COURTS
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JURISDICTION

The Utah Supreme Court has original jurisdiction under U.C.A. § 78A-3-102(3)(j) and transferred the case to the Court of Appeals pursuant to U.C.A. §78A-4-103(2)(j).

CONTROLLING CONSTITUTIONAL PROVISIONS, STATUTES OR RULES

The Utah Consumer Sales Practices Act (“UCSPA”), U.C.A. §13-11-1 *et seq.* A copy of the act is attached as Addendum “A”.

STATEMENT OF THE CASE

A. Nature of the Appeal

Plaintiffs’ claim for violation of the UCSPA while signing up for a Best Buy credit card was dismissed after all evidence was presented during a one day bench trial. In support of it’s dismissal of the lawsuit, the trial court issued a detailed findings of facts and conclusions of law. A copy of the trial court’s Order Dismissing Plaintiffs’ Claim with Prejudice is attached as Addendum “B”.

B. Course of the Proceedings

Plaintiff, Hugo Martinez, filed his complaint on March 25, 2009, alleging he and his wife did not intend to purchase credit card protection services when they signed up for a Best Buy credit card. Plaintiff’s complaint contained causes of action for alleged breach of contract, violation of the Utah Consumers Sales Practices Act, and declaratory relief and damages. (R. at p. 1).

On May 29, 2009, plaintiff sent a set of discovery requests to defendant. Defendant responded that the requests were in violation of Rule 26 because the parties had not entered into a stipulated discovery plan and until such a plan was in place, discovery cannot be conducted. On June 15, 2009, defendant again contacted plaintiff requested that plaintiff comply with his requirement under Rule 26 and provide a proposed discovery plan. Plaintiff failed to do so. (R. at p. 153).

After June 2009, defendant did not hear from plaintiff or his counsel again until nearly a year later. In roughly April 2010, for a third time defendant requested that plaintiff comply with his requirement under Rule 26 and provide a proposed discovery plan. Plaintiff again failed to do so. Defendant did not hear further from plaintiff regarding moving the case forward. (R. at p. 153).

A couple months later, on June 2, 2010, the court, of its own initiative, issued a Notice of Order to Show Cause due to plaintiff's lack of prosecution of his case. (R. at p. 16). In response to the Notice, on August 19, 2010 plaintiff filed a Certificate of Readiness for Trial. (R. at p. 20). The parties exchanged pretrial disclosures, but no other discovery was conducted. Procedurally, the trial court added plaintiff's wife, Claudia Martinez, as a plaintiff prior to trial. (R. at p. 220).

On December 3, 2010, the parties conducted a bench trial. Prior to the trial, plaintiffs voluntarily dismissed their cause of action for declaratory relief. (R. at p. 220). In the

closing arguments, plaintiffs voluntarily dismissed their cause of action for breach of contract. (R. at 283 p. 113). Therefore, the only remaining claim submitted to the court was the allegation of violation of the UCSPA. (R. at p. 245).

C. The Court's Order

At trial, plaintiffs alleged five ways that defendant violated the UCSPA. In its finding of facts and conclusions of law, the trial court reiterated each of plaintiffs' five arguments and rendered a finding related to each one. The court ruled as follows:

- A. **Alleged:** Plaintiffs allege Best Buy violated the Act [the UCSPA] 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. Martinez 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 (the company that provides the credit monitoring service) 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.

(R. at p. 244).

Based on the foregoing, the trial court concluded that defendant's actions were not deceptive under the UCSPA and therefore did not violate the Act. The court also concluded that plaintiffs' damages, if any, were a result of HSBC's actions. (R. at p. 244).

SUMMARY OF ARGUMENTS

This brief will show plaintiffs' main appellate argument was not preserved, nor even presented, at the trial court and therefore is improper for appeal review now. Plaintiffs' brief argues against contract principles and for FTC precedent. However, until closing argument at trial, plaintiffs presented this case as a contract case and never raised FTC precedent or argument at the trial court level.

Moreover, this brief will show that the trial court correctly applied the facts of this case to the UCSPA and correctly found, after presentation of all the evidence, that defendant did not violate the Act.

ARGUMENT

I. PLAINTIFFS' FAILED TO PRESERVE THEIR ARGUMENT BASED ON FTC PRECEDENT.

The heart of plaintiffs' brief is based on the definition of the word "deceptive" according to FTC case law and precedent. However, plaintiffs never raised this argument at the trial court level and it is therefore not permissible for appellate review. Claims not raised before the trial court generally may not be raised on appeal. *Lunt v. Lance*, 2008 UT App 192, 186 P.3d 978. Further, an issue is not preserved for appellate review unless it is presented to the trial court in such a way that the trial court had an opportunity to rule on the issue. *Id.*; *See also Coleman ex rel. Schefski v. Stevens*, 2000 UT 98, 17 P.3d 1122 (Party was precluded from raising three new issues on appeal because the trial court had no

opportunity to rule on those issues and the record did not reveal any request by the party that they be addressed).

The preservation requirement is extended to apply to every claim unless a party can establish (1) that the trial court committed plain error; (2) that there are exceptional circumstances; or (3) if the claim is one of ineffective assistance of counsel at appeal. *State v. Irwin*, 924 P.2d 5 (Utah App. 1996); *See also Walter v. Stewart*, 2003 UT App 86, 67 P.3d 1042 (Appellate court declined to address issues because they were raised for the first time at appeal and party did not argue plain error or exceptional circumstances).

In this case, plaintiffs never raised the issue of the FTC definition of “deceptive” at the trial court level and therefore never gave the trial court an opportunity to rule on that issue. Instead, plaintiffs raise the issue for the first time on appeal, and state the trial court was wrong to not consider the FTC precedent. However, the record clearly shows that plaintiffs never raised the issue for the trial court’s consideration. Plaintiffs cite to pages 94-100 of the trial transcript found at R. 283. However, the record shows that plaintiffs’ counsel only mentions the FTC in one solitary sentence of his closing argument. (R. at 283 p. 95). No argument or evidence was presented in connection with this passing mention of the FTC. This argument was never raised at trial and was therefore not properly preserved for appellate review.

Plaintiffs also claim that the trial court erred by treated this case as a contract case and using contract principles in determination of their UCSPA claim. However, at trial, plaintiffs dressed and presented this case as a contract case. As stated above, plaintiffs originally made a claim for breach of contract. The record shows that they continued to pursue their case under contract principles and it was not until plaintiffs' final rebuttal closing argument that plaintiffs' voluntarily dismissed their breach of contract claim. (R. 283 at pp. 113-114).

In short, plaintiffs failed to present and preserve their FTC argument at trial. Because their argument was not raised at the trial court level and the trial court was not given an opportunity to rule on that argument, it cannot be raised for the first time now on appeal. Accordingly, all portions of plaintiffs' brief which refer to and rely on the new argument (which includes Sections B, C, D, E, and F) must be stricken.

II. THE TRIAL COURT CORRECTLY RULED ON THE FACTS AND ARGUMENTS PRESENTED.

Looking past the new arguments raised by plaintiffs in this appeal, the trial court correctly reviewed and applied the facts and law in front of it. The appellate courts accept the trial court's factual findings in a bench trial absent clear error, but review the application of law to those facts for correctness, albeit with some measure of deference to the trial court's assessment. *Johnson v. Higley*, 1999 UT App 278, 989 P.2d 61. Further, in appeals

from bench trials it is generally not within the province of an appellate court to substitute its judgment for that of a front line fact-finder. *In re S.Y.T.*, 2011 UT App 407.

As listed above, plaintiffs presented five arguments to the trial court for consideration. These were that defendant violated the UCSPA by (1) telling plaintiffs to sign on both portions of the credit card applications; (2) not explaining the credit monitoring services; (3) not providing a Spanish version of the contract; (4) only having Mrs. Martinez sign the contract for the credit monitoring services; and (5) not disclosing the cost of the credit monitoring services. The court carefully examined and ruled on each of these arguments as follows:

A. The Terms of the Contract were Clear, Unambiguous and Not Deceptive.

In relation to plaintiffs' first two arguments, the court correctly held that the contract was unambiguous and plaintiffs are held responsible to read and understand the terms of a contract which they sign. Plaintiffs' brief makes much over the fact that plaintiffs' were told to sign "here" and "here" by the Best Buy employee. However, the fact overlooked by plaintiff and relied upon by the trial court is that the credit monitor services section of the contract has two choices of lines to sign upon. One specifically states "yes, I want this service" and the other says "no, I do not want this service". See Application attached as Addendum "C".

Therefore, even if the Best Buy employee indicated that plaintiffs needed to sign the application in two spots, the option was still left open to plaintiffs to sign in the “no, I don’t want this service” spot. The trial court correctly held that this does not constitute a deceptive act under the UCSPA.

Similarly, regarding plaintiffs’ second argument that the contract was not adequately explained to them, the court correctly held that the contract was there for plaintiff to review and it is their responsibility to understand the terms to which they sign. Plaintiffs point to nothing in the UCSPA that creates a proactive duty for a supplier to explain any and all terms of a contract to a consumer. To hold otherwise would be a significant deviation in Utah law and substantially increase the breadth and scope of the UCSPA beyond its intended reach. Therefore, the trial court correctly limited the UCSPA’s scope to penalize deceptive actions and not create a proactive duty to explain contracts.

B. Defendant Was Not Deceptive in Failing to Provide a Copy of the Application in Spanish.

Plaintiffs’ third argument was that defendant was deceptive because it did not provide a Spanish copy of the application to plaintiffs. However, at trial, plaintiffs testified that they understood English and did not request or need a Spanish version of the application. Surely, one cannot testify that they did not ask for or need a application in Spanish and then turn around and say when they did not receive one it was deceptive.

Given these clear facts and evidence, the trial court correctly ruled that defendant's failure to provide the Spanish version of the application was not deceptive under the act.

C. The Evidence Showed That Only Mrs. Martinez Needed to Sign the Credit Monitoring Service Contract

Plaintiffs' fourth issue, preserved at trial and reiterated in their brief, is that it was deceptive for Hugo Martinez to be included in the credit monitoring service when only Claudia Martinez signed that portion of the application. However, the clear facts laid out at trial show that this argument fails for two reasons. First, the language of the application itself only calls for the signature of the primary cardholder, who, in this case, was Claudia. Therefore, as touched on above, the language of the contract was unambiguous and laid out in front of plaintiffs. They cannot claim to be deceived when the contract is clear and unambiguous. All they had to do to be perfectly aware of what they were signing, was to read the language in front of them. Therefore, the court was correct to rely on this clear, unambiguous contract language in determining that defendants did not act deceptively as it relates to Mrs. Martinez signing up for the credit monitoring service as the primary cardholder.

Second, at trial plaintiffs voluntarily confessed that this contract for the credit monitoring service is a separate contract between plaintiffs and HSBC (the company that provided the services). (R. at 283 pp. 113-114). Given this evidence, the trial court correctly held that any claim Hugo Martinez has against the credit monitoring service contract must

be brought against HSBC and not Best Buy. Best Buy is the wrong defendant for any such claim.

D. Best Buy is Not the Proper Defendant for Plaintiffs' Claims Regarding the Pricing of the Credit Monitoring Service.

Plaintiffs' final issue raised at trial and reintroduced in this appeal is that defendant was deceptive because it did not address the pricing of the credit monitoring service. As just pointed out, at trial plaintiffs agreed that the credit monitoring contract is between them and HSBC and Best Buy is not a party to that contract. Further, the evidence before the trial court was that Best Buy does not participate in that service at all. Once a client signs up for the service, Best Buy notifies HSBC and has absolutely no further involvement in the program. (R. at 283 pp. 45, 65, and 74).

Therefore, the trial court correctly found that any issue of pricing relating to those services has to be directed towards HSBC. Best Buy does not provide those services and any questions or issues related to those services cannot be laid at Best Buy's feet. Therefore, if plaintiffs have a claim about deceptive pricing of the credit monitoring service, those claims must be leveled at the company that controls the service and the pricing; HSBC.

III. EVEN ACCEPTING PLAINTIFFS' NEW ISSUES, DEFENDANTS' ACTIONS WERE NOT DECEPTIVE UNDER THE UCSPA.

Even should this court allow plaintiffs' new issues and newly presented FTC definition of "deceptive", as laid out above, defendant did nothing that had a tendency to

deceive plaintiffs. Again, as discussed above, plaintiffs were given an application. They never asked for or required a copy of the application in Spanish. On the application, it was clearly indicated for plaintiffs that they could sign one line for “yes, I want this service” and one line for “no, I do not want this service”. They voluntarily signed on the “yes” line. The contract called for only the signature of the primary cardholder. Defendant did nothing deceptive, nor did it do anything with the tendency to deceive, in this transaction of events.

Plaintiffs allege that the Best Buy employee did nothing more to explain the contract. However, this cannot be deemed to be deceptive, even under the newly presented FTC definition. To hold otherwise, would place every “supplier” in violation of the UCSPA if the other party ever simply states that they did not fully understand every single term of the contract. Such a holding by this court would expand the legislative scope of the UCSPA and completely undermine Utah’s black letter law that a party is responsible to understand the terms of a contract he or she signs.

Plaintiffs’ remaining claims of deception have to go towards HSBC, even under the newly presented FTC definition. If plaintiff alleges that the credit monitoring service is not clear in what it costs, Best Buy has no control over that. That service and the pricing of that service are purely in the hands of HSBC. Again, plaintiffs have the wrong defendant.

According to the evidence and arguments presented and preserved by plaintiffs at trial, defendant was not deceptive under the UCSPA. Furthermore, even if we allow plaintiffs’

newly presented FTC definition, plaintiffs fail to show that defendant did anything that had the tendency towards deceiving plaintiffs in this transaction. Therefore, even under plaintiffs' newly presented FTC definition, defendant was not deceptive under the UCSPA.

IV. PLAINTIFFS' ALLEGATIONS DO NOT FALL WITHIN THE SAME SCOPE OF DECEPTIVE ACTS LISTED IN THE UCSPA.

Plaintiffs attempt to stretch the reach of the UCSPA further than its legislative intent. This is made clear by looking at the listed actions that the UCSPA deems deceptive and comparing those with the allegations against defendant here. Although it is not exclusive, the UCSPA contains a specific list of acts that are considered "deceptive". Examples of actions from this list includes if the supplier:

- indicates that an item has a sponsorship, uses, benefits or characteristics that it does not have;
- indicates that the item is a particular standard, grade or quality that it is not;
- indicates that an item is new if it is not;
- falsely advertises that an item is available because of "going out of business", "bankruptcy sale" or "final days" events;
- indicates that a replacement or repair is needed if it is not;
- indicates that a specific price advantage exists if it does not;
- fails to ship goods after receipt of payment; or
- promotes a pyramid scheme.

U.C.A. 13-11-4.

One glimpse at this list shows that the intent of the legislature in enacting the UCSPA was to deter actions far different from the facts of this case. The legislature clearly shows that the UCSPA is intended to stop and penalize blatantly dishonest and deceitful sale

practices such as pyramid schemes and false advertisements. In this case, plaintiffs seek to expand the scope of the UCSPA to cover times when a party signs a contract without having read the terms of that contract. Surely, the legislature never intended the UCSPA to reach that far. Accordingly, the trial court properly held that defendant did not violate the act.

V. THE UCSPA IS A SHIELD AS WELL AS A SWORD.

Finally, although one of the purposes of the UCSPA is to protect consumers, another listed purpose is to “recognize and protect suppliers who in good faith comply with the provisions of this act.” U.C.A. 13-11-2(6). In this case, defendant presented an application that had two options to which plaintiffs could sign. One clearly states “yes” to the credit monitoring service and one clearly states “no” to the service. Defendant and HSBC tried to make it clear and easy for people decline the service if that is what they wanted. Despite the clear language of the signature lines, plaintiffs voluntarily signed the “yes” line and now seek to find recourse for their failure to read and understand the clear terms.

Although the UCSPA provides the means to penalize suppliers who create pyramid schemes or conduct false advertising or are dishonest about the quality and nature of their product, it also seeks to protect suppliers who make good faith efforts to comply with the act. Plaintiffs fail to show that defendant did anything to violate the act, therefore defendant should be protected by the act.

CONCLUSION

After hearing all the testimony, argument and evidence, the trial court dismissed plaintiffs' sole surviving claim that defendant violated the UCSPA. The vast majority of plaintiffs' brief introduces and relies on new issues not raised or preserved at trial. However, the analysis of this case, under either the newly presented FTC definition or the arguments preserved at trial, show that defendant did nothing deceptive and did not violate the UCSPA. Plaintiffs' brief fails to show how their allegations are at all similar to the listed violations contained within the act. In fact, all plaintiffs are able to show is that they did not bother to read or understand the clear, unambiguous terms of the application and now seek to blame defendant for their own lack of due diligence.

More importantly for this appeal, plaintiffs fail to show any clear error by the trial court that would justify substitution of the trial court's judgment as the fact finder. The trial court properly considered all the arguments and evidence presented and issued its detailed findings of fact and conclusions of law. Plaintiff fails to show that those findings and conclusions should be undone. Accordingly, the trial court's dismissal should not be upset.

DATED this 18 day of January, 2012.

KIPP AND CHRISTIAN, P.C.

A handwritten signature in black ink, appearing to read "Patrick C. Burt", is written over a horizontal line.

GREGORY J. SANDERS

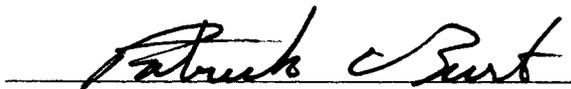
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CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 18 day of January, 2012, two true and correct copies of the foregoing **BRIEF OF APPELLEES** was mailed, first class, postage pre-paid to:

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ADDENDUM

- A. The Utah Consumers Sales and Practices Act, U.C.A. 13-11-1 et seq.
- B. Order Dismissing Plaintiffs' Claims with Prejudice dated January 31, 2011
- C. Best Buy Credit Card Application dated March 6, 2008

ADDENDUM A

The Utah Consumers Sales and Practices Act, U.C.A. 13-11-1 et seq.

§ 13-11-1. Citation of act, UT ST § 13-11-1

West's Utah Code Annotated

Title 13. Commerce and Trade

Chapter 11. Utah Consumer Sales Practices Act (Refs & Annos)

U.C.A. 1953 § 13-11-1

§ 13-11-1. Citation of act

Currentness

This act¹ shall be known and may be cited as the "Utah Consumer Sales Practices Act."

Credits

Laws 1973, c. 188, § 1.

Notes of Decisions (18)

Current through 2011 Third Special Session.

Footnotes

¹ Laws 1973, c. 188, that enacted this chapter.

End of Document

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§ 13-11-2. Construction and purposes of act, UT ST § 13-11-2

West's Utah Code Annotated

Title 13. Commerce and Trade

Chapter 11. Utah Consumer Sales Practices Act (Refs & Annos)

U.C.A. 1953 § 13-11-2

§ 13-11-2. Construction and purposes of act

Currentness

This act¹ 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 Act² 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; and
- (6) to recognize and protect suppliers who in good faith comply with the provisions of this act.

Credits

Laws 1973, c. 188, § 2.

Notes of Decisions (5)

Current through 2011 Third Special Session.

Footnotes

¹ Laws 1973, c. 188, that enacted this chapter.

² 15 U.S.C.A. § 41 et seq.

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West's Utah Code Annotated

Title 13. Commerce and Trade

Chapter 11. Utah Consumer Sales Practices Act (Refs & Annos)

U.C.A. 1953 § 13-11-3

§ 13-11-3. Definitions

Currentness

As used in this chapter:

(1) "Charitable solicitation" means any request directly or indirectly for money, credit, property, financial assistance, or any other thing of value on the plea or representation that it will be used for a charitable purpose. A charitable solicitation may be made in any manner, including:

(a) any oral or written request, including a telephone request;

(b) the distribution, circulation, or posting of any handbill, written advertisement, or publication; or

(c) the sale of, offer or attempt to sell, or request of donations for any book, card, chance, coupon, device, magazine, membership, merchandise, subscription, ticket, flower, flag, button, sticker, ribbon, token, trinket, tag, souvenir, candy, or any other article in connection with which any appeal is made for any charitable purpose, or where the name of any charitable organization or movement is used or referred to as an inducement or reason for making any purchase donation, or where, in connection with any sale or donation, any statement is made that the whole or any part of the proceeds of any sale or donation will go to or be donated to any charitable purpose. A charitable solicitation is considered complete when made, whether or not the organization or person making the solicitation receives any contribution or makes any sale.

(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; or

(ii) purposes that relate to a business opportunity that requires:

(A) expenditure of money or property by the person described in Subsection (2)(a); and

(B) the person described in Subsection (2)(a) to perform personal services on a continuing basis and in which the person described in Subsection (2)(a) has not been previously engaged.

(b) "Consumer transaction" includes:

(i) any of the following with respect to a transfer or disposition described in Subsection (2)(a):

(A) an offer;

(B) a solicitation;

(C) an agreement; or

(D) performance of an agreement; or

§ 13-11-3. Definitions, UT ST § 13-11-3

(ii) a charitable solicitation.

(3) "Enforcing authority" means the Division of Consumer Protection.

(4) "Final judgment" means a judgment, including any supporting opinion, that determines the rights of the parties and concerning which appellate remedies have been exhausted or the time for appeal has expired.

(5) "Person" means an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, cooperative, or any other legal entity.

(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.

Credits

Laws 1973, c. 188, § 3; Laws 1983, c. 58, § 4; Laws 1987, c. 105, § 2; Laws 2000, c. 57, § 1, eff. May 1, 2000; Laws 2004, c. 55, § 1, eff. March 15, 2004.

Notes of Decisions (9)

Current through 2011 Third Special Session.

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§ 13-11-4. Deceptive act or practice by supplier, UT ST § 13-11-4

West's Utah Code Annotated

Title 13. Commerce and Trade

Chapter 11. Utah Consumer Sales Practices Act (Refs & Annos)

U.C.A. 1953 § 13-11-4

§ 13-11-4. Deceptive act or practice by supplier

Currentness

(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.

(2) Without limiting the scope of Subsection (1), a supplier commits a deceptive act or practice if the supplier knowingly or intentionally:

(a) indicates that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits, if it has not;

(b) indicates that the subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not;

(c) indicates that the subject of a consumer transaction is new, or unused, if it is not, or has been used to an extent that is materially different from the fact;

(d) indicates that the subject of a consumer transaction is available to the consumer for a reason that does not exist, including any of the following reasons falsely used in an advertisement:

(i) "going out of business";

(ii) "bankruptcy sale";

(iii) "lost our lease";

(iv) "building coming down";

(v) "forced out of business";

(vi) "final days";

(vii) "liquidation sale";

(viii) "fire sale";

(ix) "quitting business"; or

(x) an expression similar to any of the expressions in Subsections (2)(d)(i) through (ix);

(e) indicates that the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not;

(f) indicates that the subject of a consumer transaction will be supplied in greater quantity than the supplier intends;

§ 13-11-4. Deceptive act or practice by supplier, UT ST § 13-11-4

- (g) indicates that replacement or repair is needed, if it is not;
- (h) indicates that a specific price advantage exists, if it does not;
- (i) indicates that the supplier has a sponsorship, approval, or affiliation the supplier does not have;
- (j)(i) indicates that a consumer transaction involves or does not involve a warranty, a disclaimer of warranties, particular warranty terms, or other rights, remedies, or obligations, if the representation is false; or
 - (ii) fails to honor a warranty or a particular warranty term;
- (k) indicates that the consumer will receive a rebate, discount, or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective consumers or otherwise helping the supplier to enter into other consumer transactions, if receipt of the benefit is contingent on an event occurring after the consumer enters into the transaction;
- (l) after receipt of payment for goods or services, fails to ship the goods or furnish the services within the time advertised or otherwise represented or, if no specific time is advertised or represented, fails to ship the goods or furnish the services within 30 days, unless within the applicable time period the supplier provides the buyer with the option to:
 - (i) cancel the sales agreement and receive a refund of all previous payments to the supplier if the refund is mailed or delivered to the buyer within 10 business days after the day on which the seller receives written notification from the buyer of the buyer's intent to cancel the sales agreement and receive the refund; or
 - (ii) extend the shipping date to a specific date proposed by the supplier;
- (m) except as provided in Subsection (3)(b), fails to furnish a notice meeting the requirements of Subsection (3)(a) of the purchaser's right to cancel a direct solicitation sale within three business days of the time of purchase if:
 - (i) the sale is made other than at the supplier's established place of business pursuant to the supplier's personal contact, whether through mail, electronic mail, facsimile transmission, telephone, or any other form of direct solicitation; and
 - (ii) the sale price exceeds \$25;
- (n) promotes, offers, or grants participation in a pyramid scheme as defined under Title 76, Chapter 6a, Pyramid Scheme Act;
- (o) represents that the funds or property conveyed in response to a charitable solicitation will be donated or used for a particular purpose or will be donated to or used by a particular organization, if the representation is false;
- (p) if a consumer indicates the consumer's intention of making a claim for a motor vehicle repair against the consumer's motor vehicle insurance policy:
 - (i) commences the repair without first giving the consumer oral and written notice of:
 - (A) the total estimated cost of the repair; and
 - (B) the total dollar amount the consumer is responsible to pay for the repair, which dollar amount may not exceed the applicable deductible or other copay arrangement in the consumer's insurance policy; or
 - (ii) requests or collects from a consumer an amount that exceeds the dollar amount a consumer was initially told the consumer was responsible to pay as an insurance deductible or other copay arrangement for a motor vehicle repair under Subsection (2)(p)(i), even if that amount is less than the full amount the motor vehicle insurance policy requires the insured to pay as a deductible or other copay arrangement, unless:

§ 13-11-4. Deceptive act or practice by supplier, UT ST § 13-11-4

- (A) the consumer's insurance company denies that coverage exists for the repair, in which case, the full amount of the repair may be charged and collected from the consumer; or
 - (B) the consumer misstates, before the repair is commenced, the amount of money the insurance policy requires the consumer to pay as a deductible or other copay arrangement, in which case, the supplier may charge and collect from the consumer an amount that does not exceed the amount the insurance policy requires the consumer to pay as a deductible or other copay arrangement;
 - (q) includes in any contract, receipt, or other written documentation of a consumer transaction, or any addendum to any contract, receipt, or other written documentation of a consumer transaction, any confession of judgment or any waiver of any of the rights to which a consumer is entitled under this chapter;
 - (r) charges a consumer for a consumer transaction that has not previously been agreed to by the consumer;
 - (s) solicits or enters into a consumer transaction with a person who lacks the mental ability to comprehend the nature and consequences of:
 - (i) the consumer transaction; or
 - (ii) the person's ability to benefit from the consumer transaction;
 - (t) solicits for the sale of a product or service by providing a consumer with an unsolicited check or negotiable instrument the presentment or negotiation of which obligates the consumer to purchase a product or service, unless the supplier is:
 - (i) a depository institution under Section 7-1-103;
 - (ii) an affiliate of a depository institution; or
 - (iii) an entity regulated under Title 7, Financial Institutions Act;
 - (u) sends an unsolicited mailing to a person that appears to be a billing, statement, or request for payment for a product or service the person has not ordered or used, or that implies that the mailing requests payment for an ongoing product or service the person has not received or requested;
 - (v) issues a gift certificate, instrument, or other record in exchange for payment to provide the bearer, upon presentation, goods or services in a specified amount without printing in a readable manner on the gift certificate, instrument, packaging, or record any expiration date or information concerning a fee to be charged and deducted from the balance of the gift certificate, instrument, or other record; or
 - (w) misrepresents the geographical origin or location of the supplier's business in connection with the sale of cut flowers, flower arrangements, or floral products.
- (3)(a) The notice required by Subsection (2)(m) shall:
- (i) be a conspicuous statement written in dark bold with at least 12 point type on the first page of the purchase documentation; and
 - (ii) read as follows: "YOU, THE BUYER, MAY CANCEL THIS CONTRACT AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY (or time period reflecting the supplier's cancellation policy but not less than three business days) AFTER THE DATE OF THE TRANSACTION OR RECEIPT OF THE PRODUCT, WHICHEVER IS LATER".
- (b) A supplier is exempt from the requirements of Subsection (2)(m) if the supplier's cancellation policy:

§ 13-11-4. Deceptive act or practice by supplier, UT ST § 13-11-4

(i) is communicated to the buyer; and

(ii) offers greater rights to the buyer than Subsection (2)(m).

(4)(a) A gift certificate, instrument, or other record that does not print an expiration date in accordance with Subsection (2)(v) does not expire.

(b) A gift certificate, instrument, or other record that does not include printed information concerning a fee to be charged and deducted from the balance of the gift certificate, instrument, or other record is not subject to the charging and deduction of the fee.

(c) Subsections (2)(v) and (4)(b) do not apply to a gift certificate, instrument, or other record useable at multiple, unaffiliated sellers of goods or services if an expiration date is printed on the gift certificate, instrument, or other record.

Credits

Laws 1973, c. 188, § 4; Laws 1983, c. 55, § 1; Laws 1983, c. 58, § 5; Laws 1985, c. 250, § 1; Laws 1987, c. 105, § 3; Laws 1995, c. 237, § 1, eff. May 1, 1995; Laws 1998, c. 194, § 1, eff. May 4, 1998; Laws 1999, c. 21, § 8, eff. May 3, 1999; Laws 2001, c. 196, § 1, eff. April 30, 2001; Laws 2004, c. 55, § 2, eff. March 15, 2004; Laws 2005, c. 18, § 2, eff. March 8, 2005; Laws 2005, c. 27, § 1, eff. May 2, 2005; Laws 2006, c. 115, § 1, eff. May 1, 2006; Laws 2007, c. 19, § 1, eff. April 30, 2007; Laws 2008, c. 232, § 1, eff. May 5, 2008; Laws 2010, c. 54, § 1, eff. May 11, 2010.

Notes of Decisions (11)

Current through 2011 Third Special Session.

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§ 13-11-5. Unconscionable act or practice by supplier, UT ST § 13-11-5

West's Utah Code Annotated

Title 13. Commerce and Trade

Chapter 11. Utah Consumer Sales Practices Act (Refs & Annos)

U.C.A. 1953 § 13-11-5

§ 13-11-5. Unconscionable act or practice by supplier

Currentness

(1) An unconscionable act or practice by a supplier in connection with a consumer transaction violates this act¹ whether it occurs before, during, or after the transaction.

(2) The unconscionability of an act or practice is a question of law for the court. If it is claimed or appears to the court that an act or practice may be unconscionable, the parties shall be given a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making its determination.

(3) In determining whether an act or practice is unconscionable, the court shall consider circumstances which the supplier knew or had reason to know.

Credits

Laws 1973, c. 188, § 5.

Notes of Decisions (7)

Current through 2011 Third Special Session.

Footnotes

¹ Laws 1973, c. 188, that enacted this chapter.

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§ 13-11-6. Service of process, UT ST § 13-11-6

West's Utah Code Annotated

Title 13. Commerce and Trade

Chapter 11. Utah Consumer Sales Practices Act (Refs & Annos)

U.C.A. 1953 § 13-11-6

§ 13-11-6. Service of process

Currentness

In addition to any other method provided by rule or statute, personal jurisdiction over a supplier may be acquired in a civil action or proceeding instituted in the district court by the service of process in the following manner. If a supplier engages in any act or practice in this state governed by this act,¹ or engages in a consumer transaction subject to this act, he may designate an agent upon whom service of process may be made in this state. The agent shall be a resident of or a corporation authorized to do business in this state. The designation shall be in writing and filed with the Division of Corporations and Commercial Code. If no designation is made and filed, or if process cannot be served in this state upon the designated agent, whether or not the supplier is a resident of this state or is authorized to do business in this state, process may be served upon the director of the Division of Corporations and Commercial Code, but service upon him is not effective unless the plaintiff promptly mails a copy of the process and pleadings by registered or certified mail to the defendant at his last reasonably ascertainable address. An affidavit of compliance with this section shall be filed with the clerk of the court on or before the return day of the process, if any, or within any future time the court allows.

Credits

Laws 1973, c. 188, § 6; Laws 1984, c. 66, § 30; Laws 1991, c. 268, § 3; Laws 2010, c. 378, § 199, eff. May 11, 2010.

Current through 2011 Third Special Session.

Footnotes

¹ Laws 1973, c. 188, that enacted this chapter.

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§ 13-11-7. Duties of enforcing authority--Confidentiality of identity..., UT ST § 13-11-7

West's Utah Code Annotated

Title 13. Commerce and Trade

Chapter 11. Utah Consumer Sales Practices Act (Refs & Annos)

U.C.A. 1953 § 13-11-7

§ 13-11-7. Duties of enforcing authority--Confidentiality of identity of persons investigated--Civil penalty for violation of restraining or injunctive orders

Currentness

(1) The enforcing authority shall:

(a) enforce this chapter throughout the state;

(b) cooperate with state and local officials, officials of other states, and officials of the federal government in the administration of comparable statutes;

(c) inform consumers and suppliers on a continuing basis of the provisions of this chapter and of acts or practices that violate this chapter including mailing information concerning final judgments to persons who request it, for which he may charge a reasonable fee to cover the expense;

(d) receive and act on complaints; and

(e) maintain a public file of final judgments rendered under this chapter that have been either reported officially or made available for public dissemination under Subsection (1)(c), final consent judgments, and to the extent the enforcing authority considers appropriate, assurances of voluntary compliance.

(2) In carrying out his duties, the enforcing authority may not publicly disclose the identity of a person investigated unless his identity has become a matter of public record in an enforcement proceeding or he has consented to public disclosure.

(3) On motion of the enforcing authority, or on its own motion, the court may impose a civil penalty of not more than \$5,000 for each day a temporary restraining order, preliminary injunction, or permanent injunction issued under this chapter is violated, if the supplier received notice of the restraining or injunctive order. Civil penalties imposed under this section shall be paid to the General Fund.

Credits

Laws 1973, c. 188, § 7; Laws 1983, c. 58, § 6; Laws 1987, c. 92, § 24.

Current through 2011 Third Special Session.

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§ 13-11-8. Powers of enforcing authority, UT ST § 13-11-8

West's Utah Code Annotated

Title 13. Commerce and Trade

Chapter 11. Utah Consumer Sales Practices Act (Refs & Annos)

U.C.A. 1953 § 13-11-8

§ 13-11-8. Powers of enforcing authority

Currentness

(1) The enforcing authority may conduct research, hold public hearings, make inquiries, and publish studies relating to consumer sales acts or practices.

(2) The enforcing authority shall adopt substantive rules that prohibit with specificity acts or practices that violate Section 13-11-4 and appropriate procedural rules.

Credits

Laws 1973, c. 188, § 8.

Current through 2011 Third Special Session.

End of Document

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§ 13-11-9. Rule-making requirements, UT ST § 13-11-9

West's Utah Code Annotated

Title 13. Commerce and Trade

Chapter 11. Utah Consumer Sales Practices Act (Refs & Annos)

U.C.A. 1953 § 13-11-9

§ 13-11-9. Rule-making requirements

Currentness

(1) In addition to complying with other rule-making requirements imposed by this act,¹ the enforcing authority shall:

- (a) adopt as a rule a description of the organization of his office, stating the general course and method of operation of his office and method whereby the public may obtain information or make submissions or requests;
- (b) adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of the forms and instructions used by the enforcing authority of his office; and
- (c) make available for public inspection all rules, written statements of policy, and interpretations formulated, adopted, or used by the enforcing authority in discharging his functions.

(2) A rule of the enforcing authority is invalid, and may not be invoked by the enforcing authority for any purpose, until it has been made available for public inspection under Subsection (1). This provision does not apply to a person who has knowledge of a rule before engaging in an act or practice that violates this act.

Credits

Laws 1973, c. 188, § 9.

Current through 2011 Third Special Session.

Footnotes

- ¹ Laws 1973, c. 188, that enacted this chapter.

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§ 13-11-16. Investigatory powers of enforcing authority, UT ST § 13-11-16

West's Utah Code Annotated

Title 13. Commerce and Trade

Chapter 11. Utah Consumer Sales Practices Act (Refs & Annos)

U.C.A. 1953 § 13-11-16

§ 13-11-16. Investigatory powers of enforcing authority

Currentness

(1) If, by his own inquiries or as a result of complaints, the enforcing authority has reason to believe that a person has engaged in, is engaging in, or is about to engage in an act or practice that violates this act,¹ he may administer oaths and affirmations, subpoena witnesses or matter, and collect evidence.

(2) If matter that the enforcing authority subpoenas is located outside this state, the person subpoenaed may either make it available to the enforcing authority at a convenient location within the state or pay the reasonable and necessary expenses for the enforcing authority or his representative to examine the matter at the place where it is located. The enforcing authority may designate representatives, including officials of the state in which the matter is located, to inspect the matter on his behalf, and he may respond to similar requests from officials of other states.

(3) Upon failure of a person without lawful excuse to obey a subpoena and upon reasonable notice to all persons affected, the enforcing authority may apply to the court for an order compelling compliance.

(4) In the event a witness asserts a privilege against self-incrimination, testimony and evidence from the witness may be compelled pursuant to Title 77, Chapter 22b, Grants of Immunity.

Credits

Laws 1973, c. 188, § 16; Laws 1997, c. 296, § 3, eff. May 5, 1997.

Current through 2011 Third Special Session.

Footnotes

¹ Laws 1973, c. 188, that enacted this chapter.

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§ 13-11-17. Actions by enforcing authority, UT ST § 13-11-17

West's Utah Code Annotated

Title 13. Commerce and Trade

Chapter 11. Utah Consumer Sales Practices Act (Refs & Annos)

U.C.A. 1953 § 13-11-17

§ 13-11-17. Actions by enforcing authority

Currentness

(1) The enforcing authority may bring an action:

- (a) to obtain a declaratory judgment that an act or practice violates this chapter;
- (b) to enjoin, in accordance with the principles of equity, a supplier who has violated, is violating, or is otherwise likely to violate this chapter; and
- (c) to recover, for each violation, actual damages, or obtain relief under Subsection (2)(b), on behalf of consumers who complained to the enforcing authority within a reasonable time after it instituted proceedings under this chapter.

(2)(a) The enforcing authority may bring a class action on behalf of consumers for the actual damages caused by an act or practice specified as violating this chapter in a rule adopted by the enforcing authority under Subsection 13-11-8(2) before the consumer transactions on which the action is based, or declared to violate Section 13-11-4 or 13-11-5 by final judgment of courts of general jurisdiction and appellate courts of this state that was either reported officially or made available for public dissemination under Subsection 13-11-7(1)(c) by the enforcing authority 10 days before the consumer transactions on which the action is based, or, with respect to a supplier who agreed to it, was prohibited specifically by the terms of a consent judgment that became final before the consumer transactions on which the action is based.

(b)(i) On motion of the enforcing authority and without bond in an action under this Subsection (2), the court may make appropriate orders, including appointment of a master or receiver or sequestration of assets, but only if it appears that the defendant is threatening or is about to remove, conceal, or dispose of the defendant's property to the damage of persons for whom relief is requested. An appropriate order may include an order:

- (A) to reimburse consumers found to have been damaged;
- (B) to carry out a transaction in accordance with consumers' reasonable expectations;
- (C) to strike or limit the application of unconscionable clauses of contracts to avoid an unconscionable result; or
- (D) to grant other appropriate relief.

(ii) The court may assess the expenses of a master or receiver against a supplier.

(c) If an act or practice that violates this chapter unjustly enriches a supplier and damages can be computed with reasonable certainty, damages recoverable on behalf of consumers who cannot be located with due diligence shall be transferred to the state treasurer pursuant to Title 67, Chapter 4a, Unclaimed Property Act.

(d) If a supplier shows by a preponderance of the evidence that a violation of this chapter resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error, recovery under this Subsection (2) is limited to the amount, if any, by which the supplier was unjustly enriched by the violation.

§ 13-11-17. Actions by enforcing authority, UT ST § 13-11-17

(e) An action may not be brought by the enforcing authority under this Subsection (2) more than two years after the occurrence of a violation of this chapter.

(3)(a) The enforcing authority may terminate an investigation or an action other than a class action upon acceptance of the supplier's written assurance of voluntary compliance with this chapter. Acceptance of an assurance may be conditioned on a commitment to reimburse consumers or take other appropriate corrective action.

(b) An assurance is not evidence of a prior violation of this chapter. Unless an assurance has been rescinded by agreement of the parties or voided by a court for good cause, subsequent failure to comply with the terms of an assurance is prima facie evidence of a violation.

(4)(a) In addition to other penalties and remedies set out under this chapter, and in addition to its other enforcement powers under Title 13, Chapter 2, Division of Consumer Protection, the division director may issue a cease and desist order and impose an administrative fine of up to \$2,500 for each violation of this chapter.

(b) All money received through administrative fines imposed under this section shall be deposited in the Consumer Protection Education and Training Fund created by Section 13-2-8.

Credits

Laws 1973, c. 188, § 17; Laws 1983, c. 58, § 8; Laws 1993, c. 4, § 55; Laws 1995, c. 198, § 2, eff. May 1, 1995; Laws 1995, c. 237, § 2, eff. May 1, 1995; Laws 2004, c. 55, § 3, eff. March 15, 2004.

Notes of Decisions (3)

Current through 2011 Third Special Session.

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§ 13-11-17.5. Costs and attorney's fees, UT ST § 13-11-17.5

West's Utah Code Annotated

Title 13. Commerce and Trade

Chapter 11. Utah Consumer Sales Practices Act (Refs & Annos)

U.C.A. 1953 § 13-11-17.5

§ 13-11-17.5. Costs and attorney's fees

Currentness

Any judgment granted in favor of the enforcing authority in connection with the enforcement of this chapter shall include, in addition to any other monetary award or injunctive relief, an award of reasonable attorney's fees, court costs, and costs of investigation.

Credits

Laws 1987, c. 105, § 4.

Notes of Decisions (2)

Current through 2011 Third Special Session.

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§ 13-11-18. Noncompliance by supplier subject to other state..., UT ST § 13-11-18

West's Utah Code Annotated

Title 13. Commerce and Trade

Chapter 11. Utah Consumer Sales Practices Act (Refs & Annos)

U.C.A. 1953 § 13-11-18

§ 13-11-18. Noncompliance by supplier subject to other state supervision--
Cooperation of enforcing authority and other official or agency

Currentness

(1) If the enforcing authority receives a complaint or other information relating to noncompliance with this act¹ by a supplier who is subject to other supervision in this state, the enforcing authority shall inform the official or agency having that supervision. The enforcing authority may request information about suppliers from the official or agency.

(2) The enforcing authority and any other official or agency in this state having supervisory authority over a supplier shall consult and assist each other in maintaining compliance with this act. Within the scope of their authority, they may jointly or separately make investigations, prosecute suits, and take other official action they consider appropriate.

Credits

Laws 1973, c. 188, § 18.

Current through 2011 Third Special Session.

Footnotes

¹ Laws 1973, c. 188, that enacted this chapter.

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§ 13-11-19. Actions by consumer, UT ST § 13-11-19

West's Utah Code Annotated

Title 13. Commerce and Trade

Chapter 11. Utah Consumer Sales Practices Act (Refs & Annos)

U.C.A. 1953 § 13-11-19

§ 13-11-19. Actions by consumer

Currentness

- (1) Whether he seeks or is entitled to damages or otherwise has an adequate remedy at law, a consumer may bring an action to:
 - (a) obtain a declaratory judgment that an act or practice violates this chapter; and
 - (b) enjoin, in accordance with the principles of equity, a supplier who has violated, is violating, or is likely to violate this chapter.
- (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.
- (3) Whether a consumer seeks or is entitled to recover damages or has an adequate remedy at law, he may bring a class action for declaratory judgment, an injunction, and appropriate ancillary relief against an act or practice that violates this chapter.
- (4)(a) A consumer who suffers loss as a result of a violation of this chapter may bring a class action for the actual damages caused by an act or practice specified as violating this chapter by a rule adopted by the enforcing authority under Subsection 13-11-8(2) before the consumer transactions on which the action is based, or declared to violate Section 13-11-4 or 13-11-5 by a final judgment of the appropriate court or courts of general jurisdiction and appellate courts of this state that was either officially reported or made available for public dissemination under Subsection 13-11-7(1)(c) by the enforcing authority 10 days before the consumer transactions on which the action is based, or with respect to a supplier who agreed to it, was prohibited specifically by the terms of a consent judgment which became final before the consumer transactions on which the action is based.
 - (b) If an act or practice that violates this chapter unjustly enriches a supplier and the damages can be computed with reasonable certainty, damages recoverable on behalf of consumers who cannot be located with due diligence shall be transferred to the state treasurer pursuant to Title 67, Chapter 4a, Unclaimed Property Act.
 - (c) If a supplier shows by a preponderance of the evidence that a violation of this chapter resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error, recovery under this section is limited to the amount, if any, in which the supplier was unjustly enriched by the violation.
- (5) Except for services performed by the enforcing authority, the court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed if:
 - (a) the consumer complaining of the act or practice that violates this chapter has brought or maintained an action he knew to be groundless; or a supplier has committed an act or practice that violates this chapter; and
 - (b) an action under this section has been terminated by a judgment or required by the court to be settled under Subsection 13-11-21(1)(a).

§ 13-11-19. Actions by consumer, UT ST § 13-11-19

(6) Except for consent judgment entered before testimony is taken, a final judgment in favor of the enforcing authority under Section 13-11-17 is admissible as prima facie evidence of the facts on which it is based in later proceedings under this section against the same person or a person in privity with him.

(7) When a judgment under this section becomes final, the prevailing party shall mail a copy to the enforcing authority for inclusion in the public file maintained under Subsection 13-11-7(1)(e).

(8) An action under this section shall be brought within two years after occurrence of a violation of this chapter, or within one year after the termination of proceedings by the enforcing authority with respect to a violation of this chapter, whichever is later. When a supplier sues a consumer, he may assert as a counterclaim any claim under this chapter arising out of the transaction on which suit is brought.

Credits

Laws 1973, c. 188, § 19; Laws 1983, c. 58, § 9; Laws 1993, c. 4, § 56; Laws 1995, c. 198, § 3, eff. May 1, 1995; Laws 2010, c. 378, § 200, eff. May 11, 2010.

Notes of Decisions (9)

Current through 2011 Third Special Session.

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West's Utah Code Annotated

Title 13. Commerce and Trade

Chapter 11. Utah Consumer Sales Practices Act (Refs & Annos)

U.C.A. 1953 § 13-11-20

§ 13-11-20. Class actions

Currentness

- (1) An action may be maintained as a class action under this act¹ only if:
- (a) the class is so numerous that joinder of all members is impracticable;
 - (b) there are questions of law or fact common to the class;
 - (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
 - (d) the representative parties will fairly and adequately protect the interests of the class; and
 - (e) either:
 - (i) the prosecution of separate actions by or against individual members of the class would create a risk of:
 - (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or
 - (B) adjudications with respect to individual members of the class that would as a practical matter dispose of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
 - (ii) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
 - (iii) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.
- (2) The matters pertinent to the findings under Subsection (1)(e)(iii) include:
- (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
 - (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
 - (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
 - (d) the difficulties likely to be encountered in the management of a class action.
- (3) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subsection may be conditional, and it may be amended before decision on the merits.

§ 13-11-20. Class actions, UT ST § 13-11-20

(4) In a class action maintained under Subsection (1)(e) the court may direct to the members of the class the best notice practicable under the circumstances, including individual notice to each member who can be identified through reasonable effort. The notice shall advise each member that:

- (a) the court will exclude him from the class, unless he requests inclusion, by a specified date;
- (b) the judgment, whether favorable or not, will include all members who request inclusion; and
- (c) a member who requests inclusion may, if he desires, enter an appearance through his counsel.

(5) When appropriate, an action may be brought or maintained as a class action with respect to particular issues, or a class may be divided into subclasses and each subclass treated as a class.

(6) In the conduct of a class action the court may make appropriate orders:

- (a) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;
- (b) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in the manner the court directs to some or all of the members or to the enforcing authority of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;
- (c) imposing conditions on the representative parties or on intervenors;
- (d) requiring that the pleadings be amended to eliminate allegations as to representation of absent persons, and that the action proceed accordingly; or
- (e) dealing with similar procedural matters.

(7) A class action may not be dismissed or compromised without approval of the court. Notice of the proposed dismissal or compromise shall be given to all members of the class as the court directs.

(8) The judgment in an action maintained as a class action under Subsection (1)(e)(i) or (ii), whether or not favorable to the class, shall describe those whom the court finds to be members of the class. The judgment in a class action under Subsection (1)(e)(iii), whether or not favorable to the class, shall specify or describe those to whom the notice provided in Subsection (4) was directed, and who have requested inclusion, and whom the court finds to be members of the class.

Credits

Laws 1973, c. 188, § 2; Laws 1974, c. 5, § 1; Laws 1992, c. 30, § 26; Laws 2010, c. 378, § 201, eff. May 11, 2010.

Notes of Decisions (2)

Current through 2011 Third Special Session.

Footnotes

- 1 Laws 1973, c. 188, that enacted this chapter.

End of Document

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§ 13-11-21. Settlement of class action--Complaint in class action..., UT ST § 13-11-21

West's Utah Code Annotated

Title 13. Commerce and Trade

Chapter 11. Utah Consumer Sales Practices Act (Refs & Annos)

U.C.A. 1953 § 13-11-21

§ 13-11-21. Settlement of class action--Complaint in class action delivered to enforcing authority

Currentness

(1)(a) A defendant in a class action may file a written offer of settlement. If it is not accepted within a reasonable time by a plaintiff class representative, the defendant may file an affidavit reciting the rejection. The court may determine that the offer has enough merit to present to the members of the class. If it so determines, it shall order a hearing to determine whether the offer should be approved. It shall give the best notice of the hearing that is practicable under the circumstances, including notice to each member who can be identified through reasonable effort. The notice shall specify the terms of the offer and a reasonable period within which members of the class who request it are entitled to be included in the class. The statute of limitations for those who are excluded pursuant to this Subsection (1) is tolled for the period the class action has been pending, plus an additional year.

(b) If a member who has previously lost an opportunity to be excluded from the class is excluded at his request in response to notice of the offer of settlement during the period specified under Subsection (1)(a), he may not thereafter participate in a class action for damages respecting the same consumer transaction, unless the court later disapproves the offer of settlement or approves a settlement materially different from that proposed in the original offer of settlement. After the expiration of the period of limitations, a member of the class is not entitled to be excluded from it.

(c) If the court later approves the offer of settlement, including changes, if any, required by the court in the interest of a just settlement of the action, it shall enter judgment, which is binding on all persons who are then members of the class. If the court disapproves the offer or approves a settlement materially different from that proposed in the original offer, notice shall be given to a person who was excluded from the action at his request in response to notice of the offer under Subsection (1) (a), and he is entitled to rejoin the class and, in the case of the approval, participate in the settlement.

(2) On the commencement of a class action under Section 13-11-19, the class representative shall mail by certified mail with return receipt requested or personally serve a copy of the complaint on the enforcing authority. Within 30 days after the receipt of a copy of the complaint, but not thereafter, the enforcing authority may intervene in the class action.

Credits

Laws 1973, c. 188, § 21; Laws 2010, c. 324, § 34, eff. May 11, 2010.

Current through 2011 Third Special Session.

End of Document

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West's Utah Code Annotated

Title 13. Commerce and Trade

Chapter 11. Utah Consumer Sales Practices Act (Refs & Annos)

U.C.A. 1953 § 13-11-22

§ 13-11-22. Exemptions from application of act

Currentness

(1) This act¹ does not apply to:

- (a) an act or practice required or specifically permitted by or under federal law, or by or under state law;
- (b) a publisher, broadcaster, printer, or other person engaged in the dissemination of information or the reproduction of printed or pictorial matter so far as the information or matter has been disseminated or reproduced on behalf of others without actual knowledge that it violated this act;
- (c) claim for personal injury or death or claim for damage to property other than the property that is the subject of the consumer transaction;
- (d) credit terms of a transaction otherwise subject to this act; or
- (e) any public utility subject to the regulating jurisdiction of the Public Service Commission of the state of Utah.

(2) A person alleged to have violated this act has the burden of showing the applicability of this section.

Credits

Laws 1973, c. 188, § 22.

Notes of Decisions (3)

Current through 2011 Third Special Session.

Footnotes

- ¹ Laws 1973, c. 188, that enacted this chapter.

End of Document

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§ 13-11-23. Other remedies available--Class action only as..., UT ST § 13-11-23

West's Utah Code Annotated

Title 13. Commerce and Trade

Chapter 11. Utah Consumer Sales Practices Act (Refs & Annos)

U.C.A. 1953 § 13-11-23

§ 13-11-23. Other remedies available--Class action only as prescribed by act

Currentness

The remedies of this act¹ are in addition to remedies otherwise available for the same conduct under state or local law, except that a class action relating to a transaction governed by this act may be brought only as prescribed by this act.

Credits

Laws 1973, c. 188, § 23.

Notes of Decisions (1)

Current through 2011 Third Special Session.

Footnotes

¹ Laws 1973, c. 188, that enacted this chapter.

End of Document

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ADDENDUM B

Order Dismissing Plaintiffs' Claims with Prejudice dated January 31, 2011

FILED DISTRICT COURT
Third Judicial District

JAN 31 2011

SALT LAKE COUNTY
By [Signature]
Deputy Clerk

Gregory J. Sanders, USB No. 2858
Patrick C. Burt, USB No. 11138
KIPP AND CHRISTIAN, P.C.
Attorneys for Best Buy, Co.
10 Exchange Place, 4th Floor
Salt Lake City, Utah 84111
Telephone: (801) 521-3773

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

HUGO MARTINEZ and CLAUDIA MARTINEZ,	:	ORDER DISMISSING PLAINTIFFS'
	:	CLAIMS WITH PREJUDICE
Plaintiff,	:	
	:	
vs.	:	
	:	Civil No. 090905510
BEST BUY CO., INC.,	:	
	:	
Defendant.	:	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. Martinez 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.

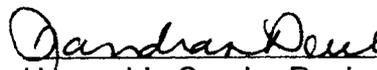
4. Because Best Buy did not violate the Act and because plaintiffs' damages, if any, were a result of HSBC's alleged conduct, the Court concludes, as a matter of law, plaintiffs' claims against Best Buy are dismissed with prejudice.

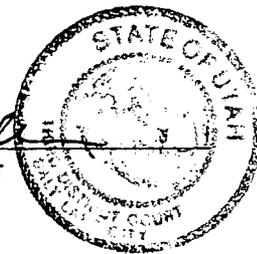
5. The Court is not currently prepared to address Best Buy's request for an award of reasonable attorney's fees and court costs. Therefore, the Court does not rule on this issue, but grants Best Buy leave to submit an motion for such fees and costs for the Court's consideration.

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:

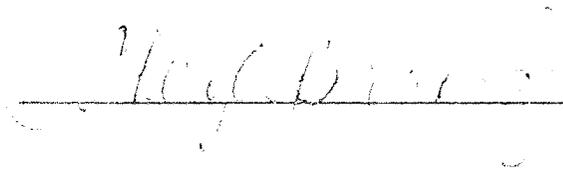

Honorable Sandra Peuler



CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 10th 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, appearing to read "Greg Brown", is written over a horizontal line.

ADDENDUM C

Best Buy Credit Card Application dated March 6, 2008

Best Buy Credit Card Application

1. APPLICANT: Incomplete form may result in decline of your application.

For WI Residents Only Check box if you are married

"WRITE OR BLACK INK ONLY"

Home Phone: 1801 1655-3000 First Name: Claudia Middle Initial: F Last Name: Martinez Initial Sale Amount: \$3,000.00

Urbanization: 1870W 4650S Current Address: F Apt. #: City: Provo State: UT Zip: 84067 Own Rent Other

Date of Birth (MM/DD/YY): 01/30/64 Social Security Number: [REDACTED] Business Phone: ()

E-Mail Address (optional): Annual Income*: \$18,000 Check if you have a: Checking Account Savings Account

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

2. JOINT APPLICANT (for spouse of applicant if married WI resident - complete name and address only)

Home Phone: 1801 1 577-4465 First Name: Hugo Middle Initial: D Last Name: Martinez

Urbanization: Current Address: same above Apt. #: City: State: Zip:

Date of Birth (MM/DD/YY): 9/4/60 Social Security Number: [REDACTED] Business Phone: Annual Income*: \$24,000

* INCOME NOTICE: Can include all sources. You need not declare earnings, child support or separate maintenance income if you do not wish to have it considered as a basis for repaying this obligation.

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 both Best Buy, and to HSBC Bank Nevada, N.A. ("us", "we", "our"), 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 limit in the highest amount we deem appropriate, regardless of any initial sale amount, and you are requesting a Card issued to you by which will allow you to make purchases under this Account. By signing, using or permitting others to use this Card, by signing or permitting others to sign sales slips, by 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 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 made 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 1-800-345-3804. The Spanish translation has been provided for your convenience. In case of conflict, the English version is the binding contract and will govern. See acknowledgment receipt of the English/Spanish application and important terms. 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: [Signature] 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 #00 ORG #169 CREDIT LIMIT 750 CIRCLE ONE: APPROVED / DECLINED

APPLICATION # 070306011885

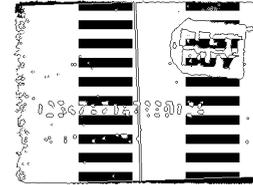
I.D. Verified by (Employee I.D.): 687036

I.D. #1 Photo ID (Applicant) Type: DL ID # 164473868

State: UT Date of Issue: 11/15/07 Exp. Date: 1/30/09

I.D. #2 (Credit Card Applicant) Type: BK VISA MEXX DISCOVER Exp. Date: 12/1/10 Ak I.D. _____

Get what you want. Today.



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 part-time), 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 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!

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

SIGN HERE TO ENROLL DATE

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

Applicant's Signature: _____ Date (MM/DD/YY): 1/1

SIGN HERE TO DECLINE DATE

687111

11/12/07

00273BEST BUNYCSR07 11-08